

**Explaining the Conceptualisation of Reputation in the
Trinity of Torts: Defamation, Misuse of Private
Information and Data Protection**

Laura Emile Marie Hannan

Emmanuel College

29th of November 2023

This thesis is submitted for the degree of Doctor of Philosophy.

This thesis is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the preface and specified in the text. It is not substantially the same as any work that has already been submitted, or, is being concurrently submitted, for any degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the preface and specified in the text. It does not exceed the prescribed word limit for the relevant Degree Committee.

*It is said that English law permits claimants to pursue different, overlapping causes of action in response to the same event provided each action protects a distinct value. Despite this, concern has been expressed about claimants' ability to pursue misuse of private information and data protection claims in response to reputational harm, when historically these claims would usually sound only in defamation. The assumption is that this cause-of-action-shopping is illegitimate, as misuse of private information and data protection are being used to protect 'reputation' in a manner which evades defamation's procedural and substantive limitations: the defence of truth, the one-year limitation period and the rule in *Bonnard v Perryman*. However, reputation is not a monolithic concept, and this assumption reveals that the protection of reputation in law is generally under-theorised.*

*This thesis explores the eight dominant theories of reputation: reputation as an epistemic tool; reputation as a tool for upholding social norms; reputation as property; reputation as a function of human dignity; reputation as a tool for forming social bonds; and three forms of reputation as 'honour'. It then examines the history, development and substantive requirements of defamation, misuse of private information and data protection to determine which conception of reputation, if any, is embodied in each. It argues that, for the most part, each cause of action protects a different conception of reputation. It therefore fits the principle that claimants may bring overlapping actions which protect distinct values. In this regard, the thesis shows how judicial dicta on abuse of process and the application of *Bonnard v Perryman* to non-defamation claims is unnecessary, lacks coherency and consistency, and is the result of judicial failure to properly theorise the role of reputation protection in law.*

Table of Contents

Chapter 1: Introduction	7
I. Reputation in Law and Society	7
II. Method and Structure	8
Chapter 2: Theories of Reputation	11
I. Reputation's Nature	11
II. Consequentialist Theories	14
(i) Epistemic Reputation	14
(ii) Social Norm Theory	18
III. Rights-Based Theories	22
(i) Proprietary Reputation	22
(ii) Deferent Reputation	26
(iii) Sociality Theory	31
IV. Honour	35
(i) Aristocratic Honour	36
(ii) Virtuous Honour	42
(iii) Cultural Honour	44
V. Legal Implications	48
Chapter 3: Criminal Defamation	52
I. Scandalum Magnatum	52
II. Criminal Libel	55
Chapter 4: Civil Defamation	62
I. Actionability	62
(i) Slander	63
(ii) The Divergence and Convergence of Slander and Libel	70
(iii) Developing the Modern Actionability Requirements	72
II. Defences	84
(i) Justification and Truth	84
(ii) Fair Comment and Honest Opinion	86
(iii) Privilege	93
(iv) Reynolds Privilege and the Public Interest	97
(v) Rehabilitation	101
(vi) Offer of Amends	103
III. Remedies	105
(i) Damages	105
(ii) Declarations of Falsity and Corrections	107
IV. Overall Analysis	109

Chapter 5: Misuse of Private Information.....	113
I. Introduction to Misuse of Private Information.....	113
(i) A Brief History	113
(ii) The Perceived Interaction of MOPI and Reputation.....	116
II. Reputation in Article 8 Jurisprudence.....	117
III. The Nature of the Interests in MOPI.....	123
(i) Is Reputation Relevant?	123
(ii) Reputational Theory and the First Limb	131
IV. Balancing Reputation and Free Speech	133
V. Reputation and MOPI Remedies.....	138
VI. Overall Analysis.....	145
Chapter 6: Data Protection.....	148
I. Introduction to Data Protection.....	148
(i) History of Data Protection	148
(ii) Key Elements	151
(iii) The Purpose and Scope of Data Protection.....	155
II. Substantive Requirements.....	159
(i) The Scope of Data Protection	160
(ii) Objection, Erasure and Search Engines	163
(iii) Adequacy and Accuracy	170
(iv) Relevance and Limitation	177
(v) Legal <i>Vires</i>	179
(vi) Exceptions.....	191
III. Remedies.....	201
IV. Overall Analysis.....	204
Chapter 7: The Overlap.....	210
I. Background.....	210
(i) Striking Out a Claim	210
(ii) Injunctions.....	211
II. The ‘Nub of the Claim’	214
(i) Abuse: Falsity vs Reputation	216
(ii) Can an Arguable Claim be an Abuse?	220
III. <i>Bonnard v Perryman</i>	225
IV. Overall Analysis.....	232
Chapter 8: Conclusion.....	233
I. Findings.....	233
(i) The Theories	233

(ii) The Actions	235
(iii) Overall Analysis.....	239
II. Future Research	241
Table of Cases.....	243
Table of Legislation	255
Bibliography	257
I. Books	257
II. Periodicals.....	258
III. Other	261
(i) EU Materials	261
(ii) UK ICO Materials.....	262
(iii) Parliamentary and Law Commission Materials	263
(iv) Academic Materials	263
(v) Miscellaneous	264

Chapter 1: Introduction

I. Reputation in Law and Society

Reputation is central to human life. It is referred to by different names in different forms throughout history – ‘good name’, ‘honour’, ‘credit’ – but always treated as an important social value. Shakespeare called it ‘the immediate jewel’¹ of people’s souls, while Socrates labelled it ‘the richest jewel you can possibly be possessed of’.² It is the external evaluation of the self, how others perceive a person or entity. That evaluation shapes or even dictates aspects of a person’s life: the ease with which they make friends, engage in cooperative social interactions, succeed in their career, access credit, and more.

Despite reputation’s personal and societal importance, its protection in law is under-theorised. It is widely accepted as ‘axiomatic’³ that reputation in law is protected through the tort of defamation – a centuries-old cause of action consisting of ‘slander’ (oral attacks on reputation) and ‘libel’ (written/recorded attacks). However, the tort’s incremental development has led to a confused action with an eclectic mishmash of elements and defences.

Lamentations of reputation’s under-theorisation are not new. Over a decade ago, McNamara deemed it the source of many criticisms of defamation law’s substantive requirements.⁴ However, in recent years, this under-theorisation has created a new issue. There were always alternative causes of action a claimant might use to protect their reputation where defamation did not avail them: e.g. conspiracy to injury or malicious falsehood. However, their application was niche and their requirements more strenuous:⁵ defamation remained overwhelmingly the primary legal means of protecting reputation. Now, new actions, seemingly capable of protecting reputation, have emerged or gained heightened prominence: particularly, misuse of private information (‘MOPI’) and data protection.

MOPI protects claimants from use of information in which they have a ‘reasonable expectation of privacy’. It developed from the equitable action for breach of confidence, under the influence of Article 8 of the European Convention on Human Rights (‘ECHR’). Data protection regulates proper use of ‘personal data’ – information ‘relating to’ a person. In both

¹ Othello Act 3, Scene 3, 155–161.

² Hassan Masum and Mark Tovey, *The Reputation Society* (MIT Press 2015) 25.

³ Lawrence McNamara, *Reputation and Defamation* (OUP 2007) 1.

⁴ *ibid* 1.

⁵ Such as requiring the claimant to prove the defendant bore them malice.

cases, behaviours capable of affecting reputation can attract a reasonable expectation of privacy or constitute personal data.

Claimants are frequently criticised as relying on these two causes of action to protect reputation in cases where the ‘real’ reputational action – defamation – is unavailable or difficult to establish: especially where the information is true,⁶ or an interim injunction is sought.⁷ This cause-of-action-shopping is often assumed illegitimate, but without proper theorisation of reputation and its relationship with the law, this is open to question.

At the heart of the issue are questions of what reputation is, why it matters to society, and its relationship with the various forms of action used (directly or indirectly) to protect it. The law’s notion of reputation reflects on its concept of people’s rights within the legal system and the extent to which they should be protected against certain harms or interferences. Which facets of reputation are most important to people’s lives changes with social morality over time. More fundamentally, the law’s social values and ingrained moral norms determine what it considers protectable ‘reputation’ on a fundamental, definitional level.

Post, who formulated three of the distinct conceptions of reputation considered in this thesis, explained that reputation’s nature varies based on the relevant society’s ‘conception of social life’ – their idea of the community’s normative, binding principles.⁸ A society which prioritises social order over personal rights has a very different idea of reputation and its importance than one which focuses on individuals’ personal honour or human dignity, for example. Accordingly, the law’s protection of reputation reflects the kind of society in which we live. To the extent it fails to reflect the kind of society we *want* to live in, we must identify precisely those facets requiring reform. This requires proper theorisation of reputation and its relationship with law. This thesis tackles this problem.

II. Method and Structure

This thesis examines the understandings of reputation underpinning three causes of action in English law: defamation, MOPI and data protection. The literature identifies eight dominant theories: reputation as an epistemic tool; as a tool for upholding social norms; reputation as property; as a function of human dignity; as a tool for forming social bonds; and three forms

⁶ Truth is an absolute defence in defamation, but not for MOPI and data protection.

⁷ The rule in *Bonnard v Perryman* makes such injunctions difficult to acquire for defamation claims.

⁸ Robert C Post, ‘The Social Foundations of Defamation Law: Reputation and the Constitution’ (1986) 74 *California Law Rev* 691, 720-721.

of reputation as ‘honour’. The next chapter explains these eight theories, explores each theory’s conception of social life and evaluates their legal implications.

This provides the theoretical basis by which the thesis evaluates the law in the subsequent four chapters, examining criminal defamation, civil defamation, MOPI and data protection in turn. Each chapter explores the law’s histories, aims, evolution and operation and evaluates how they correspond to one or more of the eight central theories of reputation. Its enquiry is limited to natural persons’ interests.⁹ Theories of corporate and legal persons’ reputation are likely more expansive and require separate inquiry into the nature of legal personhood beyond what is possible here.

Defamation, MOPI, and data protection were chosen because they are a natural person’s most likely options for protecting their reputation: Weinert characterises them as the ‘trinity’ of reputational torts.¹⁰ Criminal defamation is also included, both to demonstrate how it encapsulated different historical conceptions of reputation and its influence on the development of civil defamation.

The seventh chapter explores cases where the courts explicitly address the overlap between the torts, particularly striking out applications and the rule in *Bonnard*. English courts consider overlapping protection, via laws protecting different but related values, legitimate.¹¹ However, there is not yet any in-depth evaluation of the extent to which the overlaps perceived between defamation, MOPI, and data protection actually protect different values. If they protect the same conception, there is merit in eliminating the overlap: either by more strictly delineating between two actions, or by integrating them in a more careful and principled manner.

Each action is concerned with balancing their core values with freedom of speech. Each sets a different balance, particularly regarding defences, limitation periods, and procedural requirements. If each protects the same kind of reputational interest, claimants will favour actions providing the broadest protection and the fewest limitations: rendering the balance and limitations of the narrowest or most restrictive law (classically thought to be defamation) redundant. Additionally, where actions protect mixed notions of reputation, identifying these elements helps predict how unclear areas will likely be decided. It also allows the identification

⁹ Flesh-and-blood humans, as opposed to companies and other legal entities.

¹⁰ Eileen Weinert, ‘£120,000 damages for Mr Lachaux of Defamation Act s.1 fame for serious failure of responsible journalism’ (2021) 32 Ent LR 259, 263.

¹¹ *NT1 & NT2 v Google LLC* [2018] EWHC 799 (QB) [61].

of aspects of the law which are conceptually conflicting or contrary to a future reform effort's social values.

This project therefore sheds light on whether the practical overlap between the trinity of torts is defensible. It does so by identifying each law's values, elucidating whether there is a dominant and shared theory of reputation and conception of social life underpinning each. Of course, there is likely no unitary conception of social life in a modern Western democracy – rather many overlapping and often inconsistent ones. Legal protection of reputation in England and Wales is unlikely to reflect just one conception of social life. Not only will different laws likely protect different reputational conceptions, but individual laws may not reflect a single conception. This thesis expected to find thematically dominant theories in each tort, but no theory coherently and completely embodied, which proved correct: defamation only imperfectly embodies a dignity-based theory of reputation, while MOPI does the same for a theory of reputation as a tool for forming social bonds. The exception was data protection, which fairly cleanly embodies reputation as an epistemic tool.

This thesis touches upon, but ultimately leaves open, the question of whether protecting different notions of reputation using different laws is a good thing. Some values and conceptions of social life are incompatible. If the law protects inconsistent values, then this is an area ripe for reform. However, certain conceptions of social life are compatible, such that society might have legitimate reasons to protect overlapping or parallel conceptions of reputation.

Equally, some reformists may not wish to legally acknowledge a particular conception of social life, even if it is theoretically compatible with their own values – they would want to eliminate any such overlap. This might be so, for example, for purists who believe there should only be a single scheme governing the relationship between society and the people within it. Either way, full theorisation of reputation allows those interested in legal reform here to identify what aspects of the law are grounded in what theories and conceptions of social life, and so more precisely articulate perceived flaws and the reasons behind them. This is the kind of discussion this thesis aims to enable.

Chapter 2: Theories of Reputation

I. Reputation's Nature

Reputation is an external evaluation of people's behaviour, values, and/or characteristics by a specific community in a particular context.¹² Its externality makes reputation more than simply a value-neutral assessment of a person's attributes. As McNamara argues, reputational evaluation possesses the four components of a moral or normative assessment:¹³ judgement, facts (that which is judged), sociality (the judgement being the product of association), and community (those doing the judging).¹⁴

Assuming interdependence and social interaction form the 'basis for a moral life that maximizes individual fulfilment', communities are normative constructs: groups of individuals sharing normative practices and decision-making structures.¹⁵ Reputation is therefore the evaluation of a person's standing within that construct.¹⁶ Since reputation is collectively perceived and created, people can influence but not declare or completely control it.¹⁷

Understanding a reputational judgement therefore requires knowing 'who the community is' and its binding normative ties and principles.¹⁸ The person judged (the 'target') can be part of multiple communities and sub-communities, possessing multiple reputations assessed by different criteria relating to different aspects of their person in different contexts.¹⁹ Identical perceived characteristics have different evaluative significance in different contexts and communities. For example, a reputation for co-operating with the police is positive for a suburbanite judged by their neighbours, but negative for a prisoner judged by other prisoners.²⁰

Reputation's normative, community-dependent nature means that a reputation-protecting law's ideal structure and content differs by community. Unsurprisingly, there are multiple theories in the literature explaining why reputation is, or ought to be, protected. Post explains that each relies on a particular 'conception of social life' – an idea of the community's

¹² Dario Milo, *Defamation and Freedom of Speech* (OUP 2008) 17; Gian Paolo Terravecchia, 'The Imperative of Reputation Between Social and Moral Norms' (2017) 13 *Phenomenology & Mind* 184, 186.

¹³ Lawrence (n 3) 21.

¹⁴ *Ibid* 21-22.

¹⁵ *Ibid* 26.

¹⁶ *Ibid* 30.

¹⁷ Terravecchia (n 12) 186.

¹⁸ McNamara (n 3) 31.

¹⁹ Terravecchia (n 12) 186.

²⁰ *Ibid*.

normative, binding principles.²¹ Some reputational theories are compatible with many types of community while others are compatible with only a narrow few. A society's conception of social life primarily affects the law's content and structure in three ways.

Firstly, it indicates what harms the law is concerned with preventing: determining what must be proven for a reputational attack to be actionable and the available remedies. Bennet classifies interests as either unipolar or bipolar.²² Under a unipolar model, 'wrongs and losses/harm are conflated' and '[t]he harm suffered inheres in the commission of the wrongful act.'²³ The harm is essentially the diminution of the target's right – regardless of consequences. Conversely, under a bipolar model, the wrong and harm come apart. A bipolar law is usually unconcerned with reputational attacks producing no separate consequences.

To illustrate, say an individual has a right to liberty. They are deliberately locked in a room, but do not notice before being freed. A unipolar law allows them to sue for loss of liberty despite their unawareness and lack of harm. A bipolar law requires them to suffer additional consequences, like emotional distress. The ignorant individual has no action. Analogously, if reputational loss is legally actionable even if the target suffers no further consequences, then it is unipolar. Otherwise, it is bipolar. A unipolar law will likely grant remedies for diminution of right, while a bipolar law may not.

Secondly, the theory adopted illuminates the potential role of truth and falsity. Some theories may not distinguish between true and false statements. Others may find no legitimate interest in a false reputation. Others might tolerate protecting a false reputation in pursuit of other values.

Two values are likely relevant. First is rehabilitation – that people can, by fulfilling certain social hurdles or criteria, render a past reputation-damaging event normatively irrelevant to their present reputation. A reputation-protecting law in such a society might deem true statements non-actionable unless the fact is no longer relevant to how the community ought to judge the target.

The second value is preventing the 'chilling effect'. Legal sanction of speech reduces people's incentives to seek out and circulate true information in important spheres of life:

²¹ Post (n 8) 720-721.

²² Thomas DC Bennett, 'Why so serious? Lachaux and the threshold of 'serious harm' in section 1 Defamation Act 2013' (2018) 20 *Journal of Media Law* 1, 12.

²³ *Ibid* 12.

‘chilling’ speech.²⁴ Avoiding the chilling effect means tolerating some potentially false speech, to avoid suppressing true speech which is difficult or expensive to prove in court. A society may value speech more than reputation in these instances. Alternatively, it may see the chilling effect as limiting the flow of correct reputational signals (since information about true reputation-affecting facts may be chilled by excessive legal sanction).

Finally, society’s conception of social life, and the reputational theory adopted, determines the appropriate role of satisfaction: personal reparation.²⁵ Where satisfaction is available, the target becomes entitled to do something to, receive something from, or require a particular action from, the person attacking them (the ‘attacker’). This is not merely the right to be compensated or restored to one’s original position, however. The entitlement is specifically to something the relevant community accepts as the kind of thing that ought to quell the target’s ire (even if they continue to suffer loss) – something ‘settling the matter’: often vengeance, where the target punishes or inflicts harm on the attacker.²⁶ However, other forms exist, like apologies or symbolic rituals.²⁷ To be satisfaction-based, the remedy’s purpose must be to ameliorate the target’s internal state, rather than primarily aimed at some other task – many remedies incidentally have this effect, but that is not their primary point (like compensation).

It must be noted that individual theories are not necessarily prescriptive of these elements. In some cases, they may be: a particular kind of remedy may make no sense within a particular theory, for example. In other cases, a theory may be able to accommodate different approaches, though some may be more consistent than others.

This chapter sets out eight theories of reputation, explores the conception of social life underpinning each, and evaluates their legal implications. It focuses on the theories’ implications for truth/falsity, the wrong’s nature, and the role of satisfaction. It splits the theories into three groups based on their normative underpinnings: consequentialist, rights-based, and honour-based theories.

²⁴ As coined in Eric M Barendt, *Libel and the Media: The Chilling Effect* (Clarendon Press 1997).

²⁵ *The Standard Library Cyclopaedia of Political, Constitutional, Statistical and Forensic Knowledge* (Henry G Bohn 1848) 782-83.

²⁶ Post (n 8) 704-05.

²⁷ Tamler Sommers, *Why Honor Matters* (Basic Books 2018) 173; Whitley RP Kaufman, *Honor and Revenge: A Theory of Punishment* (Springer Science & Business Media 2012) 179.

II. Consequentialist Theories

Consequentialism evaluates an action's normative quality by its consequences.²⁸ The following theories value reputation not as an intrinsic individual interest, but because of some external benefit it provides, making them consequentialist in nature.

(i) Epistemic Reputation

Heyman formulated the epistemic theory of reputation.²⁹ She posits that communities have an interest in using reputation 'as a form of warranty, to reduce search costs, or as a signalling device.'³⁰ Reputation is an epistemic device – used to validate the accuracy of information about a person. This is consequentially good because it lowers economic 'search costs' by acting as a 'warranty' of personal qualities, allowing social actors to substitute a reputational judgement for extensive personal experience and experimentation with the target,³¹ particularly where only limited personal experience is possible.³² For example, it allows people to choose their doctor without having to interview a range of professionals.

Search costs are not limited to the economic sphere. Reputation reduces 'search costs in interpersonal interactions' by allowing people to make informed choices about with whom to enter a relationship or reveal personal information.³³ It also enables 'choices that, while still economic, relate more closely to identity creation or self-fulfilment':³⁴ like identifying authoritative authors in academia or a fan's reliance on celebrity endorsement to choose a lifestyle.³⁵ Reputation can also be used epistemically as a 'user signal' to develop identity or form community bonds: signalling association with another's more established reputation to

²⁸ Julia Driver, *Consequentialism* (Routledge 2011) 1.

²⁹ Laura Heymann, 'The Law of Reputation and the Interest of the Audience' (2011) 52 *Boston College Law Rev* 1341. A similar epistemic account of reputation has been penned by Gloria Origgi, 'On the Epistemic Value of Reputation: The Place of Ratings and Reputational Tools in Knowledge Organization' (*CiteSeer*,] 26 February 2010) <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.329.7087&rep=rep1&type=pdf>> accessed 8 October 2018; Gloria Origgi, 'A Social Epistemology of Reputation' (2012) 26 *Social Epistemology* 399; Gloria Origgi, 'What is Reputation' (*Edge*, 5 November 2015) <https://www.edge.org/conversation/gloria_origgi-what-is-reputation> accessed 20 October 2018.

³⁰ Heymann (n 29) 1343.

³¹ *Ibid* 1344.

³² *Ibid* 1360. There is sociological and evolutionary literature on the value of epistemic reputation in facilitating the direct and indirect reciprocity between social actors which keeps communities together (Manfred Milinski, 'Reputation, a Universal Currency for Human Social Interactions' (2018) 317 *Phil Trans R Soc V* 1, 1) particularly in large and information-dense communities where it is not possible for social actors to verify information (Gloria Origgi, 'On the Epistemic Value of Reputation' (n 29) 3).

³³ Heymann (n 29) 1348.

³⁴ *Ibid* 1346.

³⁵ *Ibid* 1347.

bolster the target's own status or prestige.³⁶ An example is listing one's attendance at a prestigious university.

Epistemic theory's versatility makes it relevant to many conceptions of social life. The audience's interest in reputation as an epistemic tool is a general human interest, while reputation's fundamentally social nature makes it a public good. It is also beneficial to the individual. The target benefits economically and socially if they modify their behaviour in response to social judgements to influence their reputation.³⁷ However, the public benefit is analytically separate from this private interest, and epistemic theory is only concerned with the former. Where the target's interests and the audience's interests diverge, the target has no legal right. Indeed, one might expect the State, as arbiter of public interest, to be the primary enforcer of a law embodying epistemic reputation. However, the law might create personal causes of action as a proxy, given individuals are specially motivated to enforce the public interest in the utility of their personal reputational signals.³⁸ This is how the economic theory of intellectual property views trade mark law, for example.³⁹

Not all conceptions of social life are compatible with epistemic reputation. The society must value community access to information as a tool to make decisions about their lives, personality and behaviour. A society which sees an individual's life as determined by their social role or innate, unchangeable (ascriptive) characteristics would not value epistemic reputation, for example. Even within a society which values epistemic reputation, what constitutes an actionable statement may change according to that society's opinion of what information the community does or should use to govern their lives. An attack on a particular reputation becomes 'a legal matter only when a judicial body interprets a statement as likely to have a deleterious effect on the relevant community's collective judgment about the individual'.⁴⁰

What if a sub-community's values differ from the broader community? A law protecting epistemic reputation might concern itself with that sub-community's value judgements, or confine itself to those affecting the wider community or law-makers' opinions. Arguably, the latter is more likely, particularly where the wider community's values conflict with the sub-

³⁶ Ibid 1362-1363.

³⁷ Ibid 1350.

³⁸ Ibid 1359.

³⁹ Ibid 1359; Vincent Chiappetta, 'Trade Marks: More than Meets the Eye' (2003) UILLJL Tech & Pol'y 35, n 54. Notably, the economic theory of trade mark is also premised on the idea of lowering search costs.

⁴⁰ Heymann (n 29) 1350.

community: a consequentialist law is unlikely to restrict the wider community's access to useful information just because a sub-community uses it anti-socially.

Truth takes centre-stage in any epistemic reputation-based law, as the theory's core value is ensuring social actors have an epistemic shorthand conveying enough true information to enable proper and useful judgements.⁴¹ The law is likely to be mainly concerned with deterring circulation of false information which leads to anti-social judgements. Its remedies will likely also be concerned with correcting the record: e.g. a public declaration of truth. Notably, unlike other theories of reputation, epistemic reputation is concerned with truth even if it puts the target in a more positive light than is warranted (which is why the State may be its best enforcers, as individuals are unlikely to be motivated to correct false statements that put them in a positive light).

However, not every true statement necessarily falls beyond the law's purview. Heymann's formulation implicitly assumes that, given correct information, social actors form pro-social judgements. In reality, many social actors give disproportionate weight to certain kinds of information (for example, continuing to judge people based on past misdeeds once they are rehabilitated) or use biased evaluation criteria (for example, racist, sexist or otherwise ideologically-driven). This is an issue if the wider community deems this antisocial. They may not – a community might think any judgement based on true information is valid: if so, truth would always be an absolute defence. However, any society which values rehabilitation or equality, for example, will deem this problematic. Accordingly, Origgi describes the use of reputation as an epistemic device as potentially 'morally questionable'.⁴² So, it may be in the community's interest to restrain access to *true* information to preserve reputation's epistemic value.⁴³

The possibility for 'misuse' of reputation shows the audience's interest is not simply ensuring evaluations are based on 'accurate information'. Rather, it is about enabling audiences to make (what society considers) an accurate and proper *judgement*. What constitutes 'proper' or pro-social judgement depends on the particular community's values. Disseminating truth is

⁴¹ Ibid 1362.

⁴² Gloria Origgi, 'On the Epistemic Value of Reputation' (n 29) 6.

⁴³ Heymann acknowledges this to some degree, citing examples of instances in (American) society where reputational information is suppressed to prevent its misuse – blind grading of exams or academic submissions, screened orchestral auditions: (n 29) 1362. She does not fully explore the impact of this, however.

an imperfect tool for ensuring proper judgement, and where it fails to fulfil consequentialist aims, even true speech might be restrained.

A society which values epistemic reputation might similarly balk at restraining all false information. Its consequentialist nature requires it to ensure circulation of as much true information enabling pro-social judgements as possible. This may require tolerating circulation of some false information to avoid the chilling effect. So, the law would likely avoid sanctioning false information where this would deter investigations tending to provide enough useful, true information to justify the odd mistake. This too depends on the society's values: a society might value true political information so much that it tolerates considerable false information for the odd golden nugget, but take a different attitude to celebrity gossip. It is still likely to require a public declaration of truth where false information is spread, however, even if it grants no other remedy: at least to the extent this can be done without imposing excessive 'chilling' costs. This is because it is important to correct the public record of demonstrable falsity for reputation to have ongoing epistemic value.

The next issue is the relevance of satisfaction. Epistemic reputation theory assigns no special value to the target's internal response – it is solely concerned with the public interest (namely the audience's response). The target is only relevant insofar as they act as proxy for this public interest. Accordingly, satisfaction has no inherent role. Legal remedies might satisfy the target, and some satisfaction-type remedies might be understood to set the record straight – e.g. apologies. Such satisfaction is incidental, however. This limits the likely remedies, barring those solely concerned with satisfaction.

Finally, epistemic reputation is unipolar. Heymann argues that private losses like injury to feelings are merely derivative of the statement's effect on the community's collective judgment – the law is not directly concerned with that harm.⁴⁴ Even if the target is indifferent, there is still a normative wrong deriving purely from the fact that people are now forming incorrect/anti-social judgements. This is difficult to quantify in monetary terms, and requiring the attacker to compensate the target would not necessarily repair the damage: the target might use the money to set the record straight, or to go on holiday. So, an epistemic reputation-protecting law might not provide damages for personal losses. Indeed, Heymann herself

⁴⁴ Heymann (n 29) 1342.

questions this, speculating ‘a disclaimer or retraction that corrects the informational imbalance’ is the more appropriate remedy.⁴⁵

On the other hand, civil compensation is partly designed for its deterrent effect. A society with consequentialist laws likely values deterrence, and requiring attackers to pay compensation forces them to internalise their attacks’ social cost. This may deter anti-social reputational attacks by making the attack costlier than any benefit the attacker derives from it. If that is the goal, taking money from the attacker to compensate the target is as good as it going anywhere else. It is also consequentially convenient, since the target is best positioned and incentivised to prove the reputational attack in court if there is a possibility of compensation. Given the impossibility of calculating society’s loss, the courts might plausibly use the target’s personal losses as a ‘good enough’ indicator. This theory can, therefore, accommodate the full range of pecuniary and non-pecuniary damages.

(ii) Social Norm Theory

Reputation’s role in upholding social norms is greater explored in sociological and psychological, rather than legal, literature. Posner explains that people have many possible reasons to comply with social norms, including: the norm being personally beneficial; emotions (fear of revenge or loss of social benefits or ostracization);⁴⁶ enforcement by means of disapproval, ridicule, ostracism and deprivation of social benefits;⁴⁷ and the discomfort of guilt and shame inculcated in children.⁴⁸

The fear of ostracization and deprivation of social benefits explains reputation’s role under social norm theory. Posner characterises ostracisers as ‘unpaid norm-enforcers’: they incur costs enforcing the norm (effort, emotion and lost interaction opportunities) for no reward, but in doing so avoid the future costs of interacting with the norm-breaker.⁴⁹ Ostracization signals to the community that the target has broken a norm and so should be avoided: allowing the community to avoid the same interaction costs. The unpaid norm-enforcer therefore serves society. Meanwhile, the threat of ostracization or social deprivation influences people to abide by costly norms.⁵⁰ Reputation, with its promise of social inclusion

⁴⁵ Ibid 1344.

⁴⁶ Richard Posner, ‘Social Norms and the Law: An Economic Approach’ (1997) 87 *American Economic Review* 365, 365-66.

⁴⁷ Ibid 366.

⁴⁸ Ibid 366.

⁴⁹ Ibid 366.

⁵⁰ Shinji Terraji, ‘A Theory of Norm Compliance: Punishment and Reputation’ (2013) 44 *Journal of Socio-Economics* 1, 1.

and associated benefits, rewards the individual for compliance, and its loss makes non-compliance more costly.⁵¹

The social norms which reputation supports vary depending on the community's nature and values. Some may be universal. For example, having a reputation for helpfulness increases the likelihood of receiving assistance from strangers (indirect reciprocity).⁵² People may be motivated to help others by a need to maintain their reputation, leading to indirect reciprocity from people also motivated by reputational concerns. This illuminates the ultimate social benefit of reputation here: helping maintain the community. As a moral construct, a group bound by shared normative principles, eroding the community's social norms erodes the community itself. Reputation-based incentives will not always be necessary: there are other methods of enforcing social compliance,⁵³ not all individuals are responsive to reputational concerns,⁵⁴ and many internalise society's norms without these incentives.⁵⁵ However, maintaining robust reputational systems is a low-cost method for those who are responsive,⁵⁶ and saves communities the negative interaction costs associated with interacting with a norm-breaker. In this sense, social norm theory is a narrower form of epistemic theory – emphasising the audience's interest in receiving information necessary to police their groups' composition as a particularly strong social good.

Extrapolating from social norm theory, a reputation-protecting law treats the attacker as an unpaid norm-enforcer. The attacker alerts the community to norm-violations and enables the normal social system of punishment and deterrence. However, the attacker can also damage the system if they perform their role improperly. If they cause the community to punish a norm-

⁵¹ There is an abundance of experiments indicating that people hold themselves to higher standards of conduct when they perceive that reputation is at stake: e.g. Genyue Fu and others, 'Young children with a positive reputation to maintain are less likely to cheat' (2016) 19 *Developmental Science* 275, 275; Jan M Engelmann, Esther Herrmann and Michael Tomasello, 'Concern for Group Reputation Increases Prosociality in Young Children' (2018) 29 *Psychological Science* 181, 181; Violet Swakman and others, 'Reputation-Based Cooperation: Empirical Evidence for Behavioral Strategies' (2016) 37 *Evolution and Human Behaviour* 230, 230.

⁵² Violet Swakman and others (n 51) 230.

⁵³ E.g. the criminal law.

⁵⁴ This is a topic which has taken up some ink in the literature, particularly when it comes to issues such as why a person would comply with a norm when they could gain the same reputational benefit by merely pretending to comply (where that costs less than compliance): Charlotte Leigha Cruise, 'Protecting the Reputation of Defamation Law: How Defamation Law Can Remain Justified in an Age of Globalized Communications, Science, Human Rights and Democratic Values' (2012) 2 *Southampton Student L Rev* 77, 187. There are potential solutions to this problem; the risk and cost of being caught out in a lie may be worse than being honest about non-compliance and certainly more costly than compliance.

⁵⁵ Peter Olsthoorn, *Honor in Political and Moral Philosophy* (State University of New York Press 2010) 6.

Though, even those who have internalised a community's norms may be motivated to go above and beyond by the promise of reputational rewards.

⁵⁶ Terraji (n 50) 5.

compliant target, the community pointlessly incurs costs. If this happens on a wide scale, it can even lead to community breakdown: too many norm-compliant people will be excluded and those who remain may cease to perceive any benefit from compliance (as they might get excluded anyway). Wrongful punishment or exclusion may itself breach social norms: if the attacker causes the community to breach its own norms, the community is further degraded. The law's aim here is to protect the community from incurring these harms. As with epistemic reputation, one might expect the State to be the primary enforcer, but the target might be treated as an adequate, motivated proxy.

This theory fits a wide range of social structures and normative communities, since many societies value the labour of those acting as unpaid norm-enforcers, but not all. Conceptions in which a person's social value is purely ascriptive (linked to biological traits) are incompatible. In these societies (discussed later in the context of honour theories), a person's social standing is immutable and so incapable of question. Publicising the target's flaws is itself a breach of a social norm. No one in such a society can sensibly act as unpaid norm-enforcer, since they will be condemned for doing so.

Social norm theory is about protecting group composition. This raises the question: which groups? This, and therefore what statements are actionable, turns on the wider community's values. Where the wider community's social norms conflict with a sub-community's social norms, or the former sees no value in the sub-community existing, the law is unlikely to moderate that community's norm-enforcement. The law will be perfectly content to allow attackers to act improperly as unpaid norm-enforcers for the sub-community: any falsehoods undermining that community do not harm the wider community.

Take the example previously mentioned: a target from a police-fearing sub-community falsely accused of snitching. If the wider community disapproves of communities who ostracise informants, it will not invest resources in preventing that sub-community from excluding perceived snitches. That statement would be non-actionable. Essentially, the law is solely concerned with reputational attacks which lower the target in the wider community's eyes, not just in the eyes of an eclectic sub-community.

Social norm theory is inextricably linked to truth. With a truthful attack, the unpaid norm-enforcer correctly indicates to the group that the target is worthy of exclusion. There is no reason for the law to intervene. However, if the attack is untrue, the attacker pointlessly increased the group's costs, causing them to waste effort in social condemnation.

That said, concern for the chilling effect may lead the law to tolerate a degree of untrue information to ensure true attacks are duly made. For example, a community's norms might deem it critical that adulterers cannot be successful politicians. The normative value of ensuring no adulterer is a successful politician may be so high that the law will tolerate many untrue accusations to achieve that goal. So, a law shaped by social norm theory might deem excusable or non-actionable false statements made in pursuit of important social goals.

Social norm theory has greater difficulty justifying restraint of true information, by contrast. If the wider community values a social norm, it is right to ostracise a target correctly accused of breaking it. If it does not value the social norm, conversely, it has no incentive to promote it, or police community membership based on that norm. Accordingly, it should not care if people are excluded from sub-communities which value that norm: this does not affect the wider community's composition. Either way, the law has no reason to intervene.

A possible exception is where the community values rehabilitation. Such a community believes that social judgement past the point of rehabilitation serves no purpose, since it is unlikely to shape the target's future behaviour in any useful manner. So, the constant, costly re-revelation of past sins and re-ostracization is counterproductive and wasteful. This provides a counterweight justifying the restraint of true statements after it is clear or presumed that the target is rehabilitated.

The theory is bipolar. Since the focus is on ensuring exclusion costs are only expended in proper cases, the target must suffer, or be at risk of suffering, some consequences before the law is interested. That the community thinks worse of the target does not necessarily mean they will incur costly action: for example, regarding breaches of minor etiquette norms. The emotional effort of judgement might be deemed a cost in these cases, but not all judgements involve substantial emotional effort: for example, if the social actor and the target are strangers. In any case, the law might deem it too minor a cost to justify invoking the law's costly apparatus (this being, after all, a consequentialist calculation). So, a law based on social norm theory would probably require proof of actual or likely social condemnation. This might manifest as threshold requirements for seriousness, for example, or proof of consequences as a precondition to damages.

Remedially, social norm theory should provide injunctions restraining false speech and declarations correcting the record. These remedies most directly stifle harm by reducing the potential for further costly social judgement. Any other remedy which leads the community to

believe the attack was unjustified could also fit into the scheme (for example where an apology is perceived as admitting the attack was wrong). As might be expected from a consequentialist theory concerned only with policing proper community membership, satisfaction has no non-incident role. The same remarks made regarding epistemic reputation apply equally here.

As with epistemic theory, a society basing a law on social norm theory might also allow the target to recover damages as part of a scheme of deterrence. The target's losses are a particularly 'good enough' proxy for the community's losses here, since the injury has some proportionate relationship with the ferocity of the community's response. Meanwhile, that ferocity is directly linked to the costs wasted trying to punish a non-existent (or irrelevant) norm-violation. The link is imperfect, because targets' emotional responses will vary depending on their psychology and personal circumstances. However, absent excessive efforts to measure the cost to society, there is practical logic in using the target's harm as a proxy. A law based on social norm theory might well do so.

III. Rights-Based Theories

The three rights-based theories do not privilege reputation because of its general social value, but because reputational attacks damage something fundamental to the target's psyche or personhood, something shared and valued by all people. So, reputation is a 'right' to which all are entitled, only rightfully diminished by personal behaviour and not society's external fiat.

(i) Proprietary Reputation

Proprietary reputation is the first of Post's three theories.⁵⁷ It treats reputation as a marketplace asset akin to business goodwill⁵⁸ which people build with talent, effort and/or virtuous actions, depending on what society values.⁵⁹ Injuring a person's reputation is wrongful because it 'unjustly destroy[s] the results of an individual's labor'.⁶⁰ This injury can be calculated economically like any other damaged property or lost labour.⁶¹

⁵⁷ Post (n 8) 693.

⁵⁸ *ibid.*

⁵⁹ *Ibid* 693-695.

⁶⁰ *Ibid* 694

⁶¹ *Ibid* 694. Even in relatively personal or non-commercial settings, reputation can sometimes translate into financial value. Post cites the example of 20th century adherents to religious sects whose admission and associations of good moral worth made others consider them creditworthy: *ibid* 695.

Proprietary reputation ‘presupposes that individuals are connected to each other through the institution of the market’ under a ‘market society’.⁶² In a market society, three assumptions are true. Firstly, social actors believe a person is always capable of working towards a new reputation. This means an individual’s personal and social identities are presumed completely distinct: ‘reputation for good character, as distinct from the possession of the character itself, can also be understood as the result of individual exertion.’⁶³

Secondly, a person’s market-worth varies with market conditions, so reputation is relative. Thirdly, social actors assume all are equally subordinated to market laws. No person is entitled to reputation ‘other than that created by the evaluative processes of the market’, but ‘every person enjoys an equal right to enter the market to attempt to achieve what reputation he can.’⁶⁴

Post’s proprietary conception of reputation is ‘thin’. As McNamara points out, Post’s enunciation merely states that once a reputation exists it is economically valuable: it does not explain ‘how or why the opinion ... forms as it does’ nor ‘why esteem, confidence, and goodwill are vested in a person’ or why economic value is worthy of legal protection.⁶⁵ This is remediable: since reputation is property, its importance and method of acquisition is explained by the relevant society’s normative justification for property rights. Post himself uses language with heavy Lockean/desert-based overtones, implying people are entitled to reputational property due to the effort expended in cultivating it.

Proprietary reputation divides social life into marketable and non-marketable areas. Non-marketable areas are non-actionable because an attack on those areas does not impact a target’s market worth. So, actionability turns on whether the statement negatively impacts the target’s market value. Marketable and non-marketable are not necessarily the same as public or private, however. Some or even all private aspects of life may be marketable: particularly in the modern age of influencers and mass personal data sales.

Nevertheless, even in a society where all information is *potentially* marketable, targets must demonstrate they actually were marketing or likely to market that aspect and thereby suffered financial loss or the diminishment of their economic value as a ‘personality’. Accusing a Jehovah’s Witness of accepting a blood transfusion would be actionable if the target makes money proselytising their religion on YouTube, but not if their religion has no realistic bearing

⁶² Ibid 695.

⁶³ Ibid 694-95.

⁶⁴ Ibid 695-696.

⁶⁵ McNamara (n 3) 42.

on their economic capabilities. So, the features of the market in which the target operates is critically important. The same statement may be actionable when made against one target, but non-actionable when made against another.

Additionally, since every lawful market and sub-market is equally valid, and all are equally subordinated to market laws, proprietary reputation protects against statements which only damage reputation in a particular sub-community's market. It is not solely concerned with the wider community's opinion.

The split between marketable and non-marketable aspects of life also impacts remedies. Post argues that proprietary reputation excludes 'purely private' – meaning market-independent – injuries like emotional harm.⁶⁶ It is solely concerned with restoring the economic value of the target's lost reputation through pecuniary damages. One would therefore expect quantification of damages to be akin to quantification in contract law, where the law's sole concern is placing the claimant in the economic position they would occupy had the defendant behaved properly.⁶⁷ Satisfaction plays no direct role, since proprietary reputation is unconcerned with the target's emotions or personal sense of right and wrong. Any satisfaction from a pecuniary award is incidental. Similarly, a satisfaction-based remedy might be available if it restores reputation (e.g. an apology which admits the attack was wrong), but the satisfactory effect is incidental.

Proprietary reputation's relationship with truth and falsity depends, in part, on the relevant society's justification for protecting property. It has no *necessary* link to truth. For example, under a simple desert-based theory, people have a valid interest in a false reputation which they took effort to cultivate. Truth's sole inherent value is shaping the remedies available as means of preventing future economic loss: for example, where a declaration of truth reduces or erases economic loss by restoring the reputation.

For the same reasons, this theory has no natural reason to countenance false statements, for chilling effect purposes or otherwise. A theory of property could conceivably privilege truth more substantively. For example, some consequentialist theories allocate property rights based on what is socially beneficial.⁶⁸ This would move proprietary theory beyond natural rights, however, and make it difficult to articulate as a distinct theory from epistemic or social norm

⁶⁶ Post (n 8) 695.

⁶⁷ With some rare exceptions.

⁶⁸ For example, because rewarding pro-social behaviour with property is in the public interest, or because a particular person is most likely to manage it pro-socially.

theory. Perhaps a more complex rights-based theory of desert could be formulated which linked ‘desert’ with truth, but this too might devolve into other theories, like virtue honour (discussed below).

The more likely role of truth under a proprietary reputation-protecting law relates to the concept of market value. Everyone in a market society is equally subjected to market rules and only entitled to the value those market rules would allocate them. It is very likely, in practice, that markets would not assign the same (if any) value to an untrue reputation as it would to a true one. After all, one pays for a product or service hoping to get a specific thing. If the advertised claims are not true, a customer will usually consider themselves to have overpaid. So, in many cases, a person with an untrue reputation suffers no cognisable loss to have the truth revealed: the attacker is merely correcting an incorrect over-valuation of the target’s property.

This is not automatically true of every market. In some markets, actors may not care about truth. For example, consumers generally accept that influencer and reality TV personalities are not projecting their ‘true’ selves, but are nevertheless willing to pay for entertaining falsehoods. Accordingly, even on the assumption that markets generally do not value untrue reputations, one would expect truth not to be an absolute defence under a proprietary reputation-protecting law. It would be market-specific.

Additionally, there is no developed society which views property rights as immutable and incapable of being overridden by the public interest. English land law, the origins of which many attribute to Lockean thought,⁶⁹ limits absolute ownership – property owners are subject to planning permission laws, nuisance, occupiers’ liability, eminent domain and so on. It is not inconceivable, therefore, that a natural rights-based proprietary reputation-protecting law would admit exceptions based on public interest, including the public interest in knowing true facts or avoiding the chilling effect. One would expect any such defence to be heavily limited, however, or this would lead an observer to question whether society did truly privilege reputation as a natural rights-based fundamental interest.

Finally, proprietary reputation can be interpreted as either bipolar or unipolar. One could say there is a need for an additional consequence to the reduction of reputation – pecuniary loss – making the theory bipolar. However, it is better interpreted as unipolar. It envisages

⁶⁹ James Tully, *An Approach to Political Philosophy: Locke in Contexts* (CUP 1993) 139.

reputation's very scope to be those facets of social perception which a person has worked to imbue with economic value. The wrong and the harm is reducing that economic value, even if that does not immediately manifest as loss of money or business. This is why attacks which affect the target's standing in a non-marketable area are not acknowledged as wrongful – they fall beyond the theory's concept of valuable reputation. This would presumably be the case even if, by a rare and unforeseeable chain of events, the target lost money because of an attack on a non-marketable area of their life.

It may not matter in practice: to have a remedy, targets must normally prove pecuniary impact. The law may even use the existence of pecuniary loss as necessary evidence that the relevant area of life is marketable. However, it would be consistent for a proprietary reputation-protecting law to be actionable *per se*, particularly if certain kinds of statement are assumed to diminish a person's economic standing without the need for proof.

(ii) Deferent Reputation

Post's second conception is reputation as an aspect of 'dignity'. Its rhetorical appeal, he argues, is exemplified by a passage from the United States Supreme Court decision in *Rosenblatt v Baer*:

The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being ...⁷⁰

Post explains there might seem a gulf between reputation and personal dignity, since the former is socially-constituted and the latter is a private aspect of self.⁷¹ As he puts it,

it is not immediately clear how reputation, which is social and public, and which resides in the "common or general estimate of a person," can possibly affect the "essential dignity" of a person's "private personality." The gulf ... can be spanned only if defamation law contains an implicit theory of the relationship between the private and public aspects of the self.⁷²

Post links public and private using social interactionist thought, which posits that personal identity is (at least partially) constituted by internalising different external perspectives:⁷³ identity is 'continuously being constituted through social interactions.'⁷⁴ If the target realises

⁷⁰ 383 US 75, 92 (1966).

⁷¹ Post (n 8) 708.

⁷² *ibid.*

⁷³ *Ibid* 708.

⁷⁴ *Ibid* 709.

people perceive them in a manner conflicting with their internal identity, they may (wholly or in part) internalise this external feedback. So, the target takes ‘on the characteristics that are imposed on them in a cycle of positive feedback of belief and behaviour ... [and] has had their original autonomous identity destroyed by the defamatory statement and replaced with a less favourable one.’⁷⁵

Post cites the symbolic interactionist tradition by defining the social interactions relevant to reputation as those concerning the ‘rules of “deference and demeanor”’.⁷⁶ Demeanour rules define behaviour which expresses to others that the target has particular good or bad qualities.⁷⁷ Deference rules identify conduct whereby one person ‘conveys appreciation’ of another for displaying positive demeanor.⁷⁸ These rules bind individuals, ensure the target’s autonomous identity is externally affirmed, allow individuals to ‘confirm the social order’ and therefore bind the community together.⁷⁹

This model’s cost is that each person may only paint parts of his identity (their demeanor image), relying on others to complete the rest through compliance with deference rules (their deference image).⁸⁰ This ritual is required to fully express the individual’s private self – to achieve full dignity.⁸¹ Post calls the combined set the ‘rules of civility’⁸². Since reputation is an external assessment, it concerns the sub-set of deference rules with a social aspect: those used by social actors to determine group membership.⁸³

When a social actor is presented with someone breaking a deference rule, they must side either with the attacker or the target. If they side with the attacker, the target is discredited and subjected to exclusion, but, most importantly, the attack on their identity is affirmed.⁸⁴ So, Post argues the ‘dignity that [a reputation-protecting] law protects is thus the respect (and self-respect) that arises from full membership in society.’⁸⁵ Given its concern with deference rules, this theory is labelled ‘deferent reputation’.

⁷⁵ Cruise (n 54) 79.

⁷⁶ Post (n 8) 709.

⁷⁷ Ibid.

⁷⁸ Ibid 709.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid 710.

⁸² Ibid 710.

⁸³ Ibid 710.

⁸⁴ Ibid 711.

⁸⁵ Ibid.

Deferent reputation requires a ‘communitarian society’, which assumes that people are ‘equally eligible for inclusion within the community’ and that reputation is a non-pecuniary public good.⁸⁶ An attack on a target’s dignity also tests the community’s notion of proper inclusion.⁸⁷ So, a core purpose of any deferent reputation-protecting law is reaffirming the claimant’s social membership (if the attack is unjustified) or the stigma (if the attack is justified).⁸⁸ In doing so, the community maintains its identity,⁸⁹ while reinforcing or repairing the target’s internal identity.

One might question how this differs from social norm theory, given its benefit is encouraging people to portray a demeanour image which society deems virtuous, policed by the threat of exclusion. Certainly, the two theories are compatible and potentially complementary. The difference is that social norm theory is fundamentally external – it is the imposition of community morality and norms without any need for individuals to internalise that morality. Conversely, deferent reputation focuses on the internal component – how the individual internalises the imposed external morality. The individual relies on adherence to deference rules to constitute part of their identity, and a breach attacks that identity. This is what a law protecting deferent reputation aims to police. So, deferent reputation is an individual right, individually actionable and accompanied by the full range of pecuniary and non-pecuniary remedies.

Extrapolating from the above, to be actionable, the statement must a) conflict with the target’s internal identity and b) break society’s rules of deference in a manner which risks the target’s social membership. This raises the question of whether there are any qualifications on b). Gibbons criticises Post’s theory as assuming community membership is always worthy of protection.⁹⁰ A member of an immoral community is partially constituted by their norms, and suffers internal damage if wrongly accused of breaking them. Their community loses integrity if it starts mistakenly excluding people. Gibbons characterises deferent reputation as essentially giving individuals a right to community membership so long as they meet the inclusion criteria, no matter how immoral. One might argue that society has public policy reasons to reject immoral communities based on *ex turpi causa* (illegality grounds), but not all immoral communities will be actively illegal: particularly in a society which values free speech.

⁸⁶ Ibid 716-717.

⁸⁷ Sommers (n 27) 163.

⁸⁸ Post (n 8) 712-713.

⁸⁹ Ibid 715.

⁹⁰ Thomas Gibbons, ‘Defamation Reconsidered’ (1996) 16 OJLS 587, 595.

However, it is the wider community's social norms which are relevant to actionability. The wider law-creating community is solely concerned with *its* rules of civility and considers *those* necessary for dignity. This allows the wider community to determine whether membership of a particular sub-community is required for dignity, based on whether the latter's norms are compatible with the former's rules of civility: and only then will it recognise a breach of deference. At the risk of devolving into moral relativism, Post's theory *would* justify legal protection of a Nazi's right to inclusion in a Nazi State. It would not, conversely, justify protection of that same person's inclusion in a Nazi commune in an anti-Nazi State.

This theory strongly privileges truth, which connects to both the theory's internal and external aspects. From the internal perspective, if an allegation is true, then it cannot usually affect the target's identity. The target already reconstituted their own identity (and so lost dignity) by behaving a particular way. So, if the target internalises the attacker's view, their identity does not change.⁹¹ The attack merely recognises the pre-existing loss of dignity. For example, calling a thief a thief will not make them any more of a thief from an internal perspective.

All this assumes that identity is objective rather than merely self-perception. Otherwise, for example, a cheat who delusionally thinks they are honest might have their identity reconstituted by accusations of cheating. This does not intuitively seem like an attack on their dignity, since self-deceit and denial are not intuitively dignified states of being. It is therefore assumed that identity is the objective fact of the person's mental and behavioural characteristics rather than pure self-perception. Consequently, a deferent reputation-protecting law should normally render true statements lawful.

Nevertheless, a true attack might conceivably cause a shift in a rehabilitated individual's identity. There, the past event or characteristic forming the attack's subject matter is no longer relevant to the target's current identity. If the attack conveys the message that it does remain relevant, this may reconstitute that current identity. So, the mere statement that a person stole ten years ago would not affect a person's identity, but the implication 'once a thief, always a thief' might. A community which values rehabilitation and deferent reputation might render some true statements actionable, therefore.

⁹¹ Olsthoorn (n 55) 7.

Tolerating false statements, conversely, has no natural basis in deferent reputation. Unlike social norm theory, the focus of deferent reputation is on internal harm; the community's ability to police its composition is secondary. The theory grants individuals the freedom from identity-reconstituting false attacks; this is the core of their dignity. That the community might be better off if it can more easily exclude bad people at the cost of a few false-negatives is irrelevant. A deferent reputation-protecting law would therefore not inherently concern itself with the chilling effect.⁹²

That said, (as discussed in more detail below regarding sociality theory), it is possible a society which values deferent reputation might value other rights as incommensurately important or also necessary to achieve individual dignity. Accordingly, it may limit reputation protection to accommodate this. However, the stronger these limits become, the more indistinguishable the law becomes from one underpinned by social norm theory or epistemic reputation – the priority becomes society's interests rather than individuals' personal rights.

Meanwhile, even though deferent reputation has a strong internal component, satisfaction plays little role. Emotional satisfaction does not reverse a damaged identity, because the community still perceives the individual inconsistently with their original autonomous identity. The individual may feel better, but they will keep internalising the change and suffering the violation. Only remedies which rehabilitate the individual's reputation in the community can repair the damage, so these would be the law's focus. Some remedies associated with satisfaction (like an apology) might be available if the communities' norms understand such acts as correcting the record, but the satisfactory aspect is incidental.

Simultaneously, rehabilitative remedies are not automatically available. This is because deferent reputation is bipolar – if society changes its perception but the target does not internalise the change, no harm has occurred, making legal intervention unnecessary. Regarding any external harm to the community, one must turn to social norm theory to justify intervention. This is true even if one accepts that personal identities are entirely socially constituted: an individual will not internalise the change if they are unaware of it, for example. Similarly, to the extent that one perceives the attack itself as inherently harmful due to the lack

⁹² This is why Post, when justifying the result in *New York Times v Sullivan* (a US case imposing actual malice requirements for defamation of public officials), rationalised it as preferring 'constitutional autonomy' over 'reputation as dignity', the former of which he characterised as based on a notion of dignity in which the self is not socially constituted: Post (n 8) 738.

of respect it shows, this is the province of other theories of reputation – particularly cultural honour, discussed later.

In practice, the theory's bipolar nature may not matter – an ignorant individual will obviously not sue. However, there may still be circumstances in which individuals perceive the attack, but the law requires further proof of a reconstituted identity. Presumably, people do not reconstitute their identity in response to a single attack which very few others believe or reaffirm, when the rest of society continues to show deference. Or, an individual may have unusual psychology and demonstrably fail to internalise the shift.⁹³ So, a law based on deferent reputation might require some consequential change in how wider society treats the target or some external manifestation of society's affirmation of the attack. Alternatively, it may require specific proof of internal change: e.g. by treating emotional harm as presumptive proof of internalisation.

So, the burdens and actionability requirements for a reputation-protecting law based on deferent reputation may differ. This may turn on how strongly the society values reputation, particularly as weighed against other values like freedom of speech. A society concerned with the chilling effect, for example, might place more onus on claimants to prove internal change.

(iii) Sociality Theory

Sociality theory was posited by Howarth,⁹⁴ who argued that reputation's main function is allowing individuals to 'form and maintain social bonds.'⁹⁵ Losing reputation tends to lead to ostracism, damaging the target's ability to form social bonds. This ability is a near-universal human need,⁹⁶ and its absence can decrease wellbeing through diminished opportunity, overall happiness and fulfilment.⁹⁷ Reputational attacks are harmful since they lead to 'social isolation and rejection', or the threat thereof, damaging fundamental aspects of human life.⁹⁸ The right

⁹³ Though, if this is deemed rare, the law may not account for such people to avoid overcomplicating matters for most claimants.

⁹⁴ David Howarth, 'Libel: Its Purpose and Reform' (2011) 74 MLR 845.

⁹⁵ Ibid 849.

⁹⁶ Ibid 849.

⁹⁷ Ibid 849-850. So ingrained is this negative psychological response to ostracism that it occurs even in experiments where the subject knows that a non-sentient, random computer algorithm is doing the ostracising: ibid citing L Zadro, K Williams and R Richardson, 'How Low Can You Go? Ostracism by a Computer is Sufficient to Lower Self-Reported Levels of Belonging, Control, Self-esteem, and Meaningful existence' (2004) 40 Journal of Experimental Social Psychology 560.

⁹⁸ Howarth (n 94) 850.

to sociality is inherently personal, and so a law protecting sociality would provide a personal cause of action.

This theory is distinct from deferent reputation because it does not require identity to be socially-constituted. The individual suffers harm from ostracism regardless of whether their identity is affected. As Howarth puts it, the ‘basis of the elemental reaction to the threat of ostracism is not that one’s own view of one’s value as an individual person has been damaged’ but rather that the target’s ‘ability to maintain and form relationships with other people has been interfered with’.⁹⁹

The exact harm suffered depends on the kind of social ties which targets are precluded from making. Howarth distinguishes between ‘strong ties’ (‘those associated with affection and frequent contact’) and ‘weak ties’ (‘those with acquaintances and business contact’).¹⁰⁰ Damage to the former leads to psychological and health effects whereas damage to the latter is typically economic. Accordingly, the law is likely to grant non-pecuniary remedies to those whose strong ties are affected, but only pecuniary remedies to cases solely involving weak ties.

The near-universal incident of these harms in response to ostracization is evidence that the ability to form social bonds is fundamental to human nature. This fundamentality makes sociality more than a private interest – it concerns community functioning, and this pertains to everyone’s welfare.¹⁰¹ Widespread loss of sociality can cause the breakdown of communities or alteration of their composition, since people are discouraged from participating in communities where reputational attacks are widespread.¹⁰²

Howarth’s allusions to psychological and economic harm should probably not be taken to mean these harms must be proven before a statement is actionable. Rather, these harms evidence sociality’s fundamental nature. This fundamentality makes it wrongful and harmful to attack reputation even if the target is an indifferent, sociopathic hermit. However, the theory is not unipolar: a person’s reputation can be lowered without affecting a person’s social bonds. For example, a target might be accused of breaching some norm which does not warrant overt social judgement, like a minor rule of etiquette. Accordingly, sociality is bipolar: the target

⁹⁹ Ibid 853.

¹⁰⁰ Ibid 856.

¹⁰¹ Ibid 859.

¹⁰² Ibid 863.

must be at risk of different social treatment. One might expect a law based on sociality theory to require proof of social backlash or impose a threshold of seriousness, therefore.

Sociality provides an intuitive test of actionability: whether the statement degrades or is likely to degrade weak or strong ties. This raises the issue of whether every strong or weak tie is equal, particularly as regards morally repugnant communities. Taken at face-value, a sociality-based law should bar reputational attacks within a specific sub-community whose norms are repugnant to wider society. Targets have the same interest in forming bonds with that community as any other, since they are at the same risk of suffering the same harm if those bonds are broken. The Nazi commune member shunned over a false allegation that they broke racial purity norms appears to have the same kind of ‘fundamental’ interest in sociality with that community as everyone else, and so should be entitled to a legal remedy.

Howard accepts ‘such questions are difficult’ but argues they ‘do not affect the central issue of what makes harm actionable in the first place’ – the harm which exclusion causes to a fundamental interest.¹⁰³ The problem with this is that, unless the fundamental interest in sociality is limited in some way Howarth does not exposit, one of two things must be true. The first is that sociality theory has no issue with the law protecting sociality within immoral communities. Indeed, since all sociality interests are equal, it demands this. The second alternative is that the intuition that the law should *not* protect membership of immoral communities is evidence that sociality *is not* what makes reputation worthy of protection. This indicates the theory is, at least, incomplete: absent a theory of why certain communities are so fundamentally antisocial that enabling membership of them nevertheless does not serve (or even harms) the sociality interest.

A possible modification of Howarth’s theory could accommodate a lack of protection for sociality in immoral communities, however. This modification provides that humanity’s interest in sociality is not with respect to a particular community, but rather the wider community. Provided people can form social bonds with a reasonable subsection of the wider community, thereby enabling them to flourish in principle, it does not matter if their ability to form bonds in a specific sub-community is damaged. This fits the intuition that it can be in a person’s best interests to be prevented from socialising with a ‘bad crowd’, but never to be isolated completely.

¹⁰³ Ibid 851-852.

With this modification, the Nazi commune member may lose the ability to form bonds with other Nazis, but remains able to live a fulfilling social life with everybody else.¹⁰⁴ A law protecting this modified sociality interest protects the target's right to 'sufficient' sociality or sociality with 'good people' (as the wider community defines). This shapes the kinds of actionable statement, limiting them to those which lower the target's reputation in the wider community's eyes and ignoring minority groups' esoteric and conflicting opinions.

Truth's role within a sociality-protecting law is also fraught. A person's ability to form social bonds is affected by a reputational attack whether or not the allegation is true. Since sociality is a fundamental human interest, the sinner and saint seem equally entitled. This indicates that a law based on sociality alone would not distinguish between true and untrue statements.¹⁰⁵ The possible exception is at the remedies stage, since a declaration of falsity, or other remedy which set the record straight, could rehabilitate the reputation and repair the target's ability to form social bonds. However, false statements would still entitle targets to other remedies, like damages.

This conclusion appears to cause Howarth discomfort – his instinct is that truth should provide a defence. He squares this circle by arguing that freedom of expression (particularly true expression) is also a fundamental human interest. Accordingly, it is necessary to 'balance' sociality and free speech as equal but incommensurable interests. This can only be done on a case-by-case basis, he argues, examining in every instance whether the harm done to the community by the restraint of publication is greater or lesser than the harm done to the human interest in sociality.¹⁰⁶

Assuming the relevant society values speech as a fundamental interest, therefore, a sociality-based reputation law might consider truth relevant: but not as an automatic defence. One can conceive of a society which privileges true speech so much it always trumps sociality, but one would naturally question exactly how fundamental sociality is to such a society. It is also possible a society might consider only some instances of speech to always trump sociality, like political speech. In these areas one might even anticipate the toleration of false speech on

¹⁰⁴ Unless they lived in a Nazi state, in which case the law presumably would value their ability to have sociality with Nazis.

¹⁰⁵ Save at the remedies stage, since a declaration of falsity could rehabilitate the reputation and repair the target's ability to form social bonds.

¹⁰⁶ *ibid* 864.

‘chilling effect’ grounds. Again, however, if the categories were wide and normalised, one would question how important that society actually considered sociality.

It is more likely that either of two defence structures would be adopted. In the first, truth would be a precondition of a defence with additional requirements designed to identify circumstances in which the harm done to sociality is outweighed by the value of speech. These could include, for example, context (e.g. speech in a legislative session) or topic (e.g. political speech), or even a broad standard based on the public interest.

In the second, truth would be a non-necessary part of a structured discretionary assessment of all relevant circumstances, aimed at balancing the speech and sociality interests. As previously noted, a society valuing speech may be concerned with tolerating some false speech to avoid the chilling effect. A sociality society might, therefore, not have separate defences for the truth and the public interest. Both could be dealt with under a structured discretion designed to balance speech and sociality, with truth being a significant but non-necessary factor. Additionally, sociality may be concerned with proportionality: a statement might be true, but the public backlash and extent of the ostracism unjustifiable – in which case, the law may still wish to sanction the speech. This could be another factor in the discretion.

What is more certain is that satisfaction plays no role. The target’s personal satisfaction does nothing to repair their ability to form social bonds. So, a law concerned with sociality would not provide remedies designed to provide satisfaction. As with other theories, however, remedies typically associated with satisfaction might exist if they repair social bonds going forwards. Any satisfactory effect would be incidental.

IV. Honour

‘Honour’ is frequently used interchangeably with ‘reputation’, though there is a concept of ‘personal honour’ distinct from the external perceptions on which reputation relies. The language of honour is often deployed (in both reputational and other senses) without clear definition or explanation of its underlying values. The mere assertion of what honour requires is sufficient justification for action. Honour theories of reputation are, therefore, as far from consequentialism as one can get.

Three conceptions of reputation-relevant honour exist in the literature, labelled here: aristocratic honour, virtuous honour, and cultural honour. These relate specifically to the

reputational aspect – none purport to be a complete theory of how honour is understood by societies reliant on the concept.

(i) Aristocratic Honour

Post's third conception of reputation is as a form of social rank or 'honour'. This form of reputation is conferred entirely by others and has no necessary relationship with an individual's actions. Post argues that historical adherents of this view saw reputation as incommensurate with economic value.¹⁰⁷

a form of reputation in which an individual personally identifies with the normative characteristics of a particular social role and in return personally receives from others the regard and estimation that society accords to that role.¹⁰⁸

This honour is not earned, but claimed by right due to the individual's socially-allocated role or membership of a particular group. It therefore

presupposes that individuals are unequal ... Different social positions will be more or less honorific, and within each social position either one will have the honor which is due that position, or one will not and be accordingly dishonored.¹⁰⁹

Post cites 18th century British aristocracy – who were *prima facie* entitled to respect regardless of any particular achievements – as an example. Though Post's historical methodology and the accuracy of this contention has been criticised, it certainly aligns with the popular stereotype.¹¹⁰ In return for the honour of their role, Post argues the individual is required to personify its attributes,¹¹¹ typically by fulfilling various responsibilities or displaying particular attributes.¹¹²

This 'aristocratic' honour sees reputation as absolute and fixed rather than relative and variable.¹¹³ Since it is conferred by society, it assumes the individual's identity is socially constituted such that their personhood cannot be distinguished from their role.¹¹⁴ This version of reputation envisages a society where 'ascribed social roles are pervasive and well established' and where these roles 'provide the point of reference both for the ascription of

¹⁰⁷ Post (n 8) 699.

¹⁰⁸ Ibid 699-700.

¹⁰⁹ Ibid 700.

¹¹⁰ Gibbons (n 90) 594-95. Other less romantic examples exist – such as being a 'made man' in the Sicilian Mafia: Sommers (n 27) 18.

¹¹¹ Post (n 8) 700.

¹¹² Sommers (n 27) 18-19.

¹¹³ Post (n 8) 700-701.

¹¹⁴ *ibid* 706.

social status and for the normative standards of personal conduct.¹¹⁵ Post calls this a ‘defence society’.¹¹⁶

Aristocratic honour bears similarities to deferent reputation: it also assumes ‘individual identity is in some sense constituted by reputation’.¹¹⁷ However, it differs since it is ‘concerned with attributes of personal identity that stem from the characteristics of particular social roles’.¹¹⁸ Conversely, the dignity which deferent reputation seeks to preserve ‘is concerned with the aspects of personal identity that stem from membership in the general community’ – a community with egalitarian entry criteria.¹¹⁹ Deferent reputation is equal opportunity – aristocratic honour is distinctly not. So, the more society ceases to value individual ‘dissimilarities and inequalities’,¹²⁰ the further from a defence society it moves and the less it values aristocratic honour.

An actionable statement under an aristocratic honour-protecting law is one which diminishes the target’s honour. This turns on the social role they occupy: a particular statement might diminish the honour of a working-class individual but not an aristocrat, and *vice versa*. The person’s role, and its embodied values, is critical to actionability. Beyond this, conflicting requirements can be derived from Post’s enunciation of the theory, and it’s supposed purpose.

An aristocratic honour law is designed to enforce the status of social roles in which society is invested by reaffirming existing social consensus on the value of those roles.¹²¹ Since reputation-as-honour has no monetary value, Post claims the law’s purpose is instead to restore the lost honour.¹²² However, what is unclear is how the law goes about restoring that lost honour – and the value of truth and satisfaction.

Post makes three potentially contradictory assertions. The first is that aristocratic honour is absolute and fixed. The second is that the individual holding a role is supposed to live up to the behaviour expected of that role,¹²³ and if they fail, they ‘forfeit’ the honour.¹²⁴

¹¹⁵ Ibid 701.

¹¹⁶ Ibid 702.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Ibid 707.

¹²¹ Ibid 703.

¹²² Ibid 703.

¹²³ ibid 700.

¹²⁴ Ibid 701.

The third is that honour can be restored via a ‘status rehabilitation ceremony’ (which seemingly equates to satisfaction or criminal punishment).¹²⁵

The problem is that the first contention indicates honour cannot be lost (it inures inexorably to the role). Conversely, the second envisages that honour *can* be lost – and, from this, Post engages in a discussion of how the law ought to provide remedies which ‘vindicate’ reputation (via status rehabilitation ceremonies). All three contentions cannot be true at once.

It is possible that, by the first contention, Post characterises honour as a binary status, not a spectrum: you either have it or you do not. However, this seems unlikely. Such a conception of honour is difficult to square with reputation being a communal evaluation; opinions may differ amongst different community subsets. If honour being ‘fixed and absolute’ means it can only be present or absent, every attack either turns the whole community against the target or does nothing. This seems implausible.

The contention that honour *cannot* be lost better follows from the idea that honour adheres to a role allocated based on the individual’s inherent position in the defence society. The role’s assignment is ascriptive: an individual cannot by action change their innate characteristics and therefore should not be able to affect the entitlements their innate characteristics attract.

At the heart of this contradiction is a lack of clarity about why the law should get involved in a system of aristocratic honour. Post’s argument – that aristocratic honour is socially-constituted and therefore a public good – is insufficient. There are plenty of socially-constituted aspects of the world with which the law is unconcerned. There are two possible explanations of why a defence society’s legal system would concern itself with aristocratic honour. This produces two different conceptions of aristocratic honour with different approaches to truth, satisfaction and remedies. This thesis labels them ‘perceived’ and ‘Arthurian’ aristocratic honour.

Perceived Aristocratic Honour

The first conception takes seriously the idea that society values these roles because their holders are supposed to embody particular characteristics, this being necessary to uphold social

¹²⁵ Ibid 704.

order. Under this conception, defending aristocratic honour is necessary to uphold the status of particular roles. This matches Post's contention that

The protection of honor thus involves the maintenance of "the consensus of the society with regard to the order of precedence." To serve this function, defamation law must define and enforce the ascribed status of social roles.¹²⁶

If role-holders are widely perceived as failing to live up to their role-associated characteristics, the role's value in society crumbles and so does social order. This conception of aristocratic honour is unipolar, because each attack on reputation is itself a small crack in the role's integrity, which grows wider the more role-holders lose their reputations. The law's purpose is to prevent this scenario, or as Post puts it:

to be used either as a potent method for reaffirming the importance to the whole society of the status of particular social roles, or as an instrument for the forceful imposition of such status.¹²⁷

Post opines that truth has little bearing on honour, because this 'shifts inquiry away from the impersonal attributes of social roles, which cannot be true or false, and toward the particular conduct of the individuals who occupy those roles'.¹²⁸ However, under this first conception of aristocratic honour, truth must have some importance. If the attack is false, a law protecting perceived aristocratic honour must declare it false to restore society's faith in the role. Equally, people who publicly fail to live up to those expectations *damage the integrity of the role themselves* by signalling to the world that role-holders do not necessarily embody the advertised attributes. The attacker does the role no further harm.¹²⁹ One would expect the combination of truth and pre-existing publicity to be a defence.

However, if the role-holder can keep their unsuitability secret, revealing that unsuitability jeopardises the social order. In such circumstances, truth would not be a defence. Effectively, this conception of aristocratic honour values the *perception* that role-holders embody particular characteristics. This need not be true, so long as that perception is maintained. It thereby demarcates between 'public' and 'secret' areas of life, protecting the latter from view and deterring attempts to lift the masquerade. This is why this thesis labels it 'perceived' aristocratic honour.

¹²⁶ Ibid 702.

¹²⁷ Ibid 703.

¹²⁸ Ibid 706.

¹²⁹ There might be an exception, however, if the attacker brought the role-holder's unsuitability to a new audience, since this would freshly undermine that audience's faith in the social role.

Somewhat counterintuitively (given this theory's nominal association with the stereotypical honour practices of 18th century England), this conception also has no clear role for satisfaction. The focus is on the role's integrity, not the target's personal feelings. Satisfaction does not logically restore the role back to its original lofty status: duelling the attacker will not necessarily convince the public of the target's suitability. Some satisfaction-associated remedies like apologies might have the necessary corrective effect, but the satisfaction is incidental.

Also contentious is the appropriateness of damages. This theory is concerned with harm to the role and the society on which it relies, not harm to the role-holder. While a damages award might be valued for its deterrent effect, there is no obvious way to quantify society's harm, nor any link between that and the target's personal loss which might make the latter a good proxy for the former. Given perceived aristocratic honour is mainly about the powerful communal interest in social order, one might expect it to manifest within the criminal law rather than the civil law.

Perceived aristocratic honour has no basis to allow publication of false information, for any reason – including the chilling effect. It is concerned with social order and society's fundamental fabric, which false attacks necessarily undermine. Since it does not value people correctly pointing out a role-holder's unsuitability, there is no benefit to allowing some false attacks to maximise true ones. It is unlikely a society concerned with perceived aristocratic honour would in any circumstances value free speech above honour: it seems inconsistent to deem social order fundamental while simultaneously permitting speech which undermines that order. So, truth and falsity have no bearing on actionability/liability.

Arthurian Aristocratic Honour

The second conception of aristocratic honour abandons the idea that anything particularly meritorious is required or expected of role-holders. It characterises social roles in a defence society as allocated based on possession of particular, highly-valued ascriptive characteristics. Mere possession of those characteristics, without more, comes with the right to be spoken about and treated as if the target possesses certain virtues associated with the role (whether true or not).

A desire to maintain the social order is relevant, but only because in practice the contemporary social order favours the incumbent classes' right to their lofty position. This

understanding of a defence society perhaps more closely mirrors the stereotypical aristocratic one. It grants people with particular ascriptive characteristics a right to dictate their own public ‘truth’ – that their characteristics align with stereotypical understandings of their role – regardless of the ‘private’ truth.¹³⁰ Others must behave as if that public truth is real, even if they know better. It is perhaps best exemplified in Malory’s tales of King Arthur, in which everyone (including the King) knows of the Queen’s affair with Lancelot, but behaves publicly as if both are chaste and virtuous: that is what their roles and honour embody.¹³¹ Accordingly, this thesis calls this ‘Arthurian’ aristocratic honour.

This is unipolar – damaged reputation directly affects the individual’s entitlements and therein lies the harm. Truth is completely irrelevant, as Post envisaged. The attack is wrongful whether or the allegation is true. Satisfaction – especially vengeance – is key. The target is entitled to treat themselves as wholly constituted by the role – a reputational attack is an attack on the core of their psyche. However, unless the attack is so extreme it destroys the role’s status and upends social order, the role-holder does not internalise the attack into his own personality (as with deferent reputation). His entitlement to profess virtuousness remains.

So, the attack does not damage the role-holder’s identity, but rather makes them feel anger and outrage – a desire to punish the attacker for threatening their entitlement. Vengeance is the solution. Obtaining satisfaction also publicly signals the attacker is a wrongdoer for daring to impugn the role-holder, and a similar fate awaits those who refuse to continue upholding the masquerade. So, a law focused on Arthurian aristocratic honour mainly aims to achieve satisfaction and punish attackers for breach of honour-norms. This might be done through criminal or civil means. The role-holder has a secondary right not to be subjected to any consequences of an attack, meaning the law might provide a system of civil damages, and damages might be perceived as a form of satisfaction in some societies. However, the target’s right is fundamentally personal and non-pecuniary.

Like perceived aristocratic honour, Arthurian honour would never tolerate falsity. Undermining the role-holder’s entitlement is never justified: a society which values speech and one which values the right to profess a persona based on lies and punish contradiction cannot be reconciled. Accordingly, there would be no defences concerning public interest or designed to encourage or protect speech.

¹³⁰ James Bowman, *Honor: A History* (Encounter Books 2006) 53-54.

¹³¹ *ibid* 42.

(ii) Virtuous Honour

McNamara posits a rival to aristocratic honour, labelled ‘virtuous honour’ here.¹³² Virtuous honour characterises the reputational aspect of honour as an interlinking of social worth and self-worth, based on both the target’s perception of their own value and society’s evaluation. ‘Value’ refers to virtuous characteristics like honesty and loyalty (determined by the community’s ethics).¹³³ Virtuous honour refers to both possessing and being judged to possess virtuous characteristics.¹³⁴

This conception of honour looks similar to deferent reputation, as it also assumes individual identity is partially socially-constituted. Self-worth and social worth are linked because individuals internalise their social worth, at least to the extent of ceasing to believe their self-worth is justified. McNamara distinguishes the two theories by arguing that virtuous honour is grounded in the community’s traditional values where ascriptive features are determinants:¹³⁵ a virtue honour society is one which believes that those who possess certain ascriptive traits or roles should live up to an ideal stereotype, exhibiting certain virtues. Conceptions of social life which deny any link between ascriptive traits or pre-ordained roles and a person’s eligibility for reputation will not protect virtue honour. Conversely, deferent reputation treats dignity as grounded in liberal values of individualism.

In a virtue honour society, possessing biological or inherited traits makes the person ‘eligible’ for particular kinds of virtuous honour. However, unlike Arthurian aristocratic honour, entitlement is not automatic. The individual must still be virtuous. This depends on what the society expects of people with those specific ascriptive traits. For example, in a gendered society, courageousness might be honourable for those deemed male, while chastity is honourable for those deemed female. The brave male and chaste female have honour, while the cowardly man and promiscuous female do not. The brave female gains no honour (nor does she lose it), and neither does the chaste male (likewise). In some societies, particular ascriptive traits may even disentitle a person from honour entirely.

This has some similarities with social norm theory: it encourages people to comply with pro-social norms (albeit ascriptive features determine the relevant norms). The two theories are potentially compatible. The difference is social norm theory is entirely external, while virtuous

¹³² McNamara (n 3) 44.

¹³³ Ibid 49.

¹³⁴ Ibid 54.

¹³⁵ Ibid 55-56.

honour has an internal and external component. The target relies on honour both to feel justified self-worth *and* to claim respect from others. Their motivation for virtuous action is not (just) material reward, but a need to feel internal self-worth: this requires external validation.¹³⁶ A false attack on virtuous honour attacks the person's self-worth and affronts their sense of entitlement to societal recognition.

However, a virtue honour society is distinct from a defence society: the latter assumes that people *must* embody the values associated with their role (or that people must pretend they do). While virtuous honour privileges ascriptive roles, an attack on the target is not an attack on the stereotype's integrity, nor is the target's entitlement to honourable perception absolute. The ascriptive stereotype is an independent aspiration – which some will fail to achieve. The ideal is not undermined by their failure: only their personal entitlement to self-worth.

The criteria for a statement's actionability turn on the ascriptive traits which society assigns particular virtues. Two kinds of statement would fall afoul of the law. The first is those alleging the target failed to exhibit the virtues expected of them, given their ascriptive traits. In the gendered society described above it would be actionable to call a man cowardly, but not to accuse him of promiscuity. The second is those denying the target even possesses the ascriptive traits they present as having: denying their eligibility for a particular kind of honour and stripping them of accrued honour. So, in the gendered society, accusing a man of being a woman is actionable even if the society had no 'negative' opinion of women (merely a different one).

Virtuous honour is bipolar. The ignorant target will not feel their self-worth is unjustified, and suffers no harm. As with deferent reputation, this may lack practical impact: an unaware target has no reason to sue. While deferent reputation might impose thresholds of seriousness as evidence of internal damage, this is less likely for a virtuous honour-based law: a single attack can damage a person's feeling of self-worth, since the target need not show alteration of identity. Nevertheless, the theory's bipolarity and focus on the target's internal life indicates the law would be primarily concerned remedially with rectifying and compensating emotional harm. This does not imply a restriction on the other kinds of recoverable damage, however: a virtue-honour society might be concerned with a variety of consequential losses.

¹³⁶ Kaufman (n 27) 156.

Meanwhile, an attack on a person who fails to live up to the privileged virtues (or who lacks the ascriptive characteristics claimed) is justified, and any harm to the target's self-worth is deserved. Truth is therefore an important aspect of virtuous honour. One would expect virtuous-honour-based laws to treat truth as an absolute defence. It may make exceptions for rehabilitation, but only to the extent the society believes one can compensate for past loss of honour with future virtuous behaviour. A society which believes unvirtuous behaviour permanently scars one's honour, conversely, would treat truth as absolute.

Virtuous honour provides no obvious basis for tolerating false information. The theory is not strictly concerned with the external benefit others derive from possessing information about the targets' virtues: it focuses on the individuals' personal entitlement, which is always potentially undermined by a relevant false statement. Nevertheless, there is nothing stopping a society viewing speech as an important but incommensurate value to be balanced against reputation: unlike a defence society, a virtuous-honour society is not intuitively incompatible with valuing speech. There might be defences protecting speech or some other public interest. However, the wider and stronger that defence, the more indistinguishable the law becomes from one underpinned by social norm theory or epistemic reputation – the priority becomes society's external interests rather than individuals' personal rights.

Normally, satisfaction has no role: retaliation does not repair the damaged self-worth. There may be an exception where the allegation is that the target lacks bravery, but given a virtue-honour society will have other virtues, one would not expect satisfaction-based remedies to be the norm.

(iii) Cultural Honour

Cultural honour¹³⁷ grants all people, regardless of role or ascriptive characteristics, entitlement to self-respect and respect from others until they demonstrate unworthiness.¹³⁸ Reputational attacks are one way to damage a person's cultural honour. As Nietzsche explains, by deliberately attacking a person's reputation, the attacker demonstrates they do not 'fear' – respect – the target and thereby breaches their right.¹³⁹

¹³⁷ As labelled such by Bowman (n 130) 1.

¹³⁸ E.g. Kaufman (n 27) 121.

¹³⁹ Friedrich Nietzsche, 'The Wanderer and His Shadow' in Friedrich Nietzsche, *Human, All Too Human* (RJ Hollingdale ed, CUP 2004) 317.

Unlike deferent reputation, cultural honour is not restored by the community reaffirming the target's membership or identity. More personal action is required - a demonstration that the target must be respected: that they will respond to and challenge the attacker. If the target does not respond, they indicate to society that the attacker's disrespect was warranted, thereby losing face and entitlement to self-respect. This theory explains why, historically, many societies considered honour capable of restoration by mere participation in a duel or similar vengeance proceeding.¹⁴⁰ It was unnecessary to 'win', merely to demonstrate willingness to retaliate.

Not all societies can accommodate cultural honour. The less a society believes retributive action is appropriate, the less relevant cultural honour becomes.¹⁴¹ The West is sometimes called a 'post-honour' society¹⁴² - from which it might be hypothesised that English law should not bear many, if any, traces of this kind of reputational interest, though it may have done so in the past.

Any disrespectful statement can be actionable under a cultural honour-protecting law. This might extend beyond reputational matters - like prohibiting 'insult', though as discussed below private insult and public disrespect are analytically separate and so potentially legally separate. Society's ideas about entitlement to respect define the law's scope. Statements which wider society considers perfectly respectful, but which the target finds disrespectful because of some esoteric views they or their sub-community possess, would not be actionable. This is because the wider community which designed the law is presumably only concerned with protecting its own notion of respectful behaviour. This external element - the wider community's norms - bounds cultural honour's scope, meaning the law will not grant State-sanctioned redress against any perceived insult.

Satisfaction is at cultural honour's core. By seeking satisfaction, particularly vengeance, the target demonstrates bravery and willingness to respond. This restores their right to self-respect and indicates to society they should be shown respect in future.¹⁴³ Some theorists

¹⁴⁰ Kaufman (n 27) 143.

¹⁴¹ Bowman (n 130) 6.

¹⁴² *ibid* 7.

¹⁴³ Kaufman (n 27) 121.

like Kaufmann characterise this broader social effect as merely incidental,¹⁴⁴ while others deem honour as inherently a combination of private and social effect.¹⁴⁵

Kaufmann seemingly interprets vengeance's communicative aspect as purely based on a desire to deter future harm,¹⁴⁶ which he argues does not match reality: targets often put themselves at risk of greater harm (notably physical harm) by seeking satisfaction, so deterrence is not the issue.¹⁴⁷ However, a reputational attack arguably leads to ongoing, passive disrespect by the community: until the target retaliates, the community will continuously deem them unworthy of respect. Rather than deterring future harm, the target is actually motivated by a desire to put an end to this ongoing harm – which they evidently perceive as worth the risks involved in pursuing satisfaction. This may explain why, though some honour-restoring acts may be entirely private (e.g. a secretive assassination), many historical honour-based practices were inherently public, like the pre-arranged, public duel. Satisfaction is as much about indicating to society that one deserves respect as it is about restoring one's internal sense of respect.

Whether satisfaction need be public likely turns on the nature of the honour-effacing act. Parker suggests that historical Spanish notions of honour had different manifestations depending on whether the dishonouring act was public or private. Destruction of public reputation 'could only be restored by an equally public act' while a private dishonour must be avenged in secret 'in order not to publicise what vengeance was intended to remove'.¹⁴⁸

Bowman labels the more public-facing honour as 'cultural honour' (concern with perception by a particular cultural honour group) and the more private honour as 'reflexive honour' (the desire to lash out reflexively at those who disrespect us, regardless of public perception).¹⁴⁹ Since reputation is inherently external, any reputation-protecting law will not be concerned with the purely private reflexive honour: only cultural honour. If reflexive honour is privileged, it may be regulated by other laws.

The relationship between cultural honour and satisfaction demonstrates its unipolar nature. Public disrespect is both harmful and wrong whether the target is aware of it or not,

¹⁴⁴ Ibid.

¹⁴⁵ Olsthoorn (n 55) 7, citing Charles H Cooley's definition of honour in *Human Nature and the Social Order* (Charles Scribner's Sons 1922) 184.

¹⁴⁶ Kaufman (n 27) 121.

¹⁴⁷ *ibid.*

¹⁴⁸ Alexander Parker, *The Mind and Art of Calderón: Essays on the Comedias* (CUP 1988) 213.

¹⁴⁹ Bowman (n 130) 4-6.

because it diminishes their right to respect. So, reputational harm is unlawful under this theory whether or not any consequences flow from it. A law protecting cultural honour would probably look very different from laws embodying other theories described in this chapter. As Bowman puts it, cultural honour is fundamentally ‘the traditions, stories and habits of thought of a particular society about ... the proper and improper use of violence’ and retributive action.¹⁵⁰ The public good a cultural honour-based law seeks to promote is providing a proper channel for ‘good’ retributive action.

However, cultural honour is never a completely public concern – it is fundamentally personal. It is the target who must retaliate to restore their honour. It therefore matters who does the avenging.¹⁵¹ A target might seek retribution using a representative, but to restore one’s personal honour there must be a close link between the target and the retributive act. So, one might expect a law wedded to cultural honour to be invocable only by way of private prosecution. Alternatively, State action might only be initiated on application by the victim. This might be too weak a link, however: some theorists consider ‘turning to third parties ... indicates weakness of cowardice and a lack of self-respect’.¹⁵²

Most likely, the law would simply provide controlled mechanisms for people to reclaim their own honour. There are many reasons the State might do this. Reducing the costly violence associated with traditional modes of vengeance is an obvious reason, as is reducing other negative externalities associated with a chaotic, subjective system of satisfaction by providing structure, predictability, and stability. Or, the State might provide legal mechanisms to give official sanction to those willing to defend their honour. These legal mechanisms affirm the community’s recognition of the retaliation and respect for the target, ensuring the target is emotionally satisfied.

Theoretically, truth could be relevant to cultural honour: the underlying society may consider people disentitled to respect if certain allegations are true – for example, if society privileges authenticity and sincerity. However, in such a society, cultural honour becomes difficult to distinguish from deferent reputation or virtuous honour. As a distinct theory, it is better associated with societies in which people are deemed absolutely entitled to respect. In such a society, others act wrongfully by truthfully declaring the target’s shortcomings. In essence, ‘what is known privately by everyone nevertheless does not matter or even exists ...

¹⁵⁰ Ibid 6.

¹⁵¹ Kaufman (n 27) 110.

¹⁵² Sommers (n 27) 17.

so long as it is not spoken of publicly'.¹⁵³ So, cultural honour would not treat truth as a justification for the attack.

Finally, a cultural honour-based law would never permit false statements. Since the right to retaliate is indifferent to the truth, there is no basis for saying that some false speech should be tolerated to enable valuable true speech. The idea of a society which values speech as an incommensurate, equal right to reputation seems inconsistent with a society which values the ability to retaliate against perceived disrespect. Cultural honour only seems compatible with a society which values speech rather little.

V. Legal Implications

Based on the above analyses, conclusions can be drawn on five matters: the purpose of any law embodying a theory; its implications for the scope of actionability, including whether the law is unipolar or bipolar; truth's relevance; whether falsity is ever tolerable; and the likely remedies, including the relevance of satisfaction.

The purpose of an epistemic reputation-protecting law is ensuring the community can access information which enables pro-social judgements. Actionable statements are those likely to cause individuals to reach what the wider community considers an anti-social judgement. The law is unipolar: any civil action is actionable *per se* and any damages reflect diminution of right.

Truth is a core value in enabling pro-social judgements, as the community wants to act on true information. Accordingly, the law should usually treat truth as an absolute defence. However, if the community acknowledges true statements can cause anti-social judgements – like biased evaluations or those ignoring rehabilitation – it might restrain them. It would also countenance some false statements to avoid the chilling effect, but still require the record to be corrected if a statement were demonstrably false.

Since the theory is concerned with the public interest, one might expect the State to be its primary enforcer. However, a private cause of action using the target as proxy for the public interest is also possible. If so, the law might provide damages for personal losses to force attackers to internalise their actions' social cost, thereby deterring harmful behaviour. Satisfaction has no direct role.

¹⁵³ Bowman (n 130) 42.

The purpose of law based on social norm theory is ensuring unpaid norm enforcers perform their role correctly and do not cause the community to waste costs. Actionable statements are those indicating the target has broken the wider community's social norms: the law is unlikely to be concerned with eclectic sub-community norms. Since the community needs unpaid norm-enforcers to spread true information to correctly exclude norm-breakers, truth is likely a near-absolute defence: with a possible exception for rehabilitation if the community considers the cost of constant re-ostracization wasteful.

Similarly, the law may countenance some false statements to avoid the chilling effect where the community's social norms are deemed so important that true judgements must be maximised, even at the expense of false positives. This law is still concerned with setting the record straight where a statement was demonstrably false.

The law would be bipolar: actionability requires a risk of the community wasting social costs by acting against the target. This might manifest as a requirement for specific proof of social harm or a threshold of seriousness. Since social norm theory is based on the public interest, one might expect the State to be the primary enforcer. Once again, deterrence provides justification for a private cause of action, however. Satisfaction plays no direct role.

The purpose of a proprietary reputation-protecting law is protecting and restoring reputation's economic value. Actionable statements are those impugning people in marketable areas of life. It would not matter if the statement only lowered the target's reputation in a sub-community, provided the reputation has economic value. On a simple desert-based theory of property, the law cannot countenance falsehoods. It may provide a defence for truth, but only where the relevant market assigns value based only on true facts or there are specific public interests which overrides the value of property.

Proprietary theory is unipolar, so the implementing law could be actionable *per se*. However, in practice it could be implemented in a bipolar fashion, requiring proof of pecuniary impact, as an evidential proxy for diminution of right. The remedies aim to restore or compensate the reputation's lost economic value and its pecuniary consequences: non-pecuniary damages are unavailable. Satisfaction has no direct relevance.

The purpose of a deferent reputation-protecting law is policing breaches of deference rules, namely statements which risk reconstituting a person's identity, and reaffirming a person's community membership where there is improper breach. Actionable statements conflict with the target's internal identity and suggest they have breached the wider community's norms in

a way which risks their wider community membership. The law is not concerned with attacks relating only to a sub-community's membership.

Since a true statement normally cannot reconstitute identity, truth is an absolute defence, with a possible exception for rehabilitation. The law has no natural reason to protect false statements, but could create defences to avoid the chilling effect if the society incommensurately values free speech. One would expect the defences' scope to be limited, however.

The law would be bipolar, and so require evidence of external manifestation of society's judgement, or proof the target's internal identity has changed: for example, proof of isolation or emotional harm. The law would provide a private action accompanied by the full range of damages, pecuniary and non-pecuniary, but satisfaction has no direct role.

The purpose of a sociality-protecting law is protecting people's ability to form social bonds with the wider community, and repair wrongful damage to that capacity. An actionable statement degrades weak or strong ties with the wider community. The law is unlikely to be concerned with sub-communities, particularly if it deems them immoral.

Neither truth nor falsity are inherently relevant. However, if the law deems free speech a countervailing interest, it will likely provide one of two defences. The first is a defence for true speech which meets other conditions, like promoting the public interest. The second is a discretionary defence (likely based on the speech's public interest nature) in which truth and falsity are relevant, but non-determinative.

The law would be bipolar, and so require proof the target's social bonds have been jeopardised – either through specific proof of social backlash or perhaps a threshold of seriousness. The full range of remedies (including non-pecuniary damages) should be available for those whose strong ties are affected, but only pecuniary damages would be available for those with affected weak ties. Satisfaction has no direct relevance.

The purpose of law based on perceived aristocratic honour is protecting the integrity of important social roles. Any statement impugning the target's suitability for a role deemed important by the wider community is actionable. Truth is only a defence if already publicly known by the relevant audience. Falsity would never be tolerated. The law would be unipolar, and so require no additional consequences. However, perceived aristocratic honour would

likely be mainly State-enforced, possibly as a criminal matter. Satisfaction would have no direct relevance, and personal remedies may be supplemental or entirely unavailable.

Laws based on Arthurian aristocratic honour protect entitled individuals' right to project their own public truth. Anything contradicting this is actionable, and since the law would be unipolar no additional effects need be proven and any damages reflect diminution of right. Both truth and falsity are irrelevant. Remedies would be based mainly on providing satisfaction, though supplemental compensation for consequential losses may be available.

A virtuous honour-protecting law aims to protect people's right to justified self-esteem based on their compliance with social virtues. Anything indicating a person is unvirtuous, based on their ascriptive eligibility, or which denies ascriptive characteristics relevant to honour, is actionable. While the theory is bipolar, it is only in the sense the target must be aware of the attack: since the litigious target obviously knows, the cause of action is likely actionable *per se*.

Truth should be an absolute defence, save potentially regarding rehabilitated targets in a society which considers honour reparable. If the society sees speech as a countervailing right, there may be some defence permitting public interest false speech, but one would expect its scope to be limited. The remedies would focus primarily (but not necessarily exclusively) on compensating emotional harm, and satisfaction plays no direct role.

Finally, the purpose of a cultural honour-protecting law is providing State-sanctioned methods for disrespected targets to reclaim their honour through retaliation. Anything indicating public disrespect under the wider community's norms is actionable. Since the theory is unipolar, there is no need to prove more – the law is actionable *per se*. Truth and falsity are irrelevant. The remedies are legal channels for the target to take 'appropriate' retributive action, giving satisfaction core relevance.

Given these conclusions, the remainder of the thesis examines the extent to which the law embodies these conceptions of reputation.

Chapter 3: Criminal Defamation

In addition to the various civil actions used to police reputation, two relevant criminal offences existed in English legal history: *scandalum magnatum* and criminal libel. Though both are now obsolete, they demonstrate how one can identify changing conceptions of reputation throughout English law. This chapter shows how reputation protection in England originated in aristocratic honour concerns in the form of *scandalum magnatum*, before shifting to cultural honour concerns under the criminal defamation offence. It shows that, as concerns with cultural honour diminished, so too was the offence diminished, eroded, and ultimately abolished.

I. Scandalum Magnatum

Criminal defamation originates in the 1275 ‘*scandalum magnatum*’ statute and its subsequent iterations. These prohibited citation and publication of ‘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’.¹⁵⁴ *Scandalum magnatum* has not formed part of English law for over 100 years. Nevertheless, it provides historical context for the subsequent criminal libel offence and the modern civil actions. It also demonstrates the law’s changing emphasis on different facets of reputation.

The 1275 statute and its successors created the *scandalum magnatum* offence. The common law courts in the late 15th century provided a corresponding civil remedy, applying the principle that ‘where a statute prohibited a particular offence, any person injured ... was entitled to damages’.¹⁵⁵ The criminal offence was barely used outside of politically turbulent periods,¹⁵⁶ where it was a ‘political weapon’ for the Crown and nobility against dissent and civil unrest.¹⁵⁷ It was ultimately repealed in 1887,¹⁵⁸ by which point it was widely considered obsolete. The corresponding civil law action naturally died alongside it.

The breadth of *scandalum magnatum* was notable compared to early forms of civil defamation. Civil defamation was initially keen to limit what kinds of statement were actionable. Conversely, *scandalum magnatum* covered all ‘disparaging language, which if

¹⁵⁴ 3 Edward I, c 34 (1275) *Statute of Westminster the First*, cited in McNamara (n 3) n 80.

¹⁵⁵ John C Lassiter, ‘Defamation of Peers: The Rise and Decline of the Action for Scandalum Magnatum, 1497-1773’ (1978) 22 *American Journal of Legal History* 216, 217.

¹⁵⁶ CHS Fifoot, *History and Sources of the Common Law: Tort and Contract* (Stevens & Sons Ltd 1949) 128.

¹⁵⁷ Law Commission, *Criminal Libel* (Law Com No 84, 1982) para 2.2.

¹⁵⁸ Statute Law Revision Act 1887.

spoken of a commoner would not have been held actionable at all'.¹⁵⁹ All that was required was that the words 'touched [the noble] in his honour and dignity', for example by raising 'contempt betwixt him and the people, or the King's indignation against him'.¹⁶⁰ It has been suggested that 'vague criticisms and expressions of dislike or disrespect' were sufficient.¹⁶¹ As civil defamation developed a practice of interpreting words in the most defendant-friendly fashion, the *scandalum magnatum* action did the opposite – taking words 'in the worst sense against the speaker'.¹⁶² Additionally, despite the statutes repeatedly referring to 'false news' or 'lies', defendants could not escape liability by arguing that the imputation was true.¹⁶³

McNamara argues that 'it seems difficult to view [the *scandalum magnatum* laws] as laws that protected reputation',¹⁶⁴ as their core purpose was preventing public violence and protecting public order. This was clear from the 1275 statute's wording and how it was used (albeit minimally) throughout history. Lassiter ascribes the creation of *scandalum magnatum* to the 'discord and scandal' which led to war and rebellion during the 1216-1272 reign of King Henry III.¹⁶⁵ He also correlates upticks in *scandalum magnatum* cases (both civil and criminal) to eras where the social and economic divide between the upper and lower classes began to close – when the 'specialness' of aristocratic roles and entitlements was less obvious or secure.¹⁶⁶ The social order based on the existence of aristocratic roles was threatened, as was their role-holder's sense of entitlement. The action 'became a way of reinforcing – albeit artificially – old and weakening social boundaries.'¹⁶⁷

McNamara's position assumes a desire to preserve the public order is entirely divorced from reputational concerns. As demonstrated in the previous chapter, this is incorrect. The purpose of perceived aristocratic honour is to preserve social order by preventing and punishing speech which undermines faith in particular social roles. *Scandalum magnatum* therefore aligns with perceived aristocratic honour, particularly as it primarily took the form of a criminal

¹⁵⁹ Lassiter, 'Defamation of Peers' (n 155) 220; see e.g. *Earl of Peterborough v Sir John Mordant*, 1 Ventris 60, 86 Eng Rep 42 (1670).

¹⁶⁰ *Earl of Lincoln v Roughton*, Cro Jac 196, 79 Eng Rep 171 (1608).

¹⁶¹ Theodore FT Plucknett, *A Concise History of the Common Law* (5th edn, Liberty Fund Inc 2010) ch 5.

¹⁶² *Earl of Peterborough* (n 159).

¹⁶³ *Ibid.*

¹⁶⁴ McNamara (n 3) 79.

¹⁶⁵ John C Lassiter, 'Scandalum Magnatum: The "Scandal of Magnates" in English Law, Society, and Politics' (MA Thesis, College of William and Mary Virginia, 1974) 5.

¹⁶⁶ Lassiter 'Defamation of Peers' (n 155) 219-20.

¹⁶⁷ *Ibid* 220.

offence. The fit is imperfect, however, since truth was never a defence – not even where the role-holder’s unsuitability was already public.

Arthurian aristocratic honour is another option. That notion is also concerned with maintaining social order, since a social order which privileges particular, ascriptive-assigned social positions is necessary for people in those positions to claim their entitlements. This theory would also explain truth’s irrelevance and the peculiarity of allowing nobles to assert that the defendant’s words were ‘lies’ even if they were demonstrably true: the law reinforced the nobility’s right to assert a public truth.

A focus on Arthurian honour also explains the courts’ willingness to interpret words in their worst possible sense. An Arthurian aristocrat can dictate their own truth and demand respect on their own terms. Any slight, however minor, impinges upon this. Again, the fit is imperfect: the law’s explicit purpose was a greater (perceived) public interest than the personal entitlements of nobles. However, the law’s actual substance and its operation best fits Arthurian aristocratic honour.

Supporting this, *scandalum magnatum* – invariably by private prosecution – provided an official mode of satisfaction. A common 17th century explanation for the existence of *scandalum magnatum* was that it was ‘an acceptable alternative to violent revenge’ – the stereotypical mode of satisfaction.¹⁶⁸ There were even expectations that other, less extreme modes of satisfaction would be pursued first. Commonly, the attacker would be ‘brought before the bar of the House of Lords’ to apologise for disrespecting the target.¹⁶⁹ Only if the target remained unsatisfied would they escalate. So, satisfaction was a core goal of the legal structure surrounding the offence, as expected of an Arthurian aristocratic honour-based law.

The civil *scandalum magnatum* action, meanwhile, was merely an implementation of the contemporary principle that any criminal injury is actionable in civil law. The ultimate moral or philosophical justifications for such a principle go beyond this thesis’ discussion. Nevertheless, its existence is consistent with Arthurian aristocratic honour, which can accommodate damages consequential on the affront.

¹⁶⁸ Ibid 218; Lassiter notes that there is very little contemporary evidence from the 13th century to support or refute this, though there is certainly evidence that it was a driving force behind *scandalum magnatum* in the 17th century.

¹⁶⁹ Ibid 221.

II. Criminal Libel

‘Defamatory libel’ or ‘criminal libel’ was a common law criminal offence in England and Wales from 1606 until 2010.¹⁷⁰ Its late development in English legal history was likely due to the fact that non-*scandalum magnatum* reputational attacks were deemed a spiritual matter: the purview of ecclesiastical courts, whereas common law courts dealt with more tangible harms like bodily injury.¹⁷¹ There was an ecclesiastical criminal defamation offence prior to 1606, but the typical penalty was penance and its significance was minimal.

The first non-ecclesiastical case was *The Case de Libellis Famosis*, wherein the Archbishop of Canterbury was accused of criticising another bishop in verse.¹⁷² The Star Chamber held it was a criminal offence whenever ‘an epigram, rhyme, or other writing is composed or published to the scandal or contumely of another, by which his fame and dignity may be prejudiced’. The justification was that libel ‘robs a man of his good name, which ought to be more precious to him than his life’.¹⁷³ The Chamber was also concerned about how highly the population valued reputation, risking violence from the wronged party if the State did not intervene.¹⁷⁴ A libel offence was therefore necessary to maintain public order. This justified criminal libel liability regarding dead targets, because ‘the libeller traduces and slanders the State and Government, which dies not’.¹⁷⁵

When the Star Chamber was abolished, common law courts continued to prosecute criminal libel,¹⁷⁶ branching out to other forms like blasphemous and seditious libel. However, criminal libel remained distinct, being seen as ‘private’ rather than ‘political’ in nature: it aimed to quell private disorder, rather than public disputes.¹⁷⁷

The prosecutor needed to prove the defendant intentionally published, in written form, words which ‘savoured of any contempt of their persons, and as such brought them into disgrace with the Commons, for hereby they took occasion of provocation and revenge’.¹⁷⁸ Later formulations phrased this as words likely to bring the victim into ‘hatred, contempt and

¹⁷⁰ Coroners and Justice Act 2009, s 73(1)(b).

¹⁷¹ *Rotuli Parliamentorum*, I, 132-134, cited by Theodore FT Plucknett (n 161).

¹⁷² *The Case de Libellis Famosis* (1606) 5 Co Rep 125a, 77 ER 250.

¹⁷³ *ibid*

¹⁷⁴ *ibid* 251.

¹⁷⁵ *ibid*.

¹⁷⁶ E.g. *R v Beare* (1698) 1 Ld Raym 414, 91 ER 1175.

¹⁷⁷ Law Commission (n 157) para 2.9.

¹⁷⁸ *Lord Townsend v Dr Hughes* (1677) 2 Mod 150, 156.

ridicule’, something later adopted in civil defamation cases.¹⁷⁹ Like *scandalum magnatum*, the criminal libel never adopted the civil law’s defendant-friendly interpretative presumptions.

During the 18th and 19th century, the courts suggested that the statement’s tendency to lead to a breach of the peace was important.¹⁸⁰ However, successful convictions occurred in cases lacking this,¹⁸¹ and it was ultimately rejected in *Wicks*.¹⁸² This, combined with the lack of any requirement to demonstrate damages, indicates a unipolar approach. Interestingly, oral attacks fell beyond criminal libel.¹⁸³ This might have related to a perception that the populace perceived written reputational attacks more seriously than spoken ones.¹⁸⁴

Despite not being a requirement, the focus on peace-keeping was echoed in criminal libel actions for centuries after *The Case de Libellis Famosis*. As Smith J in *Major of London* put it in 1886, libel is a criminal offence ‘because of its supposed tendency to arouse angry passions, provoke revenge, and thus endanger the public peace’.¹⁸⁵ Certainly in the medieval era, there was a concern that revenge would not remain a private matter, as friends and family would get involved until ‘the whole kingdom was often in a flame’.¹⁸⁶

This influenced criminal libel’s requirements in two respects. Firstly, there was no requirement of third-party publication – publication to the victim sufficed.¹⁸⁷ Secondly, it became common practice for indictments to state the defendant published the libel ‘knowing the same to be false.’¹⁸⁸ However, the truth¹⁸⁹ or ‘knowledge of the untruth of the libel was immaterial in point of law’: this practice simply communicated that the libel was aggravated and so warranted a higher sentence.¹⁹⁰ That the charge was both false and the defendant knew it was assumed for sentencing purposes, so the defendant often attempted to demonstrate truth or lack of malice despite its immateriality to substantive liability.¹⁹¹

The Star Chamber in *The Case de Libellis Famosis* opined that parties should seek legal remedy for grievances, rather than seeking revenge ‘either by the odious course of libelling, or

¹⁷⁹ William Hawkins, *A Treatise of the Pleas of the Crown* (Eliz Nutt 1716) 193

¹⁸⁰ *R v Labouchere* (1884) 12 QBD 320, 322.

¹⁸¹ JR Spencer, ‘Criminal Libel - A Skeleton in the Cupboard’ [1977] Crim LR 465, 466.

¹⁸² *R v Wicks* (1936) 25 Cr App R 168, 172-73; confirmed in *Gleaves v Deakin* [1980] AC 477, 483.

¹⁸³ *R v Penny* (1687) 1 Ld Raym 153.

¹⁸⁴ Starting with *King v Lake* (1670) Hardres 470, 145 ER 552.

¹⁸⁵ *The Queen v The Lord Mayor of London* (1886) 16 QBD 772, 777.

¹⁸⁶ *Lord Townsend v Dr Hughes* (n 178) 156.

¹⁸⁷ *The Queen v Adams* (1888) 22 QBD 66, 69; see also *Barrow v Lewellin* (1616) 80 Eng Rep 211, Hobart 62,

¹⁸⁸ *Boaler v The Queen* (1888) 21 QBD 284, 286.

¹⁸⁹ *R v Hollingberry* (1825) 4 B&C 329; *R v Burdett* (1820) 4 B & Ald 95, 106 ER 873.

¹⁹⁰ *Boaler v The Queen* (n 188) 286.

¹⁹¹ *The Queen v Munslow* (1895) 1 QB 758, 762.

otherwise'.¹⁹² So, making a true statement likely to disturb the peace was deemed unjustified. Indeed, some contemporary commentators considered a true statement more likely to breach the peace than a false one, people apparently being less offended by falsehoods.¹⁹³ This is at odds with prosecutors' typical assertions that the libels were false, however.

The Libel Act 1843 created the first truth defence, but only for public-interest publications.¹⁹⁴ It also created the offence of publishing 'any defamatory libel, knowing the same to be false, every such person, being convicted thereof', a separate offence to common law libel.¹⁹⁵ Additionally, there were some cases in which a common law defence of public interest (absent truth) was mooted,¹⁹⁶ though this was never confirmed by the appellate courts and apparently never succeeded.

In the 1800s, newspapers were commonly targeted. As they became larger, it became more difficult to determine responsibility for publishing a libel, so prosecutors typically went after the paper's editors or proprietors. Initially, the law assumed their responsibility for publication by reason of their proprietorship,¹⁹⁷ though owners and editors could prove otherwise by demonstrating that the publication was made without authority or negligence.¹⁹⁸ The justification was that if a person is profiting from a publication business, and they entrust the means of publication to others, they ought to answer for their publications.¹⁹⁹

In 1881, statute created a qualified privilege for newspapers who published fair, accurate and non-malicious reports of proceedings of lawfully-convened public meetings, for the public benefit.²⁰⁰ However, this was unavailable unless the defendant agreed to include a 'reasonable letter or statement or explanation or contradiction' in the publication containing the report.²⁰¹

The Director of Public Prosecution's ('DPP') permission became necessary for State prosecutors to pursue criminal libel actions against newspaper proprietors, editors or publishers (but not journalists or contributors).²⁰² This aimed to prevent newspaper prosecutions unless

¹⁹² *The Case de Libellis Famosis* (n 172) 251.

¹⁹³ William Hudson, 'A Treatise on the Court of Star Chamber' in Francis Hargrave (ed), *Collectanea Juridica: Vol 2* (Clarke and Sons 1791) 103.

¹⁹⁴ Libel Act 1843, s 6.

¹⁹⁵ *ibid* s 4; as interpreted by the High Court in *The Queen v Munslow* (n 191) 762.

¹⁹⁶ E.g. *R v Newman* (1853) 1 El & B1 558, 569.

¹⁹⁷ *R v Almon* (1770) 5 Burr 2686, 98 ER 411.

¹⁹⁸ Libel Act 1843, s 7, stated to represent the prior common law in *The Queen v Holbrook and Others* (1877) 3 QBD 60, 66, though there was apparently no authority on the point.

¹⁹⁹ *R v Gutch* (1829) M&M 433, 437.

²⁰⁰ Newspaper Libel and Registration Act 1881, s 2.

²⁰¹ *ibid*.

²⁰² *ibid* s 3.

the libel was serious.²⁰³ However, private prosecutions remained possible with the court's permission.²⁰⁴ When the DPP's intercession ultimately failed to reduce prosecutions, further reforms required judicial permission to bring any criminal prosecution against the media.²⁰⁵ In practice, the DPP or Attorney General's leave was obtained.²⁰⁶ Judicial permission was only granted where there was a clear *prima facie* case, the libel was sufficiently serious to justify prosecution and the public interest required prosecution.²⁰⁷

In the last two centuries of its life, the offence became increasingly unpopular with the courts. By the end of the 19th century, courts opined that criminal law had no business interfering in cases which were 'clearly an individual squabble between two people'.²⁰⁸ By the 1970s, the courts described criminal libel prosecutions as 'relatively uncommon'.²⁰⁹ Nevertheless, they still periodically occurred²¹⁰ – typically private prosecutions.²¹¹ By 1980, the House of Lords stated that the offence's existence clashed with the UK's ECHR commitments since an individual could be convicted for imparting accurate information about 'seriously discreditable conduct' despite this result lacking any public interest.²¹² Despite this, it was not formally abolished until 2010.²¹³

One might instinctively link early criminal libel to aristocratic honour, like *scandalum magnatum*. The offence's stated purpose was to preserve public order by preventing private disputes from devolving into violence. However, its characteristics never met either conception of aristocratic honour: the criteria for a publication being deemed 'libellous' was never inherently married to the characteristics of particular roles. Additionally, the later development of a general defence of truth in the public interest does not match either conception. Truth is irrelevant to Arthurian aristocratic honour, public interest or otherwise, and perceived aristocratic honour has no need for a 'public interest' caveat.

²⁰³ *The Queen on the Prosecution of the Earl of Lonsdale v Yates* (1883) 11 QBD 750, 754.

²⁰⁴ *ibid* 755.

²⁰⁵ Law of Libel Amendment Act 1888, s 8.

²⁰⁶ *Gleaves v Deakin* (n 182).

²⁰⁷ *Goldsmith v Pressdram* [1977] QB 83, 88-92.

²⁰⁸ *R v Deverell* (1889) 86 LT Jo 300 (Lord Coleridge).

²⁰⁹ *R v Wells Street Stipendiary Magistrate* [1978] 1 WLR 1008, 1010.

²¹⁰ Law Commission (n 157) para 2.21.

²¹¹ *ibid*, see also *R v Hind* [1966] Crim LR 100 (private prosecution), *R v Lewes Crown Court* [1974] 1 WLR 196 (private prosecution) and *Gleaves v Insall* [1999] 2 Cr App 466 (private prosecution) for other examples of actions brought.

²¹² *Gleaves v Deakin* (n 182) 483.

²¹³ Coroners and Justice Act 2009, s 73.

In any case, it is wrong to conclude that criminal libel was only concerned with public order and not with reputation. That a breach of the peace was never an offence element is notable here: one would expect an offence's core purpose to be reflected in its requirements. The extent to which criminal libel embodies or relates to other conceptions of reputation must therefore be explored.

Some conceptions were plainly irrelevant. This is true of proprietary reputation, given the irrelevance of economic concerns. Truth's initial irrelevance also rules out social norm theory and epistemic reputation. The (judicially believed) idea that the truer the statement, the more grievous the legal wrong, particularly flies contrary to these theories.

Later incarnations could perhaps be interpreted consistently with the consequentialist theories, assuming the purpose of the defence of truth in the public interest was to delineate between true information the public can use to form pro-social judgements and those they use to form anti-social (or wasteful) judgements. However, this is probably an incorrect interpretation for two reasons.

Firstly, that the offence was heavily skewed against publication of true information sits ill-at-ease with these theories' core purpose: normally, maximising access to true information (about social norm breaking or otherwise). Only a pessimistic view of people's tendency to use information anti-socially would lead to an epistemic reputation-based law looking like criminal libel: society would have to assume that people misuse true information rather routinely.

Secondly, it is unclear whether there was a defence for the publication of *false* public-interest information, which epistemic reputation would probably require in some form to avoid the chilling effect. One might point to the qualified privilege defence for newspapers, but this is strained given that defence was limited to what was, at the time, a small class of people publishing narrow types of information.

As for deferent reputation, there are some superficial similarities. Criminal libel was broadly egalitarian. It was somewhat concerned with enforcing proper rules for dealing with others. It was also concerned with the possibility that breach would undermine community integrity: albeit through violent responses rather than wrongful exclusion. However, truth is central to deferent reputation, while it was initially irrelevant to the law. A similar analysis applies to virtuous honour, which also privileges truth.

Criminal libel's requirements bore some similarity to sociality theory. Notably, criminal libel usually concerned statements likely to result in social exclusion (though it was unipolar and required no actual proof of a change in social bonds). Its initial lack of a truth defence, and subsequent development of the same (and privilege for newspapers), mirrors Howarth's notion that attacks on sociality might be limited where society also deems other interests fundamental. It could reflect society initially not valuing speech as a fundamental interest, but increasingly doing so as time passed.

However, criminal libel was probably not deliberately connected to sociality. Sociality does not explain the law's intense focus on preserving peace. Though it was not an actionability requirement, it shaped many of the offence's elements. For example, sociality cannot explain why publication to the victim alone was an offence – there is no impact on sociality in these circumstances. The same is true of libels against the dead.

This leaves cultural honour. As previously explained, legal intervention concerning cultural honour (and its non-reputational cousin, reflexive honour) illuminates society's views on proper and improper use of retributive violence. This gets to the heart of criminal libel and demonstrates why cultural honour is the best explanation of this offence and its development.

The Star Chamber perceived a society where individuals responded to public and private slights with immediate, sometimes socially-catastrophic violence: a society in which cultural and reflexive honour were both highly prized and detrimental. The Star Chamber's near-explicit purpose in creating the offence was to redirect notions of cultural and reflexive honour – to redefine what constitutes proper use of retributive violence. The courts provided an alternative means for private individuals to obtain satisfaction using State-sanctioned, mostly non-violent machinery,²¹⁴ encouraging a shift in what was perceived to be adequate 'satisfaction' from violence to other means. In other words, criminal libel was a tool for controlling cultural honour.

This characterisation explains all the offence's initial characteristics. The offence is unipolar, as the theory predicts. Most cases were brought by private prosecution, indicating the offence's primary purpose was providing personal satisfaction. The lack of any requirement for third-party publication is explicable as the offence covering both cultural and reflexive honour – even if most cases concerned cultural honour. That statements against the dead were

²¹⁴ Save in those serious cases where facial mutilation could be ordered as a sentence.

actionable was explicable since such statements could still provoke disrespect against their living associates in a society with strong community and familial values, and ties.

Most importantly, linking criminal libel to cultural honour explains why truth was irrelevant for the first 200 years, just as it is irrelevant to cultural honour. The judicial belief that truth makes the libel worse also fits well: it linked to a perception that true statements were more likely to be perceived as a disrespect worthy of violent retaliation (whether or not this was actually true). The focus was the public's perceived tendency to retaliate to disrespect.

Of course, cultural honour does not fit later developments, particularly the defence of truth in the public interest and newspapers' qualified privilege defence. Nevertheless, explanation is possible. The Star Chamber originally empathised with society's violent responses to insult and reputational attacks – characterising a good name as more precious than life. However, by attempting to mould standards of satisfaction away from violence towards more 'civilised' means, they were bound to influence people not to consider reputational concerns a matter of life and death. Inevitably, the law would follow or influence shifts in social standards which no longer saw cultural honour as critically important.

As previously explained, the less a society values retributive action in response to reputational attacks, the less concerned it becomes with cultural honour. This sets the stage for other concerns to take the fore, like speech and a free press. The increasing concerns about frivolous and vexatious libel prosecutions – which resulted in procedural obstacles to prosecutions – may reflect judicial and Parliamentary frustration with the populace's cultural honour concerns in what were increasingly perceived as minor circumstances. As time passed, society (or at least lawmakers) valued retributive action less, and criminal libel's coherence was eroded by reforms reflecting contemporary social values.

By the time criminal libel was finally abolished, the notion that the law needed or should provide an outlet for impulses of cultural honour was nearly dead – as indicated by the dearth of prosecutions and outright judicial disapproval at those brought. The need for criminal libel to protect cultural honour diminished, until there was no need at all.

Chapter 4: Civil Defamation

Civil defamation can be split into five aspects. The first is the actionability rules. The second is the publication requirement – the statement must be communicated to a third party.²¹⁵ Formerly, republications counted as separate publication, even where the defendant did only one act:²¹⁶ publication online counted as fresh publication every time someone accessed the statement.²¹⁷ The Defamation Act 2013’s single publication rule abolished this, unless the manner of republication is materially different.²¹⁸ The third is that the statement must refer to the claimant. The fourth is potential defences. The fifth is the available remedies.

The second and third elements reflect defamation’s core purpose of protecting reputation in some form: statements must be capable of causally impacting another’s evaluation of the target. Notably, the other torts examined in this thesis (MOPI and data protection) have no third-party publication requirement. Accordingly, while they can protect reputation, they also apply where reputation is irrelevant – not so with defamation. These elements do not reveal precisely what form of reputation the law is interested in protecting, however. To learn this, one must analyse the criteria for actionability, defences and remedies. This will be the aim of this chapter, which will show that defamation best fits with the deferent theory of reputation – albeit imperfectly.

I. Actionability

First, the defendant must make an actionable statement.²¹⁹ The actionability criteria have evolved over time. The tort historically divided between slander²²⁰ and libel,²²¹ leading to initially bifurcated and then converging development. This section tracks the history of civil defamation’s actionability requirements, starting with its origins in slander, to expose the key notions at play.

²¹⁵ Even implicitly – *Hird v Wood* (1894) 38 Sol J 234 – or accidentally – *Huth v Huth* [1915] 3 KB 32.

²¹⁶ *Duke of Brunswick v Harmer* [1849] 14 QB 185.

²¹⁷ *Loutchansky v Times Newspapers Ltd* [2002] 1 All ER 652.

²¹⁸ Defamation Act 2013, s 8(4).

²¹⁹ *Miller v David* (1873-74) LR 9 CP 118, 124-25.

²²⁰ Broadly, spoken attacks.

²²¹ Broadly, attacks recorded in a permanent form, typically in writing.

(i) Slander

Defamation originated in the 16th century from the action on the case: a generic action for wrongs not otherwise provided against by a specific legal action.²²² This would later be labelled ‘slander’.

a) Slander as Temporal Loss

Actionability did not originally require words to be ‘defamatory’ or ‘slanderous’. Rather, they needed to cause ‘temporal’ (as opposed to ‘spiritual’ loss): what would now be called ‘special damages’ combined with damage to one’s legal rights or entitlements. Words did not need to be wrongful beyond the tendency to cause such loss, though some cases offhandedly referenced the plaintiff being ‘scandalised’²²³ or having their ‘name’ or ‘estate’ harmed.²²⁴ Reputational damage absent pecuniary loss was insufficient.²²⁵ So, it was non-actionable to call someone a ‘heretic’²²⁶ or ‘whore’ even if the plaintiff suffered demonstrable social ire.²²⁷

Conversely, reputational damage leading to tangible legal or economic consequences were actionable: e.g. allegations of sexual impropriety causing the plaintiff’s wife to divorce him²²⁸ or his fiancé to end the engagement.²²⁹ Mere social consequences, like causing strife between spouses (but not divorce), were insufficient to render a ‘moral’ accusation actionable.²³⁰ Other ‘temporal’ losses might include the cost of defending against criminal

²²² Prior to this, defamation was normally seen as the province of the ecclesiastical courts and there are cases stating that the King’s Courts would not entertain such an action: Van Vechten Veeder, ‘The History and Theory of the Law of Defamation. I’ (1903) 3 Columbia Law Review 546, 556.

²²³ E.g. *Norman and Symons*, Mich 11 Car BR, cited in Knightley D’Anvers, *A General Abridgment of the Common Law: Volume 1* (J Walthoe 1705) 82-83.

²²⁴ *Sparowe v Heygrene* (1508), found in John Baker, *Introduction to Legal History* (5th edn, OUP 2019) 694; *Edward’s Case*, Cro Eliz 6 (1661).

²²⁵ *Anon* (1557) B&M 699.

²²⁶ *Anon* (1535) YB Trin 27 Hen VIII fo 14 pl 4, found in John Baker, *Sources of English Legal History* (2nd edn, OUP 2013) 688.

²²⁷ D’Anvers (n 223) 80, citing *Poliard and Irmshaw*, Cro Eliz 582 (1661); though there were intermittently statutes giving rise to actions for specific allegations, such as the Act against Adultery; and at 82 citing *Norman and Symons* (n 223) where no action lay in relation to a concerted effort by a woman to scandalise a man, causing him to be ‘much scandalized in his fame and name, and that all honest men having the fear of God before them’.

²²⁸ *Ibid* 81 citing *Taylor and Tolwin*, SP Lat 218 (1661); or monetary loss in searching for a fleeing spouse – *Roshdale v Thorne* (1382) Selden Soc Vol 88 p 22, found in Baker (n 226) 686.

²²⁹ *ibid* 82 citing *Carter and Smith*, Mich 11 Car BR (though that claimed failed because it turned out the plaintiff had refused to marry his fiancé for unrelated reasons, rather than the other way around); see also *Davyes v Gardiner* (1593) 4 Co Rep 16v.

²³⁰ *ibid* citing *Randal and Beale*, 2 Rol Rep 24SC (1675). There may have been an exception for very serious religious harms, such as being excommunicated, but there is only one anomalous case to this effect: *Barnabas and Traunter* (1640) Rolle Abr I p 37 pl 15 (KB), found in Baker (n 226) 690.

prosecutions,²³¹ the risk of criminal prosecution, or punishment,²³² or losing inherited lands,²³³ or economic damage to trade, business or office.²³⁴ The latter category could render actionable statements which were generally non-actionable. For example, to accuse someone of having the plague was actionable if they were an innkeeper, but not otherwise.²³⁵

The temporal loss requirement aimed to distinguish between the secular and ecclesiastical courts' jurisdictions, the latter of which had extensive powers to criminally punish defamation (though not to award damages).²³⁶ Baker speculates that, additionally, non-financial harms like provoking disorder were seen 'as a form of immorality best left to be punished by the Church'²³⁷ and later criminal defamation.

However, an early distinction arose between actions requiring proof of temporal loss and those where such loss was assumed from the imputation's nature. The latter historically included criminal allegations, sufferance of a serious infectious disease,²³⁸ imputations affecting the plaintiff's office, profession or business,²³⁹ or like to cause loss of inheritance, title to land or other legal rights.²⁴⁰

The need for temporal loss frequently made actionability turn on narrow technicalities. For example, in *Utting's* case, the defendant alleged the plaintiff was 'a traitor and worthy to be hanged, for he said that money was fallen a noble in the pound'.²⁴¹ The treachery accusation alone was actionable, since it opened the plaintiff to the risk of legal consequences, unless the defendant's explanation of the treachery indicated no illegality and so risked no legal consequences. Falsely reporting inflation was straightforwardly illegal, by contrast.

²³¹ Ibid citing *Harris and Smith*, Mich 9 Car BR, cf *Lightfoot and Piggot*, Hill 5 Car BR.

²³² ibid 83 citing *Rily and Lewis*, Hill 15 Car BR, though initially criminal allegations only seemed to be actionable where it appears from the defendant's statement that the defendant intended to seek such prosecution or punishment.

²³³ ibid citing *Humfry and Stutfield*, Pasch 13 Car BR .

²³⁴ Hence why referring to a regular person as a 'Papist' was non-actionable, while calling a Bishop the same was actionable: ibid 85, citing *Ireland and Smith*, 1 Brownl 12 (1651), 2 Brownl 166 (1651), see also Trin 16 Car 2.

²³⁵ E.g. *Housden v Stoyton* (1568) B&M 698.

²³⁶ 'The Pre-Thorley v Kerry Case Law of the Libel-Slander Distinction' (1955) 23 University of Chicago Law Review 132, 135 citing *Anonymous*, 2 Salk 694, 91 Eng Rep 587 (KB, 1697) which was concerned with avoiding 'double' litigation and punishment.

²³⁷ Baker (n 226) 465.

²³⁸ E.g. the plague.

²³⁹ Albeit this did not apply to all trades – they had to inherently have the requisite status: *Bell v Thatcher* (1675) Vent 275.

²⁴⁰ *Anon* (1564) Dalison 63, pl 23, found in Baker (n 226) 696.

²⁴¹ *Utting's Case* (1566) found in Baker (n 226) 697. Notably there was a dissent in this case: Walsh J thought accusing someone of being a traitor was sufficiently 'heinous, and such as cannot be by any means taken in a good sense' that no additional words could temper it.

Some 1700s cases might be interpreted as watering down the temporal loss requirement. For example, in *Russell*,²⁴² the defendant accused the plaintiff of attempted robbery but argued this caused them no damage. The court rejected this, arguing: ‘what could be more grievous damage than such a report of him?’ Similarly in *Fowler*, it was actionable to call the plaintiff a ‘returned convict’²⁴³ despite this risking no legal consequences (he had already served his sentence). Nevertheless, the court considered key that ‘the obliquy [broadly ‘disgrace’ or ‘strong public condemnation’] remains’.²⁴⁴

These were cases broadly falling into categories where temporal loss was presumed – imputation of crime. So, they do not necessarily show the ‘obliquy’ alone was sufficient loss (either in those categories or in general). However, if *Fowler* was merely a case of presumed temporal loss, it is odd the defendant could not rebut this by pointing out the sentence was already served. Nevertheless, despite these cases, and despite judges in the 1800s complaining that the exceptions to the temporal loss rule were ‘arbitrary’,²⁴⁵ the need for temporal damages remained for most forms of slander throughout its history.²⁴⁶

b) Construing Slanderous Imputations

In the mid-1500s to 1600s, the courts perceived an excess of slander claims.²⁴⁷ Accordingly, they insisted that statements were only actionable if sufficiently ‘certain’ and non-general.²⁴⁸ Coke explained this in *Stanhope* as a need to place the more favourable construction on general or doubtful words.²⁴⁹ This was the rule of construction *in mitiori sensu* (the milder or more positive meaning is intended).²⁵⁰ Only some words were deemed incapable of a mild meaning;²⁵¹ even words like ‘villain’ or ‘rogue’ were often non-actionable as merely words of ‘passion or anger’.²⁵²

²⁴² *Russell v Haward* (1737) Dyer 26, found in Baker (n 226) 695.

²⁴³ *Fowler v Dowdney* (1838) 2 M & Rob 119.

²⁴⁴ *ibid* 120.

²⁴⁵ *Foulger v Newcomb* (1866-67) LR 2 EX 327, 330.

²⁴⁶ *Onslow v Horne* (1771) 3 Wils KB 177, 187: ‘There must be some certain or probable temporal loss, or damage, to make the words actionable’; *Miller v David* (n 219), using the modern term ‘special damages’.

²⁴⁷ *Carpenter’s Case* (1558) Gell’s Reports fo 49, found in Baker (n 226) 698: Dyer J: ‘I think these actions on the case for words are too common, and it is not good to allow an action on the case for every trifling word.’

²⁴⁸ E.g. *Stanhope v Blith* (1585) 4 Co Rep 15a.

²⁴⁹ *Ibid*: ‘quia benignior sententia in verbis generalibus seu dubiis præferenda’.

²⁵⁰ *Jeames v Rutletch* (1599) 4 Co Rep 17 (QB) in Baker (n 226) 702-04.

²⁵¹ *Anon* (1568) HLS MS 1180(1), fn 334v, found in Baker (n 226) 704.

²⁵² Baker (n 226) 702: the justification being ‘boni judicis est lites dirimere’ – it is the duty of a good judge to prevent litigation.

These qualifications interacted inconsistently with the temporal loss requirement. Some vague statements were still assumed to cause temporal loss; particularly those touching on the plaintiff's trade (e.g. calling a merchant bankrupt).²⁵³ For others, the defendant had to be relatively specific. For example, in *Gray's* case, the defendant alleged the plaintiff 'suborned witnesses',²⁵⁴ but argued these words were 'too general and uncertain' as they did not specify whether the witnesses lied under oath or not. The latter was lawful; constructing the words *in mitiori sensu* would therefore mean the defendant had not alleged anything unlawful occurred. The court agreed.²⁵⁵ A particularly absurd case, *Holt*, deemed that an allegation that the plaintiff had cleaved a chef's head in two was non-actionable because the chef might have lived (a mere trespass, not a crime).²⁵⁶

As concerns with excessive litigation abated, the courts became more willing to treat vague accusations as having no mild meaning.²⁵⁷ These accusations were 'taken *in malem partem*' – ill will or intention.²⁵⁸ *Lewes* in 1661 is the first example of courts choosing to interpret a statement as to their 'common acceptation and construction',²⁵⁹ though the *in mitiori sensu* rule was not formally abandoned until *Harrison* in 1714.²⁶⁰ That case affirmed that words should be taken in the 'sense that the hearers understood them'.²⁶¹ This marked the start of slander's actionability requirements converging with libel, as discussed below.

c) Malice

Slander historically had an increasingly confused relationship with the concept of 'malice'. Malice's original meaning was 'spite', 'ill-will', vindictiveness, or a desire for revenge.²⁶² This is labelled 'malice in fact'.²⁶³ A second definition, 'malice in law', gained prominence in the early 20th century. It referred to intention to cause the relevant harm or wrong. For much of this period, such intention was presumed if it was a natural and probable result of the defendant's

²⁵³ *Anon* (1580) LI MS Misc 488, p 76 (Wray CJ) found in Baker (n 226) 699-700.

²⁵⁴ *Gray's Case* (1582) LI MS Misc 488 fo 106 (QB) found in Baker (n 226226) 700; to suborn a witness is to induce them to some unlawful act, usually perjury.

²⁵⁵ *ibid* (Wray CJ and Gawdy J).

²⁵⁶ *Holt v Astgrigg* (1607) B&M 704, found in Baker (n 226) 704.

²⁵⁷ Though Paul Mitchell argues that even at the height of the *in mitiori sensu* craze there was considerable inconsistency in applying the rule: *The Making of the Modern Law of Defamation* (Hart Publishing 2005) 32.

²⁵⁸ *Gastrell v Townsend* (1591) Cro Eliz 239, pl 8 (QB) found in Baker (n 226) 705.

²⁵⁹ That the plaintiff 'brought the late King to death' – *Lewes v Roberts* (1661) Hardres 203, pl 1 found in Baker (n 226) 705.

²⁶⁰ *Harrison v Thornborough* (1714) Gilb Cas 114 (QB) found in Baker (n 226) 705-707.

²⁶¹ *ibid*.

²⁶² GHL Fridman, 'Malice in the Law of Torts' (1958) 21 Modern Law Review 484, 484.

²⁶³ *Bromage v Prosser* (1824) 1 Car & P 475, 171 ER 1362, [674].

actions.²⁶⁴ A later, third meaning – termed ‘untargeted malice’ – is improper exercise of a power or right,²⁶⁵ regardless of the defendant’s mental state.²⁶⁶

16th to 19th century cases consistently treated malice as an element of slander, but seemingly presumed its existence, either as a matter of law or because juries were happy in practice to find it unless given good reason otherwise. Malice’s meaning, and whether it was rebuttable, was inconsistent over time. In early cases, defendants could avoid liability by showing lack of malice in fact.²⁶⁷ As discussed later, an entire defence (qualified privilege) arose from circumstances where the court presumed the defendant lacked malice in fact.

In the early 19th century, the courts shifted to malice in law.²⁶⁸ This rendered the defendant’s motive largely irrelevant, and the presumption of malice from natural and probable consequences meant there were few ways to rebut malice in principle.²⁶⁹ This was hampered further by the bar on defendants providing sworn testimony until 1851.²⁷⁰

In these ways, malice (however defined) could ‘form a part’ of slander despite being irrelevant in practice. This practical irrelevance, however, led to its gradual ‘withering’, until ultimately it disappeared as a requirement.²⁷¹ That said, untargeted malice became relevant to several defences, as discussed below.

d) Early Slander and Reputation

Early slander was concerned with bipolar loss – but notably, the bipolar loss was not reputation *per se*. Unless temporal loss was presumed, plaintiffs had to show their legal or financial standing was affected. Even in those excepted categories, reputational loss was not

²⁶⁴ *Haire v Wilson* (1829) 9 B & C 643, 645.

²⁶⁵ See e.g. *Three Rivers District Council v Governor and Company of the Bank of England* [2003] 2 AC 1 (HL).

²⁶⁶ Though this could, of course, evidence impropriety.

²⁶⁷ *Crawford v Middleton* (1662) 1 Lev 82; see also *Herver v Dowson* (1765), cited in Francis Buller, *Introduction to the Law Relative to Trials at Nisi Prius* (W Strahan and M Woodfall 1772) 8, where the defendant spoke ill of the plaintiff out of a genuine desire to advise a friend not to sell the plaintiff a horse.

²⁶⁸ *Bromage v Prosser* (n 263) [674]; though this was probably not fully accepted until *The Capital and Counties Bank v Henty & Sons* (1882) 7 App Cas 741, 767.

²⁶⁹ Eventually, as discussed below, no ways remained save proving qualified privilege.

²⁷⁰ This was not possible until the enactment of An Act to Amend the Law of Evidence (The Evidence Act) 1851.

²⁷¹ David J Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 1999) 185, fn 108; for example, it was clear that the defendant’s state of mind, constructive or otherwise, was no longer relevant once the court’s decided that a statement could be defamatory of the claimant even if the defendant did not know him, could not reasonably have known of him, and intended to refer to someone else: E.g. *Newstead v London Express Newspapers Ltd* [1940] 1 KB 377. Malice was explicitly deemed irrelevant to ordinary liability in *E Hulton & Co v Jones* [1910] AC 20.

the focus: it was assumed temporal loss flowed naturally from the reputational damage, such that specific proof was unnecessary. So, theories which treat reputation as a unipolar right, or otherwise focus on internal, emotional or psychological effects, were not in issue: ruling out deferent reputation, Arthurian aristocratic, cultural and virtue honour. The law was solely concerned with the claimant's private loss and not public interest or social order: making epistemic reputation, social norm theory and perceived aristocratic honour irrelevant.

One might argue that early slander was a limited instantiation of sociality theory, solely concerned with the target's weak (economic) ties. It may seem non-obvious why a law aimed at sociality would be completely unconcerned with strong ties,²⁷² though a speculative explanation was that (at the time), strong ties were the province of the ecclesiastical courts rather than the common law courts. However, a potential objection remains that weak ties can be damaged without any immediate economic loss, and early slander seems to have been unconcerned with the more ephemeral weak losses versus existing loss of money: e.g. a more diffuse, greater difficulty in acquiring credit.

This leaves proprietary reputation. This has superficial appeal in explaining the need for temporal loss. While proprietary reputation is inherently unipolar, bipolar laws may be consistent: requiring proof of economic harm helps distinguish between market-dependent and independent injury. Notably, the law required no proof where risk of economic harm was obvious – e.g., words touching trade and profession.

However, treating slander as protecting proprietary reputation risks ad hoc rationalisation, given slander's origins in the action on the case. Actions on the case only protected a target's rights to property and temporal entitlement, and were unconcerned with how that loss came about. An alternative interpretation is that slander arose where it just so happened that words causing reputational damage were the particular tool depriving the plaintiff of their extraneous property and external entitlements. Rather than protecting any form of reputation per se, slander was a means by which the claimant preserved other entitlements. This interpretation is supported by the fact that injunctions were not originally available for

²⁷² Cases concerning familial strife are particularly hard to explain – for example, causing strife between spouses (a clear impact on strong ties) was non-actionable, but causing divorce (marriage being a form of 'temporal advancement' for women and loss of a wife being loss of property for men) was actionable: *Popham* (1593) 79 Eng Rep 1155.

slander: early injunctions only protected proprietary rights and reputation was explicitly deemed non-proprietary.²⁷³

The rule was likely ‘do not take or diminish by words what the claimant is entitled to’, not ‘do not damage the claimant’s reputation’. This explains the somewhat pedantic distinctions early cases drew between allegations of general criminality (which were too uncertain to attract liability) and specific instances of criminal conduct (where temporal loss was presumed). The latter jeopardised the plaintiff’s separate entitlement not to be arrested or prosecuted, while the former did not and so required proof of some other damage to external property, wealth or entitlements. Reputation was not itself the relevant economic asset.

This contextualises the role of malice, which seems an unnecessary requirement for a reputation-protecting tort: slander was merely duplicating the notion of wrongfulness common to actions on the case. These were essentially ‘malicious’ causes of action (akin to the modern classification of ‘intentional torts’): interference without malice (however defined) was not wrong at all. Just as the ‘wrong’ in battery was malicious touching,²⁷⁴ the ‘wrong’ in slander was malicious causation of temporal loss. Later, as these torts shifted to classifying ‘intentionality’ as the relevant wrong, slander shifted with them.

The later developments complicate this picture. The *in mitiori sensu* and certainty rules perhaps built upon the temporal loss rule by raising the burden of proof. However, since plaintiffs seemed unable to circumvent them by showing actual loss, this was probably not their purpose. They might be interpreted as the germination of a specific need for reputational loss – a need for the statement to convey to others something negative about the plaintiff.²⁷⁵ More likely, however, they were a practical response to the (perceived) excessive litigation caused by plaintiffs taking advantage of the categories of presumed temporal loss in response to trivial allegations. Supporting this, most of the relevant cases would have fallen into an exempted category had they not fallen afoul of *in mitiori sensu* or certainty issues.

Counterintuitively, while early slander (and so the origins of defamation) is consistent with proprietary reputation, it likely did not deliberately protect it or *any* conception of reputation. However, the development of libel – and slander’s later convergence with libel – cemented defamation as a reputation-protecting tort.

²⁷³ Mitchell (n 257) 77; citing in particular *Gee v Pritchard* (1818) 2 Swans 402, which adopted that reasoning.

²⁷⁴ Or ‘hostile’: *Cole v Turner* (1704) 90 ER 958.

²⁷⁵ Albeit taken to an absurd degree, particularly in *Holt v Astgrigg* (n 256).

(ii) The Divergence and Convergence of Slander and Libel

a) Divergence

The action on the case did not initially distinguish between slander and libel,²⁷⁶ and treated them subject to the same rules.²⁷⁷ Given low literacy rates, libel was rare and slander effectively occupied the entire field.²⁷⁸ The distinction was first made in *King v Lake* in 1670.²⁷⁹ The defendant responded to a petition, insulting the plaintiff as notoriously violent and claiming the petition was ‘stuffed with illegal assertions, ineptitudes, imperfections, clogged with gross ignorances, absurdities and solecisms’. The defendant argued these words were too general and uncertain. Hale J rejected this, stating ‘although such general words spoken once, without writing or publishing them, would not be actionable; yet here they being writ and published, which contains more malice, than if they had but once been spoken, they are actionable’.

While *King v Lake* was omitted in some subsequent cases,²⁸⁰ it was affirmed in *Austin* that an ‘action lies for scandalising a man by writing those words which will not, being spoken, bear an action.’²⁸¹ In *Austin*, the plaintiff was accused of forswearing witnesses, but whether the witnesses spoke under oath was not specified – so there was no certain allegation of criminality. Nevertheless, the written words were actionable. This appeared to exempt written words from both the certainty and temporal loss requirements – making libel actionable *per se*.

The precise reason for this development is unclear. The stated reason in *King v Lake* was essentially that writing contains more malice, but why the court might have thought this is unclear,²⁸² nor why it mattered, given ill-will was essentially presumed in slander. Kaye suggests three potential reasons. Firstly, the court might have been influenced by the

²⁷⁶ Mitchell (n 257) 4, though there is scant evidence of non-criminal cases involving letters before 1667 – all the examples cited in William Hudson’s *Treatise of the Star Chamber* (Collectanea Juricada 1621) 100-04 are Star Chamber cases, see also those cases cited in Baker (n 226) 707-09.

²⁷⁷ See e.g. *Corbin v Mercin* (1669) 84 Eng Rep 166. This was in stark contrast to criminal defamation, which focused on the written word (‘epigram, rhyme, or other writing’) from the outset: *The Case de Libellis Famosis* (n 172) 125b. This focus may be explicable as deriving from the Star Chamber’s particular power to control the press at the time or because the written word was perceived of as more dangerous to the public order than the spoken word, given its increased proliferation potential: ‘The Pre-Thorley v Kerry Case Law of the Libel-Slander Distinction’ (n 236) 139-40 citing *R v Langley* (1704) 91 Eng Rep 769, 3 Salk 190.

²⁷⁸ ‘The Pre-Thorley v Kerry Case Law of the Libel-Slander Distinction’ (n 236) 138.

²⁷⁹ *King v Lake* (n 184).

²⁸⁰ Including the second case between *King and Lake* (1683) 86 Eng Rep 289, 2 Vent 28, which also concerned libel but was decided according to the slander rules.

²⁸¹ *Austin v Culpeper* (1683) 2 Show KB 313, pl 322 (KB) found in Baker (n 226) 714.

²⁸² Malice in fact being the dominant meaning of malice at the time.

development of criminal libel, which established practice for treating libel distinct from slander.²⁸³ Alternatively, Hale might have been ‘unaware of the importance of what he was doing’, meaning there was no real reason.²⁸⁴ Thirdly, Hale might not have meant any clean distinction between written and spoken word, but rather between writing and off-the-cuff, one-off remarks:²⁸⁵ notably, he contrasts writing with words ‘spoken once’. If so, he may have been attempting to remove the temporal loss requirement from cases involving repeated or permanent attacks. The split between slander and libel was potentially based on accidental misinterpretation of this case.²⁸⁶

However it occurred, it became settled that libel did not require temporal loss:²⁸⁷ it was concerned with the general social effects of statements. In other words, it was directly concerned with reputation.

b) Convergence

Though libel and slander likely had different purposes at origin, they started to converge in their substantive requirements. As slander’s certainty and *in mitiori sensu* requirements fell out of favour, slander cases did not restore the prior practice of treating any words causing temporal loss (or falling within an exception) as actionable. Rather, criminal libel, civil libel and slander cases jointly germinated the requirement that the statement had to have a particular kind of meaning (namely one which impacted reputation): though this was not definitively confirmed as a separate requirement to temporal loss in slander until the late 1800s.²⁸⁸

Criminal and civil libel developed concepts of defamatory meaning early on in their existences. Both bore resemblances to slander, particularly since the diminishing number of slander cases tended to fall within an exception to the need for temporal loss, since proving special damages is difficult.²⁸⁹ This process sped up as general literacy improved and the balance between libel and slander cases flipped: where once they dominated the field, slander cases became increasingly rare.²⁹⁰ So, cases increasingly treated slander and libel as subject to

²⁸³ JM Kaye, ‘Libel and Slander – Two Torts Or One?’ [1975] 91 LQR 524, 525.

²⁸⁴ ‘The Pre-Thorley v Kerry Case Law of the Libel-Slander Distinction’ (n 236) 141.

²⁸⁵ Kaye (n 283) 523.

²⁸⁶ Ibid 536.

²⁸⁷ Hence why it was applied in *Thorley v Lord Kerry* (1812) 4 Taunt 355, 365, despite Mansfield J being unable to find any convincing justification for distinguishing between the spoken and written word.

²⁸⁸ E.g. *Miller v David* (n 219), though that case left open the question of whether a non-defamatory but intentionally harmful and untrue statement could ground some other cause of action.

²⁸⁹ Kaye (n 283) 527-28.

²⁹⁰ *Raj Dhir v Bronte Saddler* [2017] EWHC 3155 (QB) [1].

the same rules – save for the special damages requirement – and had firmly aligned by the end of the 20th century.²⁹¹ Rising libel cases also seem to accelerate the death of malice: populist journalism made the courts unsympathetic to the idea that innocently-intended but widespread and serious reputational harms should go uncompensated.²⁹²

Proposals to assimilate libel and slander in the early 1800s demonstrated a consensus that they should be governed by the same principles: there was merely disagreement on which should subsume the other.²⁹³ Plainly, the courts favoured subsuming slander under libel, ultimately identifying a single tort of ‘defamation’, though the need for special damages or an exception for slander remains to this day. Together, it was said that the ‘law of defamation protects reputation’.²⁹⁴ So, while slander may not have originally been a reputation-protecting tort, its original purpose became muddled (and eventually subsumed with some accidental holdovers) with libel’s purposes.

(iii) Developing the Modern Actionability Requirements

Having reached the point where ‘defamation’ was about protecting reputation specifically, the law’s requirements and developments became more directly aimed at delineating the scope of the protected reputational interest. Of course, that defamation consists of two originally separate actions with two distinct historical purposes is likely to affect the law’s ability to protect a single, coherent interest. Nevertheless, examining the development of these requirements can provide insight into what form(s) of reputation modern defamation law protects: as this section now discusses.

a) The Consensus Requirement

Having established itself as solely concerned with reputation, libel quickly developed a concept of ‘defamatory meaning’. Examples included the statement inducing ‘ill opinion’, making the target ‘contemptible and ridiculous’,²⁹⁵ or ‘caus[ing] him to be avoided in society’.²⁹⁶ Later cases favoured similar but less extreme formulations to describe the requisite

²⁹¹ *Frank Kofi Otuo v Watch Tower Bible and Tract Society of Britain* [2019] EWHC 1349 (QB) [20]; *ABC (A mother) v The Chief Constable of West Yorkshire Police* [2017] EWHC 1650 (QB) [83]; *Berkoff v Burchill* [1997] EMLR 139, 146.

²⁹² *Mitchell* (n 257) 119.

²⁹³ Paul Mitchell, ‘The Foundations of Australian Defamation Law’ (2006) 28 *Sydney Law Review* 477, 480, in relation to Brougham’s 1816 Bill for Securing the Liberty of the Press.

²⁹⁴ *Berkoff v Burchill* (n 291) 154.

²⁹⁵ *Cropp v Tilney* (1964) 90 Eng Rep 1132, Holt, KB 422.

²⁹⁶ *Savile v Jardine* (1795) 126 Eng Rep 686, 687.

social effects.²⁹⁷ A commonly cited formulation, even today, is *Sim v Stretch*'s definition: words tending 'to lower the plaintiff in the estimation of right-thinking members of society generally'.²⁹⁸

This, and other 19th and 20th century cases, clarified that impact on 'reasonable persons' – not any person – was key: statements incapable of diminishing a reasonable person's opinion could be withdrawn from a jury.²⁹⁹ They have interchangeably been referred to as the 'right-minded' or 'right-thinking' people, 'reasonable people generally',³⁰⁰ or 'ordinary reasonable',³⁰¹ 'fair-minded',³⁰² 'ordinary',³⁰³ or 'fair-minded and ordinary' people.³⁰⁴ The focus on the hypothetical reasonable person led to the development of the 'single meaning' rule: a statement is taken to have a single 'true' meaning as understood by the reasonable person.³⁰⁵ Recent cases label this the 'consensus' requirement.³⁰⁶

The reasonable person is not a real person, but a hypothetical construct,³⁰⁷ and so differs from the ordinary person in several respects: they read entire articles (not just headlines³⁰⁸), watch entire programs,³⁰⁹ and do not infer guilt from the mere fact of a police investigation.³¹⁰ Simultaneously, they are not a lawyer: they 'readily' read implication without dissecting language,³¹¹ are unfettered by legalistic rules of construction,³¹² and usually lack special knowledge impacting meaning unless the claimant alleges the actual recipients had such knowledge (something known as legal innuendo³¹³).³¹⁴ They have the general 'knowledge and background' of the actual recipients and prefer the words' 'ordinary and natural meaning'

²⁹⁷ See the discussion in *Berkoff v Burchill* (n 291) 143-46.

²⁹⁸ *Sim v Stretch* [1936] 2 All ER 1237, 1240.

²⁹⁹ *Nevill v Fine Art and General Insurance Co Ltd* [1897] AC 68, 72; *Merivale v Carson* (1887) 20 QBD 279.

³⁰⁰ *Gillick v British Broadcasting Corporation and Another* [1996] EMLR 267, 273.

³⁰¹ *Rubber Improvement Ltd v Daily Telegraph Ltd* [1964] AC 234, 268.

³⁰² *Al Rajhi Banking & Investment Corporation v The Wall Street Journal Europe SPRL* [2003] EWHC 1776 (QB) [6]; sometimes the formulation 'reasonably capable' is used: *Dorset Flint & Stone Blocks Ltd & Others v Moir & Others* [2004] EWHC 2173 (QB) [30].

³⁰³ *Gillick v Brook Advisory Centres (No 1)* [2001] EWCA Civ 1263, [18].

³⁰⁴ *Dorset Flint* (n 302) [30].

³⁰⁵ *Nevill v Fine Art and General Insurance* (n 298) 73.

³⁰⁶ *Millett v Corbyn* [2021] EMLR 19, [9]; *Richard Rufus v Paul Elliott* [2015] EWHC 807 (QB) [46].

³⁰⁷ *Rubber Improvement Ltd* (n 301) 259.

³⁰⁸ *Charleston v News Group Newspapers* [1995] 2 AC 65, 71.

³⁰⁹ *Gillick* (n 300) 273.

³¹⁰ *Rubber Improvement Ltd* (n 301) 260.

³¹¹ *Gillick* (n 300) 273.

³¹² *Rubber Improvement Ltd* (n 301) 257.

³¹³ *Ibid* 264.

³¹⁴ *ibid* [3]; *Alexander Vassiliev v Frank Cass & Co* [2002] EWHC 1169 (QB) [10].

(which can include an inferred or indirect meaning),³¹⁵ understanding without undue suspicion³¹⁶ or need for scandal.³¹⁷

Most cases turn in practice on whether the reasonable person perceives a violation of social or moral norms, and some cases even claim such perception is outright necessary.³¹⁸ This is not strictly true, however – a statement can be actionable even if the person did nothing wrong – as hinted by the inclusion of ‘ridicule’ in the early definitions cited above.³¹⁹ The High Court in *Thornton* identified from the caselaw three categories of ‘personal’³²⁰ defamatory statements. The first is imputations that social norms have been violated.³²¹

The second is imputations of a matter ‘which is not voluntary, or the result of the claimant’s conscious act or choice, but rather a misfortune for which no direct moral responsibility can be placed upon the claimant’.³²² An obvious example is allegations that the claimant innocently contracted a serious, infectious disease: provided the statement risks the person being ‘shunned and avoided’, it is irrelevant that the situation is not their fault.³²³ These statements are non-normative, but they still lead to exclusion.

The third is imputations ‘which ridicule the claimant’.³²⁴ For example, in *Berkoff*, the defendant was found liable for labelling the plaintiff ‘hideously ugly’.³²⁵ The court explained that a mere insult or expression of a purely subjective evaluation (like being ugly) will not cause a target to lose their place in society or be shunned,³²⁶ but will still be defamatory if likely to lead to ridicule.³²⁷ The court in *Thornton* noted that ‘ridicule’ and ‘non-voluntary’ personal

³¹⁵ *Jones v Skelton* [1963] 1 WLR 1362, 1370; *Yavuz v Tesco Stores Limited, Tesco Plc* [2019] EWHC 1971 (QB) [7]; *Rubber Improvement Ltd* (n 301) 258.

³¹⁶ *Gillick* (n 300) 273.

³¹⁷ *Charterhouse Clinical Research Ltd v Richmond Pharmacology Ltd* [2002] EWHC 2745 (QB)

³¹⁸ *Triplark Limited v Northwood Hall (Freehold) Limited, Philip Whale, David Wismayer* [2019] EWHC 3494 (QB) [41]: ‘words are only defamatory in law if they attribute to the claimant some quality or conduct which is contrary to standards that are shared and agreed upon by society as a whole’.

³¹⁹ *Cropp v Tilney* (n 295).

³²⁰ As distinct from business defamation.

³²¹ *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB) [34(ii)(a)], citing *Clay v Roberts* (1863) 8 LT 397, 398.

³²² *Ibid* [34(ii)(b)]; a case based on this ground is *Warnes and Robson v Forge* [2020] 4 WLR 91, [2020] EWHC 1496 (QB), where the defamatory statement was that the claimant was mentally ill and should be shunned. While the court did not think a right-minded person would judge the defendant for being mentally ill, the exhortation to ignore the defendant for that reason was plainly calculated to result in him being shunned or avoided: [73].

³²³ *Hayley Warnes, Raymond Robson v David Forge* (n 322) [71].

³²⁴ *Thornton* (n 321) [34(ii)(c)].

³²⁵ *Berkoff v Burchill* (n 291).

³²⁶ *ibid* 154-55.

³²⁷ See also *Charlotte Church v MGN Ltd* [2012] EWHC 693 (QB) [16], where the judge acknowledged that falsely accusing a celebrity of drunkenly embarrassing herself in public would not be defamatory of an ordinary person, but was defamatory of a ‘star’ likely due to the additional risk of mass ridicule.

defamation is ‘now likely to be brought under misuse of private information’.³²⁸ However, they confirmed it remains open for claimants to bring a defamation case instead of or in addition to MOPI.

The consensus requirement provides considerable insight into the form of reputation defamation seeks to protect. As the court in *Monroe* explained, the purpose of the consensus requirement is to determine ‘whether the behaviour or views that the offending statement attributes to a claimant are contrary to common, shared values of our society’.³²⁹ Accordingly, the reasonable person is ‘a member of society as a whole, and not some of some section of society.’³³⁰ To that end, claimants cannot complain of defamation just because a sub-community would judge them poorly.³³¹

Theories of reputation deeming reputational attacks wrongful even if they do not relate to the wider community’s norms or concerns, like proprietary reputation, fit poorly at this early juncture. The lack of any attempt to distinguish between marketable and non-marketable areas of life (and the inclusion of non-market injuries like ridicule) compounds the law’s poor fit with this theory. Similarly, the reasonable person’s perspective makes no sense to Arthurian aristocrats seeking to exercise their right to impose their personal truth on the world.

Rather, the basic actionability test better fits theories concerned only with how the wider community is affected by or responds to a reputational attack. Some of these are theoretically consistent but do not match how cases are decided in practice, however. For example, virtue honour and perceived aristocratic honour might treat the reasonable person as identifying the community’s ascriptive values or important ascriptive social roles respectively. However, the law applies egalitarian standards to the reasonable person’s morals, indicating our society lacks the belief in ascriptively-assigned virtues and roles these theories require.

Social norm theory is an attractive explanation of the basic actionability test, given the language used to describe the consensus requirement and the law’s focus on norm-violation in most cases.³³² The ‘right-thinking’ reasonable person represents the courts’ perception of the normatively upstanding, community-minded person who makes a good unpaid norm-enforcer.

³²⁸ *Thornton* (n 321) [36].

³²⁹ *Monroe v Hopkins* [2017] EWHC 433 (QB), [2017] 4 WLR 68 [51].

³³⁰ *Thornton* (n 321) [77].

³³¹ *Richard Rufus* (n 306) [43].

³³² Sewell’s evaluation of the ‘serious harm’ case law up to 2020 indicates that around four fifths of cases involve allegations of moral impropriety: Charlie Sewell, ‘More serious harm than good? An empirical observation and analysis of the effects of the serious harm requirement in section 1(1) of the Defamation Act 2013’ (2020) 12 JML 47, 58.

The reasonable person is rightly primarily concerned with identifying correct allegations that the target has breached social norms, so that they can police community membership. The actionability of non-normative attacks leading to social exclusion is potentially explicable, since false attacks of this nature also erode the community by wastefully and wrongly excluding people.

The ridicule cases are harder to explain. One could argue that society has a norm that people should not be ridiculed, and that defamation liability ensures unpaid norm enforcers do not trick the community into this norm-breaking action. This is stretching the theory's boundaries, since there is no risk of exclusion or change to the community's constitution. More plausibly, ridicule risks people self-excluding to avoid the ridicule, which is harmful to the group. So, the actionability requirements can fit social norm theory, but, despite the courts' *dicta*, it is not the most natural fit.

From an epistemic reputation perspective, the hypothetical person encapsulates how judges think members of society *ought* to understand and respond to information. Epistemic reputation is also consistent with defamatory meaning going beyond allegations of norm-violation. While information about norm-violations is important to any community, the audience interest goes far beyond this: covering any knowledge audience members might find useful in deciding how to act or live, including keeping safe from disease, signalling prestige or deciding not to associate with a particular person. So, non-voluntary allegations are relevant. Information which embarrasses or exposes a target to ridicule is useful information: it allows audience members to avoid associating with that person, and to express or form their own identities or community membership by joining in.

Deferent reputation is also interesting at this juncture, since its themes are also common in judicial language – for example, one court described reputation as an ‘integral and important part of the dignity of the individual.’³³³ From a deferent reputation perspective, a person only loses dignity if the attacker fails to convey appreciation of their identity according to the wider community's rules of deference. The perspective of the reasonable person identifies those rules. It is unsurprising that any society would identify false allegations of norm-violation as contrary to the rules of deference: these clearly risk altering the target's identity. Ridicule may also degrade a person's self-respect and identity – reconstituting them as an object of ridicule or

³³³ *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 201.

redefining them by an attribute or event they did not assign much weight to when constituting their demeanour image. So, the law might deem this a breach of deference.

More difficult is fitting in non-normative, non-ridicule-based attacks. Deferent reputation is concerned with the risk of individuals reconstituting their identity non-autonomously. A person will not develop an infectious disease or other physical characteristic, or believe they have, simply because wider society believes they have that characteristic. There is therefore no real risk of the target's identity being reconstituted in that way. However, they might internalise more diffuse connotations of the allegation (like being 'unclean' as an association of disease), and many supposedly non-moral judgements have such connotations.³³⁴

This is a speculative interpretation since judges explicitly characterise these statements as implying no moral fault and make no effort to identify such connotations as a condition of actionability. However, certain moral judgements must also be reliant on connotations within deferent reputation: accusing an innocent person of theft will not cause them to believe they are guilty. It is the associated judgements – that they are untrustworthy, for example – which stick.

Meanwhile, sociality theory might be concerned with the eclectic views of sub-communities, but it can be interpreted to only care about what the wider community thinks – making sense of the reasonable person standard. Imputations of immorality bear the risk of weakening social ties, as do non-normative allegations which lead to shunning. Comments eliciting ridicule erode the quality and range of the target's strong ties by 'othering' them from the group, and may encourage them to self-exclude.

Finally, from a cultural honour perspective, the reasonable person identifies the nature of 'respectful' behaviour. The inclusion of ridicule, a clear form of disrespect, makes particular sense from a cultural honour perspective. Though the law does not cover all public insults, this could reflect the distinction between cultural honour and reflexive honour. Cultural honour's compatibility with the basic test is unsurprising given the previous chapter's conclusions: civil

³³⁴ There are debates in ethics and psychology as to whether emotions such as disgust inherently moralise otherwise neutral states of affairs: see e.g. Daniel C Wisneski and Linda J Skitka, 'Moralization Through Moral Shock: Exploring Emotional Antecedents to Moral Conviction' (2016) *Personality and Social Psychology Bulletin* 1 and Jussi Jylkkä, Johanna Härkönen and Jukka Hyönä, 'Incidental disgust does not cause moral condemnation of neutral actions' (2021) 35 *Cogn Emot* 96.

and criminal defamation developed their basic requirements in sync, and the latter was concerned with regulating cultural honour.

So, the basic actionability requirements are, and historically have been, compatible with several conceptions of reputation: social norm theory, epistemic reputation, sociality theory, cultural honour and deferent reputation. However, additional requirements were added – first by the common law in *Jameel* and *Thornton*, and then by the Defamation Act 2013 (‘the 2013 Act’).

b) Thresholds of Seriousness

By the early 2000s, the media was increasingly concerned with ‘libel tourism’: claims with little-to-no connection with England.³³⁵ The internet permitted English recipients to receive any online communication made abroad by foreigners or about foreigners, meaning the statement counted as ‘published’ in this jurisdiction even if few read it.³³⁶ Libel was actionable per se, and subject to an irrebuttable presumption of (at least *de minimis*) damage.³³⁷ With the defendant bearing the burden of proving truth, England was an attractive jurisdiction for such libel claims.

This concern led to the 2005 Court of Appeal decision in *Jameel*,³³⁸ which involved foreign parties and an online article accessed by only five people in the jurisdiction. The defendant challenged the ‘presumption of harm’ law as contrary to Article 10 ECHR – the right to freedom of expression and to ‘hold opinions and receive and impart information’.³³⁹ The Court of Appeal defended the presumption’s irrebuttable nature, arguing it was unpragmatic to allow defendants to track down the five recipients and have them testify their opinion of the claimant was unchanged.³⁴⁰ However, they accepted the presumption could disproportionately impact speech compared to what was necessary to protect reputation, and be contrary to the court’s new priorities in efficient and proportionate claims management under the Civil Procedure Rules.

So, they held libel claims can be struck out as an abuse of process if they did not serve the legitimate purpose of protecting reputation, including ‘compensating the claimant only if

³³⁵ Thomas Rudkin and Caroline Pearce, ‘Forum Shopping in the 21st Century’ (2014) 25 Ent LR 73, 73.

³³⁶ *ibid* 75.

³³⁷ *Berezovsky v Michaels* [2000] 1 WLR 1004, 1012; *Shevill v Presse Alliance* [1996] AC 959, 983.

³³⁸ *Jameel v Dow Jones & Co Inc* [2005] QB 946.

³³⁹ Implemented into UK law by the Human Right Act 1998.

³⁴⁰ *Jameel v Dow Jones* (n 338) [31].

that reputation had been unlawfully damaged’:³⁴¹ if there is no ‘real and substantial tort’ within the jurisdiction.³⁴² The claimant in the present case failed to do so, given the minimal publication in the jurisdiction. Subsequent cases identified other relevant factors: the allegation’s nature, the recipients’ identity and how seriously they took the allegation, any evidence of ‘genuine impact’ on reputation, any defences relied on³⁴³ and the proportionality of any likely damages to the action’s public and private costs.³⁴⁴ Notably, the issue here is the statement’s likely impact on real people, not a hypothetical construct, though a ‘real and substantial tort’ was not a particularly high bar.³⁴⁵

Jameel was a case of procedural practicality, not strictly relevant to the definition of ‘defamatory’. However, inspired by *Jameel*, the High Court in *Thornton* thought the definition of defamatory itself imported some threshold of seriousness, ‘so as to exclude trivial claims’.³⁴⁶ It conceived of this within the framework of the consensus requirement: holding ‘it is the actions of the right-thinking persons that must be likely to be affected (so that they treat the claimant unfavourably, or less favourably than they would otherwise have done), *not just their thoughts or opinions*’.³⁴⁷ So, reputational damage must now be sufficiently serious that it will likely motivate the hypothetical person to change their behaviour.³⁴⁸

Thornton does not necessarily impose a greater evidential burden: tendency can be implied from the statement’s objective nature and the context in which it was made alone. Other circumstantial factors (e.g., no one actually believed the statement) are both irrelevant³⁴⁹ and cannot be relied on to rebut a finding of seriousness.³⁵⁰ Most cases passing the *Thornton* test

³⁴¹ Ibid [55].

³⁴² This mimics the test for determining whether service outside the jurisdiction should be granted.

³⁴³ *Tareq Al Baho, Andrew Pinnell, Sheika Salem Homood AL-Jaber AL-Sabah v Asad Ali Meerza* [2011] EWHC 2984 (QB) [5].

³⁴⁴ *Khader v Aziz* [2010] EWCA Civ 716, [32]

³⁴⁵ *Haji-Ioannou v Dixon* [2009] EWHC 178 (QB), [30]; *Carrie v Tolkien* [2009] EWHC 29 (QB), [2009] EMLR 9, [19].

³⁴⁶ *Thornton* (n 321).

³⁴⁷ *ibid* [92] (emphasis added).

³⁴⁸ The High Court argued that this was always the case, drawing support from the strong language of ‘hatred’, ‘contempt’ and similar phrases used in the classic cases, but argued that even if such a threshold was not intended by the prior law, the prior law should be modified to include a new threshold: [94]-[95].

³⁴⁹ *Millett v Corbyn* (n 306) [34].

³⁵⁰ *Lachaux v Independent Print Ltd* [2019] UKSC 27, [2020] AC 612 [16].

involve statements imputing obvious immorality³⁵¹ (even if not so serious)³⁵² or embarrassment.³⁵³ Only very minor imputations have failed.³⁵⁴

Notably, almost no subsequent cases specifically explore what consequences the defamatory statement is likely to have, and some merely mention offhand that the hypothetical person would disapprove of the claimant:³⁵⁵ which should not suffice for the *Thornton* standard. Few cases specify a concrete change in the hypothetical person's behaviour.³⁵⁶ This is perhaps unsurprising given the reasonable person's behaviour is purely a matter of the judge's impressionistic assessment, and judges may not fully explain such assessments – particularly given the allegations are normally obviously sufficiently serious. *Thornton*'s practical impact is therefore hard to assess.

Finally, s.1(1) of the 2013 Act states that a 'statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.' The meaning of serious harm was initially controversial. The courts denied that claimants had to prove consequential harms other than reputational harm,³⁵⁷ but it was unclear whether the serious harm had to be 'real' (in the eyes of real people) or whether it could be inferred from the nature of the words (as under *Thornton*). It was also unclear if reputational harm without risk of social consequences sufficed.³⁵⁸

The Supreme Court in *Lachaux* provided the authoritative interpretation in 2019.³⁵⁹ The case concerned national newspaper publications about the claimant (a Dhubai national) and their acrimonious divorce and allegations of domestic abuse, read by hundreds of thousands.³⁶⁰ The Supreme Court explained that the common law presumption of damage in the eyes of the

³⁵¹ E.g. murder (*Nasir Mehmood (Butt) v Dunya News Limited* [2022] EWHC 905 (QB)), rape (*Esther Ruth Baker v John Alexander Melvin Hemming* [2019] EWHC 2950 (QB)), disreputable, criminal and dishonest business (*Terri Ann Davies v Gavin Paul Carter* [2021] EWHC 3021 (QB)), being in league with Putin (*Roman Abramovich v HarperCollins Publishers Limited, Catherine Belton* [2021] EWHC 3154 (QB)), corruption (*Sayed Zulfikar Abbas Bukhari v Syed Tauqeer Bukhari* [2022] EWHC 173 (QB); *Anar Mahmudov, Nargiz Mahmudova v Maria Luisa Goni Sanzberro* [2021] EWHC 3433 (QB)) or making false rape allegations (*Samuel Collingwood Smith v Esther Ruth Baker* [2022] EWHC 246 (QB)).

³⁵² *Sarah James v Julian Saunders* [2019] EWHC 3265 (QB) [92].

³⁵³ *Charlotte Church* (n 327).

³⁵⁴ *Triaster Limited v Dun & Bradstreet Limited* [2019] EWHC 3433 (QB) [40]: The imputation was that the claimant's business had a 1.79% of failing in the next year – the judge considered a higher risk might be defamatory, but that was too low.

³⁵⁵ *Jack Monroe v Katie Hopkins* [2017] EWHC 433 (QB) [52].

³⁵⁶ E.g. *Teal Swan v Associated Newspapers Ltd* [2020] EWHC 1312 (QB) [53].

³⁵⁷ This was rejected outright by the Supreme Court in *Lachaux*.

³⁵⁸ The Court of Appeal in *Lachaux v Independent Print Ltd* [2017] EWCA Civ 1334 [50], [73], [78] thought that s.1(1) was essentially *Thornton* (+), but were overruled by the Supreme Court.

³⁵⁹ *Lachaux* (Supreme Court) (n 350) [20].

³⁶⁰ *Lachaux v Independent Print Ltd* [2015] EWHC 2242 (QB), [2016] QB 402 [5].

hypothetical person was a distinct requirement from s.1(1),³⁶¹ which necessarily required evidence of likely impact on those who perceived the statement – actual or inferred. The Supreme Court was silent on whether the *Thornton* qualification remains a distinct requirement, though it approved of the High Court judgement which held that the qualification continued to exist but ‘will cease to play any significant role’ given that s.1(1) imposes a higher burden of proof.³⁶² Post-*Lachaux* cases have adopted the High Court’s approach.³⁶³

Additionally, the Supreme Court did not specify whether it was necessary to prove that real people would act (through expressed attitudes or behaviour like shunning). In theory, mildly lowered reputation could be described as serious if millions of people are involved.

Subsequent cases seem to assume behavioural changes are unnecessary. Percolation of the information (the ‘grapevine effect’) is strong evidence of serious harm,³⁶⁴ as is evidence of ‘tangible adverse consequences’,³⁶⁵ but no case has required either. Other relevant factors make behavioural changes more likely but not necessary, like the allegation’s seriousness³⁶⁶ and the nature of the recipient.³⁶⁷ Subsequent cases’ language also indicates judges do not look for social consequences: language referring to purely internal states like ‘no one thought less’³⁶⁸ or ‘thought badly’³⁶⁹ of the claimant³⁷⁰ is common.

This leaves a somewhat convoluted process of establishing whether a statement is defamatory. Firstly, the claimant must show the consensus requirement is met. Secondly, the claimant must establish a hypothetical person would not only think less of them, but act on that thought. Thirdly, the claimant must show their reputation was or will be lowered in the eyes of actual people in a ‘serious’ way (or is likely to be), but not that actual people would act on the thought (though this helps). Warby J labelled the first two stages ‘defamatory tendency’ and the third ‘defamatory impact’.³⁷¹

³⁶¹ *Lachaux* (Supreme Court) (n 350) [13].

³⁶² *Lachaux* (High Court) (n 360) [60].

³⁶³ E.g. *Ameyaw v McGoldrick* [2020] EWHC 3035 (QB) [35]; *Gubarev v Orbis Business Intelligence Ltd* [2020] EWHC 2912 (QB) [38]; *Rachel Riley, Tracy Ann Oberman v Myrna-Jane Heybroek* [2020] EWHC 1259 (QB); *Millett v Corbyn* (n 306).

³⁶⁴ *Riley v Murray* [2021] EWHC 3437 (QB) [42].

³⁶⁵ E.g. *Turley v Unite the Union* [2019] EWHC 3547 (QB) [114].

³⁶⁶ *Sakho v World Anti-Doping Agency* [2020] EWHC 251 (QB) [27].

³⁶⁷ *Wright v Granath* [2022] EWHC 1181 (QB) [81], citing *Dhir v Saddler* (n 290); *Lachaux* (Supreme Court) (n 350) [16]; *George v Cannell* [2021] EWHC 2988 (QB) [124].

³⁶⁸ See e.g. *Yavuz* (n 315) [57], citing *Lachaux* (Court of Appeal) (n 358) [79], see also *Riley v Murray* (n 364) [46].

³⁶⁹ E.g. *Wright v Ver* [2020] EWCA Civ 672 [63].

³⁷⁰ *Nwakamma v Umeyor* [2020] EWHC 3262 (QB) [79].

³⁷¹ *Ameyaw v McGoldrick* (n 363) [35].

What these attempts to raise the evidential bar for actionability tell us about reputation is mixed. *Jameel* appeared an entirely procedural attempt to balance reputation and freedom of speech – excluding claims where protecting the former would clearly disproportionately impact on the latter. *Lachaux* and subsequent caselaw indicates s.1(1) is the same: it increases the evidential threshold to require serious changes in opinion rather than just a ‘real and substantial’ change. Both were external impositions to protect speech, not attempts to delineate or identify the reputational interest which defamation protects.

Nevertheless, they clearly show that the concept of reputation underpinning defamation is one which can in principle be treated as an incommensurate interest with freedom of speech. Epistemic reputation is suited to this consequentialist balancing.

A law based on the consequentialist social norm theory might not want to expend State resources punishing unpaid norm enforcers in circumstances where there is insufficient risk of exclusion.

Deferent reputation can treat speech as an incommensurate interest, but might also justify seriousness thresholds in its own right. Even an ardent believer in socially-constituted identity must accept a single judgement by a stranger cannot reconstitute identity when the rest of society continues to show deference. A threshold of seriousness may identify when society has sided with the attacker sufficiently to reconstitute identity. The shift to the higher threshold of s.1(1) is interesting from this perspective, as it would demarcate a shift in social attitudes as to the fragility of personal identity. This is speculative, however – more likely, s.1(1) is simply a measure to protect speech.

Arguably, sociality might also justify threshold requirements without turning to the need to protect speech: minor damage to reputation may not damage social bonds. However, a sociality-based threshold would likely require proof that real people are likely to act on their lowered opinion (whether by shunning the target or engaging in the kind of ridicule which may cause them to self-exclude), which neither *Jameel* nor s.1(1) requires. Once again, these thresholds make more sense as an attempt to protect speech.

This provides further evidence that certain conceptions of reputation – those with no role for free speech – are incompatible: particularly, the aristocratic honours. *Jameel* and s.1(1) might be reconciled with cultural honour – rejecting minor slights as insufficiently

disrespectful. However, this does not align with *Jameel*'s stated purpose and s.1(1)'s implicit purpose.³⁷²

Thornton was a more theoretically significant development. The court was partially motivated by practical concerns, namely avoiding trivial claims and ensuring Article 10 compliance.³⁷³ However, their method was altering the very definition of 'defamatory':³⁷⁴ this indicates *Thornton* narrowed the protected concept of reputation here. Previously, the presumption of damage appeared to imply damage to reputation *simpliciter*. In other words, the law appeared unipolar. By requiring social consequences, *Thornton* introduced bipolarity. It did not introduce a strong element: it is easy to infer social consequences when they exist only hypothetically, and *Thornton* does not require significant social consequences – expressing an opinion aloud is enough. However, it indicated that the law was not attempting to protect forms of reputation unconcerned with social consequences, like cultural honour.

Post-*Thornton* law remains compatible with many theories which mesh with the basic actionability requirements. Social norm theory only advocates legal intervention in cases likely to cause wrongful or wasteful norm-policing action as a result – if people are unlikely to act on their altered opinions, there is little risk of this. Notably, many behaviours cited as meeting the *Thornton* threshold are norm-policing – ostracising, criticising, expressing an attitude etc.

Regarding deferent reputation, a target's identity can only be reconstituted if they learn society has sided with the attacker. It is therefore consistent to require external manifestations of lowered reputation. Notably, the degree of external manifestation which *Thornton* envisages is low. Expressed attitudes will do, which seems the most minimal indication that society has sided with the attacker, and the least which could trigger a reconstituted identity. The *Thornton* standard therefore fits well with deferent reputation.

Conversely, *Thornton* weakens the fit of other theories. Sociality theory might view it as limiting the law to attacks likely to prompt social bond-affecting behaviours. However, *Thornton* permits an expressed attitude to suffice, and criticism by a friend or business partner does not necessarily weaken a social bond. Sociality is an entitlement to relationships, not praise.

³⁷² And, in any case, serious disrespect could still fail the *Jameel* test – for example, if no one in the jurisdiction noticed it.

³⁷³ *Robin Cammish v Clive Hughes* [2012] EWCA Civ 1655 [61].

³⁷⁴ *ibid* [94].

Epistemic theory, meanwhile, struggles to explain *Thornton*. This theory values people's ability to use information for matters beyond deciding how to behave; for example, in shaping their identities, a potentially entirely internal process. The reputation's epistemic value might be seriously damaged by an allegation causing many people to reshape their internal identities without any social consequences for the claimant, but this would not pass the *Thornton* test.

II. Defences

Justification and fair comment, later called 'truth' and 'honest opinion', and the various forms of privilege were the earliest and enduring defences to libel and slander. Statutory intervention added an additional defence of offer of amends.

(i) Justification and Truth

In stark contrast to criminal defamation, truth (labelled 'justification' until 2013) has seemingly always been a full defence (subject to points about rehabilitation below).³⁷⁵ It has changed very little, ultimately codified as 'truth' by s.2(1) of the 2013 Act. That requires the defendant to prove every defamatory aspect³⁷⁶ of the 'imputation conveyed by the statement complained of is substantially true.' Malice and the defendant's beliefs are irrelevant, and the defendant is usually free to rely on evidence which was unavailable when they made the statement.³⁷⁷

The stated early justification for this defence was that a true statement could not cause relevant damage:³⁷⁸ 'the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not, to possess.'³⁷⁹ So, from its inception, defamation embodied a conception of reputation in which truth delineates the reputational

³⁷⁵ Colin R Lovell, 'The "Reception" of Defamation by the Common Law' (1962) 15 *Vanderbilt Law Review* 1051, 1065. There is some evidential controversy over whether this goes right to defamation's origins or was applied consistently in the early days: Roy Robert Ray, 'Truth: A Defense to Libel' (1931) 2279 *Minnesota Law Review* 43, 49. The earliest mention can be found as early as 1617 (*Lake v Hatton* (1617) Hobart 253 (Holt Ch J)) and the matter was firmly settled by 1792 at the latest: judges answering questions before Parliament at that time treated the existence of an absolute truth-based defence as self-evident: Francis Ludlow Holt, *The Law of Libel* (W Reed 1812) 278.

³⁷⁶ *Turcu v News Group Newspapers Ltd* [2005] EWHC 799 (QB) [109]; *Bokova v Associated Newspapers Ltd* [2019] QB 861 [28(i)].

³⁷⁷ Unless the particular meaning conveyed by the statement makes this inappropriate – e.g., that there are currently reasonable grounds to suspect the claimant of a crime: *Chase v News Group Newspapers Ltd* [2002] All ER (D) 20 [64].

³⁷⁸ Lovell (n 375) 1065.

³⁷⁹ *Watkin v Hall* (1867-68) LR 3 QB 396, 400.

interest's scope – a person has no legally recognised interest in false reputation. It is not merely an attempt to protect the countervailing value of speech (though it has that effect).

It might be objected that the delineating nature of truth to defamation is undermined by the fact that the defendant bears the burden of proving truth, rather than the claimant being required to prove falsity as an element of the action.³⁸⁰ The justification for this has always been fraught, with modern pre-2013 cases only really resisting the reallocation of the burden of truth on the grounds that it would change long-settled law.³⁸¹ Government committees have justified it based on public policy – for example, the Faulks and Neill Committees thought it was necessary to make publishers act with caution before publishing statements which might be false.³⁸² An alternative view is that the claimant is actually the accused, being the target, justifying placing on the defendant the burden of showing the attack was justified.

Despite this, the courts have always been clear that the claimant is not entitled to a reputation which does not correspond with reality.³⁸³ The reverse burden of proof is likely purely a policy consideration, an indication that courts feared excessive, unpunished false statements if the claimant was forced to prove falsity in every instance. At least, they feared this more than they feared the chilling effect on true statements resulting from the reversed burden of proof. It reflects a feeling that reputation, or the risk of unjustified attacks on reputation, is a stronger value than freedom of speech at least in this respect. Reinforcing this, defamation has always been incredibly pro-claimant – presuming many of its supposedly core elements (like malice).

The defence's mere existence concretely rules out the overall relevance of reputational theories which deem truth irrelevant: especially cultural and Arthurian aristocratic honour. Its absolute nature provides evidence against perceived aristocratic honour and proprietary reputation, which would require a more limited defence. Meanwhile, this form of defence fits poorly with sociality. Though sociality may deem truth relevant to speech as an incommensurate interest, it would not permit it to always trump reputation³⁸⁴ – that would indicate society does not really see sociality-based reputation as fundamental.

³⁸⁰ Generally, the law requires the claimant to prove all elements which are fundamental to their claim, leaving issues of excuse or justification to defences.

³⁸¹ E.g. *Jameel v Dow Jones* [2005] EWCA Civ 74 [57]

³⁸² *Milo* (n 12) 156.

³⁸³ *McPherson v Daniels* [1829] 10 B&C 263, 273; *Chase v NGN* [2002] EWCA Civ 1772 [33].

³⁸⁴ Subject to the discussion of rehabilitation below.

Conversely, the defence's existence and form fit well with epistemic reputation, social norm theory, deferent reputation and virtuous honour, all of which normally privilege truth as absolute. Epistemic reputation privileges the audience's access to true information, an absolute defence for true statements makes perfect sense. Though an epistemic society might restrain some true speech if it thinks it leads to anti-social judgement, it might equally conclude that no judgement based on true information is anti-social.

Social norm theory privileges true information to enable norm-enforcers to make proper judgments about who to punish, criticise and ostracise for wrongdoing. The historical label of 'justification' is also interesting in this respect: it indicates truth was not merely an excuse but a morally correct and 'justified' form of speech. A correct attack by an unpaid norm enforcer is, under social norm theory, morally correct and pro-social speech.

Meanwhile, deferent reputation privileges truth because a true statement cannot wrongly reconstitute a person's identity. Similarly, virtuous honour does not treat people as being entitled to internal self-worth where they have acted unvirtuously, so an absolute truth defence makes sense.

(ii) Fair Comment and Honest Opinion

Assessing fair comment and honest opinion is difficult because they have undergone the most fundamental changes since their inception. The history of fair comment falls into four eras: 'from the beginning of the nineteenth century; (2) from the middle of the nineteenth century ... (3) from the beginning of the twentieth century'³⁸⁵ and the era following the 2013 reforms. In the first period, defamatory statements carried a presumption of malice in fact, and later malice in law.³⁸⁶ 'Fair comment' originated in privilege:³⁸⁷ a counter-presumption that literary and artistic works bore no malice.³⁸⁸ This quickly developed into a counter-presumption that legitimate criticism was non-malicious.³⁸⁹

However, even though malice in fact is about the defendant's state of mind, this counter-presumption did not proceed on the basis that artistic, literary or critical defendants bore no actual ill-will. Rather, it was a policy-based exception to the malice rules. The court in *Carr* expressed concern that if criticism were not allowed, 'the first who writes a book on any subject

³⁸⁵ *Kemsley v Foot* [1952] AC 345, 349.

³⁸⁶ *Joseph v Spiller* [2011] 1 AC 852 [33].

³⁸⁷ *Kemsley* (n 385) 349.

³⁸⁸ *Dibdin v Swan & Bostock* (1793) 1 Esp 28, one of the first 'fair common' progenitors.

³⁸⁹ *Ibid* 29.

will maintain a monopoly of sentiment and opinion respecting it.³⁹⁰ This would tend to the perpetuity of error³⁹¹ and ‘we shall have neither purity of taste nor of morals’.³⁹²

Certain elements fluctuated during this first period. Firstly, it was largely agreed that criticism could be ‘fair’ even if the jury thought it incorrect,³⁹³ but some cases claimed it must be ‘temperate’ and ‘reasonable’ – in content or in manner or tone.³⁹⁴ Secondly, the privilege was initially limited to criticisms of a work, not the plaintiff’s personal character,³⁹⁵ but the court in *Cooper* accepted that personal comments were allowed if they were a fair inference from correct facts (e.g. ‘X is immoral because he murdered a man’).³⁹⁶ This was the first case to link fair comment to truth, requiring proof of the opinion’s basis, a requirement which thereafter stayed constant.³⁹⁷ Thirdly, mid-19th century cases began distinguishing between comments on ‘public’ statements versus private ones, with only the former benefiting from the counter-presumption.³⁹⁸ Notably, this related to the forum of the plaintiff’s behaviour and not the ‘public interest’ value of the defendant’s statement.

The second period began with the seminal decision in *Campbell*, which solidified the defence as separate from privilege.³⁹⁹ Cockburn CJ stated that those acting publicly are ‘open to animadversion’, and that those making imputations ‘which arise fairly and legitimately out of his conduct so that a jury shall say that the criticism was not only honest, but also well founded’ were not liable.⁴⁰⁰ He stressed this had ‘limits’ which ‘a writer is not entitled to overstep’ by imputing matters ‘not warranted by the facts’ even if they believe it true.⁴⁰¹ However, the jury had to give latitude for wrongness or exaggeration, provided a ‘fair man, however prejudiced he may be, however exaggerated or obstinate his views’ might have said the same.⁴⁰² Notably, the ‘fair’ man was not the hypothetical right-thinking one, but more akin to the full ‘ordinary’ spectrum of the public.⁴⁰³

³⁹⁰ *Carr v Hood* (1808) 1 Camp 355, 357.

³⁹¹ *Ibid* 357.

³⁹² *Tabart v Tipper* (1808) 1 Camp 350, 351.

³⁹³ *Soane v Knight* (1827) M & M 74, 76.

³⁹⁴ E.g. *Thompson v Shackell* (1828) M & M 187, 188.

³⁹⁵ *Carr v Hood* (n 390) 358.

³⁹⁶ *Cooper v Lawson* (1838) 8 Ad & E 746, 753.

³⁹⁷ *Ibid* 753.

³⁹⁸ *Gathercole v Miall* (1846) 15 M & W 319, 321; *Turnbull v Bird* (1861) 2 F & F 508.

³⁹⁹ *Campbell v Spottiswoode* (1863) 3 B & S 769.

⁴⁰⁰ *Ibid* 777.

⁴⁰¹ *Ibid* 778.

⁴⁰² *Ibid*.

⁴⁰³ *Merivale v Carson* (n 299) 280-81.

Campbell clarified that fair comment was distinct from privilege,⁴⁰⁴ and so no longer about rebutting malice.⁴⁰⁵ It remained unclear, however, whether it worked by rendering the statement non-defamatory (as would be the case if malice was rebutted) or if it was a separate defence akin to justification.⁴⁰⁶ It also confirmed the defence was limited to criticism of ‘public’ people in regards to their ‘public’ conduct or derived from ‘public’ facts. While some cases characterised this as ‘public discussion on matters of public interest’,⁴⁰⁷ the real focus remained on forum.⁴⁰⁸

The possible need for the opinion to be expressed with some degree of decorum remained controversial. *Campbell* implied that there was no such requirement: all that mattered was a hypothetical ordinary person categorising the statement as some kind of opinion.⁴⁰⁹ Subsequently, Mitchell identifies a spectrum between cases which thought ‘fair’ comment required temperance,⁴¹⁰ and those holding it merely had to express an opinion a ‘reasonable’ person could in principle hold.⁴¹¹ The former was more common, until the end of the 19th century,⁴¹² when the test ultimately became whether a normal person, however biased, could honestly derive the relevant opinion from the given facts.⁴¹³

The third period, which began with the decision that malice was irrelevant to ordinary defamation (being irrebuttably presumed),⁴¹⁴ requiring courts to explicitly consider fair comment’s basis. Early approaches deemed it to fill a lacuna left by justification, which some argued applied only to statements of true fact and not opinion based on no facts or false fact, but this was ultimately refuted.⁴¹⁵ Since then, the courts consistently required the comment to be based on true facts.⁴¹⁶

Meanwhile, when fair comment was deemed a species of privilege, it could be defeated by proof of untargeted malice like any other privilege. However, judges at the end of the 20th

⁴⁰⁴ *Campbell v Spottiswoode* (n 399) 781.

⁴⁰⁵ Though cases continued to refer to malice for more than half a century after: *Langlands v John Leng & Co* 1916 SC (HL) 102, 107.

⁴⁰⁶ E.g. *Peter Walker & Son, Limited v Hodgson* [1909] 1 KB 239, 239.

⁴⁰⁷ *Hedley v Barlow* (1865) 4 F & F 224, 230.

⁴⁰⁸ Mitchell (n 257) 179.

⁴⁰⁹ *Ibid* 179.

⁴¹⁰ *Ibid* 180.

⁴¹¹ *Burton v Board* [1929] 1 KB 301, 304.

⁴¹² *Merivale v Carson* (n 299).

⁴¹³ *Hunt v Star Newspaper* [1908] 2 KB 309, 319; *Reynolds* (n 333) 193; though some offhand and likely incorrect comments about whether a ‘reasonable person’ could hold the opinion can still be found in early 21st century caselaw – see e.g. *Branson v Bower* [2001] EWCA Civ 791 [8].

⁴¹⁴ *E Hulton & Co v Jones* (n 271).

⁴¹⁵ *Sutherland v Stopes* [1925] AC 47.

⁴¹⁶ *Dakhyl v Labouchere* [1908] 2 KB 325, 329.

century opined that only proof the defendant did not honestly believe the opinion could rebut the defence,⁴¹⁷ which early 21st century decisions accepted.⁴¹⁸

Meanwhile, the ‘public’ element of the defence widened into a general notion of public interest.⁴¹⁹ By 1969, Lord Denning defined the defence as applicable to any matter ‘such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on’.⁴²⁰

Finally, it was implicit in many of the early cases, and ultimately explicitly settled, that a statement of opinion failing to clearly mention the facts on which it was based fell beyond the defence.⁴²¹ Early 20th century cases required this to be done clearly and distinctly from the opinion, reasoning that ‘any injustice which [the comment] might do will be to some extent negated by the reader seeing the grounds upon which the unfavourable inference is based’.⁴²² Later decisions, were less strict: the court in *Joseph v Spiller* stressed the facts did not need to be presented in such a way that the reader could assess for themselves whether the comment was well founded.⁴²³

Finally, the Defamation Act 2013 codified, reformed and changed the defence’s name, relabelling it ‘honest opinion’.⁴²⁴ Its aim was largely codification and clarification, subject to one key change (removal of the need for public interest).⁴²⁵ Honest opinion applies provided three conditions are met: 1) the defamatory statement is an opinion;⁴²⁶ 2) ‘the statement complained of indicated, whether in general or specific terms’, the opinion’s basis;⁴²⁷ 3) an honest person could have held that opinion based on any privileged statement or ‘any fact which existed at the time’ of publication.⁴²⁸ The claimant can defeat the defence by showing the defendant did not in fact hold the opinion themselves,⁴²⁹ unless the defendant was publishing the opinion of another.⁴³⁰

⁴¹⁷ *Cheng v Tse* (2000) 3 Hong Kong Court of Final Appeal Reports 339, 361.

⁴¹⁸ *Reynolds* (n 333) 193.

⁴¹⁹ *South Hetton Coal Company, Limited v North-Eastern News Association, Limited* [1894] 1 QB 133, 140.

⁴²⁰ *London Artists Ltd v Littler* [1969] 2 QB 375, 391.

⁴²¹ *Reynolds* (n 333) 193.

⁴²² *Hunt v Star Newspaper* (n 413) 319.

⁴²³ *Joseph v Spiller* (n 386) [104]-[105].

⁴²⁴ Defamation Act 2013, s 3.

⁴²⁵ *Ibid* Explanatory Notes, para 19.

⁴²⁶ *Ibid* s 3(2).

⁴²⁷ *Ibid* s 3(3).

⁴²⁸ *Ibid* s 3(4).

⁴²⁹ *Ibid* s 3(5).

⁴³⁰ *Ibid* s 3(6): in which case the claimant must show the defendant knew or ought to have known that the original statement-maker did not hold the opinion.

Most significantly, the new defence lacks any public fact or interest requirement, and crystallised the lack of any decorum or reasonableness requirements.⁴³¹ It solidified the *Joseph v Spiller* approach to setting out the grounding basis;⁴³² the facts need only be clear enough to enable readers ‘to understand what the comment is about’⁴³³ or ‘what has led [the claimant] to make the comment.’⁴³⁴ Similarly, the courts have confirmed that the defendant must also prove that the fact or basis relied on is true (or privileged).⁴³⁵

A key constant throughout all these changes is the defence’s stated justification. The courts always treated it as a policy exception rather than truly rebutting malice. It was originally a form of privilege – which (as discussed below) were always firmly grounded in speech and public interest concerns. The court’s concern in *Carr*, that criticism is necessary to avoid perpetuity of error, is clearly grounded in free speech concerns – particularly the marketplace of ideas theory.⁴³⁶

In the second period, Cockburn CJ in *Campbell* similarly stressed that ‘[n]othing is more important than that fair and full latitude of discussion should be allowed to writers upon any public matter, whether it be the conduct of public men, the proceedings in courts of justice or in Parliament [etc]’.⁴³⁷ Courts in the third period described it as an allowance for free speech.⁴³⁸ As late as 2001, Lord Nichols stressed that ‘[t]he defence of fair comment envisages that everyone is at liberty to conduct social and political campaigns by expressing his own views’ and implied the shift from public fact to public interest resulted from the courts realising that being the arbiters of what is ‘morally or socially or politically desirable ... would be a highly dangerous course ... That way lies censorship.’⁴³⁹ The 2011 *Singh* case similarly made reference to a desire to avoid censorship or becoming a ‘Orwellian Ministry of Truth’ of the kind that would censor Galileo,⁴⁴⁰ echoing the *Carr* case’s allusion to the ‘marketplace of ideas’.⁴⁴¹

⁴³¹ *Riley v Murray* (n 364) [90].

⁴³² *Carol Yvonne Carruthers v Associated Newspapers Limited* [2019] EWHC 33 (QB) [23].

⁴³³ *Louisa Donovan v Kate Gibbons* [2014] EWHC 3406 (QB) [14].

⁴³⁴ *Tereza Burki v Seventy Thirty Limited* [2018] EWHC 2151 (QB) [229].

⁴³⁵ *Riley v Murray* (n 364) [99].

⁴³⁶ Under this theory, speech is privileged because free and open discussion leads to truth and positive values, as bad ideas are evaluated and cast aside by the metaphorical market while good ones rise to the top: this theory originated in John Stuart Mill, *On Liberty* (Longman, Roberts, & Green Co 1869).

⁴³⁷ *Campbell v Spottiswoode* (n 399) 781.

⁴³⁸ *Lyon v Daily Telegraph* [1943] 1 KB 746, 753; *Kemsley* (n 385) 46-47; *British Chiropractic Association v Singh* [2010] EWCA Civ 350, [2011] 1 WLR 133 [35].

⁴³⁹ *Cheng v Tse Wai Chan Paul* [2001] EMLR 31 [45]-[46].

⁴⁴⁰ *British Chiropractic Association v Singh* (n 438) [23].

⁴⁴¹ Richard Mullender, ‘Defamation, fair comment and public concerns’ (2010) 69 CLJ 443, 444.

So, from its inception, the defence was clearly based on balancing reputation and speech rather than delineating the internal scope of the reputational interest. This explains much about the defence's historical nature – particularly its concern with public facts (assuming speech on such facts is particularly socially important) and later the public interest. It explains the insistence that the opinion state its basis, and that basis be true. Though the courts no longer require the statement to enable recipients to fully evaluate the opinion, it means that they know where to go to investigate the matter further. This function acquired renewed importance in the internet age.⁴⁴²

This raises the issue of whether the removal of the public interest requirement changes the defence's nature. The answer is probably not. The core of the defences remains the same – the presence of an opinion. The courts have plainly always believed that 'opinion' has some special quality to it elevating it over other speech (provided whatever standards of decorum or otherwise were met). This is indicated by the considerable judicial ink spent on ensuring only opinions (at least partially subjective value judgements) fall within the defence and not facts – the tricky area arising for statements constituting inferences from facts, like inferring a claimant's motives.⁴⁴³

It is difficult to conceive of why the statement being an opinion would delineate the inherent scope of the claimant's reputational interest. While the court in *Spiller* suggested that '[a]llegations of fact can be far more damaging, even if plainly based on inference, than comments on true facts',⁴⁴⁴ they did not claim this would always be so. In any case, if the issue was the degree of harm caused, the serious harm requirement would render the defence obsolete.

It might be argued that it delineates the scope of the interest because the opinion must be based on true facts – making it an appendage of justification/truth. Lord Nicholls, when changing the definition of malice, hinted at this when he said that '[t]he spiteful publication of a defamatory statement of fact attracts no remedy if the statement is proved to be true. Why should the position be different for the spiteful publication of a defamatory, genuinely held

⁴⁴² For example, in the 2014 case of *Donovan*, the court noted that the need for the statement to indicate its basis 'is particularly important on the internet, where people can make public comment about matters which are far from generally known, and where it will often be impossible for other readers to evaluate the views expressed': *Donovan v Gibbons* (n 433) [14].

⁴⁴³ See e.g. *Cheng v Tse Wai Chan Paul* (n 439); *Joseph v Spiller* (n 386). Most strike out claims in this context turn on whether the statement was fact or opinion.

⁴⁴⁴ *Joseph v Spiller* (n 386) 114.

comment based on true fact?’⁴⁴⁵ However, truth/justification could never be defeated by malice or proof the defendant did not believe their own word, nor has it ever had a public interest/fact requirement. If fair comment was an extension of justification, then it ought to have mirrored this.

It is better to interpret the removal of the public interest requirements as reflecting a change in the kinds of speech society deems sufficiently important to outweigh reputation, or perhaps of what appropriately forms part of the public marketplace of ideas. This means the defence’s existence provides further evidence against those theories treating the reputational interest as absolute. It enhances the fit with those theories which permit speech and reputation to be balanced against each other – particularly in its modern form.

Some of the historical requirements clash with certain theories, however. For example, the need for decorum and untargeted malice’s historical role is curious from the perspective of the two consequentialist theories, since neither factor obviously bears on the speech’s social value. It is possible society thought people were more likely to make anti-social or wasteful judgments when faced with intemperate or improperly motivated speech, but this seems unlikely. Similarly, an intemperate or improperly motivated statement is no more or less likely to reconstitute identity than a temperately or properly motivated one, so it does not fit deferent reputation despite having superficial affinity with the idea of ‘rules of civility’.

More likely, intemperate or improperly motivated expression was simply contrary to social norms, and so to be discouraged even if it was socially valuable. This might indicate a historically better fit with virtue honour, which would not encourage people to behave unvirtuously when pointing out that someone else was unvirtuous. The decorum rules might also fit sociality, assuming intemperate expression is more likely to fray social bonds. One suspects it was less to do with a specific reputational theory, however, and more to do with historical British society valuing civility and etiquette highly, such that it affected the value of speech.

There is also a general point about the 2013 reforms’ impact on which theory the defence best fits. The modern defence, unmoored from the need to show public interest, may raise questions over how fundamental defamation law considers the interests inherent in sociality or deferent reputation. Opinion-based speech (provided the bases is stated and true) now almost

⁴⁴⁵ *Cheng v Tse Wai Chan Paul* (n 439) [49].

always trumps reputation, subject only to the minimal requirement that the defendant actually believe what they are saying. The reforms diminish the relative value of rights-based notions of reputation against consequentialist considerations.

(iii) Privilege

Privilege falls under two headings: qualified and absolute. The development of these two defences is linked, but their application is distinct.

a) Absolute Privilege

Absolute privilege applies to defamatory allegations made in four situations: parliamentary proceedings, judicial proceedings, and military communiques. If the statement was made on a privileged occasion, the defence applies and cannot be rebutted. Modern thought tends to unify these privileges under the same heading, though the historical picture is complex.

Parliamentary privilege has the clearest origins: the Privilege of Parliament Act 1512,⁴⁴⁶ later strengthened by the Bill of Rights 1689.⁴⁴⁷ The latter stated that the ‘freedom of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament’.⁴⁴⁸ However, despite the reference to freedom of speech, the courts interpreted this provision as primarily motivated by the need to avoid overlapping with Parliament’s separate jurisdiction to regulate its members.⁴⁴⁹ This led to peculiarities like defendants being unable to waive privilege:⁴⁵⁰ consent does not establish the court’s jurisdiction where it would not otherwise exist.

The bar on waiver was temporarily removed by s.13 of the Defamation Act 1996, which Mitchell suggested altered the basis of parliamentary privilege – from a purely jurisdictional defence to a personal privilege designed to ensure that those speaking in Parliament have no fear of adverse consequences.⁴⁵¹ However, s.13 was itself repealed in 2015.⁴⁵² In any case, while reference to the jurisdictional role of the privilege continues in the caselaw,⁴⁵³ it is now treated as a side-effect rather than the core purpose.

⁴⁴⁶ Privilege of Parliament Act 1512, II.

⁴⁴⁷ And extended to some other parties exercising functions in relation to parliament by other statutes, such as the Parliamentary Commissioner Act 1967, s 10(5).

⁴⁴⁸ Bill of Rights 1689, art 9.

⁴⁴⁹ *Prebble v Television of New Zealand* [1995] 1 AC 321.

⁴⁵⁰ *Ibid* 355.

⁴⁵¹ Mitchell (n 257) 199.

⁴⁵² Deregulation Act 2015, sch 23 para 44.

⁴⁵³ E.g. Mitchell cites *Hamilton v Al Fayed* [2000] 2 All ER 224, 234 at 199, fn 44.

Military privilege, originating in common law, also arose from concerns about jurisdictional overlap between military tribunals and common law courts.⁴⁵⁴ This concern was grounded in a general public interest perception that judicial intrusion impaired the military's ability to uphold discipline or raised institutional competence concerns.⁴⁵⁵

Finally, judicial proceedings privilege was born of concern that liability for materials submitted to the court in aid of an application would deter bona fides engagement with the courts.⁴⁵⁶ It was then extended to witnesses, parties and lawyers. This privilege was originally not absolute: it probably could be rebutted by malice.⁴⁵⁷ It was later reformulated into an absolute immunity on the grounds that liability for speech in judicial proceedings 'would be a matter of public inconvenience, and operate to deter persons from preferring their complaints against offenders'.⁴⁵⁸ Later reforms extended it to fair and accurate reports of court proceedings in newspapers⁴⁵⁹ and elsewhere,⁴⁶⁰ and then to reports on the proceedings of other bodies, like inquiries.⁴⁶¹

A specific form of judicial immunity developed separately, and, in a similar but distinct fashion to parliamentary and military privilege, was originally linked to jurisdiction. Judges were initially immune from false imprisonment claims where imprisonment was within their jurisdiction (even if strictly in error).⁴⁶² Some judges challenged the absoluteness of the privilege in relation to defamatory statements, stating it could be defeated by 'malice and the absence of reasonable or probable cause'.⁴⁶³ This was ultimately rejected in *Scott*, on the grounds that '[i]t is essential ... that the judges who are appointed to administer the law should be permitted to administer it ... independently and freely, without favour or fear ... for the benefit of the public'.⁴⁶⁴

Executive privilege originates in the 1895 *Chatterton* case, and was justified on the grounds that allowing the defamation action in respect of high level official communiques to

⁴⁵⁴ *Dawkins v Lord Paulet* (1869) LR 5 QB 94, 117 (Mellor J), 120 (Lush J).

⁴⁵⁵ *Ibid* 114-15.

⁴⁵⁶ *Cutler v Dixon* (1585) 4 Co Rep 14b.

⁴⁵⁷ E.g. *Moulton v Clapham* (1639) 1 Sir Wm Jones' R 431 (parties); *Brook v Montague* (1605) Cro Jac 90 (advocates).

⁴⁵⁸ *Johnson v Evans* (1799) 3 Esp 32, 33; though as Mitchell points out, this was not fully accepted until 1875 – Mitchell (n 257) 213.

⁴⁵⁹ Law of Libel Amendment Act 1888, s 3.

⁴⁶⁰ Defamation Act 1996, s 14(1).

⁴⁶¹ Inquiries Act 2005, s 37(3).

⁴⁶² *Bushell's Case* (1674) 1 Mod 119.

⁴⁶³ *Kendillon v Maltby* (1842) Car & M 402.

⁴⁶⁴ *Scott v Stansfield* (1868) LR 3 Exch 220, 223.

succeed ‘would be injurious to the public interest because it would tend to take from an officer of state his freedom of action in a matter concerning the public weal.’⁴⁶⁵ Executive privilege, therefore, has always been grounded in public interest concerns and appears to have always been absolute. Since then, it has been extended by statute to reports made by specific executive officers not constituting ‘high officials’, like the Fair Trading Advisory Committee⁴⁶⁶ and OFCOM.⁴⁶⁷

Overall, while the various facets of absolute privilege developed differently, with some originating in jurisdictional issues, some in public interest, some being absolute and others qualified by malice, some statutory and some not, their broad underlying principles have converged. In modern thought, each is absolute because the speech occurs in circumstances of acute public interest, such that if anyone was deterred from speaking fully to any degree, an important facet of the State’s functioning would be impeded.⁴⁶⁸ This is so important that the speech must, in every instance, override the reputational interest.⁴⁶⁹

Accordingly, absolute privilege can only reveal a limited amount about the nature of the reputational interest protected by defamation: like fair comment, it was never about delineating the reputational interest’s boundaries. Accordingly, it is consistent with any reputational theory able to balance reputation with other interests, and inconsistent with those that cannot. The narrowness of each category rescues absolute privilege from the implication that speech is being allowed to always trump reputation in a manner indicating society does not ascribe much value to the latter, however.

b) Qualified Privilege

Qualified privilege arose in the early 19th century from the presumption of malice in fact. To prove a statement was privileged was to rebut this presumption.⁴⁷⁰ Common law categories sprung up as individual, arbitrary classes without any unifying principle. Many absolute privileges began qualified, as discussed above. Others were always qualified.⁴⁷¹

⁴⁶⁵ *Chatterton v Secretary of State for India in Council* [1895] 2 QB 189, 191.

⁴⁶⁶ Fair Trading Act 1973, s 82(2).

⁴⁶⁷ Enterprise Act 2002, s 108.

⁴⁶⁸ *Bottomley v Brougham* [1908] 1 KB 584, 587.

⁴⁶⁹ Or indeed other interest that might be injured by words, as privilege is not limited to defamation.

⁴⁷⁰ William Blake Odgers, *A Digest of the Law of Libel and Slander* (Stevens and Sons 1881) 265.

⁴⁷¹ Like that applicable to employers giving references to third parties regarding their employees (mid 1700s): *Weatherston v Hawkins* (1786) 1 Term Rep 110, 111.

Other forms were statutory. For example, the Law of Libel Act 1888 privileged ‘fair and accurate’ reports of public and local governance meetings by newspapers.⁴⁷² The Defamation Act 1996 extended this to fair and accurate reports (anywhere in the world) of an even wider range of proceedings.⁴⁷³ The 2013 Act added scientific and academic statements in peer-reviewed journals.⁴⁷⁴ Whether common law or statutory, what made (and still makes) privilege qualified is the claimant’s ability to rebut it with proof of malice. Unlike early slander cases, however, general evidence was always insufficient – specific requirements applied.⁴⁷⁵

The possibility of a unifying common law defence of qualifying privilege emerged in the 1830s, when Parke B stated that where a defendant

is acting on **any duty, legal or moral**, towards the person to whom he writes, or where he has, by his situation, **to protect the interests of another**, that which he writes under such circumstances is a privileged communication.⁴⁷⁶

There was subsequently considerable consternation over whether malice could be rebutted in broader circumstances than the above and whether an honest but mistaken belief in a duty or interests would suffice. Mitchell argues that this arose from an increasingly confused response to how the defence related to the malice presumption, particularly as the meaning of malice began changing.⁴⁷⁷

Ultimately, it was settled that there must be an actual legal or moral duty and corresponding legitimate interests on the recipients’ part.⁴⁷⁸ Not any moral duty sufficed: it had to be ‘a duty recognised by English people of ordinary intelligence and moral principle’.⁴⁷⁹ Nor could the defence be relied on where publication occurred to some individuals lacking the interest. These requirements came to be known as a ‘legitimate, common and corresponding interest’.⁴⁸⁰

Even as the malice presumption evolved into a presumption of intention to do harm, the type of malice required to rebut the defence was quickly established as, and remained,

⁴⁷² Law of Libel Act 1888, s 4.

⁴⁷³ Defamation Act 1996, sch 1, pt I, para 1-8.

⁴⁷⁴ Defamation Act 2013, s 6(1)-(3).

⁴⁷⁵ Rebutting malice is in any case, even in the modern day, a rarity.

⁴⁷⁶ *Cockayne v Hodgkisson* (1833) 5 C & P 543, 548 (emphasis added).

⁴⁷⁷ See Mitchell (n 257) 156-58.

⁴⁷⁸ *Adam v Ward* [1917] AC 309.

⁴⁷⁹ *Stuart v Bell* [1891] 2 QB 341, 350.

⁴⁸⁰ *Aniekan Mary Boyo v Lloyds Bank Plc* [2019] EWHC 2279 (QB).

untargeted.⁴⁸¹ These developments divorced the common law defence from its origins in rebutting malice in fact, transforming it into a separate defence based on the inherent public interest in speaking in pursuit of moral and legal duties.⁴⁸² In doing so, it has become a separate justification for defamatory speech: based, like absolute privilege, on the public interest - either specific statutorily identified interests or the general societal interest reflected at common law.

So, similar remarks can be made about qualified privilege as were made about absolute privilege – their existence is consistent with theories able to balance reputation with other interests, and incompatible with those theories that cannot. It is not as narrow as absolute privilege, but has many limitations preventing it diminishing reputation’s value by always privileging speech: particularly, the need for an actual existing duty and corresponding interest relative to each recipient, and to a lesser extent the possibility of rebutting the defence with untargeted malice. The latter limitation reflects the fact that ‘[f]reedom of speech does not embrace freedom to make defamatory statements out of personal spite or without having a positive belief in their truth.’⁴⁸³

However, the common law test was always broad in what it considered a legitimate moral or legal duty or interest. This came to a particular head with the development of *Reynold’s* privilege, as the next section discusses.

(iv) Reynolds Privilege and the Public Interest

Reynolds privilege arose from newspapers attempting to stretch the notion of moral duty (and corresponding interest) in qualified privilege to breaking point. The claimant was a politician during a crisis in the Northern Ireland peace process,⁴⁸⁴ falsely accused of ‘fibbing’ to the Irish Dáil and withholding information.⁴⁸⁵ Lord Nicholls, giving the leading judgment for the majority, noted the need to prevent the ‘chilling’ effect of defamation’s presumption of falsity and stated that:⁴⁸⁶

⁴⁸¹ *Horrocks v Lowe* [1975] AC 135. Though there has been some obiter suggestion that it bear the same unusual meaning as it does in fair comment: lack of belief in its truth – *Keith Singh v Joseph Weayou* [2017] EWHC 2102 (QB) [8]

⁴⁸² *Mitchell* (n 257) 145.

⁴⁸³ *Reynolds* (n 333) 201.

⁴⁸⁴ *Ibid.*

⁴⁸⁵ By bringing the action, the claimant was taken to waive the otherwise absolute privilege they would have been entitled to in relation to their conduct in the Dáil.

⁴⁸⁶ *Ibid* 192-93.

At times people must be able to speak and write freely, uninhibited by the prospect of being sued for damages should they be mistaken or misinformed. In the wider public interest, protection of reputation must then give way to a higher priority.

He affirmed that privilege's purpose is identifying when public interest requires another to impart certain facts, even if later shown false, stating the 'essence of this defence lies in the law's recognition of the need, in the public interest, for a particular recipient to receive frank and uninhibited communication of particular information from a particular source'.⁴⁸⁷

Given this, he considered that 'there are occasions when the public interest requires that publication to the world at large should be privileged'.⁴⁸⁸ Accordingly, the speaker can claim a moral duty to publish generally, with the whole public having a corresponding legitimate interest to receive, the information.

Reynolds was grounded in concern for free speech and avoiding the chilling effect, not delineating the internal scope of the claimant's reputational interest. Simultaneously, Lord Nicholls was concerned not to simply provide an unlimited public interest defence, bounded only by the difficult-to-prove malice standard.⁴⁸⁹ Additional protections were needed, to avoid free speech excessively encroaching upon reputation. Accordingly, the public interest had to be assessed not purely by the statement's subject matter, but by its public interest 'quality'.⁴⁹⁰

Lord Nicholls elucidated (non-exhaustive) factors for determining whether publication was in the public interest: the allegation's seriousness (the more serious the charge, the greater the need for accuracy), subject matter, source and status; verification efforts;⁴⁹¹ whether the defendant sought the claimant's comment or included their side; and the publication's tone, circumstances and urgency ('[n]ews is often a perishable commodity').⁴⁹² To this was later added the need to give latitude for editorial judgement on presentation.⁴⁹³ In *Reynolds*, the privilege was not established given the allegation's seriousness and complete failure to seek or portray the claimant's side.

⁴⁸⁷ Ibid 195.

⁴⁸⁸ Ibid 195.

⁴⁸⁹ Made even more difficult where the defendant is a newspaper refusing to reveal their source.

⁴⁹⁰ Ibid 202.

⁴⁹¹ Unless the very fact that an allegation has been made is itself in the public interest, something referred to as the sub defence of 'neutral reportage': *Flood v Times Newspapers Limited* [2012] UKSC 11 [77].

⁴⁹² Ibid 205.

⁴⁹³ *Jameel v Wall Street Journal Europe SPRL* [2006] UKHL 44 [51].

These factors were labelled the *Reynolds* checklist or indicators of ‘responsible journalism’.⁴⁹⁴ This was an exceptionally wide approach to privilege, essentially sidestepping the need for all recipients to have an interest in receipt – literally everyone was deemed to have an interest even if they only accidentally encountered the publication. It was even controversial whether duty was still a requirement.⁴⁹⁵ Ultimately, ‘responsible journalism’ seemed determinative of both duty and interest, and both were officially dropped in the 2013 reforms.

However, *Reynolds* had some pro-claimant elements. For example, the *Reynolds* indicators applied regardless of the defendant’s identity:⁴⁹⁶ non-journalists had to behave like responsible journalists. It has also been suggested that despite its apparent breadth, defendants (particularly media defendants) struggled to establish the defence for most of its existence.⁴⁹⁷ This was partially because lower courts initially treated the indicators as requirements⁴⁹⁸ or requiring the publisher to be ‘open to legitimate criticism if it had withheld’ the publication,⁴⁹⁹ applying higher standards than *Reynolds* strictly required.⁵⁰⁰ However, their approaches eventually became more permissive. More cynically, one might attribute this to the media’s general unwillingness to be responsible when presented with salacious gossip, as the Leveson inquiry revealed – indicating the defence was not harsh: the media were simply unwilling to hold themselves to these standards. Nevertheless, successful cases did appear more commonly post-2006.⁵⁰¹

The Defamation Act 2013 abolished *Reynolds* and substituted a new defence of ‘publication in the public interest’. This applies where the defendant shows that ‘(a) the statement complained of was, or formed part of, a statement on a matter of public interest; and

⁴⁹⁴ *Bonnick v Morris* [2003] 1 AC 300, 309; *Jameel v Wall Street Journal Europe SPRL* (n 493) [54].

⁴⁹⁵ In 2006, Lord Hoffman in *Jameel* repeatedly stated *Reynolds* was not as narrow as privilege and required no moral duty (even recasting it as the ‘*Reynolds* public interest defence’ rather than *Reynolds* privilege – *Jameel v Wall Street Journal Europe SPRL* (n 493) [46]), and that public interest is determinative of both issues ([50], [57]) but Lord Hope in the same case disagreed: [105], [107]. In 2008, the Privy Council thought it was still a matter for debate whether *Reynolds* required a duty, but gave it no practical significance: *Seaga v Harper* [2008] UKPC 9, [2009] 1 AC 1 [10].

⁴⁹⁶ *Seaga* (n 495) [11].

⁴⁹⁷ Graeme M Henderson, ‘Defamation: the offer of amends defence - a lamb in lion's clothing?’ (2009) 14 Comms L 46, fn 3.

⁴⁹⁸ *Jameel v Wall Street Journal Europe SPRL* (n 493) [37].

⁴⁹⁹ *Ibid* [57].

⁵⁰⁰ David Tan, ‘The Reynolds privilege revitalised’ (2013) 129 LQR 27, 28.

⁵⁰¹ E.g. *Kneafsey v Independent Television News Ltd* [2013] EWHC 4046 (QB); *Hunt v Times Newspapers Ltd* [2013] EWHC 1868 (QB); *El Naschie v Macmillan Publishers Ltd* [2012] EWHC 1809 (QB); *Flood v Times Newspapers Ltd* (n 491).

(b) the defendant reasonably believed that publishing the statement complained of was in the public interest.⁵⁰² The defence can be defeated by proof of untargeted malice.⁵⁰³

An initial version, codifying the ‘responsible journalism’ indicators, was rejected as too speech-restrictive.⁵⁰⁴ The courts took this as transforming the defence into one applicable to general public interest statements, not just those made by journalists meeting conditions of reasonable journalism,⁵⁰⁵ and even abandoned the language of responsible journalism when dealing with media defendants.⁵⁰⁶ Nevertheless, *Reynolds*-type factors, along with others, remain relevant to whether the defendant’s belief is reasonable.⁵⁰⁷

The courts have also clarified that the underlying justification is the same:⁵⁰⁸ ensuring the law does not ‘stifle political debate’⁵⁰⁹ and giving weight to the ‘high importance to afford political speech protection from the chilling effects which the law of defamation can have’.⁵¹⁰ The balance between reputation and speech may not have changed that much with the 2013 reforms either. Notably, in only one reported case (at time of writing) has a journalist successfully established the defence:⁵¹¹ in all others, the defence failed based on *Reynolds* factors.⁵¹² The oft stated justification is ensuring that proper weight is given to reputation so that political speech is not just automatically treated as a trump card.⁵¹³ Speech has somewhat greater weight in non-journalism cases,⁵¹⁴ though courts remain unsympathetic to amateurs playing at journalists.⁵¹⁵

All its elements, therefore, are explained by reference to some theory justifying the value of speech. This includes the possibility of rebutting the defence through untargeted malice: it appears improperly motivated speech is not deemed as high value. Accordingly, the same

⁵⁰² Defamation Act 2013, s 4(1).

⁵⁰³ *Rodney Goldsmith v Michael Bissett-Powell* [2022] EWHC 1591 (QB) [159].

⁵⁰⁴ E.g. Joint Committee on Human Rights, *Legislative Scrutiny: Defamation Bill Seventh Report of Session* (2012-13, HL 84, HC 810) 3.

⁵⁰⁵ *Economou v de Freitas* [2018] EWCA Civ 2591, [2019] EMLR 7 [80], [110]; *Serafin v Malkiewicz and others* [2020] UKSC 23 [75].

⁵⁰⁶ *Serafin* (n 505) [77].

⁵⁰⁷ *Ibid* [110]; *Riley v Murray* (n 364) [107].

⁵⁰⁸ *Serafin* (n 505) [68].

⁵⁰⁹ *Barron v Vines* [2015] EWHC 1161 (QB) [45].

⁵¹⁰ *Ibid* [59].

⁵¹¹ *Banks v Cadwalladr* [2022] EWHC 1417 (QB).

⁵¹² *Riley v Murray* (n 364) [123]-[124] (failure to include the claimant’s side after misrepresenting her tweet); *Lachaux* (High Court) (n 360) [173] (one-sided story failed to present or seek the claimant’s side); *Turley* (n 365) [152] (failure to seek the claimant’s side despite no real urgency of publication).

⁵¹³ *Riley v Murray* (n 364) [129].

⁵¹⁴ See e.g. *Economou v de Freitas* (n 505) (journalistic source); *Onwude v Dyer* [2020] EWHC 3577 (QB) (academic journalist); *Rodney Goldsmith* (n 503) (social media contributor).

⁵¹⁵ *Doyle v Smith* [2018] EWHC 2935 (QB), [2019] EMLR 15.

remarks can be made here as were made regarding fair comment and privilege. It does not fit those theories in which speech cannot outweigh reputation, fits the consequentialist theories well, and is technically compatible with those theories treating speech and reputation as interests to be balanced (or which can do so).

Regarding the latter, the defence's breadth compared to ordinary privilege might lead one to question whether society is expressing less interest in the fundamental value of such forms of reputation within defamation. This said, some care has been taken to identify a constrained band of speech with sufficient weight to overcome the reputational interest – insulating it somewhat from criticisms that speech usually trumps reputation. Even the modern defence, having abandoned references to responsible journalism, has a similar focus on verification and reasonable speech, which makes the defence frequently hard to establish without responsible conduct. So, to say the law has abandoned any conception of reputation as a natural right is likely (currently) incorrect.

(v) Rehabilitation

Many reputational theories anticipate a special role for true speech affecting a rehabilitated person's reputation, and rehabilitation plays some role in defamation's defences. Rehabilitation long qualified justification,⁵¹⁶ beginning with the 1646 *Cuddington* ruling that a pardon legally removes a person's criminal status, making it untrue to continue referring to them as criminal.⁵¹⁷ This was later statutorily extended to non-capital felons who served their full sentence.⁵¹⁸ Courts deemed it public policy that rehabilitated felons should not continue to be judged for their past actions.⁵¹⁹ However, it remained lawful to state someone was convicted *and* served their sentence, provided the statement did not imply the conviction was correct.⁵²⁰ Judges assumed that right thinking-people would not judge such a target.⁵²¹

The Criminal Law Act 1967 repealed this law, and the Civil Evidence Act 1968 made proof of conviction conclusive proof that the plaintiff committed the relevant offence.⁵²² The

⁵¹⁶ None of the following ever applied to privilege or the later public interest defence, save in very narrow instances under the 1974 Act involving evidence excluded in court. This makes sense given privilege does not rely on the information being true, and if there is no offence then rehabilitation ceases to be relevant.

⁵¹⁷ *Cuddington v Wilkins* (1646) Hob 67 & 81.

⁵¹⁸ Civil Rights of Convicts Act 1828, s 3.

⁵¹⁹ *Leyman v Latimer* (1878) 3 Ex D 352, 356.

⁵²⁰ *Leyman v Latimer* (1877) 3 Ex D 15, 22; allegations of misdemeanours also fell beyond the scope of the statute.

⁵²¹ Somewhat conflating the issue of defamatory meaning and truth.

⁵²² Civil Evidence Act 1968, s 13(1).

combined effect of this briefly made justification an absolute defence. However, s.8 of the Rehabilitation of Offenders Act 1974 removes truth as a defence where the publication imputes an offence ‘which was the subject of a spent conviction’,⁵²³ provided the defendant acted with untargeted (improper motive⁵²⁴) malice.⁵²⁵ Such malice is hard to prove, however: it is insufficient that a reasonable person would see no good reason to publish.⁵²⁶

Any protection for rehabilitation conflicts with those theories which see no role for it: namely proprietary reputation, aristocratic and cultural honour. However, the law’s approach is anomalous and therefore difficult to square with those reputational theories which do grant rehabilitation a role. Modern law treats the public interest in true speech as sufficiently weighty to trump the social value of rehabilitated reputation in almost every instance. The historical approach made more sense, in that it provided a complete carve out for the (expanding) circumstances in which the law deemed people rehabilitated.

The 1974 Act’s approach, conversely, resulted from extreme political compromise – attempting to give its goal of rehabilitation any teeth given the significant opposition to any alteration of defamation’s treatment of free speech.⁵²⁷ Draft provisions barred the truth defence and forced defendants to rely on privilege to publish information about spent convictions.⁵²⁸ This was highly unpopular, subject to a ferocious media campaign,⁵²⁹ and ultimately rejected. The result apparently has no coherent philosophy beyond achieving what was achievable.

All theories capable of accommodating rehabilitation envisage a broader defence than the 1974 Act provides. The Act broadly permits rehabilitated people to be treated as if they are not rehabilitated, absent untargeted malice. Malice does not appear to have any bearing on whether people will form anti-social judgements, engage in wasteful or wrongful ostracization, damage a person’s identity, sense of self-worth, or the claimant’s capacity to form social bonds. Accordingly, the rehabilitation provisions do not advance our understanding of reputation protection within defamation. The weak protection in untargeted malice cases appears solely a quirk of political compromise.

⁵²³ Rehabilitation of Offenders Act 1974, s 8(1).

⁵²⁴ *Horrocks v Lowe* (n 481) 149.

⁵²⁵ Rehabilitation of Offenders Act 1974, s 8(5).

⁵²⁶ *Horrocks v Lowe* (n 481) 151; *Greenstein v Campaign Against Antisemitism* [2021] EWCA Civ 1006.

⁵²⁷ HL Deb 1891, vol 353, cols 891-892.

⁵²⁸ *Ibid* col 865.

⁵²⁹ See history provided in Andrew Henley, ‘Criminal records and the regulation of redemption: a critical history of legal rehabilitation in England and Wales’ (PhD Thesis, Keele University 2017).

(vi) Offer of Amends

Finally, there is statutory provision for defendants to make a formal ‘offer of amends’, This originated in the Defamation Act 1952, where it applied to ‘unintentional defamation’:⁵³⁰ where the defendant was unaware the words referred to the claimant, or the circumstances making the statement defamatory in legal innuendo cases, and took reasonable care regarding either matter.⁵³¹ The offer is to publish a ‘suitable correction’ and ‘sufficient apology’ and notify third-party re-publishers, accompanied by an affidavit of the facts relied on as making the defamation unintentional.⁵³² Acceptance barred further substantive claims. If not accepted, the defendant had a defence to future proceedings if they proved the publication was innocent and that the offer was not withdrawn and made ‘as soon as practicable’ after receiving notice of the potential claim by the plaintiff.⁵³³

This was replaced by the 1996 Act, which added to the defence the requirement that the offer includes an offer to pay compensation and costs if the parties so agree.⁵³⁴ It must also be made prior to filing a defence.⁵³⁵ Acceptance still bars future or current claims⁵³⁶ and grants the claimant rights to enforce the offer’s terms or seek judicial intervention if the parties cannot agree on certain matters (e.g., quantum or costs).

An unaccepted offer constitutes a defence unless the claimant demonstrates that the defendant ‘knew or had reason to believe’ the statement referred or was likely to refer to the claimant and that it ‘was both false and defamatory’.⁵³⁷ This essentially reverses and enhances the burden of proof. Additionally, an unaccepted offer not amounting to a defence (or not pleaded as one) can be relied on in damage mitigation,⁵³⁸ though Vick argues that it was already common practice to consider a prompt apology a weak mitigating factor.⁵³⁹

This defence could have introduced an element of satisfaction into law. It does not merely require correction, but an ‘apology’. The purpose of an apology is to admit wrongdoing to give the recipient emotional satisfaction, which seems quintessentially satisfaction. We often speak

⁵³⁰ Defamation Act 1952, s 4.

⁵³¹ Ibid s 4(5).

⁵³² Ibid s 4(3).

⁵³³ Ibid s 4(1).

⁵³⁴ Defamation Act 1996, s 2(4).

⁵³⁵ Ibid s 2(5).

⁵³⁶ Ibid s 3(2).

⁵³⁷ Ibid s 4(3).

⁵³⁸ Ibid s 4(5).

⁵³⁹ Douglas W Vick, ‘An Opportunity Lost: The United Kingdom's Failed Reform of Defamation Law’ (1997) 49 Federal Communications Law Journal 621, 641.

of being ‘entitled to an apology’ or an apology ending or settling the matter. This is the language of satisfaction.

Supporting this, the original 1952 defence was justified as ‘a reasonable compromise’ between the interests of the claimant and unintentional defamer: a

suitable statement ... *will relieve the feelings of the party aggrieved* ... Practical justice ... will be done if the person alleging he has been wronged gets a retraction or explanation, suitably published, without hitting the innocent libeller ... in pecuniary damages.⁵⁴⁰

Of course, the 1996 version ended the last part by requiring the apology to include an offer to pay damages. However, giving the claimant power to magnanimously waive damages continues the theme of satisfaction.

Other explanations are possible. A critical justification is promoting early settlement.⁵⁴¹ It was seen as beneficial to defendants,⁵⁴² to help force proper settlement discussions with a claimant who has them ‘over a barrel’ and uses the prospect of trial to extort an unfavourable settlement.⁵⁴³

This does not explain the need for apologies, however. An analogue to this defence for other civil claims, Part 36 CPR offers, also punishes claimants (in costs) for not accepting reasonable offers to settle, but does not require an apology – it lacks the same ceremonial, satisfaction-based aspect. Part 36 also does not provide a substantive defence, whereas the offer to make amends does – there is more of a sense that the claimant must see a proper apology as settling the matter, and greater judgment for failing to do so.

However, this does not necessarily mean this defence shifts the law to a reputational theory like cultural honour. Judges often treated apologies as instrumental, designed to repair damage to the claimant’s feelings or reputation, not the primary goal.⁵⁴⁴ As explained in the first chapter, other theories (including deferent reputation) might incorporate remedies associated with satisfaction if the communities’ norms understand such acts as setting the record straight. An apology is a plausible candidate since an admission of wrongdoing *by the*

⁵⁴⁰ HL Deb 1952, vol 177, col 1093 (emphasis added).

⁵⁴¹ Hence why in the modern version defendants cannot serve a defence first; Vick (n 539) fn 107.

⁵⁴² HL Deb 1992, vol 541, cols WA35-36.

⁵⁴³ Henderson (n 497) 46.

⁵⁴⁴ For example, in *Gilham* the defendant sought to rely on an apology to obtain a discount but the judge considered the apology ‘grudging, unsuitable and insufficient in terms of providing adequate vindication, restoring the claimant’s reputation and reducing the distress and upset caused to him’ – particularly as it continues to imply that the defamatory allegation was true: *Gilham v MGN Ltd* [2020] EWHC 2217 (QB) [76].

wrongdoer is more likely to convince people that the claimant was defamed than a judicial declaration. Notably, an apology without a correction is insufficient.

In any case, the defence is anomalous. It is unclear why the public would only consider an apology and correction to settle the matter where the reference to the claimant was unintentional (and, in the defence's original incarnation, where the defendant was a newspaper). Certainly, the defence never made satisfaction a core element of defamation since it is not available to all defendants. Overall, the philosophy underlying this defence is unexplored by the courts or the legislature, making it difficult to theoretically assess. It may be, like the rehabilitation provisions, based mainly in practicality rather than principle.

III. Remedies

The primary remedies for defamation are damages and injunctions. Only the former is discussed here, while injunctions are discussed in chapter 7.

(i) Damages

Historically, damages have always been the primary remedy for defamation. Damages were (and remained until recently⁵⁴⁵) a matter for the jury – who gave no reasons – guided only by vagaries like ‘[t]he law supposes that you will give such damages as you think are really equivalent to the injury sustained by the plaintiff.’⁵⁴⁶ This is problematic since the irrebuttable presumption of (at least *de minimis*) damage in libel – and the various types of slander in which damage was presumed – left little prospect of discerning how damages should be awarded. Judges had various historical powers regarding excessive judgements,⁵⁴⁷ but ‘excessive’ tended to be defined in perversity terms⁵⁴⁸ and judges rarely shed light on the factors juries should consider.⁵⁴⁹ Any attempt to guide juries (e.g. by reference to personal injury awards) were

⁵⁴⁵ Save for the limited exceptions allowing judge-led trials in some instances between 1918-1925 and post 1933: Administration of Justice Act 1920, s 2, repealed by Administration of Justice Act 1925, s 3, and more limited power enacted in Administration of Justice (Miscellaneous Provisions) Act 1933, s 6(1).

⁵⁴⁶ *Kelly v Sherlock* (1865-66) LR 1 QB 686, 691.

⁵⁴⁷ Including initial powers to arrest judgement until the claimant agreed a reasonable figure until 1622 (Mitchell (n 257) 53-54), the power to order a new trial where excessive damages indicated the jury failed to perform their function in the 18th century (54) and eventually the 1990 statute permitting judges to substitute excessive awards (Legal Services Act 1990, s 8(1)).

⁵⁴⁸ *Praed v Graham* (1889) 24 QBD 53, 55.

⁵⁴⁹ Their tendency to give radically different awards in similar cases was explained away as jurors having some greater insight which judges lacked: *Bocock v Enfield Rolling Mills* [1954] 1 WLR 1303, 1305; *Scott v Musial* [1959] 2 QB 429, 438.

actively discouraged.⁵⁵⁰ However, a smattering of guidance in the 19th and 20th century at least indicated that damages were supposed to reflect the fact of lost reputation *simpliciter* as well as any injury to feelings and other consequential effects.⁵⁵¹

The summary judgement procedure of the 1996 Act made jury trials less common, and the 2013 abolished them entirely in most cases: greatly clarifying the law. Subsequent cases clarified that defamation awards have three functions:

- 1) 'To act as a consolation to the plaintiff for the distress he suffers from the publication of the statement';
- 2) 'To repair loss to his reputation';
- 3) 'As a vindication for his reputation' – essentially damages for diminution of right.⁵⁵²

One might query the difference between repairing reputation and vindicating it. There has been some confusion over the matter, with counsel in one case suggested vindication has 'the effect of allowing the jury, even where exemplary damages were not claimed, to express their indignation', against the usual principles of tortious damages.⁵⁵³ Nevertheless, the preponderance of judicial comment treats vindication as part of the award's ability to convince others the attack was unjustified rather than a statement of juror/judicial disapproval.⁵⁵⁴

This interlinks the two functions. The repairing function refers to convincing those who have already had their opinion lowered. The vindication function focuses on convincing those who have not yet heard the statement and might do so in future. Many cases elide the two functions into one head of 'vindication ... past and future',⁵⁵⁵ but this is simply a matter of terminology. Both rest on the dubious assumption that the public finds damage awards specially convincing (over, say, a mere court declaration⁵⁵⁶), but the factual merit of this is

⁵⁵⁰ E.g. *Sutcliffe v Pressdram Ltd* [1991] 1 QB 153, 175; though ultimately, as Mitchell argues, the desire to ensure consistency in damages awards ultimately overrode this concern to a degree: Paul Mitchell, *The Making of the Modern Law of Defamation* (Hart Publishing 2005) 61.

⁵⁵¹ *Ley v Hamilton* (1935) 153 LT 384, 386.

⁵⁵² *Coulter v Sunday Newspapers Limited* [2016] NIQB 70 [97]; *Foster v Jessen* [2021] NIQB 56 [91].

⁵⁵³ *Rantzen v Mirror Group Newspapers (1986) Ltd* [1994] QB 670, 690.

⁵⁵⁴ *Sutcliffe v Pressdram Ltd* (n 550) 171, the trial judge described the process of vindication to the jury as the claimant's ability to 'demonstrate to others that the plaintiff has been (if you find for her) defamed, and she can say: 'I was awarded X pounds by a jury' if this matter is raised again, 'to show that I was untruthfully accused of the matters I was accused of'. Lord Hailsham in *Broome v Cassell & Co Ltd* [1972] AC 1027, 1071. emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a by-stander of the baselessness of the charge': *Broome v Cassell & Co Ltd* [1972] AC 1027, 1071.

⁵⁵⁵ *Jones v Pollard* [1996] EWCA Civ 1186, [1997] EMLR 233, 243.

⁵⁵⁶ Though one judge has suggested that a mere judgment does little for vindication as no one is likely to read it: *Flood v Times Newspapers* [2013] EWHC 4075 [52] (Davies J).

beyond this thesis' scope. The damage award is therefore bipolar, since it is apparently supposed to reflect the change in how people (past and future) will treat the claimant because of exposure to the statement. This can be seen from a sociality perspective (loss of social bonds), but also deferent reputation: it may reflect the extent to which people are responding to the statement in a manner which has in the past, or risks in the future, reconstituting the claimant's identity.

Despite this, injury to feelings is also a key function. This is the nail in the coffin for proprietary reputation, which cannot justify any non-pecuniary damages. However, it also speaks to the nature of the reputational interest protected more generally. Injury to feelings could just be treated as a mere consequential effect of the damage to reputation. This is the approach one might expect of a public-interest-based theory using the claimant's interests as a proxy for the public good.

Instead, the court's approach singles this consequence out and labels it a core function. Indeed, some cases suggest it is the most important function where the defendant made no attempt to prove the statement was true (making vindication less relevant).⁵⁵⁷ This shows an attachment to a theory which privileges reputation's internal dimension, not just its external benefits to the public.⁵⁵⁸ It also hints that this internal dimension is one focusing on the target's feelings directly, e.g. because their identity or honour is damaged, rather than as a consequence of some other bipolar loss (like exclusion and ostracization in sociality theory).

This creates a strong impression that defamation is aimed at protecting deferent reputation. As summarised below, this chapter's analysis indicates that deferent reputation, epistemic reputation, and social norm theory are all contenders for the best fit, but only deferent reputation can explain this privileging of reputation's internal dimension. The emotional harm is part of the fundamental wrong – not just a proxy for the public interest: which looks like concern for the claimant's dignity.

(ii) Declarations of Falsity and Corrections

Curiously, declarations of truth, or requiring corrections, was never a historical defamation remedy despite truth's fundamentality to the law. Only the 1996 Act created a power to force

⁵⁵⁷ *Monroe v Hopkins* (n 329) [79]; *Lisle-Mainwaring v Associated Newspapers Ltd* [2017] EWHC 543 (QB) [22].

⁵⁵⁸ The latter being the case for epistemic reputation and social norm theory.

corrections,⁵⁵⁹ but only in summary judgment cases⁵⁶⁰ or where the claimant accepted an offer of amends. Perhaps, a finding of falsity is inherent in the claim succeeding, but not in every case. For example, a defendant relying on honest opinion might prove the grounding fact true but still fail because the claimant proves malice.

There is also a ‘remedial gap’⁵⁶¹ where the defendant cannot prove truth but has the defence of privilege or public interest. There, the claimant’s reputation might still be vindicated by a declaration that the statement was not proved true even if damages are unavailable, and this would probably have limited chilling effect.

Perhaps because of this, some courts applying *Reynolds* took into account the method of publication and whether it allowed easy correction or qualification given new facts. This involved effectively treating easily accessible publications like internet articles as ‘continuous publications’, for which the defendant must reasonably believe ‘continued’ publication is in the public interest for the duration of visibility.⁵⁶² For example, in *Flood*, *Reynolds* was deemed inapplicable to an online publication which the defendant failed to modify once the claimant was cleared of the relevant allegations.⁵⁶³ The defence applied to the print newspaper, conversely.

This approach is harder under the 2013 Act: the single publication rule makes it trickier to treat online publications as continuous. However, the High Court in *Lachaux* indicated that, for publications falling beyond the single publication rule, the court might deny the public interest defence to defendants who fail to correct online articles without a ‘credible’ basis to believe the judgment wrong which is clarified by editing the original defamatory statement.⁵⁶⁴

This was confirmed in *Banks*,⁵⁶⁵ where the defendant initially had a reasonable belief which was later rendered unreasonable by statements by the National Crime Agency and Electoral Commission. There, the court held that the public interests defence was available for the first period, but not the second. However, it noted that ‘serious harm’ also had to be assessed

⁵⁵⁹ Accompanied, for whatever reason, by an apology.

⁵⁶⁰ Defamation Act 1996, s 9(1)(b).

⁵⁶¹ Infirm, ‘Libel, Damages and the “Remedial Gap”: a declaration of falsity?’ (*Infirm.org*, 27 July 2013) <<https://infirm.org/2013/07/27/libel-damages-and-the-remedial-gap-a-declaration-of-falsity/>> accessed 20 June 2022.

⁵⁶² *Lachaux* (High Court) (n 360) [159].

⁵⁶³ *Flood v Times Newspapers Ltd* [2010] EMLR 8; approved post-2013 in *Lachaux* (High Court) (n 360) [159].

⁵⁶⁴ *Lachaux* (High Court) (n 360) [203].

⁵⁶⁵ *Banks v Cadwalladr* [2023] EWCA Civ 219.

separately for each period: on the facts, the second period of continuous publication added insufficient harm over the first.

This indicates that it will be rare for a failure to correct to sound in defamation liability, since even if the public interest defence is unavailable, the ‘serious harm’ will likely be complete by the time the defence is lost. Even if the defendant is liable, this is an inefficient, roundabout way of achieving the same effect as a declaration of falsity or order for corrections. This puts the law at odds with theories which see a declaration of truth as a central remedy (particularly epistemic reputation).

The explanation is likely historical accident. Defamation remedies were developed within the context of general tortious remedies, and courts do not tend to create action-specific remedies. No greater significance should be drawn from the absence of these remedies than that, therefore. Only Parliament could change this, and, for whatever reason, they did not think this necessary or worthwhile until recently. The 2013 Act does not create a declaration of falsity per se, but s.12 allows courts to order defendants to publish a summary of the judgment. This is functionally equivalent to an order for corrections. Of course, since it only applies where the claimant succeeds, the remedial gap remains in cases where the public interest or qualified privilege defences apply.

IV. Overall Analysis

Unsurprisingly, defamation’s long history reveals a complex, potentially inconsistent picture of its central notion of reputation. Slander’s history indicates it was not originally intended to directly protect reputation. Nevertheless, conclusions can be drawn about the law’s broad fit with certain theories throughout its history and into the modern day.

Among the poorest fit is proprietary reputation. Though early slander was potentially consistent, once libel developed, the law veered away. The actionability requirements fail to distinguish between marketable and non-marketable areas of life,⁵⁶⁶ and the consensus requirement assigns no value to reputation in niche or sub-markets. A law based on proprietary reputation would not treat truth as delineating the scope of the reputational interest, as the present law has always done, nor provide such expansive (if any) defences to protect free

⁵⁶⁶ Save perhaps in the continued, anomalous requirement of special loss in non-exempted slander cases, which are exceptionally rare.

speech. It would also not provide non-pecuniary damages, and yet these are the core of defamation's damages award.

Virtue and perceived aristocratic honour could theoretically fit defamation's actionability requirements, and virtue honour is potentially consistent with the defences. However, the reasonable person has egalitarian values, whereas both theories rely on ascriptive conceptions of social life. Both perceived and Arthurian aristocratic honour fail to account for defamation's defences: neither treat truth as an absolute delineator of the reputational interest's scope, and cannot countenance reputation being overridden by speech.

Cultural honour presents an interesting fit with the actionability requirements, since it is strictly egalitarian, fits the single meaning requirement and provides insight into why the law is not solely concerned with normative statements – particularly ridicule. However, it cannot explain *Thornton*, and the law's approach to truth and free speech defences is utterly anathema. Its initial compatibility likely stems from civil and criminal libel developing in tandem and borrowing ideas from each other, given the latter was concerned with cultural honour.

Sociality can also accommodate the basic actionability requirements, including the potential actionability of normative, non-normative, and ridicule-based statements and the consensus/single meaning requirements. Sociality struggles, however, to explain the seriousness thresholds. It does not explain why the *Thornton* threshold can be fulfilled by behaviour not affecting social ties, nor the lack of any such requirement within the *Jameel* and s.1(1) thresholds. Even more significantly, while sociality is theoretically consistent with the free speech-based defences, it clashes with how truth delineates the scope of the reputational interest (with some practical caveat for the reverse burden of proof) – sociality would treat it as merely relevant or a necessary but insufficient condition.

Turning to the consequentialist theories, epistemic theory is consistent with the basic actionability requirements, and its consequentialist nature fits well with the balancing, free speech-centred nature of the *Jameel* and s.1(1) thresholds and the defences. It fits less well with *Thornton*, as this moves the law away from unipolarity and denies the importance of how audience members use information on a purely internal basis – something epistemic reputation privileges along with other uses of information. Of course, the practical impact of *Thornton* is questionable, which limits this concern somewhat. Its greatest flaw is failing to explain the focus on emotional harm at the remedies stage as a core interest, rather than mere consequential loss. It implies an internal dimension to the tort, for which this theory cannot account.

Social norm theory similarly fits well with the basic actionability requirements and judicial language often echoes social norm-based ideas and themes. It struggles to account for the actionability of ridicule, though as previously noted this may be accidental cross-pollination from criminal libel. Given its consequentialist nature, it is also consistent with the three seriousness thresholds, truth as a delineating defence, and the speech-based defences. Like epistemic theory, however, it cannot explain how the emotional harm award emphasises reputation's internal aspect.

This leaves deferent reputation which, like social norm theory, commonly sees its themes bandied about in judicial language. This theory mostly fits the actionability requirements, though some speculation is required for the actionability of non-normative, non-ridicule-based statements. Since deferent reputation can countenance weighing reputation against other incommensurate interests like speech, it is also consistent with *Jameel*, s.1(1) and the speech-based defences. It fits particularly well with *Thornton*: some minimal external expression that society has sided with the attacker (or ought to side with the attacker, given the standard is based on the reasonable person) identifies the threshold where the target's identity can be wrongfully reconstituted. It also fits truth bounding the reputational interest's scope: a person's identity cannot be reconstituted by completely true statements (subject to rehabilitation). The reversed burden can be explained by the law fearing for the risk of such damage more than it fears the chilling effect on true attacks.

Finally, deferent reputation best fits the courts' approach to damages. Deferent reputation focuses on the target's internalisation of the attack into their identity and the loss of autonomy and emotional distress this causes. Treating emotional harm as a core head of damages alongside the need to vindicate reputation therefore makes perfect sense.

The above paints a complicated picture in which no one theory is a perfect fit. This is unsurprising: defamation is centuries old and constantly evolved to suit changing values, social conditions and legal structures. Some features are completely inexplicable from a reputational perspective and must be chalked up to political compromise or other factors. Nevertheless, this chapter's analysis indicates the best case can be made for defamation embodying deferent reputation. It is superior to its two consequentialist competitors because it provides a neat explanation of the internal dimension of defamation's remedies.

The expansion of the free speech-based defences, however, indicates diminishing prominence to deferent reputation. The tort's history is a tale of speech gaining increasing

power to outweigh reputation, raising the question of how long defamation law will truly see reputation as an internal right of equal theoretical value to speech. As this occurs, the law moves gradually towards one of the two consequentialist theories – seeing reputation as just one facet of the public interest. However, this should not be overstated: at present, the defences remain limited, and reputation’s power remains strong.

Chapter 5: Misuse of Private Information

I. Introduction to Misuse of Private Information

(i) A Brief History

As a distinct action, MOPI is young. However, it derives from the older equitable breach of confidence action, recognised in the mid-nineteenth century.⁵⁶⁷

a) Limitations of Breach of Confidence

Breach of confidence has three requirements, that: the information was ‘confidential’; the defendant owed a duty to keep the information confidential; and breach or threatened breach.⁵⁶⁸ It was commonly used to protect privacy prior to the Human Rights Act 1998’s (‘HRA’) enactment, absent any other suitable action. However, such attempts met with variable success due to three obstacles.

Firstly, ‘confidential’ means ‘relatively secret’⁵⁶⁹ or ‘outside of the public domain’.⁵⁷⁰ While the degree of secrecy required varied depending on the information’s nature, forum and the number of people likely to access it,⁵⁷¹ the law was completely uninterested in protecting information ‘freely available to all’⁵⁷² or in a commonly accessed public source.⁵⁷³ Later, the ‘secret’ standard was softened for information known in one forum but not another, where the defendant threatened to publish in the latter,⁵⁷⁴ but secrecy remained the touchstone. So, ‘confidence’ was distinct from ‘privacy’. Claimants relying on confidence to protect well-known but private-by-nature information (e.g., sexual information) encountered often fatal obstacles. In the burgeoning internet age, privacy and secrecy increasingly came apart – with large quantities of information being, theoretically, globally accessible.

The secrecy requirement, combined with the maxim that equity does not act in vain, impacted remedies. Where a defendant successfully made confidential information public, no injunction to prevent further dissemination was available.⁵⁷⁵ Since the action is purely

⁵⁶⁷ *Prince Albert v Strange* (1849) 2 De g & Sm 652.

⁵⁶⁸ *Coco v Clark* [1968] FSR 415, 419-21.

⁵⁶⁹ *Stephens v Avery* [1988] Ch 449, 454.

⁵⁷⁰ i.e., not known to a ‘substantial number’: *Coco v Clark* (n 568) 419-20.

⁵⁷¹ *Attorney General v Guardian Newspapers* [1990] AC 109, 282.

⁵⁷² *Attorney General v Guardian Newspapers* [1987] 1 WLR 1248, 1269.

⁵⁷³ *Franchi v Franchi* [1967] RPC 149.

⁵⁷⁴ *Attorney General v Guardian Newspapers* (n 571) 260.

⁵⁷⁵ *Attorney General v Guardian Newspapers* (n 572) 1269.

equitable, common law damages are unavailable – instead, equity provides only damages *in lieu* (which requires an injunction to be available in principle⁵⁷⁶) and an account of profits (which is not useful if the defendant does not profit). There were considerable remedial lacunae.

Secondly, the obligation of confidence complicated privacy claims. An obligation arose automatically in certain relationships, like fiduciary, doctor-patient and solicitor-client,⁵⁷⁷ but not general social relationships (other than spouses⁵⁷⁸ and possibly other sexual relations⁵⁷⁹).⁵⁸⁰ Absent an automatic duty, the claimant had to establish that the defendant realised or ought to have realised that the information was provided in confidence.⁵⁸¹

This created two issues. Firstly, the courts often rejected that defendants ought to realise they were subject to confidence over information disclosed in public places.⁵⁸² Secondly, there was ambiguity over when a stranger was bound outside cases of illegal acquisition⁵⁸³ or knowing, dishonest participation in another's breach.⁵⁸⁴ There were *dicta* in later cases that an accidental acquirer – a person who obtained an 'obviously confidential document' which blew out of a window – owed a duty,⁵⁸⁵ but no case was ever decided on this basis prior to MOPI's crystallisation.⁵⁸⁶ This likely deterred privacy claims in indirect or non-existent relationship cases.

The third barrier was that the 'iniquity' defence rendered information about 'grossly immoral' events non-confidential.⁵⁸⁷ This was initially significant given that, for much of the

⁵⁷⁶ *Proctor v Bayley* (1889) 42 ChD 390; *Malone v Metropolitan Police Commissioner* [1979] Ch 344, 360-61.

⁵⁷⁷ *Boardman v Phipps* [1967] 2 AC 46, 62.

⁵⁷⁸ *Argyll v Argyll* [1967] Ch 302, 329F-30A.

⁵⁷⁹ Cf *M&N MacKenzie v News Group Newspapers* (High Court, 18 January 1988) (no duty between homosexual lovers), *Stephens v Avery* (n 569) 453-54 (comment that non-traditional sexual relations could give rise to a duty) and *Barrymore v NGN* [1997] FSR 600, 603 (arguable case for a duty between homosexual lovers, *dicta* that all 'kiss and tell' arrangements involve breach of confidence).

⁵⁸⁰ *De Maudsley v Palumbo* [1996] FSR 447, 458.

⁵⁸¹ *Coco v Clark* (n 568).

⁵⁸² *De Maudsley v Palumbo* (n 579) 458.

⁵⁸³ *Francome v Mirror Group Newspapers* [1984] 1 WLR 892.

⁵⁸⁴ With some dispute over whether constructive knowledge sufficed: cf *Thomas v Pearce* [2000] FSR 718 and *Valeo Vision SA v Flexible Lamps Ltd* [1995] RPC 205.

⁵⁸⁵ *Attorney General* (n 571) 281; *Malone* (n 576) 360.

⁵⁸⁶ Though in *Shelley Films v Rex Features* [1994] EMLR 134, an interim injunction was acquired on the basis that there was at least a serious issue to be tried as to whether a stranger had acquired a duty. See also recently *Clearcourse Partnership Acquireco Ltd v Jethwa* [2022] EWHC 1199 (QB).

⁵⁸⁷ *Glyn v Weston Feature Film Co* [1916] 1 Ch 261, 269. Though separate immorality did not relieve a person's duty to keep other matters confidential, such as in *Argyll v Argyll* (n 578) 332G, where the court denied that a spouse's adultery gave the innocent spouse free reign to publish confidential information about their married life.

20th century, extramarital and homosexual relationships were considered ‘grossly immoral’.⁵⁸⁸ However, this abated as the courts accepted society was losing a shared code of sexual morality: some judges expressed reluctance to apply their own ‘personal moral views’.⁵⁸⁹ The defence of iniquity eventually morphed into a general ‘public interest speech’ defence,⁵⁹⁰ similar to MOPI’s second stage.

Overall, while the confidence action somewhat broadened in a privacy-friendly manner, the need for secrecy always made the possibility of protecting privacy this way restrictive.

b) MOPI’s Germination

The HRA, s.6, made it unlawful for a public authority to act incompatibly with Convention rights: including Article 8 ECHR. That provides everyone ‘the right to respect for his private and family life, his home and correspondence’ and bars interference with the exercise of this right by public authorities save in accordance with law for certain purposes.⁵⁹¹

‘Public authority’ includes courts and tribunals.⁵⁹² A speculated consequence was ‘indirect horizontal effect’, whereby judges were obliged to develop existing law to ensure Convention rights are enforceable against private individuals.⁵⁹³ Failure would be to act incompatibly with the Article 13 ECHR right to an effective remedy. The judiciary appeared to accept this in several confidence cases, which rapidly led to its expansion.⁵⁹⁴ Initially, Article 8 was deemed relevant to whether the information was confidential,⁵⁹⁵ but this evolved further in the seminal 2004 decision in *Campbell*.⁵⁹⁶

Campbell concerned a news publication about the claimant celebrity leaving a Narcotics Anonymous meeting onto a public street, with accompanying photos and details about her condition. That some of the information was obtained from public places and sources, was not fatal to the confidence claim. The Lords held that the action had

changed its nature ... Information about an individual’s private life would not, in ordinary usage, be called “confidential”. The more natural description today is that

⁵⁸⁸ *M&N MacKenzie v News Group Newspapers* (n 579) **Error! Bookmark not defined.**

⁵⁸⁹ *Stephens v Avery* (n 569) 454.

⁵⁹⁰ *Attorney General v Guardian Newspapers* (n 571) 282.

⁵⁹¹ European Convention on Human Rights, Article 8(1)-(2).

⁵⁹² Human Rights Act 1998, s 6(3).

⁵⁹³ William Wade, ‘Horizons of Horizontality’ [2000] LQR 217, 218.

⁵⁹⁴ *Douglas v Hello!* [2001] QB 967, 998; *A v B* [2004] 2 AC 406, [4]; *Campbell v MGN Ltd* [2004] 2 AC 457 [114] (Lord Hope) and [132] (Baroness Hale).

⁵⁹⁵ *Douglas v Hello!* (n 594).

⁵⁹⁶ *Campbell v MGN Ltd* (n 594).

such information is private. The essence of the tort is better encapsulated now as misuse of private information.⁵⁹⁷

Lord Nicholls elucidated what would ultimately be accepted as the test for MOPI:⁵⁹⁸

- 1) Does the claimant have a reasonable expectation of privacy?
- 2) Is the defendant's intrusion into the claimant's Article 8 rights justified by reference to their Article 10 rights?⁵⁹⁹

The information and photograph in this case passed the first limb despite being publicly available information: since it related to medical treatment, it was quintessentially private.

Campbell did not create a separate action, but subsequent cases distinguished MOPI's requirements in substance.⁶⁰⁰ Crucially, the secrecy requirement was removed, the claimant's status as someone used to intrusion was deemed irrelevant,⁶⁰¹ and the need for a pre-existing duty vanished: it was never controversial that a stranger who acquired private information would breach the claimant's reasonable expectation if they disclosed it.⁶⁰² Ultimately, the Court of Appeal in the 2015 *Vidal-Hall* case confirmed that MOPI was not only distinct from breach of confidence, but a different form of action – a tort⁶⁰³ – grounded in Article 8 rights to respect for private life.⁶⁰⁴

(ii) The Perceived Interaction of MOPI and Reputation

Traditionally, defamation is perceived as the reputation-protecting tort, while MOPI protects (at least some) privacy interests: defined here as the right to be left alone and to control and limit access to information about the self.⁶⁰⁵ Reputation has no explicit place in the two-stage *Campbell* test. Nevertheless, the action has been criticised as a backdoor around defamation's limitations for claimants seeking to protect reputation.⁶⁰⁶ Certainly, there is overlap between a privacy-protecting law and reputational issues. As Heymann puts it, privacy

⁵⁹⁷ Ibid [14].

⁵⁹⁸ Lord Hope set out a different test which did not ultimately gain traction.

⁵⁹⁹ Ibid [21].

⁶⁰⁰ Cases for several years afterwards referred to the action as a 'branch' of confidence: *Douglas v Hello* [2008] 1 AC 1, [255].

⁶⁰¹ *HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWCA Civ 1776, [2008] Ch 57 [115].

⁶⁰² *Campbell v MGN Ltd* (n 594) [85]; *Tchenguiz v Imerman* [2010] EWCA Civ 908, [68].

⁶⁰³ *Vidal-Hall v Google* [2015] EWCA Civ 311, [2016] QB 1003 [21]-[22]

⁶⁰⁴ Ibid [21].

⁶⁰⁵ Daniel Solove, *Understanding Privacy* (Harvard University Press 2008) 19-24; NA Moreham, 'The Nature of the Privacy Interest' NA Moreham and Sir Mark Warby (eds), *Tugendhat and Christie: The Law of Privacy and the Media* (3rd edn, OUP 2016) 45-6.

⁶⁰⁶ Richard Parkes, 'Privacy, Defamation, and False Facts' in NA Moreham and Mark Warby (eds), *Tugendhat and Christie: The Law of Privacy and the Media* (3rd edn, OUP 2016) 359.

laws ‘can involve misimpressions created as to another’s associations or affiliations, which can have reputational effects.’⁶⁰⁷

MOPI has one substantive and two procedural advantages for claimants. Substantively, MOPI has no strict defence of truth – though truth is relevant to the second stage.⁶⁰⁸ Procedurally, MOPI’s limitation period is six years,⁶⁰⁹ compared to defamation’s one-year limitation period.⁶¹⁰ Additionally, the rule in *Bonnard v Perryman* against interim injunctions does not apply to MOPI.⁶¹¹ So, it is important to map out the role of reputation in the substantive, procedural, and remedial law of MOPI.

Two questions underpin whether it is legitimate to characterise MOPI as a ‘way around’ defamation’s limits. The first is whether MOPI inherently protects reputational interests. The second is what kind of reputational interest MOPI protects and whether this is distinct from defamation. If so, MOPI falls within English law’s assumption that it is legitimate to provide overlapping protection where laws protect different values.⁶¹²

To answer these questions, the remainder of this chapter adopts the following structure. The following section examines how the rights within Article 8 ECHR are defined in European Court of Human Rights (‘ECtHR’) jurisprudence, considering the extent to which they incorporate any notion of reputation. The third section explores what aspects of Article 8 MOPI is designed to protect, to determine if it logically includes any Article 8 reputational interests – if not, there is no issue of overlap. The fourth section examines how MOPI’s first stage is established and whether this embodies reputational protection. The fifth section examines the second limb of the MOPI test, balancing against Article 10. The final section examines the role of reputation in MOPI remedies.

II. Reputation in Article 8 Jurisprudence

Article 8 ECHR protects the right of all persons to ‘respect for his private and family life, his home and his correspondence’.⁶¹³ It is not absolute, and can be limited as is ‘in accordance with the law and is necessary in a democratic society’ for a variety of reasons. This includes

⁶⁰⁷ Heymann (n 29) 1342.

⁶⁰⁸ Defamation Act 2013, s 2.

⁶⁰⁹ Limitation Act 1980, s 2.

⁶¹⁰ *ibid* s 4A.

⁶¹¹ Though there is some controversy over this, as will be discussed in the final chapter.

⁶¹² *NT1 & NT2* (n 11) [61].

⁶¹³ European Convention on Human Rights, art 8(1).

‘the protection of the rights and freedoms of others’:⁶¹⁴ particularly the Article 10 right to freedom of expression.

Article 8 is split into four separate rights:⁶¹⁵ the rights to respect for private life, family life, the home, and correspondence. The right to family life refers to ‘mutual enjoyment’ of other family members in ordinary relationships,⁶¹⁶ maintenance and preservation of family ties,⁶¹⁷ family livelihood and ancestral values.⁶¹⁸ Protection of the ‘home’ refers to the right to maintain a dwelling or shelter in the manner and quality in which one is accustomed and comfortable.⁶¹⁹ The right to correspondence involves the right not to have one’s correspondence (electronic or otherwise) opened or monitored, and to maintain confidentiality of correspondence.⁶²⁰ There is no explicit judicial statement of reputation’s role in any of these rights, though reputation seems at least relevant to family life.⁶²¹ One case, *Armoniene*,⁶²² strongly indicates that reputation has a role in family rights.

Private life, meanwhile, is broadly defined in terms of whatever rights and interests are needed to ‘ensure the development, without outside interference, of the personality of each individual in his relations with other human beings’.⁶²³ This includes (non-exhaustively) a right to bodily integrity,⁶²⁴ express sexuality at work;⁶²⁵ and be protected from undignified treatment.⁶²⁶ Importantly for present purposes, control over private and personal information falls within the scope of ‘private life’.⁶²⁷

Meanwhile, both domestic and ECtHR jurisprudence recognises ‘the right to reputation’⁶²⁸ as ‘an element of private life’.⁶²⁹ This stems from the fact that ‘private life’ is

⁶¹⁴ Ibid art 8(2).

⁶¹⁵ David Hoffman and John Rowe, *Human Rights in the UK* (4th edn, Pearson 2013) 258.

⁶¹⁶ *Olsson v Sweden* Application no 10465/83 (1989) 11 EHRR 259, para 59.

⁶¹⁷ *Kroon v Netherlands* Application no 18535/91 (1995) 19 EHRR 263.

⁶¹⁸ *G & E v Norway* Application no 9278/81 and 9415/81 (1983) 35 DR 30.

⁶¹⁹ *R (Coughlan) v N&E Devon Health Authority* [2000] All ER 850; *Powell and Rayner v United Kingdom* Application no 9310/81 (1990) 12 EHRR 355.

⁶²⁰ *Herczegfalvy v Austria* Application no 10533/83 (1993) 15 EHRR 437.

⁶²¹ Learning reputation-damaging facts about a loved one could plausibly damage family ties and relationships. Domestic jurisprudence has hinted at this: *Khuja v Times Newspapers* [2017] UKSC 49, [34(3)].

⁶²² *Armoniene v Lithuania* [2009] EMLR 7.

⁶²³ *Botta v Italy* (1998) 26 EHRR 241 para 32.

⁶²⁴ *Stoicescu v Romania* Application no 9718/03 [2011] ECHR 1193.

⁶²⁵ *Smith and Grady v United Kingdom* Application Nos 33985/96 and 33986/96 (2000) 29 EHRR 493.

⁶²⁶ *Wainwright v United Kingdom* Application No 12350/04 (2007) 44 EHRR 40.

⁶²⁷ *S and Marper v United Kingdom* Application Nos 30562/04 and 30566/04 [2008] ECHR 1581; accepted in domestic jurisprudence in *Clift v Slough BC* [2010] EWCA Civ 1484.

⁶²⁸ *Chauvy v France* Application No 64915/01 (2005) 41 EHRR 29 para 70; *Axel Springer v Germany* Application no 39954/08 [2012] EMLR 15 para 83; *Radio France v France* Application no 53984/00 (2005) 40 EHRR 29 para 31.

⁶²⁹ *Clift* (n 627) [32].

intended to ensure human development in the context of their relations with others, and reputation is a tool humans use to choose associations.⁶³⁰ The ECtHR acknowledges a ‘zone of interaction of a person with others, even in a public context, which may fall within the scope of “private life”.’⁶³¹ Accordingly, disclosures relating to the claimant’s public, business, or work life might impact upon their private life despite not concerning ‘private information’ per se.

However, just because reputation is ‘part’ of private life does not necessarily make it a free-standing right under Article 8. After all, reputation may be of interest to the ECtHR only when there is an incidental overlap with privacy. Many ECtHR cases assert that reputation is part of Article 8,⁶³² often subject to stock limitations that the act complained of must have sufficiently serious effect and impact on private life,⁶³³ without much analysis of its nature or distinctiveness.

The two cases exploring this issue give conflicting answers. The first is *Pfeifer*, which stated that

a person’s reputation, even if that person is criticised in the context of a public debate, forms part of his or her personal identity and psychological integrity and therefore also falls within the scope of his or her “private life”.⁶³⁴

This implies that reputation, even public reputation, is a free-standing right since even public aspects of personhood form part of personal identity and are harmed by reputational attacks. This views the ‘self’ as socially constituted: personal identity is (partly or wholly) constituted by internalising different external perspectives.⁶³⁵ When someone hears criticism, they internalise and are altered by it. The *Pfeifer* approach, therefore, mirrors Post’s dignity theory – implying deferent reputation plays a role in Article 8.

Conversely, the ECtHR in *Karakó* rejected the idea that reputation is a free-standing right. Rather, it argued, reputation is protected under Article 8 only when the attack is ‘such a

⁶³⁰ Heymann (n 29) 1344.

⁶³¹ *Pfeifer v Austria* Application No 12556/03 (2009) 48 EHRR 8 para 33.

⁶³² E.g. *Chauvy* (n 628) para 70; *Radio France* (n x) para 31; *Lindon v France* Application no 21279/02 (2005) 41 EHRR 14 para O-18.

⁶³³ *Axel Springer* (n 628) paras 83-4.

⁶³⁴ *Pfeifer* (n 631) para 35.

⁶³⁵ Post (n 8) 708.

serious interference with his private life as to undermine his personal integrity.’⁶³⁶ Its explanation of the scope of private life is interesting:

In addressing this problem, the Court reiterates that “private life” includes personal identity. The Court further observes that the Convention ... extends the protection of private life to the protection of personal integrity. This approach itself results from a broad interpretation of art.8 to encompass notions of personal integrity and the free development of the personality.⁶³⁷

Regarding the link between private life and reputation, the court explained:

the references to personal integrity in the Von Hannover judgment reflect a clear distinction, ubiquitous in the private and constitutional law of several Member States, between personal integrity and reputation, the two being protected in different legal ways. In the legislation of several Member States, reputation has traditionally been protected by the law of defamation as a matter related primarily to financial interests or social status.

The court went onto explain that

personal integrity rights falling within the ambit of art.8 are unrelated to the external evaluation of the individual, whereas in matters of reputation, that evaluation is decisive: one may lose the esteem of society – perhaps rightly so – but not one’s integrity, which remains inalienable.⁶³⁸

This is a direct rejection of Post’s dignity theory, denying that people generally internalise their external reputation to form their identity – loss of reputation is not accompanied by a loss of integrity. Nevertheless, the court acknowledged that a reputational attack could be so serious that it affects integrity. There, Article 8 would require protection to extend to reputation. But, what makes an attack sufficiently ‘serious’? The court was vague, but noted that in previous cases protecting reputation involved allegations ‘of such a seriously offensive nature that their publication had an inevitable direct effect on the applicant’s private life’.⁶³⁹ Guidance might be drawn by examining the two cases cited by the court in *Karakó* in support of this.

In the first, *Petrina*,⁶⁴⁰ the applicant was a politician falsely accused of collaborating with the Communist secret police, but had no effective remedy against their accuser. The ECtHR concluded that ‘the disputed comments were aimed directly at the applicant’s person and not

⁶³⁶ *Karakó v Hungary* Application No 39311/05 (2011) 52 EHRR 36.

⁶³⁷ *Ibid* para 21.

⁶³⁸ *ibid* para 23.

⁶³⁹ *Ibid*.

⁶⁴⁰ *Petrina v Romania* Application No 78060/01 (ECtHR, 6 April 2009).

at his professional capacities'.⁶⁴¹ Given their complete lack of factual basis, the law disproportionately favoured speech over reputation by providing no effective remedy.

In the second, *Armoniene*,⁶⁴² a newspaper alleged that the applicant's (now deceased) husband was HIV+ and had an affair with a HIV+ person. The applicant alleged that a damages cap imposed by Lithuanian law on certain defamation and insult claims failed to adequately protect the husband's reputation and the applicant's family rights. The court noted that private life includes 'the right to establish and develop relationships with other human beings'.⁶⁴³ It went on to explain that

The disclosure of [personal] data may dramatically affect his or her private and family life, as well as the individual's social and employment situation, by exposing that person to opprobrium and the risk of ostracism.⁶⁴⁴

Here, this possibility was heightened since the family lived in a rural area, increasing the likelihood that the information would be known by those close to the family and leading to humiliation and exclusion. So, the court concluded there was 'interference with the family's right to privacy' under Article 8.⁶⁴⁵

Petrina provides little guidance on what makes an allegation serious enough to amount to Article 8 interference. It hints, however, at a distinction between reputational attacks which harm the target in their personal life versus their professional or political sphere. This is reinforced by *Karakó* itself, which concerned a politician attacked in his political capacity.

Armoniene, meanwhile, is more illuminating. The reasoning stresses reputation's role in allowing people to create and maintain social ties in a manner strongly evoking sociality theory. This makes sense, as some theories on why privacy is a fundamental human interest also rely on sociality: control over one's personal information is necessary to allow its use as 'moral capital' to show trust and thereby cultivate relationships or set social boundaries.⁶⁴⁶

Combined with *Petrina*'s distinction between personal and professional life, this indicates that, under the *Karakó* approach, a reputational attack falls within Article 8 if it harms the

⁶⁴¹ Ibid para 46.

⁶⁴² *Armoniene v Lithuania* (n 622).

⁶⁴³ Ibid para 35.

⁶⁴⁴ Ibid para 40.

⁶⁴⁵ Ibid [42].

⁶⁴⁶ E.g. Nicholas Barber, 'A Right to Privacy?' [2003] PL 602, 604; James Rachels, 'Why Privacy is Important' [1975] Phil & Pub Aff 323, 326; Robert Gerstein, 'Intimacy and Privacy' in Ferdinand Schoeman (ed), *Philosophical Dimensions of Privacy: An Anthology* (CUP 1984) 271.

target's capacity to make and maintain strong ties. It might be argued that *Armoniene's* reference to 'employment situation' might extend Article 8 into some weak ties. However, many people rely on their work environment for social relationships, so the argument is not concrete.

There is no unequivocal statement from the ECtHR on whether the *Karakó* or the *Pfeifer* approaches is correct. On one hand, *Karakó* has considerable foundations in the established requirement that attacks on reputation must operate in 'a manner causing prejudice to personal enjoyment of the right to respect for private life' before Article 8 is triggered.⁶⁴⁷ This implies a split between external evaluation and self-constitution: otherwise, all reputational attacks would prejudice personal enjoyment of private life by virtue of their impact on personal identity. It also fits the seemingly deliberate omission of 'reputation' from the final draft of Article 8,⁶⁴⁸ and the fact that it post-dates *Pfeifer*.

On the other hand, there are *dicta* in at least one subsequent ECtHR case that reputation protection follows automatically from Article 8 in a way which evokes Post's dignity theory. In *Someşan*, the ECtHR cited *Pfeifer* in support of the contention that 'it has already been established in its case-law that 'private life' extends to aspects relating to personal identity and reputation'.⁶⁴⁹ *Karakó* was not cited, though it could be argued that it remains consistent given the ECtHR only referred to 'aspects' relating to reputation. While the case for *Karakó* being the correct approach is strong, therefore, there remains some ambiguity.

Whichever approach is adopted, Article 8 contains some protection for at least one form of reputational interest. If *Pfeifer*, Article 8 requires protection for deferent reputation as an incidental part of the privacy interest. National law must provide a remedy where the target is likely to internalise a reputational attack. If *Karakó/Armoniene*, then Article 8 protects the sociality interest in strong ties. National law must provide a remedy for reputational attacks likely to affect an individuals' ability to form and maintain these ties.

So, as a partial implementation of Article 8, MOPI could provide non-incidental protection to reputational interests. Since the previous chapter argued that defamation fits poorly with sociality, there is potential for an Article 8-embodying law to protect a different aspect of

⁶⁴⁷ *Axel Springer* (n 628) para 83

⁶⁴⁸ Tanya Aplin and Jason Bosland, 'The Uncertain Landscape of Article 8 of the ECHR: the Protection of Reputation as a Fundamental Human Right?' in Andrew T Kenyon (ed), *Comparative Defamation and Privacy Law* (CUP 2016) 265.

⁶⁴⁹ E.g. *Someşan v Romania* Application No 45543/04 [2013] ECHR 1150 para 23.

reputation. Simultaneously, since defamation appears concerned with deferent reputation, there is also potential for unprincipled overlap. Of course, since MOPI only implements part of Article 8, and the ECtHR merely requires some remedy for some reputational attacks (which could be done through defamation alone), it may conversely be the case that MOPI does not protect reputation. This will now be examined.

III. The Nature of the Interests in MOPI

(i) Is Reputation Relevant?

If MOPI does not protect those aspects of Article 8 encompassing a reputational interest, then there is no issue of impermissible overlap. MOPI's first limb is designed to determine whether Article 8 is triggered in a relevant manner.⁶⁵⁰ What this consists of is not explicit, however: some cases state that a reasonable expectation of privacy does not occupy the entire field of Article 8, only protecting 'one aspect of an individual's privacy'.⁶⁵¹ MOPI is universally used in informational privacy cases, reinforcing that it is limited to one aspect of the Article 8 'private life' concept, perhaps excluding aspects like physical integrity.

Several cases refer to it as more broadly incorporating 'the right to respect for private life',⁶⁵² or stating Articles 8 and 10 are 'the very content of the domestic tort'.⁶⁵³ But, this might be accidentally broad language, as labelling the tort 'misuse of private information' (the 'essence' of the tort⁶⁵⁴) seems to inherently limit it (at least) to informational privacy cases.⁶⁵⁵ There is debate over whether 'informational privacy' can be broadly interpreted so as to encompass all other forms of private life,⁶⁵⁶ but for present purposes, there is no need to establish that the first limb of MOPI covers the full ambit of Article 8.

This is because both the *Karakó/Armoniene* and *Pfeifer* approaches locate reputation protection (at least) within the concept of 'private life', and all relevant cases involved informational privacy, indicating that reputational protection is primarily located within the

⁶⁵⁰ E.g. *A v B* (n 594) [4].

⁶⁵¹ *Campbell v MGN Ltd* (n 594) [15].

⁶⁵² *Tchenguiz v Imerman* (n 602) [65].

⁶⁵³ *Lord Browne of Madingley v Associated Newspapers* [2008] QB 103, [22].

⁶⁵⁴ *Murray v Express Newspapers* [2008] EWCA Civ 446, [2009] Ch 481, [24].

⁶⁵⁵ Rachael Mulheron, 'A Potential Framework For Privacy? A Reply To Hello!' (2006) 69 MLR 679, 712-13.

⁶⁵⁶ Cf David Meeler, 'Is information all we need to protect?' (2008) 91(1) *The Monist* 151, 160; Paul Wragg, 'Recognising a Privacy-Invasion Tort' (2019) CLJ (upcoming); Julie Inness, *Privacy, Intimacy and Isolation* (OUP 1992) 62; John Hartshorne, 'The need for an intrusion upon seclusion privacy tort within English law' (2017) 46 CLWR 287; Jeffery Johnson, 'A theory of the nature and value of privacy' (1992) 6 Pub Aff Q 271, 273.

information privacy aspect of private life. This makes sense, as reputation is information-based. Since MOPI concerns informational privacy, it is capable of protecting reputation under both the *Karakó/Armoniene* or *Pfeifer* approaches.

MOPI's first limb is a mixed objective-subjective test: the claimant must subjectively expect privacy, but whether it is reasonable is determined objectively. Unlike defamation, there is no single meaning rule. Relevant factors to the objective stage include: the claimant's identity and attributes (particularly vulnerabilities like age⁶⁵⁷); the information's nature and the activity the claimant was performing (activities perceived as 'quintessentially private' tend to meet the first limb even if few other factors are present); whether consent was given; the nature and reason behind the intrusion; how the information was obtained; and the impact of publication on the claimant.⁶⁵⁸

This list does not explicitly mention reputation. However, the impact of the publication incorporates impact by way of reputational damage in two respects. Firstly, the effect of the revelation on the target's reputation can cause emotional harm – particularly if they internalise it into their identity or respond negatively to the loss of social ties. Secondly, the notion of 'impact' on the claimant in practice privileges some forms of emotional response which are directly linked to reputational damage. In particular, the information's 'embarrassing' or 'humiliating' nature is highly relevant: Lord Nicholls opined in *Campbell* that an embarrassing photograph might be private even if taken in public, for example.⁶⁵⁹

No information is *inherently* embarrassing. Embarrassment is a social phenomenon. What makes information embarrassing is the anticipation that its release may subject the person to negative judgement, pity (arguably a form of negative judgment even if it is inherently sympathetic) or ridicule (or a response to such judgement or ridicule). People may still be upset by the release of information even if they do not anticipate judgement and ridicule – they might feel an invasion of autonomy, for example – but one would not describe them as embarrassed if they do not subjectively fear or experience a social response. This is why the High Court in *ZXC* characterised the 'effect on the claimant' factor as 'a complaint about loss of autonomy and damage to reputation'.⁶⁶⁰

⁶⁵⁷ *Weller v Associated Newspapers* [2015] EWCA Civ 1176, [29]-[31].

⁶⁵⁸ *Murray* (n 654) [36]; *Von Hannover v Germany (No 2)* [2012] ECHR 228, [108]-[113].

⁶⁵⁹ *Campbell v MGN Ltd* (n 594) [75].

⁶⁶⁰ *ZXC v Bloomberg* [2019] EWHC 970 (QB) [125] (emphasis added).

Since the information's 'embarrassing' nature affects the first limb, it follows that whether the information is reputation-damaging is relevant to whether it attracts a reasonable expectation of privacy. Indeed, it can play a strong role. The following hypothetical scenario is illustrative:

Dennis and Deandra are cohabiting siblings. A popular public footpath overlooks their back garden. Charlie, a local journalist, decides to write a fluff piece on the kinds of slippers worn by people in the area. He collects information by walking about the neighbourhood and seeing what slippers are worn by people sitting outside their homes or gardening. One day, he walks behind Dennis and Deandra's garden and sees the slippers they are wearing. In the resultant article, Charlie identifies Deandra by name, reporting that she wears blue fluffy slippers.

That Deandra wears blue fluffy slippers probably does not attract a reasonable expectation of privacy: few relevant factors apply. Deandra is not vulnerable. The intrusion is minor as the information was acquired legitimately, presented without especially intrusive methods. The publication is unlikely to impact Deandra socially or economically, nor would a reasonable person be upset by it. Wearing slippers is not inherently private or sensitive: the courts have generally required a threshold of 'seriousness' (in line with the *Karoko* approach)⁶⁶¹ and one case indicated that a description of clothing is too trivial and meaningless to suffice.⁶⁶² The only counter-factor is that Deandra was on private property. This is likely insufficient alone.

By changing the scenario slightly to make the information reputation-affecting, the argument for a reasonable expectation of privacy strengthens:

Charlie also identifies Dennis by name, and truthfully reports that Dennis wears red slippers with black swastikas on them. Dennis has no affiliation with or affinity for the Nazi party. However, having unexpectedly inherited the slippers from a distant relative, he believes it would be wasteful and churlish not to use them, and sees no problem doing so at home.

There is a stronger case for Dennis having a reasonable expectation of privacy in his slipper choices, and all that has changed is that the information is now intensely reputation-damaging, and so embarrassing. Given this, that the information was obtained while Dennis sat in his private garden becomes a more forceful argument for the information being private. This juxtaposition shows that information's reputational impact is a potentially strong determinant of whether it attracts a reasonable expectation of privacy.

⁶⁶¹ E.g. *McKennitt v Ash* [2006] EWCA Civ 1714 [12]; *Ambrosiadou v Coward* [2011] EWCA Civ 409, [28]-[30].

⁶⁶² *Trimingham v Associated Newspapers* [2012] EWHC 1296 (QB), [296]-[299].

This does not mean, however, that the reputational impact is enough to fulfil the first limb. Some cases indicate otherwise. For example, *John* concerned the publication of photographs depicting a celebrity jogging in public.⁶⁶³ The photographs revealed him to have a receding hairline, which Eady J accepted would cause him ‘embarrassment’.⁶⁶⁴ Nevertheless, Eady J was unconvinced that the claimant was sufficiently likely to succeed at trial in establishing a reasonable expectation of privacy to warrant granting an interim injunction.

Looking at the factors above, the information conveyed in the photographs was not inherently sensitive,⁶⁶⁵ was not obtained in an immoral or harassing manner,⁶⁶⁶ and the claimant was a non-vulnerable public figure in a public place.⁶⁶⁷ The mere fact the information was reputation-affecting was not sufficiently persuasive to pass the threshold. This indicates that reputation is only of real weight where there is at least one other factor in favour of a reasonable expectation of privacy: e.g., the intrusion occurring in a private space. That said, *John* only involved minor embarrassment – perhaps a major embarrassment in the absence of other weighty factors would suffice.

On the same theme, reputation plays a complicated and unclear role regarding criminal information. The High Court in *Richard* laid down the modern approach: as ‘a general rule it is understandable and justifiable (and reasonable) that a suspect [in a police investigation] would not wish others to know of the investigation because of the stigma attached.’⁶⁶⁸ While denying that this could ground a reasonable expectation of privacy in isolation,⁶⁶⁹ the court argued that such an expectation should be considered the ‘starting point’.⁶⁷⁰ The same case later used the fact that criminal allegations are ‘so damaging to ... reputation’ as a reason to give the privacy interest heightened prominence when weighing it against speech under the second limb.⁶⁷¹

The same year, the High Court in *NT1 & NT2* accepted that a reasonable expectation of privacy might arise in past convictions (though without any presumptive ‘starting point’) even

⁶⁶³ *John v Associated Newspapers* [2006] EWHC 1611 (QB).

⁶⁶⁴ Matters not mentioned in the case report but found in various comments: e.g. Angus McLean and Claire Mackey, ‘Is there a law of privacy in the UK? A consideration of recent legal developments’ (2007) 29 EIPR 389, 390.

⁶⁶⁵ *John* (n 663) [15].

⁶⁶⁶ *Ibid* [16].

⁶⁶⁷ *Ibid* [19].

⁶⁶⁸ *Richard v BBC* [2018] EWHC 1837 (Ch), [2019] 2 All ER 105 [248] cited with approval in *ZXC* (High Court) (n 660) [120].

⁶⁶⁹ *Ibid* [246].

⁶⁷⁰ *Ibid* [251].

⁶⁷¹ *Ibid* [286].

where the crime was ‘essentially public’ (e.g., a crime committed in business and subject to a public hearing).⁶⁷²

An example of this at work is *ERY*, which concerned a businessman under investigation by the police for financial crime who had been interviewed under caution.⁶⁷³ The claimant sought an injunction preventing the defendant newspaper from publishing anything about him in relation to the police investigation. The defendant accepted that publication of the information relating to the interview under caution would affect the claimant’s reasonable expectations of privacy. The court held that the claimant must also have a reasonable expectation of privacy in the fact that he was under investigation, given this concession.

While there was no real discussion of the factors, there was nothing special about the claimant’s nature, the information was obtained from publicly-accessible sources in a non-surreptitious manner, the activity was public, and there was no consent given. All factors but the last were borderline at best. The strongest argument in favour of both the interview and the fact of the investigation being private was its potential reputational impact. This indicates an extreme impact on reputation may dominate the analysis of whether there is a reasonable expectation of privacy, where other factors are ambivalent or evenly weighted.

The treatment of criminal information, particularly ‘public’ crimes, is peculiar. Crime and the criminal justice system seem inherently public. Criminal investigations may be kept secret for operational reasons, but this does not mean they are private. They are acts of the State and this colours them with a public character. Such investigations may involve private information (e.g., where the police gather information as evidence which, absent the criminal context, would be private in any event), but not necessarily so. Certainly, the existence of that information does not make the fact the investigation is happening private. So, assuming all criminal investigations are inherently private is strange. In several cases, the particularly intense potential for reputational harm appears the only factor of any weight in favour of the first limb. And, in cases like *Richard*, that potential for reputational harm then forms the core of why the privacy interest is weighty enough to outweigh the defendant’s speech rights.

Simultaneously, the treatment of criminal information has not been consistent or internally coherent. In *ZXC*, the defendant obtained a letter of request sent by a legal enforcement body regarding the claimant, as part of its investigation into allegations of criminal activity in the

⁶⁷² *NT1 & NT2* (n 11) [224].

⁶⁷³ *ERY v Associated Newspapers* [2016] EWHC 2760 (QB); see also *XKF v BBC* [2018] EWHC 1560 (QB).

claimant's business.⁶⁷⁴ The defendant published an article on the investigation using information derived from the letter.

The Supreme Court found a reasonable expectation of privacy. Reputation was not the sole factor: the information was obtained in serious breach of confidence, for example.⁶⁷⁵ Nevertheless, the Supreme Court affirmed the rule in *Richards* that the starting point for pre-charge criminal investigations is that the claimant has a reasonable expectation of privacy – with no distinction between 'public' crimes and those done in a private setting. They stressed that 'reputational damage attaining a certain level of seriousness and causing prejudice to personal enjoyment of the right to respect for private life' was relevant to the first limb.

They then characterised pre-charge criminal information as falling into one of the classes, like sexual information, which should normally be characterised as private unless there is good reason otherwise.⁶⁷⁶ Indeed, they extended such categories to 'involvement in crime as a victim or a witness' – with no distinction drawn as to where the crime occurred.⁶⁷⁷ The stated justification was that

publication of such information ordinarily causes *damage to the person's reputation* together with harm to multiple aspects of the person's physical and social identity such as the right to personal development, and the right to establish and develop relationships with other human beings and the outside world all of which are protected by article 8 ...⁶⁷⁸

So, that criminal information is inherently intensely reputation-damaging is the only reason for its elevation to special status along with sexual information. After all, the only way such information could harm a person's physical and social identity or their ability to form relationships is through reputational damage leading to a negative social response.

Somewhat confusingly, however, the Supreme Court also cited with approval a statement in *Gatley* that 'involvement in current criminal activity ... [and] information deriving from a hearing of a criminal case conducted in public' will *not* attract a reasonable expectation of

⁶⁷⁴ *ZXC v Bloomberg LP* [2022] UKSC 5, [2022] 2 WLR 424.

⁶⁷⁵ Though as Weinert points out, this factor is weak since the reason the letter was confidential was to avoid prejudicing the investigation – not because the parties were concerned about the suspect's privacy: Eileen Weinert, 'Don't bother with libel: sue for privacy instead following *Bloomberg v ZXC*' (2022) 33 Ent LR 149, 154.

⁶⁷⁶ *ZXC* (Supreme Court) (n 674) [52].

⁶⁷⁷ *Ibid*.

⁶⁷⁸ *Ibid* [71].

privacy without more.⁶⁷⁹ This is even though information on criminality surely has the effect described above, whatever the stage in the criminal justice process.

A similar problem arises in *NT1 & NT2*, where both claimants had spent, decades-old convictions for criminal misconduct in business which they sought to have delisted from search engines. The second claimant established a reasonable expectation of privacy, but the first did not.⁶⁸⁰ In both cases, the court characterised the ‘the essential nature of the crime and punishment information’ as ‘public’.⁶⁸¹ They characterised it as ‘sensitive’ but ‘not intrinsically private in nature’ and ‘not intimate or even personal’:⁶⁸² in stark contrast to the Supreme Court’s later characterisation in *ZXC* of pre-charge information as inherently sensitive.

The distinguishing factor in the second claimant’s case was the greater ‘passage of time’ and that he now had a child who might be affected by the publication.⁶⁸³ However, the mechanism by which this turned public information into private information was unexplained nor is it entirely intuitive. Presumably, for example, if the claimant had the child at the time they were convicted, the child’s embarrassment would not persuade the court that the claimant had a reasonable expectation of privacy two weeks after conviction.

Possibly, the courts have elided MOPI’s two stages – taking the obviousness of the public interest in open justice and information about current crimes as determinative of the first limb rather than solely relevant to the second. Notably, in *NT1 & NT2*, the court did not explain why Article 8 was engaged but the first limb not passed beyond saying the reasons ‘also come into play at the next stage’.⁶⁸⁴

This is perhaps supported by the *dicta* in *Sicri* that the ‘specific and hallowed rationale’ for court proceedings being public is that ‘the Court is exercising the judicial power of the state, determining rights and obligations’ and necessitating openness to scrutiny and transparency – a rationale which does not apply to other circumstances.⁶⁸⁵ Notably, the High Court distinguished arrest information, not as more private, but as ‘an executive act of a provisional nature, entirely different in character from a civil or criminal trial or other court proceeding.’⁶⁸⁶ This is reasoning relevant to Article 10, not Article 8, and the court in *Sicri* correctly placed

⁶⁷⁹ Ibid [53].

⁶⁸⁰ *NT1 & NT2* (n 11).

⁶⁸¹ Ibid [140], [224].

⁶⁸² Ibid [140].

⁶⁸³ Ibid [224].

⁶⁸⁴ Ibid [171].

⁶⁸⁵ *Sicri v Associated Newspapers Ltd* [2020] EWHC 3541 (QB), [2021] 4 WLR 9 [103].

⁶⁸⁶ Ibid [104].

this analysis in the balancing section – despite then repeating the confusing characterisation that ‘where information is disclosed in legal proceedings held in public, the starting point is that a person will not enjoy a reasonable expectation of privacy’.⁶⁸⁷

An alternative interpretation concerns the inclusion of the term ‘reasonable’ in the first limb. Reasonableness does not necessarily feature in a straight analysis of whether Article 8 is engaged – information can form part of people’s private life even if it obviously ought not be restrained. Adding reasonableness seems to introduce into the first limb elements which, in a straight Article 8 versus Article 10 comparison, would only be relevant to the latter – the defendant gets two bites at the cherry. It also raises the possibility of further inconsistency in future. After all, the existing caselaw concerns convictions (where the claimant is assumed guilty) and investigations (where this cannot be assumed). There is yet no case where a defendant reports on a claimant who is caught red-handed committing a crime but has yet to be investigated, charged or convicted. Is it reasonable for a claimant to expect privacy in those circumstances? It is unclear.

The fundamental problem is that neither explanation addresses why criminal information is ever private to begin with, necessitating some excuse to render it non-private in trial and conviction cases, beyond its reputational impact. It does not affect the conclusion that reputational concerns alone elevate pre-charge criminal information to a special ‘essentially private’ status and makes it possible to establish a reasonable expectation of privacy in conviction information. The only explanation why Article 8 would otherwise be engaged where a crime of a public nature is committed is because of the intensely and inherently reputation-damaging nature of that information. Taken to its logical extreme, any sufficiently serious allegation of wrongdoing, whether in the public or private sphere, would be private information. It remains unclear whether the courts would accept such a contention if put to them in those terms: likely not, given the *dicta* in the professional reputation cases discussed below.

Nevertheless, clearly, reputational damage plays some, strong, role in determining a reasonable expectation of privacy.

⁶⁸⁷ Ibid.

(ii) Reputational Theory and the First Limb

The previous section's conclusions beg the question: which form of reputation does MOPI protect? That reputation is incorporated solely within the 'impact on the claimant' element excludes those reputational theories which are not interested in harm to or impact on the claimant. This rules out epistemic reputation, social norm theory and perceived aristocratic honour. That MOPI can render true allegations of criminal conduct unlawful rules out virtuous honour. Under that theory a criminal is not entitled to a reputation as a non-criminal, save perhaps where rehabilitated, while in theory a fresh allegation of recent criminal conduct is protected by MOPI provided there has not been open court proceedings or a charge. That MOPI is 'equal opportunity' makes Arthurian aristocratic honour unlikely. A deeper dive into the kinds of reputational harm which render borderline cases private is necessary to establish the relevance of other theories.

Proprietary reputation's fit is weak, since MOPI is plainly interested in non-marketable areas of life (though this cannot be completely equated with privacy). Nevertheless, it is key to assess whether reputational damage alone in the professional setting (i.e., a purely market-based injury) can raise a reasonable expectation of privacy. In *Axon*, the claimant unsuccessfully sought to restrain information relating to him bullying his subordinates while working in the Royal Navy.⁶⁸⁸ The court stressed that the claimant was working in a 'very public position' and that this 'does not mean that there is nothing about his performance in that role which would attract a reasonable expectation of privacy'.⁶⁸⁹ This could hint at a reasonable expectation of privacy in publicly professional activities or a 'private' sphere to even professional work.

However, the better interpretation is that professional context does not defeat the first limb where the nature of the information is quintessentially private. Notably, successful professional cases tend to involve sexual information: which is 'essentially' private.⁶⁹⁰ For example, *GYH* concerned a sex worker harassed by an unknown individual making a variety of defamatory statements, like falsely claiming they had an STD.⁶⁹¹ Warby J suggested that while MOPI is not inherently inappropriate in claims involving commercial reputation, that the reputation is commercial inherently undermines the argument that it is private.⁶⁹² This would not always be

⁶⁸⁸ *Axon v MOD* [2016] EWHC 787 (QB).

⁶⁸⁹ *Ibid* [64].

⁶⁹⁰ E.g. *K v NGN* [2011] 1 WLR 1827.

⁶⁹¹ *GYH v Persons Unknown* [2017] EWHC 3360 (QB).

⁶⁹² *ibid* [39].

so: here, the information being sexual as well as commercial outweighed this concern and both an interim and final injunction were ultimately granted.⁶⁹³ So, MOPI is not concerned with purely market-dependent injury. This limitation also indicates a poor fit with cultural honour, which is concerned with publicised disrespect in all spheres of life (including professional areas).

Perhaps unsurprisingly given this chapter's earlier discussion on Article 8's scope, this leaves deferent reputation and sociality. The Supreme Court in *ZXC* found room for both, justifying the 'starting point' in pre-charge criminal cases by the potential harm to 'the person's physical and social identity' including 'the right to personal development' (the language of dignity) and the ability to have 'relationships with other human beings and the outside world' (the language of sociality).⁶⁹⁴

However, some aspects of the first limb pose problems for deferent reputation. *Axon* indicates that issues of competence and propriety at work or other 'public' spheres will not normally fall within MOPI's scope. This is true even if the target takes enormous pride in their work, such that it forms part of their identity. Deferent reputation therefore anticipates a wider scope of protection than possible under the first limb. This indicates that the 'impact on the claimant' element encompasses something distinct from, or in addition to, the psychological changes and distress that might arise out of any reputational attack (whether relating to the public or private sphere). This indicates a closer following of the *Karakó* approach.

That MOPI instead adopts the *Karakó* approach – with its ties to sociality – is reinforced by the need stated in some cases for the information to pass a threshold of seriousness.⁶⁹⁵ Assuming Article 8 is designed to protect strong ties, the distinction between embarrassment in public and private life makes more sense. The courts may be implicitly distinguishing between professional embarrassments which are only likely to have significant impact on a target's weak ties, versus those likely to affect strong ties. This interpretation also goes some way to make the special treatment of criminal allegations less anomalous: criminality is reasonably presumed so stigmatic that it affects the target's strong ties even if the criminality relates to purely public matters.

⁶⁹³ *GYH v Persons Unknown* [2018] EWHC 121 (QB).

⁶⁹⁴ *ZXC* (Supreme Court) (n 674) [71].

⁶⁹⁵ *ibid* [54].

Though sociality is bipolar and MOPI requires no proof of loss, the need for the claimant to be at risk of some external harm to social ties is implicitly incorporated into the first limb through the threshold of seriousness and the relevant factors. Notably, there has been at least one case where the court thought a claimant had no reasonable expectation of privacy in sexual information where there was no evidence they were impacted by publication.⁶⁹⁶

A final matter to note is that truth and falsity is irrelevant to the first limb (though it is relevant to the second):⁶⁹⁷ unsurprisingly, given the tort is focused on privacy rather than reputation. However, it makes MOPI a worse fit for deferent, epistemic, social norm and virtue honour theories where truth bounds the scope of the reputational interest. This leads to the overall conclusion that MOPI's first limb best encapsulates protection of the strong tie interests of sociality. Despite this, the language of dignity and its potential connection to deferent reputation remains a strong theme.

IV. Balancing Reputation and Free Speech

While the Lords in *Campbell* provided little guidance on MOPI's second limb, *Re S* characterised the balancing act as similar to the ECHR proportionality test for limiting human rights, assuming that neither privacy nor speech has presumptive value over the other.⁶⁹⁸ This led to a touchstone test of whether the defendant's speech contributes to a debate of general or public interest, following the formulation in the *Von Hannover (I)*,⁶⁹⁹ later expanded to add any other 'realistic justification'.⁷⁰⁰ In determining this, the courts have distinguished (as the ECtHR does) between inherently 'high value' speech like political speech and 'low value' speech like celebrity gossip, stressing that the public interest is distinct from what the public are interested in.⁷⁰¹

Early MOPI cases applied a multi-factorial test for balancing speech, but were haphazard in identifying the relevant factors. Following *Von Hannover (I)*, the focus shifted to identifying whether the speech was in the public interest and treating this as essentially a decisive factor

⁶⁹⁶ *Terry v Persons Unknown* [2010] EWHC 119 (QB) [95].

⁶⁹⁷ *Bull v Desporte* [2019] EWHC 1650 (QB) [87].

⁶⁹⁸ *Re S* [2005] 1 AC 593 [17].

⁶⁹⁹ *Von Hannover v Germany* App No 59320/00 [2004] EMLR 21 [76].

⁷⁰⁰ *Clearcourse Partnership Acquireco Ltd v Jethwa* (n 586) [51].

⁷⁰¹ *PJS v News Group Newspapers Ltd* [2016] UKSC 26, [2016] AC 1081 [24].

with little consideration of other factors. This led some commentators to criticise the process as a de facto trumping of privacy by speech of any public merit, rather than a true balancing act.⁷⁰²

Modern cases take a more nuanced approach following the factors enunciated in *Von Hannover (II)*⁷⁰³ and *Axel Springer*,⁷⁰⁴ treating public interest as critically important, even decisive, but contextualising the weight of the public interest by reference to certain factors. These are the extent to which it contributes to a debate of general interest; the claimant's fame/infamy, and public role or function; how the publication's subject matter related to this role or function; the claimant's prior conduct, particularly prior publication; the publication's content, form and likely effects; how the information was obtained, including whether intrusive methods were used; its veracity;⁷⁰⁵ and the defendant's right to speak about their own life.⁷⁰⁶ Discussions of the Article 10 consideration are now far more substantial and cases have found public interest speech to be a disproportionate intrusion with the claimant's privacy interests.⁷⁰⁷

That speech is an incommensurately equal factor to privacy (and the incorporated reputational interest) is incompatible with certain theories: aristocratic and cultural honour, particularly. Beyond this, it is interesting how truth and falsity influence the second limb, which manifests in two ways. Firstly, that the information is false is relevant but non-determinative, and the second limb gives considerable leeway to publish high-value false speech. Indeed, the factors listed above overlap considerably with the *Reynolds* indicators – veracity, method of acquisition, etc. This reinforces MOPI's poor fit with proprietary reputation, both aristocratic honours and cultural honour: none of which provide any persuasive basis to tolerate the publication of false information.

Secondly, that the information is true is also relevant but non-determinative.⁷⁰⁸ Indeed, it is not typically that weighty since this would likely render privacy rights essentially unenforceable. This lack of centrality is interesting from the perspective of reputational theories which ordinarily see truth as an absolute defence: namely epistemic, social norm, deferent

⁷⁰² Paul Wragg, 'Protecting Private Information of Public Interest: Campbell's Great Promise, Unfulfilled' (2015) 7 JML 225, 225.

⁷⁰³ *Von Hannover v Germany (No 2)* (n 658) paras 108-113.

⁷⁰⁴ *Axel Springer* (n 628) paras 89-94.

⁷⁰⁵ *ZXC* (Supreme Court) (n 674) [62].

⁷⁰⁶ *YXB v TNO* [2015] EWHC 826 (QB) [12]; *Duchess of Sussex v Associated Newspapers Ltd* [2021] EWCA Civ 1810 [34].

⁷⁰⁷ E.g. *Ali v Channel 5 Broadcast Ltd* [2018] EWHC 298 (Ch) [184]-[197], upheld on appeal [2019] EWCA Civ 677.

⁷⁰⁸ *Bull v Desporte* (n 697) [89(d)]. Many cases, such as *Richard* (n 668) [289] note in passing that the information is true when analysing the *Von Hannover* factors but give it no further analysis or weight.

reputation and virtuous honour. It indicates a better fit with sociality theory, which has a more flexible relationship with the role of truth and would likely treat it as a relevant but non-determinative factor, as MOPI does. Indeed, the concern with balancing the specific impact on the claimant with the value of the speech is inherently bound up in proportionality notions which sociality theory may be concerned with. Speech which is true, potentially public interest, but has excessive impact on the claimant's ability to form social bonds may well fail the second MOPI stage.

Truth is given more weight in 'false impression' cases, however: where the claimant lied to the public in a manner which the publication attempts to correct. This derives from the breach of confidence action, where the iniquity defence was held to apply to so-called 'role models' who presented false public impressions of themselves.⁷⁰⁹ *Campbell* itself was one such case: the defendant succeeded regarding some of the information because the claimant had said in interviews she did not take drugs: even though the court noted there would not normally be a public interest in publishing an ordinary citizen's medical details, famous or otherwise.⁷¹⁰

A second case of this ilk – *Ferdinand* – indicated that the statements can be drawn from a wide range of sources.⁷¹¹ The claimant was the married captain of the England football team, who sued in MOPI over an article discussing his affair. He previously told the media, in a campaign to rehabilitate his public image, that despite his history as a 'bad boy', he was now focused on being a 'family man' and having a 'stable family life'.⁷¹² In his autobiography, he admitted being a role model and acknowledged his 'responsibility off the field'.⁷¹³ Article 10 took precedence. The court stated that '[o]ne facet of the public interest can be correcting a false image',⁷¹⁴ and that, while the court is not generally concerned with truth or falsity in MOPI, truth was important where the public interest relied on was correcting the record.⁷¹⁵ Here, the claimant deliberately cultivated the false image of a reformed, settled family man – something inconsistent with his continued affairs.⁷¹⁶

⁷⁰⁹ *Woodward v Hutchins* [1977] 1 WLR 760.

⁷¹⁰ *Campbell v MGN Ltd* (n 594) [58].

⁷¹¹ *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB).

⁷¹² *Ibid* [18].

⁷¹³ *Ibid* [31].

⁷¹⁴ *ibid* [65].

⁷¹⁵ *Ibid* [67]-[68]

⁷¹⁶ *Ibid* [84].

There appear to be two limits to this record-correcting public interest ground. Firstly, the ‘correction’ must be substantiated and true. For example, in *Richard* the High Court accepted that information contradicting a celebrity’s cultivated ‘Christian’ image might pass the second limb of the MOPI test, but not ‘unsubstantiated allegations, or investigations, into unproved conduct’.⁷¹⁷ Meanwhile, the court in the *Duchess of Sussex* case concluded there was a public interest in permitting the defendant to reply when they are cast in a false light,⁷¹⁸ but only where the claimant’s initial publication is objectively misleading, false and damaging. It was not enough that the defendant ‘believed’ this, since this ‘would legitimize replies which were in fact false and unwarranted’.⁷¹⁹

Secondly, there is a need for a clear and specific representation which misleads the public. *AMC* concerned a famous sportsman who was also subject to an article about his affair.⁷²⁰ The court stressed that while sportsmen have a public role, this does not make their sex lives public property.⁷²¹ The court declined to hold that the article showed that the claimant was a hypocrite just because he was a role model in a general sense.⁷²² The court also declined to hold that by appearing in adverts and endorsements the claimant had created a false image of a clean family man which the information contradicted.⁷²³ Critically, unlike *Ferdinand*, the claimant made no specific, false, public claims which the information could contradict. Similarly, in another ‘kiss and tell’ celebrity case, *PJS*,⁷²⁴ the ‘role model’ and ‘correcting false impression’ arguments did not even feature. Again, the claimant made no claims that could be contradicted.

This casts interesting colour on the shape of reputation protection in law overall. It indicates that truth is a powerful, perhaps overwhelming factor, where the claimant has actively deceived the public to cultivate a false reputation. This ties into themes of epistemic reputation: there is a powerful public interest in the public not being given false positive impressions which they might use in shaping their own lives – which is particularly a concern where the claimant is a ‘role model’. However, this does not mean that epistemic reputation is embodied in MOPI in any strong sense – notably, there is no case in which it has been deemed justifiable to release

⁷¹⁷ *Richard* (n 668) [285].

⁷¹⁸ *Duchess of Sussex v Associated Newspapers Ltd* [2021] EWHC 273 (Ch) [104], [112] upheld on appeal [2021] EWCA Civ 1810.

⁷¹⁹ *Duchess of Sussex* (High Court) (n 718) [112].

⁷²⁰ *AMC v News Group Newspapers Ltd* [2015] EWHC 2361 (QB).

⁷²¹ *Ibid* [19].

⁷²² *Ibid* [24].

⁷²³ *Ibid* [26].

⁷²⁴ *PJS* (n 701).

private information to correct false impressions given about the claimant by third parties. Rather, it is merely thematically relevant.

Another interesting point is that the public interest seems to inure entirely in the public's epistemic interests rather than specifically how they might then choose to use the information. Lamb has complained that the 'role model' justification is flimsy.⁷²⁵ If one is concerned with, say, children copying immoral behaviour, it is better to uphold the false impression than allow the defendant to publicise the truth. It is less flimsy, however, if one characterises the argument as being that 'the public have a right to make decisions about their lives based on correct epistemic signals' (however ill-advised those decisions turn out). However, stiff limits on when 'role model' arguments will succeed indicate a limited approach to the public interest. Epistemic notions seem to have influenced the second limb to a degree, therefore, but are not firmly embodied within it.

While there is little caselaw on rehabilitation, the *NT1 and NT2* case reinforces the above conclusions. In holding that Article 10 interests outweighed any reasonable expectation of privacy that the first claimant might have in his conviction for business offences, the court relied primarily on the fact that the information, while old, remained relevant to the public. The first claimant remained in the same area of business and consistently denied his guilt.⁷²⁶ Assuming (as the law now requires⁷²⁷) the conviction to be objective proof of guilt, the first claimant was not rehabilitated and continued to operate in an area where his lack of rehabilitation was relevant to how others conducted their affairs.

Conversely, the second claimant's privacy interest won out over Article 10 as he acknowledged his guilt and was no longer in the same business, which meant that 'his past conduct [was not] relevant to anybody's assessment of him, or not significantly so'.⁷²⁸ This demonstrates further how the audience's interest in correct epistemic signals, as a justification for protecting or not protecting reputation, shapes the balancing of speech interests against other rights.

⁷²⁵ Michael Lamb, 'The Role Model Argument: A Fundamentally Flawed Concept' (2017) 5 NEL Rev 21, 23-24.

⁷²⁶ *NT1 & NT2* (n 11) [172].

⁷²⁷ Civil Evidence Act 1968, s 13(1).

⁷²⁸ *NT1 & NT2* (n 11) [226].

V. Reputation and MOPI Remedies

The final issue is how reputation and remedies interact. The primary remedies are damages and injunctions. As with defamation, only damages are discussed here. The first matter to note is that MOPI's classification as a 'tort' rather than an equitable action means common law damages are available. It is settled that their primary purposes here are to compensate for 'damages ... [including] distress, hurt feelings and loss of dignity' as well as 'to mark the infringement of a right' (namely the right to privacy or control over information).⁷²⁹

Damages for distress may indirectly compensate loss of reputation insofar as that distress is caused by lost reputation. As discussed below, there is one case which suggests that any distress resulting from reputational damage should be ignored for these purposes.⁷³⁰ However, others have treated the distress component as including reputationally-induced distress, such that if the claimant successfully establishes both MOPI and defamation, a deduction is made from the former award to avoid double compensation.⁷³¹ If reputational damage-induced distress is relevant, the low relevance of truth to MOPI compared to defamation indicates that MOPI envisages that distress caused by true reputational attacks and their consequences is legitimate in a way that defamation does not.

More complicated, however, is how reputation interacts with the award for loss of 'dignity' or 'privacy'. The often cited 2008 *Mosley* case referred to this head of damage as involving 'vindication of privacy', but distinguished this from vindicating reputation because the vindicatory aspect 'is simply to mark the fact that either the state or a relevant individual has taken away or undermined the right of another – in this case taken away a person's dignity and struck at the core of his personality',⁷³² 'while affording some degree of solatium to the injured party.'⁷³³ In other words, it has no restorative aspect.⁷³⁴

Though a reputation-protecting law need not have a restorative aspect, the language used to distinguish 'vindication of privacy' from 'vindication of reputation' is interesting. This is because reasoning and rhetoric of 'dignity' and 'striking at personality' is the language of deferent reputation. This raises the possibility that the vindicatory aspect of the MOPI award

⁷²⁹ *Mosley v News Group Newspapers Ltd* [2008] EMLR 20 [216]; often repeated, see e.g. *Reid v Price* [2020] EWHC 594 (QB) [50].

⁷³⁰ *Ibid* [169].

⁷³¹ See e.g. *Cooper v Turrell* [2011] EWHC 3269 (QB) [107].

⁷³² *Mosley* (n 729) [216].

⁷³³ *Ibid* [231].

⁷³⁴ *Ibid* [230].

performs the same function as the vindictory award in defamation, despite the courts' claims to the contrary.

However, the notion of dignity at work in MOPI is not the same as deferent reputation, as damages for pure loss of privacy have been granted where there is no risk of the individual presently internalising the attack, such as where the claimant is an infant.⁷³⁵ Additionally, that the courts do not envisage it being possible to restore the lost privacy shows that the notion of dignity is generally distinct from deferent reputation. After all, social disapproval of the attacker *can* restore the target's dignity under that theory, by affirming and restoring the target's original and autonomous demeanour image.

If MOPI incorporates a theory of dignity therefore, it goes beyond the narrow form Post envisaged. However, it has some overlap, since if 'dignity' includes actions which strike at personality, it includes cases where the strike comes from a breach of Post's rules of deference. Awarding damages based on this concept of dignity, therefore, may involve overlap with other actions based on deferent reputation – particularly defamation.

This is perhaps why some cases disapprove of MOPI damages having a vindictory purpose, out of fear of overcompensation and inconsistency with other tortious actions where vindictory damages are impermissible.⁷³⁶ Nevertheless, later cases affirmed that damages in MOPI do not just concern emotional harm – an element of the award must mark the loss of privacy separately from this.⁷³⁷ The language of 'vindication' is now avoided,⁷³⁸ replaced with the language of 'loss of autonomy or loss of control'⁷³⁹ or 'loss of dignity'.⁷⁴⁰ The continued reference to dignity continues to raise the possibility that this head of damage will compensate for loss of deferent reputation.

Other cases have introduced other reputational facets into this second head of damage. For example, in the High Court in *Gulati*, the court set out the relevant factors when determining quantum for this head.⁷⁴¹ These were: the nature of the information; whether the disclosure disrupted relationships or was likely to impair attempts to repair relationships; the scale and duration of the intrusion; and its impact on the claimant (a life-changing incident being more

⁷³⁵ E.g., *Murray* (n 654).

⁷³⁶ *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 [191].

⁷³⁷ *Gulati v MGN* [2015] EWHC 1482 (Ch) [111], [229]; affirmed by the Court of Appeal: [2015] EWCA Civ 1291.

⁷³⁸ E.g. *Sicri* (n 685) [138].

⁷³⁹ *Reid v Price* (n 729) [51].

⁷⁴⁰ *Gulati* (High Court) (n 737) [168].

⁷⁴¹ *Ibid* [184(iii)]

important than short-term embarrassment).⁷⁴² This characterisation directly introduces notions of sociality by considering how it impacts the claimant's ability to form strong ties. Though they were particularly relevant in *Gulati* on the facts (the claimant's friends were suspected of leaking the information), these factors are applicable more generally.

All of this is distinct from the idea that MOPI awards a separate head of damages solely for reputational loss, distinct from its impact on distress or dignity. This issue has only received judicial discussion recently, which is surprising given many MOPI cases involve embarrassing and reputation-damaging information.⁷⁴³ This is perhaps for two reasons: firstly, few cases have concerned the calculation of MOPI damages;⁷⁴⁴ and secondly, claimants did not think to claim separate damages for reputation – several cases have stressed that reputational damage was not pleaded and so not in issue.⁷⁴⁵

Mention was first made in the Court of Appeal in *Gulati* of 'libel damages' being available if the information was false,⁷⁴⁶ but presumably this was a reference to the fact that a libel claim could be brought in such circumstances. Meanwhile, the High Court in *Cooper* seemed to deem MOPI and defamation damages inherently distinct, stating:

Damages for defamation are a remedy to vindicate a claimant's reputation from the damage done by the publication of false statements. Damages for misuse of private information are to compensate for the damage, and injury to feelings and distress, caused by the publication of information which may be either true or false.⁷⁴⁷

The issue first explicitly arose in 2014 in *Hannon*, where Mann J tentatively suggested that reputational damages are recoverable. He gave the example of a case where highly embarrassing information such as that concerning a sexual health condition was revealed to the public, stating that:

The effect of that disclosure will cause embarrassment, with the victim knowing that the public at large know about a condition which he/she had every reason to suppose would be kept private ... There will be some damage to his/her reputation, but that sort of damage is part of the spectrum of public attitudes which the victim was entitled to have been protected from in the first place. Defamation may well not give a remedy for that part of the spectrum because of the availability of justification. It is

⁷⁴² Ibid [184(iii)]

⁷⁴³ E.g. *Ali v Channel 5* (n 707) (accusation that the claimant falsely swore on the Quran); *AXB v BXA* [2018] EWHC 588 (QB) (threats to disclose information about an affair).

⁷⁴⁴ *Higinbotham v Wipaporn Teekhungam* [2018] EWHC 1880 (QB) [60].

⁷⁴⁵ *Mosley* (n 729) [3].

⁷⁴⁶ *Gulati (CA)* (n 737737) [39].

⁷⁴⁷ *Cooper v Turrell* (n 731) [102].

not clear to me why, as a matter of principle, damage to reputation of this sort should not be within the sort of thing that privacy rights should protect against.⁷⁴⁸

This indicated that not only should reputational damages be available in MOPI, but that they should be available even (and in particular) where the information is true. So, the form of reputation protected under the umbrella of privacy is not one whose legitimacy is necessarily barred where the attack is true: in other words, not epistemic or social norm theory, virtuous honour, or deferent reputation. Mann J anticipated a more thorough ventilation of the issue at trial,⁷⁴⁹ but the case settled.⁷⁵⁰

The next judicial statement came in 2018 in *Richard*.⁷⁵¹ A celebrity claimed (among others) damage to his reputation arising out of the publication of an investigation into historic sex abuse, as well as helicopter footage of his home being searched by the police. The defendant argued that reputational damages are not recoverable in MOPI, being ‘the sole province of defamation’.⁷⁵²

The High Court rejected this, with Mann J presiding. Mann J rejected as irrelevant cases in which reputational damages were excluded from other torts due to this kind of reasoning (particularly, conspiracy to injure by unlawful means⁷⁵³).⁷⁵⁴ Rather, he relied on Supreme Court *dicta* in *Khuja* (an injunction application) to the effect that the right of privacy ‘provides an alternative means of protecting reputation which is available even when the matters published are true’,⁷⁵⁵ arguing that reputation protection is ‘part of the function of the law of privacy’.⁷⁵⁶ So, he concluded, the court should have the right ‘give damages which *relate* to loss of reputation.’⁷⁵⁷

This is not an explicit statement that reputational damages are a separate head of damages, particularly as Mann J then stated that ‘loss of reputation has an impact on the feelings of the wronged individual (which can be reflected in damages), and will inevitably come in to that extent’.⁷⁵⁸ It might instead support the indirect relevance of reputation to distress

⁷⁴⁸ *Hannon v News Group Newspapers Ltd* [2014] EWHC 1580 (Ch) [29] (emphasis added).

⁷⁴⁹ *Ibid* [29].

⁷⁵⁰ *Hannon v NGN* [2015] 6 WLUK 846.

⁷⁵¹ *Richard* (n 668).

⁷⁵² *Ibid* [334].

⁷⁵³ *Lonrho v Fayed (No 5)* [1993] 1 WLR 1489.

⁷⁵⁴ *Richard* (n 668) [337].

⁷⁵⁵ *Khuja* (n 621).

⁷⁵⁶ *Richard* (n 668) [344].

⁷⁵⁷ *Ibid* [345] (emphasis added).

⁷⁵⁸ *Ibid*.

awards. However, Mann J went on to say that ‘[d]amages can and should be awarded for distress ... and damage to his dignity, status *and reputation*’.⁷⁵⁹ This hints at the availability of reputational damages as a separate head, but that Mann J did not address reputation separately when determining quantum renders the matter ambiguous.

The next case is the 2019 High Court decision in *ZXC*, involving articles relating to a businessman under investigation for alleged business crimes. Nicklin J mentioned the *dicta* in *Richard* stating that damages should be awarded for reputation⁷⁶⁰ but accepted there was ‘some force’ in the defendant’s argument that reputational damages are (and ought to be) only available under defamation.⁷⁶¹ This was because the ‘common law does not protect reputations built on a false basis’, since reputation-protection is designed to give ‘individuals who lack direct knowledge of the person concerned a basis on which they may regulate their conduct towards them’: so, any action granting reputational damages must either provide a defence of truth or otherwise require claimants to show the reputational attack was unjustified.⁷⁶² He therefore concluded that reputational damages were unavailable.⁷⁶³

However, the court accepted that the claimant could recover for distress, which may well be exacerbated by the belief that their reputation has been damaged.⁷⁶⁴ Presumably, if the claimant could demonstrate that reputational damage had exacerbated some other recoverable loss, the same logic would apply. The court then assessed damages based on whether any given action bore on the claimant’s level of distress, or whether they were only relevant to the claimant’s perception by others. While *ZXC* was appealed twice, no appeal was made on the damages issue.⁷⁶⁵

A literal interpretation of this reasoning characterises legitimate protection of reputation in law as solely concerned with epistemic reputation (the concern being how strangers use knowledge to regulate their conduct), whereas MOPI is concerned with non-consequentialist considerations. This is curious, given reputation protection can be based on non-consequentialist, rights-based concerns – as envisaged by *Pfeifer*. At most, it adopts the *Karakó*

⁷⁵⁹ *Ibid* [350] (emphasis added).

⁷⁶⁰ *ZXC* (High Court) (n 660) [147(a)].

⁷⁶¹ *Ibid* [149].

⁷⁶² *Ibid* [148].

⁷⁶³ *Ibid* [150].

⁷⁶⁴ *Ibid*.

⁷⁶⁵ *ZXC v Bloomberg LP* [2020] EWCA Civ 611 [143].

approach – reputation is not an inherent part of the privacy right, though it may be a tool through which privacy interests are affected.

Confusing matters further, both cases were interpreted as consistent by the High Court in *Sicri*,⁷⁶⁶ which concerned information about a claimant arrested in the aftermath of the 2017 Manchester Arena bombings. Due to the publication, the claimant received hostile messages online, unwanted media contact, and economic damage to his business. The claimant sued in MOPI, and among the damages sought were damages for reputational damage and special damages for economic loss.

Having found the defendant liable, the court turned to damages. Warby J was not convinced that the approaches of *Richard* and *ZXC* were inherently inconsistent,⁷⁶⁷ concluding that each case was narrowly reasoned and neither ruled out the possibility of reputational damages in MOPI.⁷⁶⁸

Warby J focused on the fact that the defendant in *Richard* was not alleging that most of the information relied on for the MOPI claim was true in the sense meant by defamation law. This was understandable given that the rules for interpreting the meaning of statements relating to an arrest in defamation would normally require the defendant to prove not only that the claimant was arrested, but that there were reasonable grounds to suspect him of a crime.⁷⁶⁹ Rather, he interpreted that case as allowing compensation for reputational damage where the information was true in the ‘literal’ sense – ‘the claimant was arrested’. Accordingly, he concluded that ‘*Richard* is not authority for the proposition that the claimant in a misuse claim can recover damages for reputational injury caused by a defamatory allegation even if, or regardless of whether, that allegation is substantially true’ – as opposed to literally true.⁷⁷⁰

Conversely, Warby J interpreted *ZXC* as solely disapproving of pure reputation damages in cases where the information was true in the defamation sense, rather than the literal sense. He relied on the fact that the claimant conducted the case ‘on the footing that truth was irrelevant’ such that the defendant was denied the opportunity to show truth in the defamation sense.⁷⁷¹

⁷⁶⁶ *Sicri* (n 685) – in turn approved by the High Court in *Hayden v Duckworth* [2020] EWHC 1033 (QB) [28].

⁷⁶⁷ *Ibid* [146].

⁷⁶⁸ *Ibid* [151].

⁷⁶⁹ *Ibid* [148].

⁷⁷⁰ *Ibid* [149].

⁷⁷¹ *Ibid* [151].

Accordingly, Warby J concluded it would only be principled for a separate head of compensation for reputational damage when the information is literally true. This would allow the law to categorically state that MOPI is not being used to evade the defence of truth – after all, reputational damages are only available where the claimant would fail were he forced to bring his action in defamation.⁷⁷² However, as Warby noted, this would require the cumbersome process of importing principles of defamation into MOPI claims at the quantum stage, making it cleaner to deny the availability of reputational damages in MOPI altogether.⁷⁷³ To the extent that *Richard* implies otherwise, Warby J argued this was incorrect.⁷⁷⁴

However, Warby J was content to decide the case on the narrower basis that, if reputational damages were available in MOPI, this would only be after the claimant satisfied the court that a defamation claim based on the same information would succeed without any defence – which naturally the current pleadings did not address because defamation was not pleaded.⁷⁷⁵

It is also interesting to consider how Warby J treated the more traditional aspects of the MOPI award considering his conclusions about reputation. Warby J refused to factor reputational damage (including damage to sociality) into the award for distress:⁷⁷⁶ ignoring for those purposes evidence that the claimant had been harassed and feared attack because of the publication.⁷⁷⁷ This was, at least partially, because he doubted that the harassment was caused by the defendant’s particular article. Nevertheless, it can be inferred – from his statement that his overall award did not include ‘compensation for injury to reputation, or for distress caused by such injury’⁷⁷⁸ – that he thought that reputationally-induced distress was inherently non-recoverable, as a loss consequent on a head of damage which he considered impermissible.

Conversely, he took a different approach to the ‘loss of dignity’ award and the aspect of distress consequent on loss of dignity.⁷⁷⁹ For that, evidence of shunning and social effects was acutely relevant and ‘led or contributed to the claimant’s public status becoming a deeply

⁷⁷² The same reasoning should apply where the allegation is reputation-damaging but not strictly defamatory: for example, where the claimant’s standing is only damaged in their local community.

⁷⁷³ Ibid [156]-[158], [163].

⁷⁷⁴ Ibid [163].

⁷⁷⁵ Ibid [164].

⁷⁷⁶ Ibid [137].

⁷⁷⁷ Ibid [169].

⁷⁷⁸ Ibid [137].

⁷⁷⁹ Ibid [170].

undignified one' in the eyes of the public.⁷⁸⁰ This general undignified public impression was, unlike the harassment, reasonably foreseeable.

Warby J's attempt to distinguish prior cases involves a strained interpretation of *ZXC* and *Richard*, not least because neither case explicitly distinguished between two different forms of truth and the principled basis for making such a distinction is unclear. Similarly, his reasoning does not explain why it is principled to take reputational loss into account when discussing loss of dignity but not distress. After all, the claimant lost their dignity because their reputation was widely damaged: it is as much a consequence of a supposedly impermissible head of damage as the distress caused. The matter is confounded further by Warby J drawing a distinction between 'pure' distress damages and damages for distress as a result of loss of dignity, reputation or autonomy – one wonders what the claimant is distressed about under the first head of damages, if not loss of dignity, autonomy or reputation.

Rather, Warby's reasoning seems policy-based: based on the idea that the 'existence of two parallel regimes to govern overlapping claims would be unsatisfactory, "for practical reasons underpinned by principle"'.⁷⁸¹ Merely partitioning two overlapping causes of action is not necessarily principled – not without analysis of whether their reputational concerns are the same, which Warby J did not undertake.

Finally, the Supreme Court in *ZXC*, commenting on both the High Court in *ZXC* and *Sicri*, expressed 'reservations about the extent to which quantification of damages for the tort of misuse of private information should be affected by the approach adopted in cases of defamation' but concluded it was not appropriate for them to address it on the present facts.⁷⁸² This hints that the Supreme Court will prefer to allow reputational damages as a separate head, entirely or to some extent. However, this is yet unconfirmed.

VI. Overall Analysis

Overall, MOPI appears confused and torn between a conception of reputation based on deference and one based on sociality, though overall the stronger case can be made for sociality. Reputation is certainly relevant, incorporated into the actionability requirements through the relevance of the publications impact on the claimant when identifying a reasonable expectation

⁷⁸⁰ Ibid.

⁷⁸¹ Ibid [155].

⁷⁸² *ZXC* (Supreme Court) (n 674) [79]. The Court of Appeal declined to comment on the matter for the same reason.

of privacy, but its relevance to hard cases (particularly cases involving criminal information) is inconsistent.

This causes the most problems at the damages stage. The ambiguity and lack of clarity surrounding reputational damages in MOPI, whether as a separate head of damages or as part of the distress and loss of dignity awards, reflects a lack of real analysis of what reputational interests MOPI is protecting. Greater clarity is possible if the courts were to properly enunciate this. For example, Mann J's comments in *Richard* make particular sense if MOPI protects deferent reputation – they allude to the idea that reputation impacts on identity and dignity. If so, however, then the claimant's interest in deference is accounted for (at least) in the 'loss of dignity' award, and possibly in the distress award. This would lead to the conclusion that there is no need for a separate reputational award (indeed, it would lead to double counting). Warby J's ultimate conclusions are consistent with this, as he ultimately took reputation into account when determining the dignity award.

If MOPI is concerned with sociality, matters are more complex. On one hand, 'loss of dignity' is not an intuitive label for this interest. This makes it counterintuitive for the courts to deal with this factor under that head of damages (per *Gulati*). A separate head of damages might be appropriate. This might not be true, however, if MOPI is not concerned with protecting sociality directly, but merely with separate harms which can (but do not always) result from loss of sociality. In other words, the courts would need to acknowledge that reputation forms part of MOPI, identify the form of reputation, and determine whether it is part of what Hariharan calls the 'core interest' of privacy, or merely a subsidiary or incidental interest.⁷⁸³

Overall, the law's ambiguous nature muddies the waters when it comes to determining which theory of reputation MOPI best embodies. Ultimately, it may be that the notion of 'dignity' in privacy itself is under-theorised in judicial thinking, and this leads to confusion because dignity is also a concern in reputational thought. Given the potential for overlap between the justifications for privacy protection and reputational protection, this leads to a muddled area of law.

⁷⁸³ Jeevan Hariharan, 'Damages for reputational harm: can privacy actions tread on defamation's turf?' (2021) 13 JML 186, 203.

Chapter 6: Data Protection

I. Introduction to Data Protection

Data protection governs electronic and/or systematic use, storage, and dissemination of information ('data') about natural persons. It derives from transnational law, particularly EU law. Understanding those origins is critical to understanding its relationship with other areas of law, particularly privacy.

(i) History of Data Protection

Data protection as a distinct social concern arose in the 1970s: 'a response to the dramatic growth in information power which the electronic computer and online networks brought in their wake'.⁷⁸⁴ The UK's approach was pressured by its international obligations: despite two governmental committees recommending early adoption, successive governments deemed data protection anti-business and excessively bureaucratic.⁷⁸⁵

Erdos identifies three periods of development: 'first generation' protection between 1970 and the 1990s; 'second generation' protection stemming from the EU's 1995 Data Protection Directive ('DPD'); and the General Data Protection Regulation ('GDPR') era.⁷⁸⁶

The first generation began with limited data protection statutes in Germany and Sweden.⁷⁸⁷ In 1973 and 1974, the EU's Council of Ministers passed non-binding resolutions on the need to protect individuals' 'privacy' regarding electronic data banks.⁷⁸⁸ These contained precursors to the data protection principles – that information relating to an individual should be accurate, relevant, appropriate and up-to-date, obtained fairly, and kept securely for only a limited time.⁷⁸⁹ It also referred to individual information access rights,⁷⁹⁰ and classified certain kinds

⁷⁸⁴ David Erdos, 'The Development of European Data Protection Law and Regulation' in David Erdos (ed), *European Data Protection Regulation, Journalism, and Traditional Publishers: Balancing on a Tightrope?* (OUP 2019) 36.

⁷⁸⁵ Ian Lloyd, *Information Technology Law* (9th edn, OUP 2020) 34; see also Adam Warren and James Dearnley, 'Data Protection Legislation in the United Kingdom' (2005) 8 *Information, Communication and Society* 238.

⁷⁸⁶ Erdos (n 784) 35.

⁷⁸⁷ Lloyd (n 785) 28.

⁷⁸⁸ Council of Europe, 'Resolution (73) 22 on the Protection of the Privacy of Individuals vis-à-vis Electronic Data Banks in the Private Sector' (COE, 26 September 1973) <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680502830>> accessed 1 December 2022.

⁷⁸⁹ *Ibid* arts 2-4, 7-9.

⁷⁹⁰ *Ibid* art 6.

of ‘special’ data as specially sensitive due to their connection with an individual’s private life, or tendency to be used discriminatorily.⁷⁹¹

The Council of Europe subsequently created the intergovernmental Committee of Experts on Data Protection, who drafted the first Data Protection Convention (‘DPC’) in 1981 (coming into force in 1985).⁷⁹² The DPC extended the scope of protected data to that relating to any ‘identified or identifiable’ individual. It further explored the principles for lawful processing and articulated categories of special data. It contained the first examples of exemptions for legitimate grounds, as well as statistics and scientific research. The DPC’s preamble considered it ‘desirable to extend the safeguards for everyone’s rights and fundamental freedoms, and in particular the right to the respect for privacy’.⁷⁹³ It was supported by various non-binding Recommendations from the Council of Europe’s Committee of Ministers for the application of data protection in specific areas, like direct marketing.

To facilitate European commerce,⁷⁹⁴ the UK implemented the DPC via the Data Protection Act 1984 (‘the 1984 Act’). This implemented the DPC’s principles, individual rights, and established the Registrar of data users and computer bureaux – the first UK data protection authority capable of monitoring compliance and serving enforcement notices for non-compliance. It only implemented the DPC’s minimum standards, however.⁷⁹⁵

The EU created the DPD in 1995, implemented into UK law via the Data Protection Act 1998 (‘the 1998 Act’). The DPD, underpinned with new powers to complete the pan-EC/EU internal market, was motivated by a perceived low take-up for the DPC and divergent implementation by ratifying States.⁷⁹⁶

While the DPD retained the DPC’s core principles, it expanded them with greater specificity. It expanded the notion of ‘processing’, controllers’ transparency and notification requirements and the categories of special data, and abandoned technology non-neutral elements like references to ‘files’. It further expanded individual rights, adding limited rights

⁷⁹¹ Ibid art 1.

⁷⁹² Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (adopted 28 January 1981, entered into force 1 October 1985) ETS 108.

⁷⁹³ Ibid rec 2.

⁷⁹⁴ HL Deb 24 March 1983, vol 440, cols 1285-86.

⁷⁹⁵ Marios Koutsias, ‘Privacy and data protection in an information society: how reconciled are the English with the European Union privacy norms?’ (2012) 18 CTLR 261, 269.

⁷⁹⁶ Commission of the European Communities, *Commission Communication on the protection of Individuals In relation to the processing of personal data In the Community and Information security* (Com(90) 314, 13 September 1990) 2-3.

to object to processing, and created judicial remedies, including compensation, as well as public authority powers to monitor and respond. The exceptions were expanded to explicitly include journalistic, artistic, and literary purposes, though only where ‘necessary to reconcile the right to privacy with the rules governing freedom of expression.’⁷⁹⁷

The DPD also established the Article 29 Working Party: an advisory body comprised of representatives from each Member State, the European Commission, and the European Data Protection Supervisor. Its goals were to advise States, provide opinions to the Commission on Community law, and promote consistent DPD application. It produced many opinions on the meaning and application of data protection law, some of which will be referenced throughout this chapter.

In 2000, the European Charter of Fundamental Rights (‘the Charter’) was enacted, though it had no legal effect until 2009. It included a specific provision on data protection under Article 8, stating that individuals have a right to protect and access their personal data, and requiring such data to be ‘processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law’. This was, and remains, separate from Article 7, which concerns respect for private or family life.

In the 2010s, the European Commission proposed to replace the DPD with a regulation: resulting in the 2016 GDPR, applicable from May 2018. The proposal was prompted by new powers under the Treaty of Lisbon, and a widespread perception that the DPD was being incorrectly or excessively divergently implemented.⁷⁹⁸ The GDPR retained the DPD’s core framework and principles, though it expanded some areas like transparency requirements, categories of special data, duties of accountability and integrity, and duties, tasks and powers of national authorities in enforcing and monitoring the law. It also set up a regulatory ‘one-stop-shop’ for cross-border processing.

Additionally, the GDPR replaced (from 25 May 2018 onwards) the Article 29 Working Party with a new European Data Protection Board (‘EDPB’). The EDPB has similar remit, including issuing guidance and recommendations on the GDPR’s application and promoting consistency of application, but has additional powers to act as a dispute resolution body in cross-border cooperation cases.

⁷⁹⁷ Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31, art 9.

⁷⁹⁸ Erdos (n 784) 48.

By the time the GDPR became applicable, the UK had voted to leave the EU. It would not complete this process until 2020. By this time, it implemented those parts of the GDPR requiring national action via the Data Protection Act 2018 ('the 2018 Act'). Once the UK formally left the EU, the GDPR in national law became the 'UK GDPR' via regulations implementing most GDPR provisions.⁷⁹⁹ The EU GDPR and UK GDPR are substantively the same for present purposes, albeit the latter's wording is adapted for national law/institutions.

The UK courts applied European judgments interpreting the UK GDPR in compliance with the EU GDPR during the transition period. The European Court's decisions following the transition period are no longer binding, but are of persuasive value and likely heavily influential. Accordingly, this chapter refers to relevant EU caselaw and opinions.⁸⁰⁰ Additionally, the Article 29 Working Party opinions are frequently cited by both the Court of Justice of the European Union ('CJEU') and national courts, and the same will likely be true of EDPB guidance. These too, therefore, provide guidance on the law's content and shape.

(ii) Key Elements

Data protection law regulates any 'controller's' 'processing' of 'personal data' (excluding processing for some specific purposes like law enforcement).⁸⁰¹ Personal data 'means any information relating to an identified or identifiable living individual'.⁸⁰² The relevant individual is the 'data subject'.

The GDPR delineates between ordinary data and 'special data'. Special data is

personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation
...⁸⁰³

The GDPR also treats 'personal data relating to criminal convictions and offences or related security measures' as a separate category subject to its own rules.⁸⁰⁴ The 2018 Act

⁷⁹⁹ Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019, SI 2019/419; and later The Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2020 SI 2020/1586.

⁸⁰⁰ Erdos (n 784) 47.

⁸⁰¹ Data Protection Act 2018, s 1(1).

⁸⁰² Ibid s 3(2).

⁸⁰³ Council Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L119/1, art 9(1).

⁸⁰⁴ Ibid art 10.

specifies that this includes data relating to the ‘alleged commission of offences by the data subject’ as well as data relating to proceedings surrounding an actual or alleged offence and their disposal.⁸⁰⁵

‘Processing’ means any operation performed on information, including: ‘collection, recording, organisation, structuring or storage’; ‘adaptation or alteration’; ‘retrieval, consultation or use’; ‘disclosure by transmission, dissemination or otherwise making available’; ‘alignment or combination’; or ‘restriction, erasure or destruction’.⁸⁰⁶

A controller is any natural or legal person, public authority, or body⁸⁰⁷ ‘which, alone or jointly with others, determines the purposes and means of the processing of personal data’.⁸⁰⁸ When the controller processes personal data, they must either do so in compliance with the data protection principles, or rely on an exemption to the extent of their failure to comply.⁸⁰⁹

The data protection principles, in brief, are as follows. Firstly, personal data must be processed ‘lawfully, fairly and in a transparent manner in relation to the data subject’.⁸¹⁰ What makes processing lawful is discussed later in this chapter. The touchstone of fairness is using the data subject’s data in a manner they should reasonably expect⁸¹¹ given the initial processing’s intended purpose, how the data was obtained and what the data subject was told.⁸¹² It does not require consultation, however.⁸¹³

Transparency requires that ‘any information addressed to the public or to the data subject be concise, easily accessible and easy to understand, and that clear and plain language’ is used (with visualisation where appropriate).⁸¹⁴ An important element is ensuring data subjects understand whether data about them is being processed, by whom, and the purpose of processing.⁸¹⁵ It links to various detailed obligations to notify and inform the data subject about the use of their data.

⁸⁰⁵ Data Protection Act 2018, s 11(2).

⁸⁰⁶ *ibid* s 3(4).

⁸⁰⁷ Though a somewhat different regime applies to certain classes of controller acting for particular purposes, most notably law enforcement. This thesis will focus on the generally applicable regime.

⁸⁰⁸ GDPR (n 803) art 4(7).

⁸⁰⁹ And some principles must always be complied with, such as data security.

⁸¹⁰ GDPR (n 803) art 5(1)(a).

⁸¹¹ *Midlands Electricity Plc v Data Protection Registrar* [2001] CLY 3705.

⁸¹² *British Gas Trading Ltd v Data Protection Registrar* [1999] CLY 823.

⁸¹³ *Johnson v Medical Defence Union Ltd* 2007 WL 880937 [149]

⁸¹⁴ GDPR (n 803) rec 58.

⁸¹⁵ *Ibid*.

The second is the ‘purpose limitation’: personal information must only be collected for ‘specified, explicit and legitimate purposes’ and not further processed in an incompatible manner.⁸¹⁶ The third is ‘data minimisation’: personal data shall be ‘adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed’.⁸¹⁷ The fourth is ‘accuracy’: personal information must be accurate, kept up-to-date if necessary, and ‘every reasonable step’ must be taken to erase or rectify ‘inaccurate’ data.⁸¹⁸ The fifth is ‘storage limitation’: data must permit identification of individuals for no longer than the purpose relied on renders necessary (save as justified by the special purposes exemption relating to archiving).⁸¹⁹ The final principle is that data must be processed securely.⁸²⁰

A significant feature of data protection law is that the State is its primary enforcer. Each iteration created or enhanced the powers of an independent supervisory body (currently known as the Information Commissioner’s Office (‘ICO’)). The ICO’s primary task is to monitor and ensure compliance.⁸²¹

This does not mean that individuals have no powers: the GDPR grants personal rights. Some are beyond this thesis’ scope, like data portability, but four are of particular interest. The first is the right to obtain from the controller information as to what data concerning them is processed by the controller, and access information including: a copy of that data, the purpose of processing, the categories and source of the data and its recipients, the storage period, information about any automated decision-making involved, and the existence of relevant data protection rights.⁸²² This essentially allows the individual to obtain the information necessary to understand what the controller is doing with their data and whether there are grounds to object, complain to the ICO, or launch a legal claim.

The second is the right to make the controller rectify ‘inaccurate’ personal data.⁸²³ This is important for reputation, as it allows individuals to ensure that false information affecting their reputation is not only removed, but replaced with correct information.

⁸¹⁶ Ibid art 5(1)(b).

⁸¹⁷ Ibid art 5(1)(c).

⁸¹⁸ Ibid art 5(1)(d).

⁸¹⁹ Ibid art 5(1)(e).

⁸²⁰ Ibid art 5(1)(f).

⁸²¹ Case C-311/18 *Data Protection Commissioner v Facebook Ireland Limited and Maximilian Schrems* (ECJ, 2020) para 108.

⁸²² Ibid arts 13-15.

⁸²³ Ibid art 18.

The third is the right to object to processing (‘on grounds relating to his or her particular situation’) where Article 6(1)(e) (public interest and official authority tasks) or (f) (legitimate interests) is relied on as the ground of legality.⁸²⁴ If exercised, the controller must cease processing unless they demonstrate ‘compelling legitimate grounds for the processing which override the interests, rights and freedoms of the data subject or for the establishment, exercise or defence of legal claims.’⁸²⁵

The fourth is the right to erasure, also known as ‘the right to be forgotten’. This allows data subjects to make the controller erase their personal data if certain grounds are met corresponding to breaches of the data protection principles or rules, namely: the data is no longer necessary for the purposes for which they were processed or collected; the individual successfully exercised their right to object and this right was not defeated; the data was unlawfully processed; the data must be erased to comply with a legal obligation; or the personal data was collected regarding an offer of information society services.⁸²⁶

Distinct from the right to rectification, both the objection and erasure rights essentially allow the removal of true *and* false information. Their scope is therefore of acute interest to a data subject concerned with reputation, and are discussed in the remainder of this chapter. It must also be noted that these rights are supported by a right to restrict processing, pending determination of whether they are applicable.⁸²⁷

Finally, in certain circumstances, the defendant can claim exemption from some data protection principles. Some are specific to narrow classes of information regulated by other statutes⁸²⁸ or information processed by certain individuals for particular purposes (e.g., social workers).⁸²⁹ Others prevent conflict with other legal principles like legal privilege.⁸³⁰ The broadest are the domestic purposes and special purposes’ exemptions. The former completely disappplies the GDPR, while the latter disappplies most of it ‘to the extent that the controller reasonably believes that the application of those provisions would be incompatible with the special purposes.’⁸³¹ They will also be addressed in this chapter.

⁸²⁴ Ibid art 21(1).

⁸²⁵ Ibid art 21(1).

⁸²⁶ Ibid art 17.

⁸²⁷ Ibid art 18.

⁸²⁸ Data Protection Act 2018, e.g. sch 2, pt 2, sch 4.

⁸²⁹ Ibid sch 3.

⁸³⁰ Ibid sch 2, pt 4.

⁸³¹ Ibid sch 2, pt 5, para 26(3).

(iii) The Purpose and Scope of Data Protection

One might query the reason for data protection law, given other international and national privacy standards. On one view, it merely elevates Article 8 ECHR into a State enforcement issue, or shifts from open textured privacy standards to a more comprehensively regulatory model.⁸³² This would reflect consensus that individually enforced, open-textured privacy standards have been insufficient in the modern technological age. In some jurisdictions, laws equivalent to data protection are referred to as ‘privacy laws’.⁸³³ If data protection is merely a regulatory form of existing privacy norms, one would expect it to replicate MOPI’s underlying principles in how it protects reputation.

On another view, data protection law represents something linked but separate. For example, Parfitt argues that data protection’s premise is that data subjects own their personal data, which entitles them to some control over its use, similar to other intellectual or abstract property.⁸³⁴ This might suggest that, insofar as data protection allows privacy protection, it follows a proprietary model, though as this chapter argues this appears unlikely.

Alternatively, Lynskey argues that data protection protects individual personality rights as well as ‘reduc[ing] the power and information asymmetries between individuals and those who process their data.’⁸³⁵ She argues that individuals have a right not to be surveilled or monitored which goes beyond their ‘private life’ and so has never adequately been protected by historical privacy laws. This suggests data protection overlaps with, but goes beyond, the principles behind privacy protection: indicating a different, broader basis for any reputation protection.

More broadly, data protection may not be solely focused on individuals. Data protection laws promote good standards of data quality and management in a manner impacting a variety of public interests, particularly public access to information. This would explain why its primary enforcer is the State. Individual enforcement may be appropriate in some cases where individuals have a vested interest in ensuring good quality data flows (and reputational harm may be particularly motivating), hence why data protection law grants individuals certain rights. However, the State is the more logical promoter of the public interest. The State can

⁸³² Lloyd argues that ‘[i]n substantive terms, there is little difference between the privacy and data protection models’: Lloyd (n 785) 27.

⁸³³ Such as Australia’s Privacy Act 1988 and New Zealand’s Privacy Act 2020.

⁸³⁴ Mason Parfitt, ‘A global regime for data protection regulation: a cross-border analysis of the challenges of privacy ideas and coercion’ (2020) 25 *Cov LJ* 82, 82.

⁸³⁵ Orla Lynskey, ‘Deconstructing data protection: the “added-value” of a right to data protection in the EU legal order’ (2014) 63 *ICQ* 569, 569.

compensate power imbalances between individuals and controllers – especially regarding global corporations like Google⁸³⁶ – and act where individuals are not incentivised to act in the broader public interest. This suggests data protection’s protection of reputation might find its roots in a more consequentialist theory, particularly epistemic reputation or social norm theory.

The historical legislative and extra-legislative discussion might give the impression that data protection is all about privacy and Article 8 ECHR, rather than some other principle. Both the early non-binding resolutions and the Council of Europe parliamentary assembly request that led to the DPC were especially motivated by privacy concerns, and the latter referenced Article 8 ECHR directly. The DPD recital stated that data processing systems ‘must, whatever the nationality or residence of natural persons, respect their fundamental rights and freedoms, notably the right to privacy’.⁸³⁷ While ‘notably’ suggests other interests are relevant, privacy was the only one named – emphasising its centrality. Some elements of the substantive law also referenced privacy. For example, the journalistic special purposes exemption applied only where ‘necessary to reconcile the right to privacy with the rules governing freedom of expression.’⁸³⁸

Many ECJ cases in the DPD era (particularly pre-Charter) treated privacy and data protection as interchangeable (with privacy taking the forefront of the analysis if the court was asked to examine both).⁸³⁹ For example, in *Rundfunk*, the court was asked to assess the DPD-compatibility of an Austrian national auditing system.⁸⁴⁰ The ECJ assessed compatibility by determining whether the national legislation interfered with private life within the meaning of Article 8 ECHR and whether such interference was justified.⁸⁴¹ This, they argued, would lead to the conclusion that it was incompatible with the DPD.⁸⁴² Similarly, the court in *Satamedia* described the purpose of Article 9 DPD (the special purposes derogation) as reconciling the right to privacy with freedom of expression, without any reference to data protection as a distinct right.⁸⁴³

⁸³⁶ *ibid* 27.

⁸³⁷ Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281, rec 2.

⁸³⁸ *Ibid* art 9.

⁸³⁹ See further analysis in Orla Lynskey (n 835) 575-81.

⁸⁴⁰ Case C-139/01 *Österreichischer Rundfunk* [2003] ECR I-4989.

⁸⁴¹ *Ibid* paras 72-90.

⁸⁴² *Ibid* 91.

⁸⁴³ Case C-73/07 *Tietosuoja- ja valtuutettu v Satakunnan Markkinapörssi OY, Satamedia* [2008] ECR I-09831 para 54.

Meanwhile, the ECtHR treated Article 8 ECHR as giving rise to some form of data protection right. In a statement reiterated in several other cases, the court in *Amann* held that ‘the storing of data relating to the “private life” of an individual falls within the application of Article 8(1)’.⁸⁴⁴ However, Kokott and Sobotta suggest that Article 8 ‘requires an additional element of privacy in order for personal information to be included in the scope of private life’.⁸⁴⁵ This can be implied from the *dicta* in *Amann*: the court only stated that storing data *relating to an individual’s private life* would trigger Article 8. Though it stressed that ‘private life’ should not be restrictively interpreted here (and so could include business dealings),⁸⁴⁶ presumably there is a class of information relating to an individual but not their private life which does not trigger Article 8.

Similar implications can be found in other cases. In *Rotaru*,⁸⁴⁷ the ECtHR found a breach of Article 8 ECHR in the Romanian intelligence service making files of personal information on political undesirables. The court reiterated ‘that the storing of information relating to an individual’s private life in a secret register and the release of such information come within the scope of Article 8’.⁸⁴⁸ It noted that ‘public information can fall within the scope of private life where it is systematically collected and stored in files held by the authorities. That is all the truer where such information concerns a person’s distant past.’⁸⁴⁹

More recently in *M.M.*, the ECtHR found that the UK police’s failure to implement adequate safeguards in their system for retaining and disclosing cautions breached the applicant’s Article 8 ECHR rights.⁸⁵⁰ They repeated that ‘[e]ven public information can fall within the scope of private life where it is systematically collected and stored in files held by the authorities’.⁸⁵¹

As Kokott and Sobotta argue, if the information’s private nature in these two cases stemmed from the data’s age or systematic collection respectively, it might be assumed that such information would not be private were it more recent or less systematically collected.⁸⁵² This would certainly match the UK courts’ interpretation of Article 8 ECHR: the High Court

⁸⁴⁴ *Amann v Switzerland* App no 27798/95 ECHR 2000-II, para 65.

⁸⁴⁵ Juliane Kokott and Christoph Sobotta, ‘The distinction between privacy and data protection in the jurisprudence of the CJEU and the ECtHR’ (2013) 3 *International Data Privacy Law* 222, 224.

⁸⁴⁶ *Amann v Switzerland* (n 844) para 65.

⁸⁴⁷ *Rotaru v Romania* App No 28341/95 [2000] ECHR 192.

⁸⁴⁸ *Ibid* para 43.

⁸⁴⁹ *Ibid*.

⁸⁵⁰ *MM v UK* [2012] ECHR 1906.

⁸⁵¹ *Ibid* para 187.

⁸⁵² Kokott and Sobotta (n 845) 224.

in *NT1 & NT2* considered conviction information to only gain the necessary quality of privacy with the passage of time. Before that point, it was deemed inherently public.

However, there are several reasons to conclude data protection does more than protect privacy, and certainly that it goes beyond Article 8 ECHR. Data protection lack a requirement of minimum impact on private life – making them broader in scope than Article 8 (though there is some contention on this when it comes to defining personal data, as discussed below). This can be seen from the *NT1 & NT2* case, where there was no debate over whether the spent convictions fell within the scope of data protection law,⁸⁵³ compared to the discussion over whether they met MOPI’s first limb. This indicates that protection for information *simpliciter* arises from different concerns than simply privacy protection.

Bolstering this, the Charter treats the right to data protection as distinct. Post-Charter CJEU cases treat these rights as ‘closely connected’⁸⁵⁴ but nevertheless distinct. While the Charter is no longer part of UK law post-Brexit, the UK GDPR recognises a distinct right to data protection and s.2 of the 2018 Act emphasises similar concerns as the Charter’s Article 8 (like the need for fair and lawful processing) using similar language. Meanwhile, the UK data protection statutes have never referenced privacy explicitly and the GDPR itself merely states that the Regulation observes the rights set out in the Charter, listing privacy along with every other potentially relevant right without special prominence.⁸⁵⁵

Other personal interests connected to, but not necessarily synonymous with, privacy can be found within the data protection schema. For example, the right of access is not just a tool to allow individuals to know if their other rights have been breached: it can be a vital instrument in individuals learning more about themselves, their pasts, and how they relate to the world about them.⁸⁵⁶

Additionally, the GDPR and 2018 Act contain considerable provisions enabling the efficient spread of information – one of the purposes stated in the preamble is to ‘ensure the free flow of personal data between Member States’.⁸⁵⁷ A whole part is devoted to data transfers

⁸⁵³ Google admitted the point: *NT1 & NT2* (n 11) [53].

⁸⁵⁴ Cases C-92/09 and C 93/09 *Volker und Markus Schecke* [2010] ECR I-11063 para 47.

⁸⁵⁵ GDPR (n 803) rec 4.

⁸⁵⁶ This was the purpose of disclosure requests in the (ultimately unsuccessful) application in *R v Mid Glamorgan Family Health Services Authority* [1993] PIQR P426 and *P v Wozencroft* [2002] EWHC 1724 (Fam).

⁸⁵⁷ GDPR (n 803) rec 3.

to international organisations and third-party countries. Data protection law is plainly not solely defensive of individual rights, therefore.

Accordingly, whatever its historical roots, it is better to view modern data protection as an amalgamation of different purposes, including privacy protection,⁸⁵⁸ or as part of a broader principle to which privacy is non-exhaustively relevant, like good or fair data management. So, one cannot assume that data protection law will necessarily aim to protect reputational interests as a mere sub-set of privacy rights in the same way as MOPI or any other Article 8 ECHR-based law. It should also not be assumed that, if some aspects of data protection protect reputation, all aspects will – different aspects of the law may have nothing to do with it (e.g. cross border transfer rules).

II. Substantive Requirements

Data protection law's utility in protecting people's reputational interests is obvious. The need for a specific lawful basis and legitimate purpose limits the circumstances in which reputation-relevant information can be collected, stored, used, and disseminated. The same is true of the storage limitation and data minimisation principles. The need for transparency alerts data subjects as to how potentially reputation-damaging information is being used, allowing them to exercise any other rights to prevent or control this.

The requirement that information be accurate, kept up-to-date, and rectified where inaccurate guards against the use and spread of false reputation-damaging information. The potential for damages here provides incentives for controllers to ensure accuracy, further limiting the spread of false reputation-damaging data. Finally, the security standards deter the kinds of data loss and leaks which can cause serious reputational damage.⁸⁵⁹

Nevertheless, data protection is as much about the efficient flow of data as it is about individual interests. An individual's ability to obtain a remedy for reputational damage using data protection law encounters several hurdles, which the remainder of this chapter focuses on.

⁸⁵⁸ The same can likely be said of Article 8 ECHR itself: as Erdos points out, the individual sub-rights it encompasses, such as respect for home and correspondence, typically long predate any recognition for a general privacy right in national constitutions, the latter of which is a relatively modern development in most countries: David Erdos, 'Comparing constitutional privacy and data protection rights within the EU' (2022) 47 EL Rev 482.

⁸⁵⁹ Like the leak of user data from the extra-marital affairs website Ashley Madison in 2015: Danny Boyle, 'Ashley Madison hack' *The Telegraph* (19 August 2015) <<https://www.telegraph.co.uk/news/11811356/Ashley-Madison-hack-live.html>> accessed 27 December 2022.

A preliminary hurdle is showing that the controller has processed the data subject's personal data. Where the processor is a search engine linking to information published by other controllers, additional considerations arise when establishing whether a data subject can exercise their rights.

Another significant hurdle is establishing that the information is inaccurate or irrelevant (or no longer relevant). These are the two most common situations in which data subjects seek to assert their data protection rights (particularly the rights to erasure, rectification, and objection) where reputation-damaging information is concerned. Assuming the information is accurate and relevant, data subjects might also challenge the processing for lack of legal basis.

Finally, even if the data subject succeeds in any of these regards, the defendant may yet show that the processing falls into one of a number of exceptions. The remainder of the chapter analyses these issues, before examining the available remedies.

(i) The Scope of Data Protection

Compared to defamation and MOPI, the wording of data protection law indicates a lower opening threshold for data subjects. In defamation and MOPI, the claimant must demonstrate that the information has a particular moral or social quality – defamatory character (and serious harm) or a reasonable expectation of privacy.

Conversely, in data protection, the information need only 'relate' to the data subject. Information relates to a data subject if it refers to any living, natural individual 'identified or identifiable', whether the reference is direct or indirect, particularly where there are identifiers like names or factors specific to their 'physical, physiological, genetic, mental, economic, cultural or social identity'.⁸⁶⁰

At first glance, this appears to cover a far greater scope of information than would trigger Article 8 ECHR. For example, recording that a person attended a mundane public space by adding their name to a list of attendees would likely not trigger Article 8, but *is* information referring to an identified person.

There is some debate over whether the concept of 'relating to' is completely devoid of moral content, particularly whether it is narrowed by some notion of privacy. The EU's Article 29 Working Party Opinion 4/2007, endorsed by the ECJ in *Nowak* in 2017,⁸⁶¹ indicated not.

⁸⁶⁰ Data Protection Act 2018, s 3(2).

⁸⁶¹ Case C-434/16 *Nowak v Data Protection Commissioner* [2018] 1 WLR 3505, para 35.

They opined that data is about a person if any of three conditions are met. The first is the content element: the data subject is the information's content. The second is the purpose element: the data is used or is likely to be used 'with the purpose to evaluate, treat in a certain way or influence the status or behaviour of an individual.'⁸⁶² The third is the result element: neither of the previous conditions applies but the data's use 'is likely to have an impact on a certain person's rights and interests, taking into account all the circumstances surrounding the precise case.'⁸⁶³ This definition makes no reference to privacy. The purpose element is particularly relevant here, since all reputation-affecting information is definitionally used or likely to be used to evaluate an individual.

Conversely, the UK courts have sometimes relied on privacy-related notions when dealing with personal data meshed with non-personal data. *Durant* held that data relates to an individual if it is 'about' them,⁸⁶⁴ in that it 'affects their privacy':⁸⁶⁵ considering factors like whether the information is biographical or merely refers to their involvement in an event 'with no personal connotations',⁸⁶⁶ and whether it focuses on the data subject.⁸⁶⁷ In excluding documents which incidentally referred to a claimant being the source of a complaint, the Court of Appeal stated the concept is meant to identify information which the individual needs to 'check whether the data controller's processing of it unlawfully infringes his privacy'.⁸⁶⁸ The court considered the touchstone was whether the information 'affects [the data subject's] privacy, whether in his personal or family life, business or professional capacity'.⁸⁶⁹

This might equate personal data with private data, considerably narrowing its scope. It would lead to conflict – for example, the UK courts have held that holding DNA evidence on a police database does not interfere with Article 8 ECHR,⁸⁷⁰ but DNA data is quintessentially

⁸⁶² Article 29 Working Party, 'Opinion 4/2007 on the concept of personal data' (*clinicalstudydatarequest.com*, 20 June 2007) <<https://www.clinicalstudydatarequest.com/Documents/Privacy-European-guidance.pdf>> accessed 10 January 2023, 10.

⁸⁶³ *Ibid* 11.

⁸⁶⁴ *Durant v FSA* [2003] EWCA Civ 1746 [26].

⁸⁶⁵ *Ibid* [28].

⁸⁶⁶ *Ibid*.

⁸⁶⁷ *Ibid*.

⁸⁶⁸ *Ibid* [27].

⁸⁶⁹ *Ibid* [28].

⁸⁷⁰ *R (Marper) v Chief Constable of the South Yorkshire Police* [2004] 1 WLR 2196; though it is doubtful courts will follow this given this approach was unanimously rejected by the ECtHR in *S and Marper v United Kingdom* (n 627). Nevertheless, it shows the possibility for a fundamental conflict between the meaning of personal and private data.

special data. However, despite *Durant* being repeatedly cited,⁸⁷¹ later national cases clarify there is no real need to assess the information's 'private' nature – an unavoidable conclusion given *Nowak*. Subsequent cases like *Rudd*⁸⁷² used the *Durant* test mainly to distinguish between personal data and references to third-parties' data which the claimant argues is inextricably linked to their own data.⁸⁷³ The High Court in *Aven* declared *Durant* 'of scant relevance' in any other kind of case.⁸⁷⁴ It acknowledged that personal data covers 'most computerised information about an identifiable living individual'.⁸⁷⁵ Notably, it applied an identical test to defamation's 'reference to the claimant' test when determining whether information which did not name the claimant was 'about' them.⁸⁷⁶

It appears, then, that 'relates to' has no special moral content beyond cases where the claimant is essentially using the appearance of their name in a document to fish for data relating to other people. Data is about a person if it relates to them in terms of content, purpose, or result. As noted earlier, the 'purpose' element leads to the conclusion that reputation-affecting data is quintessentially personal data. Reputational impact is therefore a *prima facie* basis for data subjects to control information under data protection law.

Since reputation-affecting data is quintessentially personal data, and personal data must not be processed without compliance with the data protection principles or reliance on an exception, there is an implicit presumption that reputation-affecting data should not be processed which the defendant bears the onus of overcoming: the burden on the claimant is minimal compared to defamation and MOPI. The focus is almost entirely on the defendant's ability to justify their data use.⁸⁷⁷

Of course, the data subject must also show the data was processed. Processing covers an enormous breadth of data uses, and more generally 'any operation or set of operations performed on information or sets of information'.⁸⁷⁸ It does not include every conceivable use of information – orally spreading information falls beyond data protection, for example,⁸⁷⁹ as

⁸⁷¹ And other cases stating that the purpose of data protection law is to 'give practical effect to the fundamental right of individual privacy guaranteed by Article 8 of the European Convention on Human Rights': *Aven v Orbis Business Intelligence Limited* [2020] EWHC 1812 (QB) [30].

⁸⁷² *Rudd v Bridle* [2019] EWHC 893 (QB).

⁸⁷³ *Ibid* [113].

⁸⁷⁴ *Aven v Orbis Business Intelligence Limited* (n 871) [34]; see similar remarks in *Edem v Information Commissioner* [2014] EWCA Civ 92 [17].

⁸⁷⁵ *Aven v Orbis Business Intelligence Limited* (n 871) [14].

⁸⁷⁶ *Ibid* [29]-[32].

⁸⁷⁷ Ian Lloyd, *Guide to the Data Protection Act 1998* (Butterworths 1998) para 4.6.

⁸⁷⁸ Data Protection Act 2018, s 3(4).

⁸⁷⁹ *Scott v LGBT Foundation Ltd* [2020] EWHC 483 (QB).

does mentally evaluating electronic or recorded information (separate from its retrieval from the system).⁸⁸⁰ There must be some manual or electronic element to how the data is treated.

Nevertheless, this does not indicate that orally or mentally processed information falls beyond data protection's normative philosophy. Rather, it reflects the purpose of data protection law as dealing with the systematic problems caused by automated and digital processing. In any case, if the information was collected, stored, or transmitted in any digital form, the claimant will establish processing. Given all data affecting a natural person's reputation is personal data, any manual or electronic use of reputation-affecting data may therefore raise a data protection claim.

Some processing is completely excluded from the GDPR's scope: particularly processing by law enforcement and intelligence services. Those institutions are subject to similar data protection obligations under the 2018 Act's provisions. The applicable data protection principles are largely the same for present purposes, though the lawful grounds of processing are different.

(ii) Objection, Erasure and Search Engines

In the internet age, search engines are crucial to reputation maintenance. They are the primary way users access content. Searching a person's name or other pertinent information can grant access to a wealth of privacy and reputation-affecting information. Curiously, however, neither the GDPR nor its legislative predecessors singled out search engines as a special case or stated explicitly how they fit within the data protection scheme. The courts, contrastingly, have extensively explored the issue.

The instigating case was *Google Spain*.⁸⁸¹ the CJEU essentially formulated a new scheme of law for search engines by amalgamating various DPD principles. The data subject in *Google Spain* was named in a Spanish newspaper as owner of property forcibly sold to recover debt. The relevant articles were later available online via the Google search engine. Twelve years after the initial publication, the data subject sought to exercise their objection and erasure rights under the DPD against the newspaper and Google's US and Spanish companies.

The CJEU confirmed that indexing, temporarily storing and making links available to users on demand constituted processing, and that the search engine was a controller of the

⁸⁸⁰ *Johnson v Medical Defence Union Ltd* (n 813); see also *Joined Cases C-141/12 & C-372/12 YS v Minister voor Immigratie, Integratie en Asiel* [2015] 1 CMLR 18 para 39-40.

⁸⁸¹ *Case C-131/12 Google Spain SL v Agencia Espanola de Proteccion de Datos* [2014] QB 1022.

personal data contained on the websites indexed. It also confirmed that a search engine can be required by an ICO to deindex a website without addressing the website owner.

The court was also asked whether the rights to erasure, blocking, and objection allow data subjects to demand deindexing where they consider it prejudicial to themselves or ‘wishes it to be consigned to oblivion’, and whether it was relevant that the information was published lawfully. In response to this, it noted that search engine operations are

liable to affect significantly the fundamental rights to privacy and to the protection of personal data when the search by means of that engine is carried out on the basis of an individual’s name, since that processing enables any internet user to obtain through the list of results a structured overview of the information relating to that individual that can be found on the internet ...⁸⁸²

That information could cover ‘a vast number of aspects of his private life and which, without the search engine, could not have been interconnected or could have been only with great difficulty – and thereby to establish a more or less detailed profile of him.’ The court continued that:

Furthermore, the effect of the interference with those rights of the data subject is heightened on account of the important role played by the internet and search engines in modern society, which render the information contained in such a list of results ubiquitous.⁸⁸³

This characterisation was significant since DPD’s objection right required data subjects to establish ‘**compelling legitimate** grounds relating to [their] particular situation’ (the bolded words are absent from the GDPR).⁸⁸⁴ The court essentially deemed the fact that the information was accessible via the search engine to create a sufficiently serious interference so as to constitute compelling legitimate grounds (and one not ‘justified by merely the economic interest’ of the controller).⁸⁸⁵

Thus, the data subject’s rights and controller’s obligations applied even if the website was a lawful publication. The court seemed to fuse or treat as interchangeable the erasure and objection rights. It noted that data might be processed unlawfully for a variety of reasons – inaccuracy, inadequacy, irrelevancy, or being no longer relevant or excessive for the original

⁸⁸² Ibid para 80.

⁸⁸³ Ibid.

⁸⁸⁴ DPD (n 797) art 14(a) (emphasis added).

⁸⁸⁵ *Google Spain* (n 881) para 81.

purposes.⁸⁸⁶ It followed that a data subject is entitled to request erasure of any indexing of data where that indexing is incompatible with the DPD,⁸⁸⁷ without the need to demonstrate prejudice.⁸⁸⁸ This could only be overridden by the public interest in access to the information where there were ‘particular reasons’ – like the person’s role in public life.⁸⁸⁹

However, *Google Spain* curtailed this approach by noting that a search engine only owes duties ‘inasmuch as the data processing carried out in the context of the activity of a search engine can be distinguished from and is additional to that carried out by publishers of websites and affects the data subject’s fundamental rights additionally’.⁸⁹⁰ Its duties also only applied ‘within the framework of its responsibilities, powers and capabilities’.⁸⁹¹

The *Google Spain* decision was the first recognition of a generic ‘right to be forgotten’, laying the foundation for Article 17 GDPR – the modern erasure right. This states that data subjects have the right to obtain the erasure of data where: processing is unlawful; no longer necessary for the original purposes; its legality is based on withdrawn consent; they exercised their right to objection and there are no overriding legitimate grounds to process; erasure is required to fulfil a legal obligation; or the data was collected regarding an offer of information society services. This effectively grants data subjects the right to see erased reputation-affecting information where there is a breach of some data protection principle, or where the objection right applies and is not defeated.

Under Article 21, data subjects have the right to object, ‘on grounds relating to his or her particular situation’, where the legal *vires* are based on necessity to perform a public interest or official task, or necessity for the purposes of the controller’s or a third party’s ‘legitimate interests’ (discussed in more detail later).⁸⁹² Should the right apply, the controller must stop processing unless they can demonstrate ‘compelling legitimate grounds which override the interests, rights and freedoms of the data subject or for the establishment, exercise or defence of legal claims.’

⁸⁸⁶ Ibid para 93.

⁸⁸⁷ Ibid para 94.

⁸⁸⁸ Ibid para 99.

⁸⁸⁹ Ibid para 97.

⁸⁹⁰ Ibid para 83.

⁸⁹¹ Ibid.

⁸⁹² GDPR (n 803) arts 21, 6(1)(e) and (f).

Google Spain, and its relationship with the more explicit rights under the GDPR, was explored by the CJEU in *CNIL*.⁸⁹³ Delisting requests have also been addressed in EDPB guidance.⁸⁹⁴ The delisting requests in *CNIL* involved special or criminal data. The court reiterated that data protection obligations only apply to search engines insofar as their activities have significant and additional effect over the websites on which the data is contained, and ‘in the context of his responsibilities, powers and capabilities as the controller of the processing carried out in connection with the activity of the search engine’.⁸⁹⁵ However, it noted that the search engine operator

is responsible not because personal data referred to in those provisions appear on a web page published by a third party but because of the referencing of that page and in particular the display of the link to that web page in the list of results presented to internet users following a search on the basis of an individual’s name, since such a display of the link in such a list is liable significantly to affect the data subject’s fundamental rights to privacy and to the protection of the personal data relating to him.⁸⁹⁶

This indicates that there is not normally any need for the data subject to establish that the search engine’s activities have significant and additional effect, as this is presumed from the link’s availability in response to a search for the target’s name.

The recent *TU v Google* case also appeared to treat search engines as relatively automatically having significant additional effect in the context of name-based searches: ‘the activity of a search engine can be distinguished from *and is* additional to that carried out by publishers of websites’.⁸⁹⁷ It justified this because

that activity plays a decisive role in the overall dissemination of those data in that it renders the latter accessible to any internet user making a search on the basis of the data subject’s name, including to internet users who otherwise would not have found the internet page on which those data are published.⁸⁹⁸

This indicates that search engines linking to reputation-affecting websites are unlikely to establish their processing falls beyond data protection law due to a lack of significant

⁸⁹³ Case C-136/17 *GC v CNIL* [2019] ECLI:EU:C:2019:773.

⁸⁹⁴ European Data Protection Board, ‘Guidelines 5/2019 on the criteria of the Right to be Forgotten in the search engines cases under the GDPR’ (*Europa.eu*, 7 July 2020) <https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_201905_rtbsearchengines_afterpublicconsultation_en.pdf> accessed 1 March 2023.

⁸⁹⁵ Case C-136/17 *GC v CNIL* (n 893) para 48.

⁸⁹⁶ *Ibid* para 46.

⁸⁹⁷ Case C-460/20 *Re TU v Google LLC* (2022) ECLI:EU:C:2022:271 para 50 (emphasis added).

⁸⁹⁸ *Ibid*.

additional effect or the context of their responsibilities, powers, and capabilities. The very fact that search engines make potentially harmful information more broadly accessible than it otherwise would be is sufficient.

However, there may be an exception where the link can only be found on, say, page 50 of the search list. Arguably, the unlikeliness of any user delving that far means the search engine has not really elevated the risk of impacting the data subject over and above the data's presence on the original website.

Additionally, both the *Google Spain* and *CNIL dicta* were strictly confined to indexing that produces responses to a search on the individual's name.⁸⁹⁹ Given the court's concern with the public using an individual's name to receive a profile, one may wonder if a search for other terms, which happened to return search results a data subject wanted hidden,⁹⁰⁰ substantially and significantly affects the data subject beyond that website existing. EDPB guidance envisages otherwise. It notes that delisting requests will not generally prevent the website returning in response to searches for keywords other than the data subject's name and only in 'exceptional cases' must the search engine carry out full erasure from their indexes and caches.⁹⁰¹

This indicates a general concern with proportionality of impact on data subjects considering the public's general interest in accessing useful information. The need for significant additional affect (even if relatively automatically in most cases), and limiting the search engine's obligations to those relevant in the context of its responsibilities, powers and capabilities, recognises the vital role of search engines in allowing the public access to information. Assuming the right to be forgotten applies only to searches for an individual's name, reputation-harming information can remain accessible save in those cases where the potential harm to the individual is disproportionate to the value the public will derive.

The law seemingly assumes the impact is proportionate where the public is specifically looking for that type of information (e.g., 'sex offenders in Cambridge') but not when they are looking for generic information about the data subject (by searching their name), not expecting to derive any particular fact. There is perhaps a sense that the searcher in the latter case does

⁸⁹⁹ *Google Spain* (n 881) para 87-88.

⁹⁰⁰ E.g. 'sex offenders in Cambridge' returning a list with the data subject's name and presence in Cambridge on it.

⁹⁰¹ European Data Protection Board (n 894) 5

not need to know the information since they are not expecting to find it, whereas the searcher in the former does need to know. There is also a heightened risk that the searcher in the latter case will use the information antisocially. This gives the impression that epistemic concerns are important here – there is a keen focus on the public’s interest in the particular information and the value they will derive from it.

Supporting this, the Article 17 right to be forgotten is inapplicable where processing is necessary ‘for exercising the right of freedom of expression and information’, to comply with the law, for public health or public interest reasons, for certain special purposes, and for the establishment or defence of legal claims. The CJEU in *CNIL* noted that the former ‘is an expression of the fact that the right to protection of personal data is not an absolute right but ... must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality’.⁹⁰² Accordingly:

While the data subject’s rights protected by Articles 7 and 8 of the Charter override, as a general rule, the freedom of information of internet users, that balance may, however, depend, in specific cases, on the nature of the information in question and its sensitivity for the data subject’s private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life.⁹⁰³

The data’s sensitivity, particularly where it concerns special data, is also relevant.⁹⁰⁴ In the case of criminal data, relevant factors also include the offence’s nature, seriousness, the progress and outcome of proceedings, the time elapsed, ‘the part played by the data subject in public life and his past conduct, the public’s interest at the time of the request, the content and form of the publication and the consequences of publication for the data subject’.⁹⁰⁵

From most of these factors, it once again appears as if the key consideration is whether the intended audience has a good reason to know (or continue being reminded) of the information. In this sense, particularly as regards criminal data, rehabilitation of data subject’s following reputation-damaging events is built into their rights.

Another critical development since *Google Spain* is the GDPR’s seeming expansion of the objection right. As previously noted, under the DPD, data subjects had to demonstrate

⁹⁰² Case C-136/17 *GC v CNIL* (n 893) para 57.

⁹⁰³ *Ibid* para 66.

⁹⁰⁴ *Ibid* para 67.

⁹⁰⁵ *Ibid* para 77.

‘compelling legitimate grounds’ relating to their particular situation. Article 21 GDPR, conversely, merely says data subjects can object on grounds relating to their particular situation at the time of processing.

The EDPB argues this is broader than under the DPD (and broader than Article 17 GDPR’s non-objection-based grounds) ‘since it does not restrict the grounds according to which data subjects may request delisting’.⁹⁰⁶ Since data subjects no longer need to demonstrate ‘compelling legitimate grounds’, the EDPB concluded the GDPR ‘changes the burden of proof, providing a presumption in favour of the data subject by obliging on the contrary the controller to demonstrate “compelling legitimate grounds for the processing”’.⁹⁰⁷

‘Compelling legitimate grounds’ is not a low bar, either. It seemingly goes beyond the controller’s mere interests like business interests (which the Article 29 Working Party characterised as not ‘particularly compelling’).⁹⁰⁸ Relevant cases tend to involve important public interests, like the general public’s interest in specific information concerning open justice.⁹⁰⁹

The EDPB essentially argues that the data subject’s ‘particular situation’, rather than being a preliminary hurdle for them to prove to assert the right, is merely part of the proportionality balancing assessment the controller must consider, after establishing compelling legitimate grounds, when deciding whether those grounds override the data subject’s interests (along with the *Google Spain* factors).⁹¹⁰ The EDPB identified other factors relevant, like whether the information amounts to hate speech, affects the target’s privacy, is inaccurate, or ‘relates to a relatively minor criminal offence that happened a long time ago and causes prejudice to the data subject’.⁹¹¹

Effectively, this means the objection right allows data subjects to prevent processing as of right for any reason (including fear of reputational harm), with the burden being on the

⁹⁰⁶ Ibid para 27.

⁹⁰⁷ Ibid para 30.

⁹⁰⁸ Article 29 Working Party, ‘Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC’ (*Europa.eu*, 9 April 2014) <https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp217_en.pdf> accessed 2 January 2023, 31.

⁹⁰⁹ *Townsend v Google* [2017] NIQB 81 [48].

⁹¹⁰ Ibid para 32.

⁹¹¹ Ibid.

controller to justify why processing should continue, in the same way it might establish the free speech exception to Article 17.

Of course, the objection right only applies where either of two of the many legal *vires* for processing is relied on (or in direct marketing cases). However, as argued later, the legitimate interests *vis* is likely the most commonly relied on for private party processing of reputation-affecting ordinary data. The public task *vis*, meanwhile, is most relevant to public authorities. The right's strength is significant in protecting reputation in practice, therefore.

(iii) Adequacy and Accuracy

Individuals have a right to have inaccurate and inadequate data rectified, and both may form the basis of the erasure right or a damages claim. Data is inaccurate if it is 'incorrect or misleading as to any matter of fact'.⁹¹²

The UK ICO defines information as adequate if 'sufficient to properly fulfil your stated purpose'.⁹¹³ This links heavily with accuracy, since the failure to include full information may render the data misleading. Accordingly, adequacy does not receive analysis separate from accuracy in many cases. However, it can be of independent significance – particularly in search engine cases.

For example, in *CNIL*, the CJEU noted that a list of search results should be presented in an order which reflects the overall current position.⁹¹⁴ Where multiple articles deal with a legal dispute at different points in time, the most up-to-date representation of facts should be featured first on the list. The CJEU in *TU* similarly noted that, where processing is subject to legal proceedings concerning its accuracy, search engines are required 'to add to the search results a warning concerning the existence of such proceedings' once made aware of those proceedings.⁹¹⁵

Accuracy is a question of fact which requires the court (or ICO) to make findings of fact as to the truth of a situation.⁹¹⁶ Inaccuracy claims tend to run alongside defamation claims in which truth is asserted as a defence and MOPI claims, in which falsity is a factor relevant to

⁹¹² Data Protection Act 2018, s 205(1).

⁹¹³ ICO, 'Principle (c): Data minimisation' (*ICO.org.uk*, 2023) <<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/principles/data-minimisation/>> accessed 3 January 2023.

⁹¹⁴ Case C-136/17 *GC v CNIL* (n 893) para 78.

⁹¹⁵ Case C-460/20 *Re TU v Google LLC* (n 897) para 76.

⁹¹⁶ *AB v Chief Constable of British Transport Police* 2022 WL 16727153 [62].

the first or second limb. In these cases, the courts largely treat a finding that the statement is untrue for the purposes of defamation or MOPI as conclusive of inaccuracy in DP without further discussion.⁹¹⁷ Nevertheless, some cases do specifically address the meaning of inaccuracy, and from these cases it appears that it largely mirrors defamation.

The first DPD-era case, *Quinton*, suggested that the same criteria for assessing accuracy as apply in injurious falsehood (which it held to be also applicable to defamation) applied to data protection's standard of inaccuracy.⁹¹⁸ Similarly, the High Court in *NT1 & NT2* thought it was 'legitimate to draw on national legal traditions when implementing the broad principles established by European law', particularly defamation's approach of determining 'the single natural and ordinary meaning which the words complained of would convey to the ordinary reasonable reader' which the defendant must then prove true.⁹¹⁹ It rejected a less holistic approach of examining each discrete piece of data in isolation, holding that the data must be interpreted in the broader context or document.⁹²⁰ Other cases have followed this approach, like the court in *Aven* stating the court looks to find the single 'true natural and ordinary meaning' as a reasonable member of its audience would understand it in the relevant context.⁹²¹

Notably, in justifying the use of defamatory principles in this context, the High Court in *NT1 & NT2* explained that the principles of defamation 'have been developed over centuries to meet the needs of a cause of action that addresses issues arising from the publication of words *and their impact on reputation*.'⁹²²

Similarly, the High Court in *Aven* noted that any stigmatic connotations which a reasonable audience member would draw from the data can be relevant to accuracy, not just the literal meaning.⁹²³ In *Grace*, the claimant was recorded as defaulting on a hire-purchaser agreement which was later held unenforceable under consumer credit legislation.⁹²⁴ The court held that, given the stigma attached to being a defaulting debtor, 'a statutory liberty not to pay is so central to any continued non-payment that the registration of his non-payment as a default is generally inaccurate unless accompanied with a reference to that liberty'.⁹²⁵ So, a fact is more

⁹¹⁷ E.g. *EC v Sunday Newspapers Limited* [2017] NIQB 117 [166]; *Re JRI88's Application for Judicial Review* [2022] NIQB 55 [55].

⁹¹⁸ *Quinton v Peirce* [2009] EWHC 912 (QB) [87]-[92].

⁹¹⁹ *NT1 & NT2* (n 11) [82].

⁹²⁰ *Ibid* [82]-[83].

⁹²¹ *Aven v Orbis Business Intelligence Limited* (n 871) [154].

⁹²² *NT1 & NT2* (n 11) [83] (emphasis added).

⁹²³ *Aven v Orbis Business Intelligence Limited* (n 871) [154].

⁹²⁴ *Grace v Black Horse Ltd* [2014] EWCA Civ 1413.

⁹²⁵ *Ibid* [42].

likely inaccurate (even if it is true from a certain point of view) if its presentation leads to unwarranted stigma which a different presentation would avoid.

The intended audience is also a factor arising in data protection claims more prominently than in defamation. *AB* concerned an individual with an autistic spectrum disorder whose symptoms involved compulsive fiddling with fabric (stimming).⁹²⁶ He had stimmed by touching two women's clothing. They misinterpreted this as a sexually motivated attack, which they reported to the police. The claimant was not charged with any offence, but the police refused, on request, to delete the two 'Occurrence Summary Reports' recording the details of the complaints.

The High Court noted that the essence of the dispute was a conflict over what the Occurrence Summary Reports meant. The claimant contended that they meant he committed the offences in the manner the complainants described. The police contended that they were merely a record that they had been told certain information by the complainants.⁹²⁷ The High Court agreed with the police's interpretation.

In reaching this conclusion, Johnson J explained that when determining meaning, the *Chase* categories from defamation law were relevant⁹²⁸ and that the data should be considered in its 'nature, context and purpose'.⁹²⁹ Johnson J noted that while it was true, as the judge at first instance found, that an 'ordinary reader' in the sense of being a member of the public would agree with the claimant, this was irrelevant since OSRs are not read by the public.⁹³⁰ Rather, the relevant ordinary reader was a police officer who understood what an OSR was and its limits. Accordingly, the OSRs were accurate.

This approach mirrors *Coombs*, a case under the 1984 Act. It noted that if the intended audience is one which is, for whatever reason, less likely to be misled, the data is less likely to be inaccurate.⁹³¹ It is clear that data can be literally incorrect but not legally incorrect if the intended audience would understand that it is incorrect (which may require a note of any

⁹²⁶ *AB v Chief Constable of British Transport Police* (n 916).

⁹²⁷ *Ibid* [68]-[69].

⁹²⁸ *Ibid*.

⁹²⁹ *Ibid* [70].

⁹³⁰ *Ibid* [73].

⁹³¹ *R v Chief Constable of Greater Manchester Ex p Coombs* 2000 WL 877768.

mistake to be made within the data or explaining that the data is mere historical record⁹³²) or does not mean what it literally means.

It is possible that this represents a departure from the courts' general statement that accuracy follows defamation's definition of 'false'. After all, it means that the court can restrain its analysis to a far narrower audience than the reasonable public as a whole, as is usually the case in defamation claims. However, it more likely mirrors the approach to 'legal innuendo' claims in defamation. If a defamation claimant alleges the statement's recipients had some special extrinsic knowledge which would lead them to derive a different meaning than the general public, this different meaning is considered the 'single' meaning.

Meanwhile, the treatment of opinions is similar to defamation. The same rules as defamation apply to determine whether something is a fact or an opinion.⁹³³ As the UK ICO notes:

A record of an opinion is not necessarily inaccurate personal data just because the individual disagrees with it, or it is later proved to be wrong. Opinions are, by their very nature, subjective and not intended to record matters of fact.⁹³⁴

However, the record must make clear it is an opinion, and if the opinion was based on inaccurate fact that should be recorded.⁹³⁵ If the record fails to do so, it may be deemed inaccurate or inadequate. An opinion is also likely inadequate if it does not contain 'enough information to enable a reader to interpret it correctly. For example, it should state the date and the author's name and position.'⁹³⁶ However, the ICO notes that a 'record of an opinion is not necessarily inadequate or irrelevant personal data just because the individual disagrees ... [or] thinks it has not taken account of information they think is important.'⁹³⁷

So, similar to the honest opinion defence, an opinion is not assailable on accuracy or adequacy grounds provided it indicates adequate basis. Like honest opinion, the basis' adequacy is objectively assessed: the key issue is whether the data allows the audience to

⁹³² ICO, 'Principle (d): Accuracy' (*Ico.org.uk*, 2023) <<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/principles/accuracy/#challenge>> accessed 1 January 2023.

⁹³³ *Aven v Orbis Business Intelligence Limited* (n 871) [150]-[151].

⁹³⁴ ICO, 'Principle (d)' (n 932).

⁹³⁵ *Ibid.*

⁹³⁶ *Ibid.*

⁹³⁷ *Ibid.*

properly understand the information's nature, not to prevent them from reaching a conclusion the data subject does not agree with.

The law's treatment of opinions based on false facts is somewhat different from defamation. A controller is not liable to rectify opinions based on false facts if they record that the fact was later found incorrect. However, the requirement to note that the basis of the opinion is wrong is likely to completely undermine the reputation-damaging effect of the opinion. If the controller wishes to continue conveying that they still hold the opinion, they will have to indicate some true fact it is based on or face further rectification orders – or even a claim for damages. In practice, therefore, the law does not permit people to continue conveying that they hold an opinion based on false facts.

Additionally, unlike defamation's honest opinion defence, malice or lack of belief are not explicitly relevant. There is a strong argument that people who profess an opinion they do not truly hold necessarily process inaccurate data: part of expressing opinion is expressing the factual claim that 'I hold this opinion'. Similarly, there is no need for the opinion to be holdable by an honest person. However, it is difficult to imagine a court believing a defendant actually held an opinion which no honest person, however biased or unpleasant, could hold. Not much likely turns on this distinction, therefore. In practice, what makes an opinion accurate mirrors defamation.

Overall, therefore, data protection law considerably mirrors defamation law here. This likely influenced the *dicta* in *NT1 & NT2* and *Aven*, which indicate that the UK High Court implicitly characterises accuracy as primarily concerned with reputational impact. This is an oversimplification, however. A critical difference is data protection's lack of any need to prove that the information is false *in a way which causes reputational damage* in the eyes of a hypothetical reasonable person (or indeed anyone else). There is also no need to prove serious actual reputational damage (or likely damage). It is enough that the information is simply wrong.

The effect of this, for example, is that a claimant can sue for the rectification of inaccurate information even if they are solely concerned with, say, the response of a niche or antisocial community. They can do the same even if their fear of reputational harm is entirely irrational. That reasonable people would not think worse of the data subject if exposed to the error does

not preclude the data subject from exercising their rights.⁹³⁸ Data protection gives data subjects considerably more control over reputation-affecting false information than defamation. This indicates that truth is one of the law's central values, which will be relevant when determining which reputational theory data protection law best embodies.

Similarly, data protection requires the correction of inaccurate information even if it casts the target in a more positive light – something that defamation is unconcerned with. This reinforces the relevance of epistemic reputation, which as noted in the first chapter is one of the few theories that cares about false reputational signals regardless of whether they are positive or negative. Though an individual is unlikely to enforce the law in this manner, the State might.

A final matter of doubt, and a possible area of distinction with defamation, is who bears the burden of proof. Data subjects have a right to restrict processing of personal data in certain circumstances, including where they contest accuracy 'for a period enabling the controller to verify the accuracy of the personal data'.⁹³⁹ This suggests the controller bears the burden to prove accuracy to continue processing. The High Court in *NT1 and NT2* also implicitly put the burden on the defendant, in line with its adoption of defamation principles.⁹⁴⁰ However, this might have been a consequence of the fact that the court could reasonably assume much of the factual background in that case to be true, given they were derived from a prior criminal court judgment and certain CPS charging decisions.

This issue was explicitly addressed for the first time in the post-Brexit CJEU case of *TU*,⁹⁴¹ which concerned a request for search engine de-referencing of websites and thumbnail images on the basis that the website's contents were inaccurate. The search engine refused the request as it was not aware the information was inaccurate. The Grand Chamber was asked, among other matters, how national courts should balance the erasure right with that of free speech where search engine links lead to allegedly inaccurate information.

The court held that search engines are required to comply with the erasure right provided the data subject provides 'relevant and sufficient evidence capable of substantiating his or her request' establishing 'the manifest inaccuracy of the information found in the referenced

⁹³⁸ Though it might be relevant to the erasure right as part of the 'prejudice' factor.

⁹³⁹ GDPR (n 803) art 18(1)(a).

⁹⁴⁰ *NT1 & NT2* (n 11) [93].

⁹⁴¹ Case C-460/20 *Re TU v Google LLC* (n 897).

content’.⁹⁴² However, search engines are not required to accede (without a judicial decision) where the inaccuracy is ‘not obvious in the light of the evidence provided by the data subject’.⁹⁴³ This is particularly so where the information contributes to a public interest debate, given the ‘importance of the right to freedom of expression and of information’.⁹⁴⁴

The need to prove ‘manifest inaccuracy’ clearly puts the burden on data subjects, though it does not go as far as requiring a pre-existing judicial determination. Rather, the data subject need only provide ‘evidence that, in the light of the circumstances of the particular case, can reasonably be required of him or her to try to find in order to establish that manifest inaccuracy.’⁹⁴⁵ It also imposes a relatively high burden – certainly higher than showing ‘prima facie evidence’, as suggested by the Advocate General.⁹⁴⁶

The CJEU was also clear that ‘the operator of the search engine concerned cannot be required to investigate the facts’ as this would go beyond ‘what can reasonably be expected of it in the light of its responsibilities, powers and capabilities’ and risk chilling the rights to free expression and information.⁹⁴⁷ It did not mention the restriction right, however, which does appear to envisage the controller investigating the accuracy of the claim.

The CJEU also held these rules were inapplicable where the inaccuracy is ‘minor in relation to the content as a whole’.⁹⁴⁸ This is because it is ‘disproportionate’ to require delisting, ‘with the result that accessing all of them on the internet would be difficult’ where this is the case.⁹⁴⁹ This indicates the public’s interest in access to the broader information can outweigh the harm of permitting minor inaccurate information to continue disseminating, pending judicial determination of its truth. However, one might expect that reputation-affecting information will unlikely be classed as ‘minor’ even if it is quantitatively a small portion of the information which the publication conveys.

Post-Brexit, *TU* is merely of persuasive value. Also, the allocation of the burden of proof in the context of a delisting request to a private party may be distinct to the burden in ICO complaints or legal claims. It may even be different where the controller is the data’s original publisher rather than a search engine (the former is in a better position to prove the publication’s

⁹⁴² Ibid paras 68 and 72.

⁹⁴³ Ibid para 73.

⁹⁴⁴ Ibid.

⁹⁴⁵ Ibid para 68.

⁹⁴⁶ Case C-460/20 *Re TU v Google LLC* (Advocate-General Pitruzzella, 7 April 2022) para 44.

⁹⁴⁷ Case C-460/20 *Re TU v Google LLC* (n 897) para 71.

⁹⁴⁸ Ibid paras 68 and 72.

⁹⁴⁹ Ibid para 74.

truth). As Erdos argues, the CJEU’s caselaw is ‘in effect judicially establishing a *lex specialis*’ applicable to search engines against the GDPR’s strict wording.⁹⁵⁰ The law on the burden of proof therefore remains unclear.

(iv) Relevance and Limitation

The ICO defines relevance as having ‘a rational link to [the relied upon] purpose.’⁹⁵¹ Combined with the storage limitation principles, the data must retain this rational link for the duration of processing. Relevance is particularly important to reputation-based claims where the information is true. It is a common basis for data subjects asserting the erasure right where a supposedly rehabilitated target’s misconduct is published on the internet.

The *Google Spain* factors explained above – the data’s sensitivity, age, and possible utility to modern contemporary audiences – relate to relevance even if the CJEU did not explicitly say so. After all, the data subject’s primary argument for delisting in that case was that the information was irrelevant (in addition to being prejudicial to their reputation). This indicates, as explored in that section, that the interests of the recipient and the value they derive from the information is of key importance to relevance.

The Article 29 Working Party guidelines on *Google Spain* (since superseded by the EDPB guidelines, as explained above) noted that when determining the weight given to the data subject’s role in public life, ‘[a] good rule of thumb is to try to decide where the public having access to the particular information ... would protect them against improper public or professional conduct.’⁹⁵² It also stated that it was a particularly important factor that processing

might have a disproportionately negative impact on the data subject where a search result relates to a trivial or foolish misdemeanour which is no longer – or may never have been – the subject of public debate and where there is no wider public interest in the availability of the information.⁹⁵³

Unsurprisingly, this indicates it is not the prejudice *per se* which renders the information irrelevant, but the justifiability of the audience’s response to the data. Rehabilitation is therefore

⁹⁵⁰ David Erdos, ‘An Accurate Thumbnail of European Data Protection and Search Engine Indexing? Exploring C-460/20 TU, RE v Google LLC (2022)’ (2023) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4381553> accessed 14 March 2023, 3.

⁹⁵¹ ICO, ‘Principle (c)’ (n 913).

⁹⁵² Article 29 Working Party, ‘Guidelines on the Implementation of the Court of Justice of the European Union Judgment on “Google Spain and Inc v Agencia Espanola de Proteccion de Datos (AEPD) and Mario Costeja Gonzalez” C-131/12’ (*Europa.eu*, 24 January 2020)

<<https://ec.europa.eu/newsroom/article29/items/667236/en>> accessed 2 January 2023, 13.

⁹⁵³ *ibid* 18.

a key concept. The ability to force deletion or delisting of true data on relevance grounds (where the far broader objection right is unavailable) in this context is significant.

This is especially pertinent to criminal data. Warby J considered rehabilitation the ‘most important criterion’ in *NT1 & NT2*, which as previously explained involved the spent convictions of two businessmen.⁹⁵⁴ He deemed the starting point in the UK to be the spent convictions regime under the Rehabilitation of Offenders Act 1974, though he noted that while the fact that a conviction is spent is a weighty factor,⁹⁵⁵ it does not automatically tip the balance.⁹⁵⁶ He considered the right to rehabilitation an aspect of privacy, including ‘reputation’ and ‘unhindered social interaction with others’.⁹⁵⁷ Simultaneously, however, he was unimpressed with the first claimant’s case on harm, deeming it ‘largely to do with harm to reputation’ which the 1974 Act does not grant a remedy for, absent malice.⁹⁵⁸

Ultimately, the first claimant’s conviction was deemed still relevant due to the claimant’s failure to accept responsibility for his crimes, and actions attempting to bury the negative search results.⁹⁵⁹ The offence was one of dishonesty, and on the borderline of being incapable of becoming spent. He retained a public role as a businessman, creating a continuing risk he would mislead the public – both because he was convicted of a dishonesty offence and continued to attempt to mislead others.⁹⁶⁰

Conversely, the second claimant’s conviction was no longer relevant and fell to be delisted. His conviction was not one of dishonesty (and did not indicate any other threat to consumers, customers, or investors) and he accepted guilt without reservation.⁹⁶¹ It did not relate to any category of business the second claimant remained in.⁹⁶² On that basis, no category of the public which might access the information from Google had any need for it.⁹⁶³

Warby J’s mentioning of reputation in this case is inconsistent and somewhat confusing. On the one hand, he included reputation as part of the right to rehabilitation, and even specifically linked it to the human interest in sociality – a theory which as previously noted

⁹⁵⁴ *NT1 & NT2* (n 11) [161].

⁹⁵⁵ *Ibid* [166(2)].

⁹⁵⁶ *Ibid* [163].

⁹⁵⁷ *Ibid* [166(1)].

⁹⁵⁸ *Ibid* [167].

⁹⁵⁹ *Ibid* [169].

⁹⁶⁰ *Ibid*.

⁹⁶¹ *Ibid* [203].

⁹⁶² *Ibid* [222]-[223].

⁹⁶³ *Ibid* [207].

provides overlapping justification for both privacy and reputation. On the other hand, he treated reputational damage as a low weight consideration. As discussed in the defamation chapter, the 1974 Act is likely an exercise in extreme political compromise, hence its general lack of utility in defamation claims. Arguably, the minimal protection it provides against reputational damage should not be decisive when interpreting the newer and more expansive data protection regime.

Given Warby J was comparing the first claimant's reputational interests to the general public interest in access to relevant information, one can perhaps interpret him as stating that the claimant's reputation, insofar as its value is underpinned by non-epistemic concerns like dignity or honour, was low weight. Insofar as the first claimant's reputation was underpinned by epistemic concerns, the information remained relevant to the members of the public in arranging their affairs, and so he had no basis to complain of reputational damage.

The centrality of context to relevance is also interesting. The search engine cases make clear that processing the exact same information may be lawful in one context but not another. The same must be true of relevance – information may be relevant when presented to a limited audience but not when presented to the public at large. For example, it might continue to be relevant to continue listing a spent conviction on a database accessible by professionals in the data subject's industry, long after it ceased to be relevant to the general public (making it unlawful to link to the conviction on Google). The focus is on the needs and interests of the specific audience. This provides more evidence that the general theme of data protection law, as it regulates reputation, is the utility of the data's reputational signals to society in the interest of individuals making prosocial decisions about their own lives.

(v) Legal Vires

The legal *vires* for processing are also relevant to data subjects seeking to control reputation-affecting information. As previously explained, the incredibly broad objection right only applies where one of two particular *vires* are relied upon, and failure to have any proper *vires* provides separate basis for the data subject to exercise the erasure right. The *vires* available depend on whether the controller is processing ordinary, special, or criminal data.

a) Ordinary Data

There are six bases of legal processing for ordinary data. Most can be dealt with relatively briefly for present purposes. The first is consent to processing.⁹⁶⁴ The standard is stringent: consent must be ‘freely given, specific, informed and unambiguous ... by a statement or by a clear affirmative action’.⁹⁶⁵ This cannot be fulfilled by actions like putting the data in the public domain.⁹⁶⁶ Consent may be withdrawn at any time, after which point further processing cannot rely on this basis.

Accordingly, this *vis* will generally be relied on where the data subject specifically gave the controller permission to use the data in that specific manner. These are circumstances which are unlikely to give rise to a later complaint of reputational damage. After all, this *vis* combines with the fairness requirement to mean that a data subject cannot complain about the reasonably foreseeable consequences of what they have specifically consented to.

A complaint might be made if the use goes beyond what is required for this *vis*, or continues after consent is withdrawn, but that strictly relates to the other data protection principles rather than consent as a basis. Consent will therefore rarely be relevant to a reputation-motivated claim. It is notable, however, that a controller relying on consent is not free to process inaccurate or irrelevant information even if the data subject has no complaint (the ICO could in principle enforce this). This provides further evidence of the heavily audience-focused nature of data protection law: the fulfilment of the individual’s interests is not the end of the matter where processing risks sending incorrect or irrelevant epistemic signals to others.

The second *vis* is that ‘processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract’.⁹⁶⁷ For this ground and all subsequent grounds, processing is only necessary if it is the least restrictive means of achieving the relevant aim.⁹⁶⁸ Like consent, this *vis* is unlikely to lead to reputation-based complaints. It is based on a form of implied consent connected to functions the data subject wishes the controller to perform – a person who contracts with the controller must necessarily consent to processing required to achieve the performance of the bargain.

⁹⁶⁴ GDPR (n 803) art 6(1)(a).

⁹⁶⁵ Ibid art 4(11).

⁹⁶⁶ EDPS, *A Preliminary Opinion on Data Protection and Scientific Research* (EDPS 2020) 19.

⁹⁶⁷ GDPR (n 803) art 6(1)(b).

⁹⁶⁸ *South Lanarkshire Council v Scottish Information Commissioner* [2013] UKSC 55, [2013] 1 WLR 2421 [27].

The third *vis* is where processing is necessary for compliance with a ‘legal obligation to which the controller is subject’.⁹⁶⁹ For example, flight companies are required to compile passenger lists for each flight, and this involves processing personal data.⁹⁷⁰ It is conceivable that legal obligations might involve processing of reputation-damaging information. As an example, in the case of passenger lists, a list might indicate that the data subject was not where they claimed to be, perhaps indicating they were having an affair. The public interests underpinning whatever legal obligations require the processing presumably override data protection interests. As will be seen, this is a unifying theme of many of the legal *vires* for processing both ordinary and special data.

The fourth *vis* is where ‘processing is necessary in order to protect the vital interests of the data subject or of another natural person.’⁹⁷¹ A vital interest is described by recital 46 as an interest ‘essential for the life of the data subject or that of another natural person’. Accordingly, it only covers threats to life or physical integrity, though the threat need not be imminent.⁹⁷² It is mainly relevant to medical care, particularly emergency medical care.⁹⁷³ This *vis* reflects the fact that life and the prevention of serious injury are such important interests that they must override other lesser interests like privacy and reputation: another example of individual interests being trumped rather than a statement on why data ought to be protected.

The first four *vires* do not provide access to the broad objection right. In the first *vis*’ case, such a right is unnecessary as withdrawing consent fulfils the same end. As for the second *vis*, it is likely considered unreasonable to object where processing is necessary for a contract the data subject voluntarily entered into. The public interest nature of processing for the third and fourth *vires*, meanwhile, likely makes it inappropriate for the data subject to stop this processing as of right.

The fifth and sixth *vires* are of particular interest because they do provide data subjects with the objection right. The fifth *vis* is where ‘processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller’.⁹⁷⁴ The 2018 Act (non-exhaustively) specifies that processing necessary for the

⁹⁶⁹ GDPR (n 803) art 6(1)(c).

⁹⁷⁰ Justine Pila and Paul LC Torremans, *European Intellectual Property Law* (2nd edn, OUP 2019) 505.

⁹⁷¹ GDPR (n 803) art 6(1)(d).

⁹⁷² *Scott v LGBT Foundation Ltd* (n 879) [71].

⁹⁷³ GDPR (n 803) rec 46; ICO, ‘Vital Interests’ (*ICO.org.uk*, 2023) <<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/vital-interests/>> accessed 1 January 2023.

⁹⁷⁴ GDPR (n 803) art 6(1)(e).

administration of justice, Parliamentary and governmental functions, statutory functions, and activities promoting democratic engagement are public interest tasks.⁹⁷⁵

The sixth *vis* applies where

processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.⁹⁷⁶

Despite referencing the public interest, the fifth ground is not a broad public interest defence akin to MOPI's second limb or defamation's public interest defence. Rather, it is designed to capture the actions of official authorities and private parties who perform state-like or public functions. Generally, a private party must point to a statutory power authorising their function, though common law authorisation will also suffice.⁹⁷⁷

This *vis* therefore reflects the specific public interest in efficient public function. However, that it is possible to object to such processing – and therefore force the controller to specifically justify the compelling legitimate grounds (i.e., the actual public interest) permitting continued processing – perhaps indicates an acknowledgement that not all processing for official State tasks is necessary or particularly beneficial.

The sixth *vis* – legitimate interests – is also not a general public interest defence. It exclusively concerns the individual interests of the controller or the data's recipients.⁹⁷⁸ What constitutes a legitimate interest is broad and by far the most flexible legal ground for processing personal data.

The reference to 'interest' rather than 'purpose' means that any 'broader stake that a controller may have in the processing, or the benefit that the controller derives' can potentially count as a legitimate interest.⁹⁷⁹ Legitimacy presents a low bar. According to the Article 29 Working Party, the interest need not be in the public good: merely lawful, sufficiently clearly articulated, and non-speculative.⁹⁸⁰ For example, it is well established that it includes the

⁹⁷⁵ Data Protection Act 2018, s 8.

⁹⁷⁶ GDPR (n 803) art 6(1)(f).

⁹⁷⁷ ICO, 'Public Task' (*ICO.org.uk*, 2023) <<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/public-task/>> accessed 1 January 2023.

⁹⁷⁸ *Cox v Information Commissioner and Home Office* [2018] UKUT 119 (AAC), [43]-[44].

⁹⁷⁹ Article 29 Working Party, 'Opinion 06/2014' (n 908) 24.

⁹⁸⁰ *Ibid* 25.

controller's interests in providing a business service – e.g. running a search engine⁹⁸¹ or processing for direct marketing purposes to advance one's business.⁹⁸² Notably, the Article 29 Working Party identifies the 'exercise of the right to freedom of expression or information' as itself a potentially legitimate interest.⁹⁸³ However, one might imagine many controllers that could rely on that interest are more likely to turn to the special or domestic purpose exceptions, since those do not render them vulnerable to the objection right.

The sixth *vis* therefore legitimises processing for entirely private interests. In doing so, it enables controllers to use reputation-affecting data to make informed choices which affect their own lives and business – in other words, it gives them the full use of reputation's epistemic value. The low bar imposed by the standard of 'legitimacy' simply reflects that the controller must have an actual reason to use the data – it must actually be identifiably useful to them in a non-speculative manner.

However, unlike the other grounds, such processing for legitimate interests is not considered '*a priori* legitimate' in terms of balancing different rights and interests.⁹⁸⁴ The effect of this is that a legitimate interest can be overridden – both by the target's other interests and freedoms and (assuming the right to object is asserted) the absence of compelling legitimate grounds.

This raises the question of when such private interests are overridden by the data subject's 'interests or fundamental rights and freedoms' and what constitutes a compelling legitimate ground' which overrides this in turn. There appears significant overlap with the concept of fairness – recital 47 GDPR cites as an important factor 'the reasonable expectations of data subjects based on their relationship with the controller'. The need for necessity also does much heavy lifting – if the controller can obtain the same value without using the data, they must do so.

The Article 29 Working Party indicates that the target's 'interests' refers to the full range of data subject interests, including their right to data protection and privacy. Even individuals engaged in illegal activities have interests which might override the publication of

⁹⁸¹ *Townsend v Google* (n 909) [47]; NT1 & NT2 (n 11) [115]

⁹⁸² GDPR (n 803) rec 47.

⁹⁸³ Article 29 Working Party, 'Opinion 06/2014' (n 908) 25.

⁹⁸⁴ *Ibid* 9.

their data online.⁹⁸⁵ Presumably, reputation is a significant, if not the main, interest in that kind of case.

UK judicial decisions have also indicated that reputation also plays a role. A significant case is the High Court decision in *Aven*.⁹⁸⁶ The claimants were members of a Russian investment conglomerate who featured in the infamous ‘Steele dossier’. The dossier, produced by the defendant, drew links between various individuals, including then-presidential candidate Donald Trump, and Russian President Vladimir Putin. The dossier was disclosed to several US and UK officials, one of whom gave the dossier to BuzzFeed News, which published it *en masse*. The claimants alleged (and the court agreed) that the dossier incorrectly alleged they had done ‘significant favours’ for Putin (and vice versa) and delivered criminally-tainted money to Putin.

Among the legal bases the defendant relied on was the legitimate interest basis. The High Court confirmed that if the data subject’s reputation is affected by processing this constitutes an interest capable of overriding the legitimate interest.⁹⁸⁷ Notably, it treated this as separate from the data subject’s Article 8 ECHR rights. This is undoubtedly correct: that the provision refers to the data subject’s ‘interests’ in addition to their rights indicates the controller must consider the general impact of processing on the individual and their stake in it.⁹⁸⁸

The combined effect of *Aven* and the Article 29 Working Party’s opinion is that a controller must consider the data subject’s reputational interests (if relevant) when deciding whether to process under this ground. It therefore could be argued that reputation protection – particularly a more data subject-friendly version of reputation than envisaged by the epistemic theory – is implicitly built into this ground. However, a holistic view of the cases makes clear that reputational impact *alone* will not deprive a controller access to the legitimate interest basis.

In *Aven*, the critical feature rendering the defendant’s activities unlawful was the information’s inaccuracy rather than its inability to rely on a lawful basis. The court even noted that the argument that interference with the claimant’s Article 8 ECHR rights meant that the processing was ‘unwarranted’ (the DPD’s equivalent of the GDPR’s ‘overriding’ provision)

⁹⁸⁵ Ibid 30.

⁹⁸⁶ *Aven v Orbis Business Intelligence Limited* (n 871).

⁹⁸⁷ Ibid [137].

⁹⁸⁸ Article 29 Working Party, ‘Opinion 06/2014’ (n 908) 29-30.

begged ‘the question of whether the data are accurate, which is a separate issue’.⁹⁸⁹ Otherwise, the issue was whether the processing was sufficiently limited and proportionate to the legitimate interest – i.e. whether it met the ‘necessity’ requirement.⁹⁹⁰ Meanwhile, in other cases involving reputational damage and relying on the legitimate interests *vis*, like *NT1 and NT2*, the primary issues were other data protection principles like accuracy and relevance.

Of course, there will be overlap between the data protection principles. For example, it will be more difficult for the controller to argue that severe reputational harm to the data subject does not override their business interests where the information is inaccurate or not (or no longer) relevant to the intended audience. Nevertheless, it seems unlikely that reputational impact alone, absent inaccuracy, irrelevance, or a lack of compelling legitimate grounds (where the objection right is asserted) will make processing unlawful.

b) Special & Criminal Data

The GDPR regime for special and criminal data is far more restrictive than ordinary data, and the *vires* by which this data can lawfully be processed are more limited. Notably, there is no equivalent to the broad ‘legitimate interests’ *vis* for special data.

The first preliminary matter is that it is controversial whether the ability to derive special data from an instance of processing automatically means that special data is ‘revealed’. According to the UK ICO, there is a spectrum of revelation depending on ‘how certain that inference is, and whether you are deliberately drawing that inference.’⁹⁹¹ By this logic, a video recording of a Caucasian person’s face, strictly speaking, conveys information about their race or ethnic origin, but would not necessarily be treated as a revelation of that data in every context.

However, the Grand Chamber decision in *OT* conflicts with this approach, holding that processing which indirectly reveals special data as a result of intellectual operations or cross-referencing falls within the special data provisions of the GDPR.⁹⁹² As this decision post-dates Brexit it is of merely persuasive value, so it is unclear how the UK courts will approach this issue going forwards.

⁹⁸⁹ *Aven v Orbis Business Intelligence Limited* (n 871) [136].

⁹⁹⁰ *Ibid* [137]

⁹⁹¹ ICO, ‘Special category data’ (*ICO.org.uk*, 2022) <<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/special-category-data/>> accessed 25 November 2022.

⁹⁹² Case C-184/20 *OT v Vyriausioji tarnybinės etikos komisija* (ECJ, 1 August 2022) para 127.

A second preliminary matter to note is the special categories' nature and why they are considered 'sensitive'. A common justification, pertaining particularly to racial and ethnic origins, political and religious opinions, sex life, sexual orientation, and trade union membership, is historical and social. These are common justifications for the arbitrary oppression and discriminatory treatment of individuals.⁹⁹³ The core of arbitrary discrimination is an irrational reputational assessment. A person does not discriminate against people of another ethnicity because they are of that ethnicity *simpliciter*. They discriminate because of irrational negative evaluations about the character and conduct associated with that ethnicity ('white people are liars'). Special data categories refer to characteristics which are particularly likely to be misused in making reputational assessments. Reputational concerns are therefore at the heart of their characterisation: and they are deemed sufficiently important that they cannot be overridden by private interests (hence the lack of a legitimate interests ground).

Criminal data, meanwhile, is its own category subject to its own rules (albeit heavily overlapping with the special data regime). The reason for this was not discussed in the GDPR's legislative history nor in data protection caselaw. Of course, criminal convictions are a common reason to mistreat, or discriminate against, others, so one may wonder why criminal data is not simply another form of special data. Perhaps the reason is that, unlike the special data categories, such discrimination is not inherently arbitrary – the person did something to warrant *some* societal disadvantage.

If so, it might seem appropriate to treat criminal convictions like ordinary data. As with the treatment of criminal allegations as 'quintessentially private' under MOPI, its differential treatment here may be due to its unique and inherent potential to cause significant and unwarranted reputational damage if misused. The special reputational risks of criminal data, even if not always unwarranted, therefore also justifies their special status.

The GDPR prohibits processing of data relating to criminal convictions and offences save where done under 'the control of official authority' or 'when the processing is authorised by Union or Member State law providing for appropriate safeguards for the rights and freedoms

⁹⁹³ ICO, 'What is special category data?' (*ICO.org.uk*, 2022) <<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/special-category-data/what-is-special-category-data/>> accessed 1 January 2023.

of data subjects'.⁹⁹⁴ Meanwhile, processing special data is prohibited unless one of ten grounds apply.⁹⁹⁵

In both cases, some of these grounds overlap with the ordinary data grounds: data subject consent is a ground of legality unless the law of the Member State says otherwise,⁹⁹⁶ as is the vital interests ground with the additional proviso that the data subject must be incapable of consenting.⁹⁹⁷ As previously explained, these are unlikely to be relied on in reputation cases.

The main *vires* for processing both kinds of data are limited public interest-based grounds relating to specific, narrow purposes. For special data, these include processing necessary for rights and obligations in employment, social security, and social protection law,⁹⁹⁸ to establish, exercise, or defend legal claims or rights;⁹⁹⁹ legitimate activities of certain norm-motivated not-for-profit organisations;¹⁰⁰⁰ or where necessary for occupational or preventative medicine;¹⁰⁰¹ or public health;¹⁰⁰² and where necessary for public interest archiving, scientific or historical research, or statistical.¹⁰⁰³ For criminal data, the purposes include compliance with obligations connected to employment, social security and social protection, health and social care, public health, or public interest archiving, scientific/historical/research, or statistical purposes.¹⁰⁰⁴

For both, processing is also permitted where 'necessary for reasons of substantial public interest, on the basis of domestic law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject'.¹⁰⁰⁵

This is not a general public interest defence, given the need for a specific national basis. In the UK, the 2018 Act sets out limited tranches of public interests, like processing necessary for statutory functions, the administration of justice and Parliamentary functions,¹⁰⁰⁶ safeguarding

⁹⁹⁴ GDPR (n 803) art 10.

⁹⁹⁵ Ibid art 9(1).

⁹⁹⁶ Ibid art 9(2)(a). The UK has not specified any such category.

⁹⁹⁷ Ibid art 9(2)(c); sch 1, pt 3, paras 29, 30 and 32.

⁹⁹⁸ Ibid art 9(2)(b); implemented by the 2018 Act, sch 1, pt 1.

⁹⁹⁹ Ibid art 9(2)(f); see 2018 Act, sch 1, pt 2, para 26.

¹⁰⁰⁰ Ibid art 9(2)(d).

¹⁰⁰¹ Ibid art 9(2)(h).

¹⁰⁰² Ibid art 9(2)(i).

¹⁰⁰³ Ibid art 9(2)(j).

¹⁰⁰⁴ Data Protection Act 2018, sch 1, part 1.

¹⁰⁰⁵ UK GDPR art 9(2)(g).

¹⁰⁰⁶ GDPR (n 803) sch 1, pt 2, paras 6-7.

the vulnerable,¹⁰⁰⁷ insurance and pension purposes,¹⁰⁰⁸ judicial publications,¹⁰⁰⁹ and upholding behavioural standards in sports.¹⁰¹⁰

Notably, some of these, like equality and diversity monitoring¹⁰¹¹ and processing for political purposes by registered political organisations,¹⁰¹² exclude processing ‘likely to cause substantial damage or substantial distress to an individual.’ This should normally make them unavailable in claims involving reputational information, since reputational damage will likely cause distress. Additionally, since processing must be necessary, these grounds will not apply where the purpose could be achieved by other means or involve publication to more individuals than necessary.¹⁰¹³ This makes it particularly unlikely that these grounds will be routinely used to process reputation-damaging information.

The broadest tranche of the public interest concern misconduct: where processing is necessary for a particular purpose, and necessary for ‘reasons of substantial public interest’, in circumstances where those purposes are prejudiced by requiring the data subject’s consent or it is unreasonable to expect the controller to obtain that consent. There are many relevant purposes, including detecting and preventing crime¹⁰¹⁴ and complying with anti-terrorist and money laundering legislation.¹⁰¹⁵ These grounds are far more likely to concern reputation-affecting data (particularly criminal data), but they involve considerably limited disclosures, also bounded by the need for necessity.

Where available, these *vires* represent a clear statement that certain public interest purposes are deemed to outweigh the data subject’s right to prevent use of their information. As with most of the ordinary data grounds, they are considerably narrower than the public interest defences available in defamation and MOPI.

Lastly, for both criminal and special data, processing is lawful where the data was ‘manifestly made public by the data subject’.¹⁰¹⁶ What constitutes manifestly made public data

¹⁰⁰⁷ Ibid sch 1, pt 2, paras 16-19.

¹⁰⁰⁸ Ibid sch 1, pt 2, paras 20-21.

¹⁰⁰⁹ Ibid sch 1, pt 2, para 26.

¹⁰¹⁰ Ibid sch 1, pt 2, para 27-28.

¹⁰¹¹ Ibid sch 1, pt 2, paras 8-9.

¹⁰¹² Ibid sch 1, pt 2, para 22(2).

¹⁰¹³ E.g. *Lloyd v Information Commissioner* 2021 WL 00641656 [38]-[39]; *Guriev v Community Safety Development (UK) Ltd* [2016] EWHC 643 (QB) [45].

¹⁰¹⁴ Data Protection Act 2018, sch 1, pt 2, para 10(1).

¹⁰¹⁵ Ibid paras 14-15.

¹⁰¹⁶ GDPR (n 803) art 9(2)(e).

is unclear, partially because it received no discussion at the committee or legislative stage.¹⁰¹⁷ It could be broadly interpreted, however, undermining the difficulty of processing special and criminal data without a specific, narrow public interest.

Official guidance appears to keep its ambit narrow. For example, the UK Data Protection Authority requires the data to have been introduced ‘unmistakably deliberately’ to a domain which any hypothetically interested member of the public could access.¹⁰¹⁸ There are also indications that a data subject must anticipate or intend the particular use of the data resulting from its introduction into the public domain – although the exact degree of foresight needed is unclear.

Official guidance also indicates that foresight of the information becoming public is not sufficient. The Council of Europe gave the example of a CCTV recording of a firefighter becoming injured while trying to evacuate a building. They considered that the firefighter had not made his data manifestly public despite knowingly operating in a public place with CCTV.¹⁰¹⁹ Conversely, had the firefighter posted the video on his Facebook page or described the incident in a television interview, the data would meet this ground. This indicates the data subject must have the *purpose* of introducing the information into the public domain in the relevant form and useable for the relevant purpose, not merely foresee that it will or may be introduced into the public domain because of their actions. Manifestly making something public could be seen as a form of implied consent – the data subject does something objectively indicating that they accept the data will be processed in the relevant way.

Contradicting this, however, is *NT1 & NT2*. The High Court envisaged a lower threshold – whereby information could be made manifestly public even if the data subject did not want the data to be accessible in a particular form or used for a particular purpose, provided this was an ‘ordinary consequence’ of that kind of activity.¹⁰²⁰ Similarly, in *Townsend* (interpreting the equivalent ‘made public as a result of steps deliberately taken by the data subject’ under the DPD and 1998 Act), the court noted that

Ordinarily an offender wishes to hide his criminal activity rather than deliberately taking steps to make it public. However, legally as a consequence of the open justice

¹⁰¹⁷ Edward Dove and Jiahong Chen, ‘What does it mean for a data subject to make their personal data “manifestly public”?’ (2021) 11 IDPL 107, 117.

¹⁰¹⁸ ICO, ‘What are the Conditions for Processing?’ (*ICO*, 2022) <<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/special-category-data/what-are-the-conditions-for-processing/>> accessed 20 October 2022.

¹⁰¹⁹ Council of Europe, *Handbook on European Data Protection Law* (European Union 2018) 162-63.

¹⁰²⁰ *NT1 & NT2* (n 11) [111]-[112].

principle by committing an offence he is deliberately taking steps to make the information public.¹⁰²¹

This sentiment was reiterated in *ABC*.¹⁰²²

These cases all involved criminal convictions. As argued in the previous chapter, there is likely a public interest in deeming a convicted criminal's actions to be inherently public even if this is a fiction. Based on this, it is unclear whether the English courts would apply the same logic to other ordinary consequences, or ordinary or even immoral (but non-criminal) conduct.

The issue is that, colloquially, it is an ordinary consequence of entering a public high street for innocuous purposes that one's image is captured on CCTV. This is both almost factually certain to occur and most people are aware of this, whether they accept it or not. By the strict logic of *NT1 and NT2*, therefore, people who enter a public street where they know there is CCTV makes all their conduct on that street manifestly public and so lawful to use. This would severely encroach on the other legal *vires*, and undermine the law's specific intention of only allowing special data processing in narrow circumstances involving consent or a specific public interest.

NT1 & NT2's notion of 'ordinary consequences' may serve a similar function to the notion of 'reasonableness' in MOPI's reasonable expectation of privacy standard as applied to criminal information. Both seem to regulate whether the individual is justified in being aggravated by or objecting to a particular unwanted consequence of their own actions, rather than assessing whether a particular consequence is probabilistically likely.

This allows the courts to distinguish non-criminal data cases, and overlaps heavily with the principle of fairness. As noted earlier, a significant touchstone of fairness is whether data is processed in a manner the data subject might reasonably expect. The MOPI cases indicate that the law accepts that individuals reasonably expect that socially unacceptable or immoral, but non-criminal, behaviour will not be used by others without their consent.

Accordingly, it is possible that *NT1 & NT2*'s approach to this ground will be confined to criminal data cases. Given MOPI's approach to pre-charge criminal information, it may even be limited to post-charge criminal data. Even this is questionable in principle, however. The treatment of criminal data seems mainly based on its unique, categorical reputational risk. So, the GDPR regime requires a particular public interest to justify processing. If a conviction and

¹⁰²¹ *Townsend v Google* (n 909) [63].

¹⁰²² *ABC v Palmer* [2022] EWHC 3128 (KB) [76].

any data revealed in open court as part of that conviction is automatically treated as manifestly made public, it is automatically treated as lawful to process for any purpose. Only the other data protection principles protect the data subject's interests – and notably the data subject lacks access to the objection right where this *vis* is relied on. One would expect specific legislative language to achieve this effect, which is absent. Instead, the 2018 Act only made processing for the administration of justice and judicial publications a specific ground.

The limits of the special purpose exceptions are likely to blame for this state of affairs. Arguably, the public interest in open justice is adequately served by allowing journalists to make fair and accurate reports of court proceedings. A more principled approach is to treat convictions as falling beyond the 'manifestly made public' ground unless the data subject deliberately put them into the public domain themselves, and then have processors rely on the special purposes exception to justify their lack of legal basis.

However, as discussed below, the High Court in *NT1 & NT2* interpreted the special purpose exception as excluding certain functions – most notably search engines linking to journalistic articles – despite these functions being necessary to allow the public reasonable access to special purpose materials.¹⁰²³ Since the public interest in open justice is not served if the public has no practical way of accessing these articles, the High Court may have reasoned its way into a corner. This required it to interpret the 'manifestly made public' ground to allow controllers exercising supplemental functions necessary to the special purposes access to a lawful basis.

Overall, the special and criminal data regime – apart from the likely anomalous treatment of criminal convictions – treats control of certain data as a right requiring a specific public interest to override. This is significant to the shape of the law's protection of reputation. Part of why special data categories are given special treatment is an acknowledgement that the public are prone to misusing that information to make antisocial reputational judgements.

(vi) Exceptions

There are two categories of exception to or derogation from the data protection principles and rights: the domestic purposes exception, and the special purposes derogations.

¹⁰²³ And, since the DPD at the time required processing to be 'solely' for journalistic purposes to fall within the exception, the High Court probably did not have a realistic way of avoiding this issue.

a) Domestic Purposes

A significant exception to data protection law is what is known as the ‘domestic purposes’ exception. The GDPR does not apply to personal data processing ‘by a natural person in the course of a purely personal or household activity’.¹⁰²⁴ Recital 2 GDPR clarifies that:

This Regulation does not apply to the processing of personal data by a natural person in the course of a purely personal or household activity and thus with no connection to a professional or commercial activity. Personal or household activities could include correspondence and the holding of addresses, or social networking and online activity undertaken within the context of such activities. However, this Regulation applies to controllers or processors which provide the means for processing personal data for such personal or household activities.

This has the potential to exclude a great swathe of reputation-affecting processing by individuals, particularly on social media. The extent of this depends on the scope of ‘personal or household activity’. At one time, the UK ICO interpreted the exemption as excluding any individual expression of personal views, declining to deal with complaints of offensive, inaccurate, or libellous speech online.¹⁰²⁵ It viewed the law of libel as a more appropriate venue for dealing with such speech.¹⁰²⁶

Conversely, the CJEU has a narrower interpretation. *Lindqvist* (interpreting the materially identical DPD provision) stated the exclusion does not apply to ‘processing of personal data consisting in publication on the internet so that those data are made accessible to an indefinite number of people.’¹⁰²⁷ Meanwhile, *Ryneš*,¹⁰²⁸ considering a household camera able to view the public footpath in addition to a private residence, held that even partial surveillance of a public space cannot be regarded as purely personal or household activity.¹⁰²⁹ These principles were reiterated in *Buivids*, where a video posted to a website, without restriction on whom could access it, fell outside of the exception.¹⁰³⁰ This was partially due to the lack of viewing restrictions, and partially because the video covered a public space. The CJEU bases the exception’s scope on the data’s subject matter and audience, rather than purely the processor’s purpose.

¹⁰²⁴ GDPR (n 803) art 2(2)(c).

¹⁰²⁵ David Erdos, ‘Data Protection and the ‘Media’ After Leveson’ (Draft Paper for the Oxford Workshop on Media Law After Leveson, 12 April 2013) 9.

¹⁰²⁶ *Law Society v Kordowski* [2014] EMLR 2 [96].

¹⁰²⁷ Case C-101/01 *Criminal proceedings against Bodil Lindqvist* [2003] ECR I-12971, para 47.

¹⁰²⁸ Case C-212/13 *Ryneš v Úřad* (ECJ, 11 December 2014).

¹⁰²⁹ *Ibid* para 33.

¹⁰³⁰ Case C-345/17 *Buivids* (ECJ, 14 February 2019) para 43.

This has potentially counterintuitive effects. For example, an influencer might allow their social media followers to vote on their personal decisions – like what to eat and whether to stay with their partner.¹⁰³¹ This would arguably be processing with a personal purpose, since it determines their domestic and personal choices. However, the indefinite audience would, by the ECJ’s logic, take it beyond the exemption. The same would be true if the influencer then recorded themselves engaged in personal decision-making in a public space.

It is likely that in these situations the ECJ would apply a narrower interpretation of the exception since they are not ‘liable to infringe fundamental rights’ in the same way – a core concern for taking a strict approach to the exception in the existing cases.¹⁰³² This seems likely since, as Erdos argues, a literal interpretation of cases like *Lindqvist* leads to the absurd conclusion that some individuals publishing their own data must comply with the GDPR – including, for example, registering the processing with the ICO.¹⁰³³

A more purposeful interpretation would also fit the court’s approach to search engine cases regarding the need for significant and additional effect. It would similarly focus on the possibility of the activity significantly affecting the data subjects’ interests in nominally personal or household purpose cases, additional to the impact which non-systematic or constant surveillance or information use would impose. So, the influencer who publicly delegated their personal decisions to the internet would not fall under the GDPR, since that processing would not have any significant or additional impact on anyone else.

The UK judiciary has largely followed the CJEU, and supports the idea that the key issue is the processing’s impact on those beyond the processor’s domestic and personal life. The Court of Appeal in the ‘Solicitors from Hell’ case explicitly disapproved of the ICO’s initial position.¹⁰³⁴ The defendant created and operated a website which invited members of the public (typically anonymously) to name and shame solicitors with whom they had negative experiences. The website then provided a publicly available list of ‘solicitors from hell’. The defendant was sued in libel, harassment, and data protection. A complaint was made to the ICO, which declined to intervene, arguing that the case fell within the domestic purposes

¹⁰³¹ As has already happened, albeit for a partially commercial purpose and so probably falling beyond the exception on that basis: John Bett, ‘OnlyFans model gives fans control of her life – and they make her dump her boyfriend’ (*Mirror.co.uk*, 4 October 2022) <<https://www.mirror.co.uk/news/weird-news/onlyfans-model-gives-fans-control-28149690>> accessed 3 November 2022.

¹⁰³² *Ryneš* (n 1028) para 27; *Buivids* (n 1030) para 41.

¹⁰³³ David Erdos, ‘Beyond ‘having a domestic’? Regulatory interpretation of European Data Protection Law and individual publication’ (2017) 33 *Computer Law & Security Review* 275, 291-92.

¹⁰³⁴ *Law Society v Kordowski* (n 1026).

exception: the ICO argued this exception was designed to protect free speech, so data protection law did not anticipate the ICO intervening to regulate what individuals can say about each other.

While the Court of Appeal expressed sympathy for the ICO's position,¹⁰³⁵ they disagreed. Tugendhat J argued that data protection law 'does envisage that the Information Commissioner should consider what it is acceptable for one individual to say about another, because the First Data Protection Principle [of the DPD] requires that data should be processed lawfully'.¹⁰³⁶ However, the judge did not comment further on the scope of the exception, or why they thought it obvious that the defendant's activities fell beyond the exception.

The Court of Appeal revisited the issue in *Ittihadieh*.¹⁰³⁷ In the first appeal, the claimant was the resident of a flat managed by the defendant company. The claimant was in a dispute with other residents of the building, some of whom were the defendant's directors or senior staff. He was concerned they had been swapping and using his personal information, and keeping a file on him. He made a subject access request for the file, which the defendant declined on the grounds that it would involve non-consensually releasing the other residents' personal data.

The issue arose as to whether the data sought fell within the domestic purposes exception. Counsel for the claimant argued, relying on an interpretation of *Ryneš*, that

the exception applied only to matters which went on inside the data controller's own household and did not apply to his interaction with the wider world. Thus to the extent that a resident in a block of flats communicates with his neighbours about matters of mutual concern or interest about the state or administration of the block, any personal data processed in that communication falls outside the scope of the exception.¹⁰³⁸

Lewison LJ rejected this as too narrow and inconsistent with *Ryneš*. Citing *Lindqvist*, he concluded that the key was striking a balance between 'two competing entitlements to privacy: that of the data subject and that of the individual data controller.'¹⁰³⁹ Counsel's interpretation would have the unacceptable result, for example, that 'if an individual e-mailed a friend asking for a recommendation for a plumber to carry out work at home any

¹⁰³⁵ *Ibid* [97].

¹⁰³⁶ *Ibid* [100].

¹⁰³⁷ *Ittihadieh v 5-11 Cheyne Gardens RTM Co Ltd* [2017] EWCA Civ 121.

¹⁰³⁸ *Ibid* [74].

¹⁰³⁹ *Ibid* [76].

recommendation would contain personal data of both the plumber and also the friend (whose opinion would itself be personal data)'.¹⁰⁴⁰ Lewison LJ considered managing a private block of flats to fall within the exemption because 'they directly concern his private life and also directly concern his household.'¹⁰⁴¹ Though he declined to draw a bright line, his reasoning is consistent with the idea that the key factor is whether those outside the processor's household or personal circle are significantly and additionally affected by the processing.

It is possible to take a largely pragmatic approach to the philosophy of the domestic purposes exception. This was the Article 29 Working Party's approach: they thought the domestic purpose exception reflected the impossibility of national ICOs regulating all personal data processing.¹⁰⁴² By this logic, the exception was based on the individual's limited ability to make data globally and instantly available to anyone, compared to organisations.¹⁰⁴³ Of course, by the time of the GDPR, individuals gained considerable capacity to engage in systematic and global processing. It is therefore perhaps unsurprising that the Article 29 Working Party abandoned this view in 2015 in favour of 'a limited and carefully balanced' exception as reflected in cases like *Lindqvist*.¹⁰⁴⁴

Lewison LJ, conversely, treated the exception as reflecting principle: the need to balance the right to access data against other's privacy. Similar themes are seen in the CJEU's stressing of the need to interpret the scope of the exception based on the potential for infringement of fundamental rights. It reflects the fact that regulating certain kinds of processing using data protection principles could severely invade others' privacy. For example, if an online private journal fell within the GDPR, people who suspected they were mentioned in it could make a subject access request to know the diary's contents.

However, it also acknowledges that some nominally 'personal' forms of processing may have public effects which impact others' privacy and fundamental interests more broadly, like recording the public street beyond one's garden or airing one's grievances against a spouse on a public YouTube channel. So, the exception is likely unavailable in those cases.

¹⁰⁴⁰ *Ibid* [75].

¹⁰⁴¹ *Ibid* [76].

¹⁰⁴² Article 29 Working Party, 'Annex 2 Proposals for Amendments regarding exemption for personal or household activities' (*Europa.eu*, 27 March 2013) <https://ec.europa.eu/justice/article-29/documentation/other-document/files/2013/20130227_statement_dp_annex2_en.pdf> accessed 1 December 2022.

¹⁰⁴³ *Ibid*.

¹⁰⁴⁴ Article 29 Working Party, 'Appendix: Core topics in view of the trilogue' (*Europa.eu*, 2015) <https://ec.europa.eu/justice/article-29/documentation/other-document/files/2015/20150617_appendix_core_issues_plenary_en.pdf> accessed 28 February 2023, 3.

Of course, since the right to privacy encompasses or overlaps with the right to reputation (certainly in the sociality sense), this approach also delineates the circumstances in which people can process reputation-affecting information. It likely does not apply to reputation-affecting information disseminated in the domestic and social sphere, unless the fact of processing has greater impact on reputation than would be the case if the information were merely spread by limited gossip or more traditional ‘personal and household’ means of communication. To modify Lewison J’s example, the exception would likely apply if someone emailed their friend to tell them not to hire a particular plumber to fix their household pipes because their work is shoddy. This shows that the law deems this kind of low-level reputational effect to be systematically outweighed by the risks data protection principles pose to individual privacy. It does not seem to delineate the inherent scope of the reputational interest.

b) Special Purposes

In the UK, the main special purpose exception applies to processing both ordinary, special and criminal data for one or more of ‘the purposes of journalism; academic purposes; artistic purposes; [or] literary purposes.’¹⁰⁴⁵ It applies to processing which is ‘carried out with a view to the publication by a person of journalistic, academic, artistic or literary material, and’ where the controller ‘reasonably believes that the publication of the material would be in the public interest’.¹⁰⁴⁶

Such processing is exempt from all data protection principles, except the security principle, and user rights ‘to the extent that the controller reasonably believes that the application of those provisions would be incompatible with the special purposes.’¹⁰⁴⁷ It does not, however, exempt the controller from damages liability, particularly as regards accuracy.

When determining whether publication is in the public interest ‘the controller must take into account the special importance of the public interest in the freedom of expression and information’ as well as any relevant codes of practice – including the BBC, Ofcom, and

¹⁰⁴⁵ Data Protection Act 2018, s.174(1); sched 2, pt 5, para 26(1).

¹⁰⁴⁶ Ibid sch 2, pt 5, para 26(3).

¹⁰⁴⁷ Ibid sch 2, pt 5, para 26(3).

Editor's Codes of Practice.¹⁰⁴⁸ A journalistic data protection-specific Code of Practice has been completed and is currently going through the statutory process under s.125 of the 2018 Act.¹⁰⁴⁹

The Code notes that a reasonable belief in the public interest is one capable of being justified 'so that another reasonable person would consider that it is objectively reasonable', bearing in mind editorial discretion.¹⁰⁵⁰ Journalists should consider the circumstances (particularly likely harm, severity, how the information enhances public debate, and whether the information is already in the public domain¹⁰⁵¹), 'balance relevant factors for and against publication' and judge how to proportionately best serve the public interest.¹⁰⁵² This is assisted if the journalist has a clear policy on the matter that they followed and kept records of their reasoning, though this is not strictly necessary.¹⁰⁵³ Examples of public interest concerns include upholding integrity standards, ensuring justice, encouraging public understanding and involvement in democracy, and more.¹⁰⁵⁴

The Code notes that the argument for a reasonable belief is likely stronger where the data subject is a public figure or has a role in public life, but not automatically so.¹⁰⁵⁵ Indeed, it notes that public figures may be more vulnerable to acute reputational harm due to their status, and this must be borne in mind.¹⁰⁵⁶ Interestingly, the Code generally recommends 'special care' where there is a risk of damage to reputation,¹⁰⁵⁷ providing strong evidence to the claim that reputation protection is not merely an incidental aspect of data protection law.

A more limited purpose-specific exception applies to processing for 'scientific or historical research purposes, or statistical purposes, to the extent that the application of those provisions would prevent or seriously impair the achievement of the purposes in question.'¹⁰⁵⁸ This exempts the controller from certain notification requirements as well as the rectification, restriction, and objection rights. An analogous provision applies to 'archiving purposes in the

¹⁰⁴⁸ Ibid sch 2, pt 5, para 26(4)-(6)

¹⁰⁴⁹ ICO, 'Data protection and journalism code of practice' (*ICO.org.uk*, 6 July 2023) <<https://ico.org.uk/media/for-organisations/documents/4025760/data-protection-and-journalism-code-202307.pdf>> accessed 17 October 2023.

¹⁰⁵⁰ Ibid [13.16].

¹⁰⁵¹ Ibid [13.25].

¹⁰⁵² Ibid [13.18].

¹⁰⁵³ ICO, 'Reference Notes' (*ICO.org.uk*, 6 July 2023) <<https://ico.org.uk/media/for-organisations/documents/4025761/data-protection-and-journalism-code-reference-notes-202307.pdf>> accessed 2 October 2023, 36.

¹⁰⁵⁴ Ibid 37.

¹⁰⁵⁵ ICO, 'Data protection and journalism code of practice' (n 1049) [5.23].

¹⁰⁵⁶ Ibid [5.24].

¹⁰⁵⁷ Ibid [5.9].

¹⁰⁵⁸ Data Protection Act 2018, sch 2, pt 6, para 27(1).

public interest’ where a provision would prevent or seriously impede the purpose, which additionally exempts the controller from a wider scope of notification obligations and the right to data portability.¹⁰⁵⁹

Caselaw on the special purposes has exclusively concerned journalism. The CJEU requires national courts to adopt a broad interpretation of ‘the purposes of journalism’.¹⁰⁶⁰ It applies not only to media organisations, but any individual engaged in journalism,¹⁰⁶¹ and journalism may be done for profit and by any medium.¹⁰⁶² The key touchstone is whether ‘their object is the disclosure to the public of information, opinions or ideas’.¹⁰⁶³

Nevertheless, the concept has limits. Strictly speaking, any speech to a large or indefinite audience has the object of disclosing something to the public, which would make any speech on social media (absent privacy settings) journalism even if it was merely a post about something inane like the data subject’s cat doing something cute. Unsurprisingly, then, the ICO Code indicates further factors to consider, like the publication’s purpose (including how directly that purpose links to informing the public) and content, ‘how closely the activity aligns with the media’s traditional functions’ and the controllers’ attempts ‘to align with typical journalistic standards or values’ and the extent to which they have or will ‘promote the information to the public.’¹⁰⁶⁴

Significantly, the High Court in *NT1 & NT2* held that a search engine does not act with a view to publication for the purposes of journalism when it links to a journalistic piece.¹⁰⁶⁵ It noted that ‘the concept is not so elastic that it can be stretched to embrace every activity that has to do with conveying information or opinions’.¹⁰⁶⁶ Warby J concluded that the access which the Google search engine provided to journalistic material was an incidental and accidental function of its search algorithm and ‘its larger purpose of providing automated access to third party content of whatever nature it may be, that it has identified and indexed and meets the search criteria specified by the user’.¹⁰⁶⁷

¹⁰⁵⁹ Ibid sch 2, pt 6, para 28.

¹⁰⁶⁰ *Tietosuoja-valtuutettu v Satakunnan Markkinapörssi Oy* (n 843) para 56.

¹⁰⁶¹ Ibid para 58.

¹⁰⁶² Ibid para 59-60.

¹⁰⁶³ Ibid para 61.

¹⁰⁶⁴ ICO, ‘Reference Notes’ (n 1053) 35.

¹⁰⁶⁵ *NT1 & NT2* (n 11) [98].

¹⁰⁶⁶ Ibid.

¹⁰⁶⁷ Ibid [100].

While the 1998 Act only applied to processing ‘solely’ or ‘only’ for special purposes (following the DPD), the High Court considered this a mere alternative ground for Google’s argument to fail.¹⁰⁶⁸ Warby J did not consider what Google did as acting with a view to journalistic purposes.

The overall tenor of the special purpose exception is that of a broad public interest defence, but narrower than the equivalent MOPI and defamation defences. It has a similar structure, requiring reasonable belief, and similar factors apply when determining the scope of the public interest. However, it is more limited in two ways. Firstly, it applies only to processing for certain purposes – as has already proved problematic in search engine cases. Secondly, the exception applies only regarding those data protection principles reasonably believed to disproportionately impede the purpose.

The latter is likely to severely limit the use of the exemption compared to its equivalents in MOPI and defamation because it imposes the additional hurdle of showing how the specific aspect of the law impeded the special purpose. This is likely harder for some data protection principles than others – particularly relevance, adequacy, and accuracy.¹⁰⁶⁹ For example, take a concluded criminal investigation. The investigation makes clear that previously published information is inaccurate or inadequate, but it continues to be available online. The data subject demands rectification or an addendum clarifying the full picture. It will be difficult to justify a reasonable belief that correcting or highlighting a known mistake is incompatible with the journalistic purpose. How MOPI and defamation would deal with this is ambiguous.

Accordingly, the special purpose exemptions, while broad and with theoretically far-reaching effects, follow the general pattern of data protection law creating only narrow, tailored exceptions based on public interest. The assumption, even in the journalistic context, is the need for general compliance with the data protection principles. They also follow the pattern of putting the burden of justifying processing on the controller (with the possible exception of search engine inaccuracy cases).

There are two ways in which the special purpose exceptions are broader or more powerful than the public interest defence in defamation and the second stage of MOPI, however – provided there is a reasonable belief, it should not matter that publication is not actually in the

¹⁰⁶⁸ Ibid [101].

¹⁰⁶⁹ The courts appear particularly strict on the fairness principle where the journalist could have achieved their aims by fairer, but still strictly non-compliant, means: see *True Vision Productions Ltd v Information Commissioner* EA/2019/0170.

public interest. Unlike defamation's public interest defence, the special purposes provisions merely refer to a reasonable belief, without a separate requirement that the processing is on a matter of public interest. Given the burdensome nature of the data protection principles and data subject rights, compared to defamation or MOPI liability, this could be an attempt to mitigate the law's chilling effect on potentially true public interest speech.

Practically, it may not amount to much. Traditional journalists (the exemption's main beneficiary, it appears) should know the factors rendering subject matter in the public interest from the different codes and considerable defamation and MOPI caselaw involving newspapers. It will therefore be difficult for them to argue a reasonable belief that processing was in the public interest when it actually was not. However, the distinction may make it easier for non-traditional journalists to avoid the chilling effect of data protection law.

The second sense in which the special purposes exception is more powerful than the public interest defences is that the courts effectively cannot grant an injunction which would block first publication where the special purposes apply. s.176(1) of the 2018 Act applies where

the controller or processor claims, or it appears to the court, that any personal data to which the proceedings relate ... (a) is being processed only for the special purposes, (b) is being processed with a view to the publication by any person of journalistic, academic, artistic or literary material, and (c) has not previously been published by the controller.

Publications in the preceding 24 hours are ignored for the purposes of (c). If s.176(1) applies, the court must stay proceedings until either the ICO makes a determination that conditions (a) or (b) are not met or the controller withdraws the above claim (if they made one). The stay equally applies to claims for compensation. Effectively, then, a data subject must wait 24 hours after the publication of data for special purposes before they seek a judicial remedy. This gives initial priority to the free speech/information values inherent in journalistic, academic, artistic, or literary processing.

Meanwhile, processing for scientific or historical research purposes, or statistical purposes, need not be reasonably believed in the public interest, let alone actually in the public interest, though that exemption is narrower and appears to require an objective impairment of the purpose rather than merely a reasonable belief. It is likely that scientific, historical, and statistical research is *de facto* assumed in the public interest, though this will depend on how these terms are defined ('statistical' is a potentially value-neutral term, for example).

In this regard, it is interesting that where the data subject can object to processing for these purposes, it can only be overridden by showing that ‘processing is necessary for the performance of a task carried out for reasons of public interest’ rather than the arguably broader test of compelling legitimate grounds.¹⁰⁷⁰ Conversely, the archiving in the public interest provisions imply a need for the archiving to actually be in the public interest, rather than merely reasonably believed so.

III. Remedies

The court can grant an injunction to restrain data processing. The relevant rules are discussed in more detail in the next chapter, as they overlap considerably with the injunction rules for MOPI. As previously noted, it is also significant that interim injunctions restraining first publication are not available where the special purposes exception applies.

In addition to an injunction, the court can make compliance orders requiring particular steps – for example, implementing security standards, rectifying inaccurate data, and so on.¹⁰⁷¹ This gives the data subject far more flexible powers to alter the state of the information about them – unlike in MOPI and defamation where publication is either restrained or it is not.

Data protection does not enable a judicial declaration of falsity.¹⁰⁷² The possibility of rectifying, restricting, or erasing inaccurate information serves a similar function, however. This not only removes the possibility of the information continuing to damage the data subject’s reputation, but also imposes certain notification requirements on the controller.

Under Article 19 GDPR, the controller has an obligation to ‘communicate any rectification or erasure of personal data or restriction of processing carried out in accordance with Article 16, Article 17(1) and Article 18 to each recipient to whom the personal data have been disclosed, unless this proves impossible or involves disproportionate effort’. They must also inform the data subject about those recipients on request.

In fact, in combination with the data subject’s rights to demand rectification and erasure of inaccurate or inadequate information, the general scheme of data protection remedies is acutely concerned with good data management in a way which goes far beyond what is possible under defamation and MOPI. This reinforces the argument that data protection is particularly aligned

¹⁰⁷⁰ GDPR (n 803) art 21(6).

¹⁰⁷¹ Data Protection 2018, s 167.

¹⁰⁷² Confirmed in *Aven v Orbis Business Intelligence Limited* (n 871) [191]

with epistemic reputation, as it has a unique concern with ensuring that the audience does not continue to labour under incorrect or antisocial information.

Damages are also available. Article 82 GDPR states that ‘Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered.’ The 2018 Act specifies that ‘non-material damage’ includes distress,¹⁰⁷³ and the courts have held that it includes personal injury, where foreseeable.¹⁰⁷⁴ Like MOPI, there is also an award to reflect interference with the fundamental right in issue: ‘compensation is recoverable for a contravention that interferes with the data subject’s control over his data, even if this does not cause material damage or distress’.¹⁰⁷⁵

Unlike MOPI, there has been little controversy in deciding that reputational damages, separate from distress or vindication of right, are available for a data protection claim under the UK GDPR. This was an issue in the DPD era, when the Court of Appeal in *Johnson* was unwilling to countenance this, confining the meaning of ‘damage’ to pecuniary loss (a separate specific provision under the 1998 Act allowed recovery for distress).¹⁰⁷⁶ Buxton LJ rejected the contention that ‘the fact that the Directive envisages the protection of rights under article 8 of the European Convention ... entails that compensation must be available in every case for loss of a type or category that would be covered by article 8’.¹⁰⁷⁷

However, the GDPR extended the categories of available damages beyond pecuniary loss and the 2018 Act defines this as non-exhaustively ‘including’ distress rather than being limited to it. This reopened the possibility that other non-pecuniary foreseeable losses like reputational harm are recoverable. The High Court in *Aven* stated that reputational damage was ‘hard to exclude ... as a matter of principle’,¹⁰⁷⁸ though the processing in that case was both inaccurate and ‘seriously defamatory’ and the court noted that the ‘issue might deserve closer attention in different circumstances’.¹⁰⁷⁹ Calculation of reputational damages was to be assessed using the

¹⁰⁷³ Data Protection Act 2018, s 168(1).

¹⁰⁷⁴ *Grinyer v Plymouth Hospitals NHS Trust* (2012) 125 BMLR 1 (aggravation of existing, known mental disorder).

¹⁰⁷⁵ *Aven v Orbis Business Intelligence Limited* (n 871) [195].

¹⁰⁷⁶ *Johnson v Medical Defence Union Ltd* (n 813) [74].

¹⁰⁷⁷ *Ibid.*

¹⁰⁷⁸ *Aven v Orbis Business Intelligence Limited* (n 871) [196].

¹⁰⁷⁹ *Ibid.*

same principles as defamation.¹⁰⁸⁰ The High Court in *Dudley* agreed that reputational damages were available, with little additional discussion.¹⁰⁸¹

Buxton LJ in *Johnson* suggested that, had reputational loss been recoverable under the DPD, the claimant would have to specifically prove it and could not rely on any defamation-like presumption of damage.¹⁰⁸² Of course, the presumption has little practical relevance when calculating defamation damages, since the claimant must show serious reputational harm or the likelihood thereof.

In any case, this was implicitly adopted by the High Court in *Aven*, which stated that the court had ‘no evidence that the opinion of any of the recipients was of particular concern to these claimants, or that the recipients took any particular steps that led to identifiable harm.’¹⁰⁸³ This had a ‘moderating effect on the sum that is appropriate by way of vindication.’¹⁰⁸⁴ Nevertheless, this indicates considerable scope to infer damage to reputation based on implicit factors without the need to show specific, concrete evidence – again, similar to modern defamation. This was reflected in *Dudley* (a default judgment) where the primary factors in the calculus were the gravity of the allegation and the breadth of publication.¹⁰⁸⁵

It is curious that the courts have been more willing than in MOPI to assume that a separate head of reputational damages are available for breach of data protection law. This analysis in this chapter indicates that, insofar as it intends to protect reputation, data protection mainly concerns epistemic reputation. The epistemic concerns are arguably dealt with using non-compensatory remedies afforded by the data subject’s rights – the public interest in receiving correct (or prosocial) reputational signals is best served by rectifying the public record and deleting illegally processed data (particularly inaccurate or irrelevant data). The notification requirements mean there is little need to compensate the claimant as a proxy on the assumption that they will use the money to repair the public damage themselves. It is possible that damages act as a deterrent, which is consistent with epistemic reputation. However, the courts have not explicitly said so, and it not obvious why deterrence is more important in the data protection context than in MOPI.

¹⁰⁸⁰ *Ibid* [197].

¹⁰⁸¹ *Dudley v Phillips* [2022] EWHC 930 (QB) [17]-[18]

¹⁰⁸² *Johnson v Medical Defence Union Ltd* (n 813) [78].

¹⁰⁸³ *Ibid* [202]

¹⁰⁸⁴ *Ibid*.

¹⁰⁸⁵ *Dudley v Phillips* (n 1081) [21]-[31].

The courts also do not appear to have considered how the differences between defamation and data protection's substantive requirements impact damages. For example, processing incorrect data can give rise to a claim for damages even if that data does not damage the target's reputation in the eyes of reasonable members of society. Does this mean that the data subject can recover damages reflecting harm to their reputation in the eyes of a particular niche subsection of the community? Can a Nazi falsely accused of breaking racial purity norms recover damages reflecting his lowered standing in his local Nazi commune? It would not be surprising if the courts balked at the suggestion. How they would, on a principled basis, limit a Nazi's access to reputational damages while still permitting them elsewhere, is unclear. Indeed, if this kind of loss is 'real' loss, any limitation contradicts the statute's wording.

Like MOPI, therefore, data protection remedy caselaw suffers from a lack of in-depth analysis as to whether it is supposed to protect reputation, and which form of reputation it ought to protect. In MOPI, this led to considerable confusion and ambiguity over whether separate reputational damages are available. In data protection there is clarity that such damages are available, at least in inaccuracy cases. However, the principled basis and scope of those damages is left unclear in a way which is likely to cause considerable problems in later cases.

IV. Overall Analysis

Since the data subject need not establish that the information has any particular moral quality, merely that it relates to them, the burden is largely on the controller to justify their use of the data. The wrong inures in the mere misuse of the information, making data protection unipolar. The data subject's rights are centred on the idea that mere misuse of information, without any consequential effect, is the wrong.

That the data can have any content, provided it relates to the data subject, makes data protection a poor fit for those reputational theories that are solely concerned with information and inferences about ascriptive characteristics or social roles. This means that data protection is unlikely to protect perceived aristocratic honour, Arthurian aristocratic honour, or virtuous honour.

The initial strength of the data subject's rights in data protection law may give the impression that data protection grants a quasi-proprietary right to one's reputation (as well as control of one's data more generally). This could only be quasi-proprietary, as data protection

does not allow data subjects' to alienate the economic value of their reputation, but there is a sense of a 'right' to control which looks similar to property.

However, beyond this initial superficial resemblance, data protection does not follow the schema one would expect if it protected proprietary reputation. It is plainly not based on a Lockean proprietary model, since information can relate to the data subject even if they did not produce that information nor put any labour into its production or existence. While damages are available, there is far greater emphasis on non-economic remedies like rectification orders, and damages for distress, whereas one would expect a proprietary-based law's focus to be compensation for pecuniary loss.

Also, data protection does not distinguish between marketable and non-marketable areas of life – rather granting rights over any information relating to the individual. The domestic purposes exception might have been interpreted to achieve such a distinction, as it could have distinguished between market and non-market use. For example, processing data to a potentially indefinite audience might be characterized as opening the data to the market: in *Buivids*, while the defendant probably did not profit from the video, the video hosting website did. However, this is not the route the courts have taken. Instead, the focus is curtailing data protection's interference with others' rights more broadly, particularly privacy.

The outcome of *Ryneš* is illustrative – the controller was not using the data for anything that could be characterised as market purposes – he was trying to protect his private dwelling from crime. Yet, the exception did not apply. Conversely, the data in *Ittihadiieh* was used for business purposes (dealing with complaints about property management) and so was market information, even if it was not available to the general public. Despite this, the domestic purpose exception applied.

More generally, many data protection rights and obligations are not based on individual approval, as one might expect from a proprietary model. For example, while consent is a *vis*, so too is legitimate interests. While the latter can be overridden, it requires positive objection from the data subject rather than prior permission. Another example is the fact that the controller's obligation to ensure data is adequate and accurate applies even if the data subject has no objection (or would prefer the data remained as it was). The very fact that the State is envisaged as the primary enforcer makes little sense for a private proprietary model. Data protection's obligations are more geared towards general standards of good data management, enforceable even where not in the target's personal interests.

This feature of data protection law makes it a poor fit for several of the theories of reputation. It rules out cultural honour, since the remedies are almost universally built around ensuring good data management rather than achieving satisfaction, and there is no need for the data subject to perceive (rationally or otherwise) disrespect. It also clashes with bipolar theories. For example, it was noted in the first chapter that the bipolarity of virtuous honour and deferent reputation is unlikely to be of much practical consequence, since they are only bipolar in the sense that the attacked person must be aware of and internalise the attack. This is on the assumption that the individual is the law's primary enforcer, however. Data protection norms, conversely, apply and are enforceable by the ICO even if the data subject is never aware of a breach of their rights and so are never affected by them.

This is notable, since deferent reputation theory had some support from the Advocate General in *TU*,¹⁰⁸⁶ though his opinion on the burden of proof was rejected by the CJEU. The Advocate General essentially justified the rectification right by reference to deferent reputation concerns. The Advocate General first noted that there was an argument the justifications for protecting speech do not apply to false information, but that even to the extent that they did, the value of such speech

cannot, when relating to false information, in any event be placed on an equal footing with the fundamental rights to a private life and protection of personal data. In this case, the applicable prevailing criterion, rooted in one of the fundamental values of the European Union, is that of human dignity.¹⁰⁸⁷

After stressing the role which human dignity has played in the constitutional traditions of Member States and the Articles of the European Charter, he continued:

Untrue information not only infringes the fundamental right of the person concerned to protection of personal data but also ultimately affects his or her dignity in that it puts forward a false representation of him or her, thus altering his or her identity. This is especially true in the internet ecosystem in which information spreads rapidly, is permanent and, on account of the actions of search engines, produces accurate profiling of the person concerned. In cyberspace, the dissemination of false information about someone is a permanent disfigurement of his or her identity which, nowadays, is defined above all on the web, and a serious offence against his or her dignity.¹⁰⁸⁸

¹⁰⁸⁶ Case C-460/20 *Re TU v Google LLC* (Advocate-General Pitruzzella, 7 April 2022) (n 946).

¹⁰⁸⁷ *Ibid* para 30.

¹⁰⁸⁸ *Ibid* para 31.

That a false reputational attack can wrongfully alter a person's identity is the core of deferent reputation.

The problem with this view is twofold. Firstly, the idea of 'disfigurement' arising from falsity ignores the fact that a false statement about the data subject might cast them in a more positive light than would otherwise be the case. Or, it might have no impact on their identity – e.g., where an address record fails to reflect that the data subject has moved house. Or, it might only damage the claimant's identity because of their membership of an immoral sub-community without indicating a breach of wider society's rules.

Unlike in defamation, where such statements are non-actionable for lack of defamatory character, the controller in data protection remains under an obligation to correct. The State can enforce this (as can the data subject, if inclined). The core of why data protection is concerned with inaccuracy, adequacy, and relevance is therefore not the risk of damage to the data subject's dignity, or the obligation would be narrower.

A similar point can be made regarding sociality theory. Though data protection protects sociality to a degree, by ensuring that damaging information is processed no further than is strictly necessary for a (usually) public interest, it applies the same standards to information incapable of, or even beneficial to, the data subject's ability to form social bonds.

That data protection law is centred around notions of good data management rather than the internal interests of the data subject per se indicates a more consequentialist foundation. It is likely not limited to social norm theory, since it applies to information which does not indicate a breach of wider community norms, and there is no need to show that society has, or is likely to, incur wasteful judgement costs. So, while data protection can be used to police the unpaid norm-enforcer, it is far from limited to this, and does not focus upon it.

Of far greater relevance is epistemic reputation. As explained in the first chapter, epistemic reputation sees reputational signals as part of the wealth of information which members of the public use to lower their economic, social, and identity-based search costs and thereby make decisions about how to live their lives. There is therefore a benefit to ensuring that accessible information, including reputational signals, is true and enables pro-social decision-making.

Data protection's focus on ensuring the accuracy and adequacy of data, and the obligation to notify recipients of changes, regardless of the data subject's feelings on the matter, makes sense from this perspective. The mere fact that people are misinformed and forming incorrect

judgements is sufficient to warrant the law's intrusion. The data subject's feelings may make enforcement more likely (if they sue or make an ICO complaint) but are not determinative.

The need to support pro-social decision-making and dissuade anti-social decision-making is also at the heart of epistemic theory. As explained in the first chapter, while some versions of the theory might see any judgement based on true information as pro-social, it is more reasonable to acknowledge that people have arbitrary biases and evaluation standards, and that information must be curated to avoid antisocial judgements resulting from this.

For example, arbitrary or irrational bias may lead people to draw improper conclusions from information which is objectively irrelevant to that conclusion. From this perspective, data protection's concern with relevance makes sense. This can also explain the wide range of *vires* for ordinary data, particularly the legitimate interests *vis*. The focus is on ensuring that the controller actually has a potentially pro-social use for the data – and if the data subject objects, ensuring that the public benefit of that use outweighs the potential harm. Notably, the CJEU's approach to the objection and erasure rights in delisting cases essentially boils down to a cost-benefit analysis. The incorporation of rehabilitative standards into the courts' approach to delisting requests and handlings of criminal/misconduct data similarly makes sense, as the public may continue to judge people long after the information ceases to be a pro-social epistemic indicator.

This is reinforced by the law's approach to special and criminal data. As previously argued, what makes this data special is a concern that the public are particularly prone to using information of certain types antisocially – particularly resulting in arbitrary discrimination. Epistemic reputation has reason to restrain even true and relevant information about an individual if a significant portion of society is likely to evaluate that information by antisocial criteria leading to antisocial outcomes, and this is what the special/criminal data rules do. As for the anomalous treatment of conviction data, one suspects this comes from a perception by the courts that judging an individual based on an unspent criminal conviction is not anti-social (even though this seemingly conflicts with the GDPR's policy as written).

Finally, the exceptions can also be explained from an epistemic reputation perspective. Several theories can accommodate reputation being outweighed by other interests, like sociality and virtuous honour, but it is particularly easy to incorporate into a theory which is already based on consequentialist cost-benefit analyses.

The domestic purposes exception seems based on the considerable social harm which would be caused if heavily privacy-based instances of data processing fell under data protection law, contrasted with meagre social benefit. Notably, where there is social benefit in regulating processing, like where publication to an indefinite audience significantly implicates others' interests, it will likely fall beyond the exception.

Meanwhile, the special purpose exceptions are clearly concerned with the chilling effect of data protection norms on certain classes of high value speech: particularly journalism. It is notable, however, that the special purposes exception takes a more fine-grained approach to the chilling effect than the public interests test in MOPI and defamation, and requires a more proactive and ongoing management of publicly available data. This balances the need to avoid chilling public interest speech with ensuring that speech that turns out to be false or antisocial does not continue to taint the public's ongoing judgments.

Overall, the picture gleaned is that, insofar as it protects reputation, data protection is primarily concerned with the audience's epistemic interest in correct reputational signals.

Chapter 7: The Overlap

That MOPI and data protection can protect reputation is controversial. There is a perception that this overlap permits claimants to ‘abuse’ these causes of action when their ‘real complaint’ is reputational damage or to avoid defamation’s limitations. This leads to debate as to whether: a) data protection and MOPI claims can be struck out in such cases; and b) whether one of defamation’s key limitations, *Bonnard v Perryman*, applies to those claims. This chapter shows that the law is confused, and that the courts’ repeated insistence that these procedural limitations *might* apply appears largely symbolic rhetoric: grounded in a failure to properly theorise what forms of reputation MOPI and data protection protect.

I. Background

An overview of striking out and pre-trial injunction applications assists in understanding the issues arising in overlap cases.

(i) Striking Out

Courts have case management powers allowing them to ‘strike out’ claims or defences at an early juncture. The Civil Procedure Rules codify the striking out grounds: ‘that the statement of case discloses no reasonable grounds for bringing or defending the claim’; that it is ‘an abuse of the court’s process or is otherwise likely to obstruct the just disposal of the proceedings’; or there is some failure to comply with court rules and orders.¹⁰⁸⁹ The third ground is irrelevant here.

The first ground (the ‘no reasonable prospects ground’) applies where the court considers it clear that the claimant has no reasonable prospects of establishing their claim, even if all the facts asserted are assumed true.¹⁰⁹⁰ The second (the ‘abuse ground’) is broad on paper, but in practice only met if the claim is vexatious, scurrilous, or obviously ill-founded,¹⁰⁹¹ or a specific judicial sub-test is met, like the *Jameel* test. As discussed below, the courts have asserted the existence of an abuse sub-test specifically applicable to attempts to bring other actions where defamation is apparently more appropriate.

¹⁰⁸⁹ Civil Procedure Rules, r 3.4(2).

¹⁰⁹⁰ Practice Direction 3, para 1.7; *S v Gloucestershire County Council* [2000] 3 All ER 346.

¹⁰⁹¹ *Ibid* para 1.5.

(ii) Injunctions

There are three kinds of injunction: permanent (granted post-trial), interlocutory/interim (granted where a wrong may have been committed, and may be repeated, before trial), and *quia timet* (granted when a wrong is threatened but not yet committed).

Injunctions were not originally available for defamation: the equitable jurisdiction was historically limited to unlawful interference with property interests.¹⁰⁹² Ultimately, a basis to grant defamation injunctions was found in the Judicature Act 1873,¹⁰⁹³ s.25(8) of which stated that an injunction could be granted ‘in all cases in which it shall appear to the Court to be just or convenient that such order should be made’.¹⁰⁹⁴ Through subsequent reforms up to the modern Senior Courts Act 1981, this provision was retained in materially the same form.¹⁰⁹⁵ So, by the time of MOPI and data protection, there was no controversy that injunctions were available for all three actions.

Quia timet injunctions are available if a) there is a real and imminent risk the defendant will commit the wrong if not restrained and b) if they did, this would inflict grave and irreparable harm for which damages would not be an adequate remedy.¹⁰⁹⁶ As for interim injunctions, the courts developed a test of ‘just or convenient’, eventually crystallising into the famous *American Cyanamid* criteria:¹⁰⁹⁷

1. Is there a serious issue to be tried?
2. Would damages be an adequate remedy to the claimant were the injunction not granted?
3. If they would not, where does the balance of convenience lie?

The first criterion is a low bar, essentially only requiring an arguable case. However, it was raised for some cases. Section 12(3) of the Human Rights Act 1998 applies to cases which ‘might affect the exercise of the Convention right to freedom of expression’.¹⁰⁹⁸ The court must be ‘satisfied that the applicant is likely to establish that publication should not be allowed.’¹⁰⁹⁹

¹⁰⁹² Mitchell (n 257) 77; citing in particular *Gee v Pritchard* (n 273).

¹⁰⁹³ *Thorley’s Cattle Food Company v Massam* (1877) 6 ChD 582, 588; *Quartz Hill Consolidated Gold Mining Company v Beall* (1882) 20 ChD 501, 507, 509-10.

¹⁰⁹⁴ Judicature Act 1873, s 25(8).

¹⁰⁹⁵ Senior Courts Act 1981, s 37.

¹⁰⁹⁶ *Canada Goose UK Retail Ltd v Persons Unknown* [2020] EWCA Civ 303 [63].

¹⁰⁹⁷ *American Cyanamid Co (No 1) v Ethicon Ltd* [1975] UKHL 1.

¹⁰⁹⁸ Human Rights Act 1998, s 12(1).

¹⁰⁹⁹ *ibid* s 12(3).

This is the test generally applicable to MOPI and the kinds of data protection claims brought to protect reputation,¹¹⁰⁰ since they are quintessentially likely to affect freedom of expression.

Despite the same being true of defamation, however, s.12(3) is inapplicable there. Defamation had long adopted its own criteria, adopting an even higher threshold than s.12(3) or *American Cyanamid* – one held to continue to apply even after the HRA’s enactment.¹¹⁰¹ This was articulated in the 1891 case of *Bonnard v Perryman*.¹¹⁰²

The defendant publishers were accused of disseminating defamatory materials in newspapers imputing to the plaintiffs fraudulent or dishonest conduct.¹¹⁰³ The plaintiffs sought an interim injunction restraining publications pending trial. One defendant intended to rely on justification. The High Court granted an injunction, which the Court of Appeal discharged.

Giving the leading judgment for the majority in the Court of Appeal,¹¹⁰⁴ Lord Coleridge stated that:

[I]t is obvious that the subject-matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial ... The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions.¹¹⁰⁵

Lord Coleridge did not feel confident a jury would find the justification defence ‘wholly unfounded’.¹¹⁰⁶ So, he held, where justification is led ‘it is ... in all but exceptional cases must be, to abstain from interference until the trial and determination of the plea of justification.’¹¹⁰⁷

Essentially, for an interim or *quia timet* injunction in defamation cases where the defendant asserts the defence of truth, the court must be convinced that no future evidence might arise on which it could deem the statement true. This makes the test one of extreme

¹¹⁰⁰ Though not necessarily in regular data protection cases involving back-end processing.

¹¹⁰¹ *Coys Ltd v Autocheris Ltd and others* [2004] EMLR 25; *Green v Associated Newspapers* [2004] EWHC 2322, upheld: [2004] EWCA Civ 1462.

¹¹⁰² *Bonnard v Perryman* [1891] 2 Ch 269.

¹¹⁰³ *Ibid.*

¹¹⁰⁴ Only Lord Kay dissented, applying the ordinary test and strongly influenced by the defendant’s malice (in the sense of spite) towards the claimant.

¹¹⁰⁵ *Ibid* 284.

¹¹⁰⁶ *Ibid.*

¹¹⁰⁷ *Ibid* 285.

perversity: only if no reasonable court, based on present or potential future evidence, might think the statement true is an interim injunction granted.

This was labelled ‘the rule in *Bonnard v Perryman*.’ It applies even where the claimant establishes malice (as malice is irrelevant to the truth defence).¹¹⁰⁸ The only limitation is that the defendant cannot merely assert truth: they must provide ‘[s]ome credible basis for the assertion’.¹¹⁰⁹ The rule was later expanded to fair comment¹¹¹⁰ and qualified privilege, but with the proviso that the claimant could obtain an injunction by establishing malice in those cases.¹¹¹¹

The *Bonnard* rule makes pre-trial injunctions practically unobtainable in defamation cases. It imposes a higher threshold than s.12(3) HRA, which strongly incentivises claimants seeking a pre-trial injunction to avoid phrasing their claim as defamation if another cause of action is available. It has, therefore, become a focal point for arguments that other actions are being used to abuse or evade defamation’s limitations.

A preliminary point is that the s.12(3) HRA test does not always apply to reputation-affecting data protection claims. S.176 of the 2018 Act requires the court to stay proceedings where the controller/processor claims, or it appears to the court, that processing is ‘only for the special purposes’, ‘with a view to the publication by any person of journalistic, academic, artistic or literary material’ and the material has not ‘previously been published by the controller’ (and publication in the prior 24 hours being ignored).¹¹¹² Proceedings remain stayed until the claim is withdrawn or the Information Commissioner makes a s.174 determination: a determination that the data is not processed only for special purposes, or not processed with a view to publication of special purpose material not previously published by the controller.¹¹¹³

This effectively bars pre-publication interim/*quia timet* injunctions, by requiring a stay, where the special purposes apply – whether or not the defendant intends to rely on particular defences. As many data protection claims involving reputation involve media defendants, this means that in a typical case an injunction is easier (or at least possible) to acquire in defamation

¹¹⁰⁸ *Holley v Smyth* [1998] 2 WLR 742.

¹¹⁰⁹ *LJY v Persons Unknown* [2017] EWHC 3230 (QB) [45].

¹¹¹⁰ *Mulkern v Ward* (1872) LR 13 Eq 619.

¹¹¹¹ *Quartz Hill Consolidated Gold Mining Company v Beall* (n 1093) 509.

¹¹¹² Data Protection Act 2018, s 176(1).

¹¹¹³ *Ibid* s 174(3).

than data protection. This makes MOPI, where the lower s.12(3) HRA threshold applies, the most desirable of the three actions.

However, the bar on interim injunctions is not applicable to every reputational data protection case. For example, the court in the *Solicitors from Hell* case quickly dismissed the application of s.176's predecessor under the 1998 Act on the grounds that journalism involves the 'communication of information or ideas to the public at large in the public interest' and what the defendant was doing was plainly against the public interest.¹¹¹⁴ It will also not aid in cases where the defendant seeks to republish the data, or does not claim to be acting solely for special purposes. So, data protection can sometimes provide potential means of avoiding *Bonnard*.

II. The 'Nub of the Claim'

Dicta that claim-shopping to avoid defamation's limitations originated in *McKennitt v Ash*, where the Court of Appeal opined that if

it could be shown that a claim in breach of confidence¹¹¹⁵ was brought where the nub of the case was a complaint of the falsity of the allegations, and that that was done in order to avoid the rules of the tort of defamation, then objections could be raised in terms of abuse of process.¹¹¹⁶

This raises two questions. The first is when something is the 'nub of the case'. The Court of Appeal in *McKennitt* appeared to envisage this as being whenever the complaint was that the allegations were false. This is a narrower concern than whether the claimant's interest is purely reputational (since reputation can be affected by true statements). *McKennitt* defined the impermissible area of overlap as cases concerning false reputation only. This has some logic to it. Falsity is the 'core' of defamation: the action prohibits false attacks on reputation and makes no attempt to regulate true statements. Since falsity is unnecessary for MOPI or non-accuracy-based data protection claims, this implies alternative actions may play a near-full role in protecting reputation where the information is non-controversially true. However, it does imply a problem for inaccuracy-based data protection claims, where the nub of the case is also purely falsity.

¹¹¹⁴ *Law Society v Kordowski* (n 1026) [99].

¹¹¹⁵ As MOPI was then still referred to.

¹¹¹⁶ *McKennitt v Ash* (n 661) [79].

The second question is when the claimant will be perceived as attempting to avoid the rules concerning defamation actions (and which rules are impermissible to avoid). The reasoning and outcome of *McKennitt* provided no clear answer. That defendant wrote a book containing both false and true private and personal information concerning the claimant, a successful musician. The Court of Appeal held there was no abuse, as the ‘nub’ was not defamation or falsity. Little was said as to why this was the case, beyond the fact that ‘the matter complained of is by its nature such as to attract the law of breach of confidence’, meaning that the claimant could not be deprived of Article 8 ECHR protection simply because the claims were untrue.¹¹¹⁷

Taken literally, this reasoning implies that the nub of a case will never be falsity if it is possible to establish another cause of action. This is the most natural meaning for a case being ‘of a nature to attract’ another area of law. If so, presumably, then interests beyond a concern with falsity must be in issue. This is particularly true for MOPI, since a ‘reasonable expectation of privacy’ would not exist in the abstract if the claimant had no other interest. If so, no valid claim for MOPI could be characterised as abuse. Similar arguments can be made for data protection claims, which protect a variety of interests including privacy.

A possible exception involves cases where the complaint solely concerns the accuracy of the data. In such cases, the claimant’s interests in defamation and data protection appear the same, even if the case ‘is of a nature to attract’ data protection in the sense of there being an arguable case. However, the High Court in *Prince Moulay* recognised an apparent interest in having an accurate public record kept of one’s information (at least for political information),¹¹¹⁸ while the Court of Appeal posited a separate interest in avoiding ‘unfairly and unlawfully’ inflicted distress.¹¹¹⁹

Since *McKennitt*, there have been many High Court cases addressing the issue. Several simply assumed there is no problem in bringing overlapping claims, without addressing the possibility for abuse.¹¹²⁰ These cases tend to be where libel and other claims are brought

¹¹¹⁷ *ibid* [80].

¹¹¹⁸ *Prince Moulay Hicham Ben Abdullah Al Alaoui of Morocco v Elaph Publishing Limited* [2017] EWCA Civ 29 [22].

¹¹¹⁹ *Ibid* [42].

¹¹²⁰ *Law Society v Kordowski* (n 1026) [74].

concurrently,¹¹²¹ so it is perhaps unsurprising the courts did not see them as attempts to evade defamation.¹¹²²

In other cases, defamation was not brought concurrently, or other actions received greater prominence. In these cases, the matter has seen more detailed discussion. Two controversies have arisen, though they are not necessarily explicitly acknowledged by the courts: a) is the ‘abuse’ rule about falsity or reputation, and b) can there ever be an abuse if the claimant has a *prima facie* claim in MOPI or data protection?

(i) Abuse: Falsity vs Reputation

There are myriad cases in which the High Court cited *McKennitt* but overlooked its reference to ‘falsity’ and instead focused on whether ‘reputation’ is the nub of the claim. Most pertain to MOPI.

Firstly, in *Hannon*,¹¹²³ the defendant newspaper published an unflattering (and partially false) account of the claimant’s removal from a plane after an argument with other passengers. Defamation was time-barred, so the defendant sought to have the MOPI claim struck out as abuse.

Mann J acknowledged the claim had a ‘heavy reputational element’.¹¹²⁴ However, he was unsatisfied that a practical or principled ‘hard line’ could be drawn between MOPI and ‘what might be called the realms of reputation’,¹¹²⁵ nor that privacy should not be concerned with protecting some kinds of reputation.¹¹²⁶ Accordingly, he disagreed that MOPI claims with heavy reputational aspects should be subject to the limitations inherent in defamation, be it the defence of truth or the limitation period.¹¹²⁷ Overall, Mann J concluded that the ‘nub’ of the present case was not defamation because there were ‘other claims’ (i.e. MOPI) which were not ‘*de minimis*’.¹¹²⁸

Mann J’s reasoning does not properly apply *McKennitt*, which concerned itself with whether the nub of the case was the *falsity* of the allegations rather than protecting the reputational interest *per se*. Conversely, Mann J assessed the nub point purely from the

¹¹²¹ E.g. *Prince Moulay* (n 1118) [22]

¹¹²² Though it did allow a permanent injunction which was ultimately deemed unavailable in defamation.

¹¹²³ *Hannon v News Group Newspapers Ltd* (n 748).

¹¹²⁴ *ibid* [22].

¹¹²⁵ *ibid* [29].

¹¹²⁶ *ibid* [29], [39].

¹¹²⁷ *ibid* [29], [78].

¹¹²⁸ *ibid* [22].

reputational perspective, not mentioning ‘falsity’. This is unusual, since Mann J explicitly cited the *McKennitt dicta* – but only in his later discussion as to whether reputational damages are available in MOPI. Mann J merely stated that insofar as these *dicta* were relevant to the ‘nub of the claim’ argument, he had already dealt with it.¹¹²⁹

The second example is *NT1 & NT2*.¹¹³⁰ Google argued that bringing the claims under MOPI and data protection rather than defamation was abuse of process, since the claimants were solely concerned with reputational damage. Of course, a defamation claim would have failed since the information published was true and the claimants were unlikely to prove the malice provisions of the Rehabilitation of Offenders Act 1974.¹¹³¹

The High Court rejected the abuse argument. Warby J held that ‘it is legitimate for a claimant to rely on any cause of action that arises or may arise from a given set of facts’, and that doing so should not ordinarily be considered abuse.¹¹³² Rather, he argued, the abuse proviso applies to claims which concern ‘only’ reputation and no other interest.¹¹³³ That both claims ‘cross over into areas of private life which are distinct from matters of reputation’ meant that neither could be considered an abuse of process.¹¹³⁴

Once again, Warby J glossed over the centrality of ‘falsity’ to the *McKennitt* test. Interestingly, when quoting the relevant dicta, the two aspects he emphasised in italics were ‘the nub of the case’ and ‘in order to avoid the rules of defamation’ – not falsity.¹¹³⁵ Properly applying *McKennitt*, the abuse argument was irrelevant to *NT1 & NT2* since the information was true. The nub of the claim could not be falsity.¹¹³⁶

However, Warby J proceeded on the basis that the abuse argument also extended to reputational claims: ‘[n]or do I consider that the protection of **reputation** is the claimant’s only objective or, to use the words of Buxton LJ “the nub” of the claims’.¹¹³⁷ He appeared to treat the abuse rule as asking whether the claims were brought to avoid defamation’s rules in the abstract.

¹¹²⁹ *ibid* [64].

¹¹³⁰ *NT1 & NT2* (n 11).

¹¹³¹ Defamation Act 2013, s 16.

¹¹³² *NT1 & NT2* (n 11) [61].

¹¹³³ *ibid* [64].

¹¹³⁴ *ibid*.

¹¹³⁵ *ibid* [62].

¹¹³⁶ The same argument applies to *ERY* (discussed below) and every other criminal conviction case.

¹¹³⁷ *ibid* [64] (emphasis added).

The only case explicitly addressing the distinction between falsity and reputation is *Terry*.¹¹³⁸ The applicant sought a *quia timet* injunction based on MOPI and breach of confidence to prevent the publication of the fact and details of a personal relationship between himself and another. The information was already well-known by word of mouth, but the claimant was concerned that it might spread to media outlets, who would seize on the story and publish it further. He was motivated to prevent interference with his corporate sponsorship deals.

Tugendhat considered the law of defamation seemingly unbidden by the applicant (there being no respondent represented). After citing *McKennitt*,¹¹³⁹ he argued that the ‘point’ it made would have had ‘more force, not less’ if all the allegations were true: the abuse rule would equally be applicable even if falsity was not in issue, but the claimant was nevertheless seeking to avoid some rule of defamation.¹¹⁴⁰

Accordingly, Tugendhat explicitly rejected the notion that the abuse rule was solely about falsity and widened it to all cases where the purpose of the alternate claim was an attempt to avoid some rule in defamation.¹¹⁴¹ He was particularly concerned about the use of MOPI to avoid the *Bonnard* rule (discussed further below). So, even though the claimant accepted that all the allegations were true, the abuse rule could potentially apply. Accordingly, Tugendhat J held the ‘nub’ of the claimant’s claim was ‘reputation’, since the claimant’s concerns appeared entirely commercial, and he did not exhibit any personal distress.¹¹⁴²

Tugendhat did not explicitly state what the import of these conclusions were: i.e., he did not say the injunction was denied or the claim struck out on this basis. The confusion likely arises from two factors. Firstly, no pleadings had yet been filed in *Terry* (so there was nothing to strike out). Secondly, the discussion of abuse was entirely *obiter*:¹¹⁴³ Tugendhat had already held that the application did not meet the (much lower) s.12(3) and *quia timet* tests. It is therefore unclear whether *Terry* is even relevant to strike out claims, or, if it is solely relevant to the application of *Bonnard*, whether Tugendhat would have applied *Bonnard* had the s.12(3) and *quia timet* tests been met.

¹¹³⁸ *Terry* (n 696).

¹¹³⁹ *ibid* [89].

¹¹⁴⁰ *ibid* [90].

¹¹⁴¹ *Ibid* [7].

¹¹⁴² *Ibid* [95].

¹¹⁴³ As the court in *Hannon* and *ERY* pointed out: *Hannon v News Group Newspapers Ltd* (n 748) [53]; *ERY* (n 673) [67].

Insofar as it bears on strike out claims, *Terry* indicates that the High Court's practice of treating the nub of the claim test as being about 'reputation' rather than falsity is deliberate, and not merely a misapplication of *McKennitt*. This might be criticised as ignoring a potentially principled reason for limiting the abuse principle to falsity. Defamation's core is not reputation *simpliciter*, but a *false* claim which damages reputation. As McGonagle and Andreotti put it, a 'statement will only amount to defamation if it is a false or untrue statement of fact about another person because only false or untrue allegations or assertions will damage the reputation a person deserves to enjoy'.¹¹⁴⁴

McKennitt could be interpreted as attempting to keep MOPI out of cases which form this core, as a failure to do so could render defamation redundant in the private sphere. That said, while a data protection case might be solely concerned with falsity (i.e., if the claim is for inaccurate processing) it is not apparent what a case *solely* concerned with falsity, but which still met the requirements of a reasonable expectation of privacy, would actually look like. Since truth is irrelevant to the existence of a reasonable expectation of privacy, the claimant will have established other features like the information's nature being quintessentially private. This difficulty may be what has motivated the High Court to seek a broader principle.

Terry has also been criticised for seemingly assessing the 'nub' of the case purely from the claimant's subjective perspective. This might lead to counterintuitive scenarios in which one of two identical claims is struck out for abuse but not the other purely because the claimant in the former is mainly concerned about his business interests while the latter is personally distressed. As Busuttil and McCafferty point out, a subjective approach 'places a premium on specialist knowledge and clever drafting: on whether an applicant can formulate the evidence in the right way to get the desired result'.¹¹⁴⁵ The applicant in *Terry* might have avoided judicial ire by getting evidence from those other than his business associates, for example.

The issue possibly stems from MOPI's dual subjective/objective test. The claimant must actually have a subjective expectation of privacy before the court can move onto its reasonableness. Tugendhat plainly thought the claimant lacked a subjective expectation of privacy and so MOPI was unlikely to succeed, hence why the injunction claim already failed under the s.12(3) HRA test. This raises the question of whether the relevant *dicta* in *Terry*

¹¹⁴⁴ Tarlach McGonagle and Onur Andreotti, *Freedom of Expression and Defamation* (Council of Europe 2016) 14.

¹¹⁴⁵ Godwin Busuttil and Patrick McCafferty, 'Interim Injunctions and the Overlap between Privacy and Libel' (2010) 2 J Media L 1, 8.

would have differed had the claimant also been able to bring a data protection claim, where the establishing criteria are entirely objective.

Overall, it appears the abuse rule is now about whether the claimant, by bringing alternative claims, is motivated solely *by reputation* to avoid defamation's limitations. However, this begs the question of which 'rules' are impermissible to avoid. It cannot be the limitation period, since *Hannon* was completely unsympathetic to this. It is possibly the *Bonnard* rule: this was a key concern in *Terry*. However, as discussed below, the courts seem convinced that a seemingly 'abusive' claim can proceed provided the *Bonnard* rule is applied to the MOPI/data protection claim.

This leaves those defences defamation does not share with other actions – particularly truth (and possibly honest opinion). It seems extraordinarily unlikely that the court will strike out MOPI and data protection claims simply because the information is true: this would gut those two actions. Perhaps, the claimant must be solely concerned with their reputation *and* seeking to avoid the defence of truth or *Bonnard* (and possibly honest opinion). But what does it mean for a claimant to be solely concerned with reputation, and can this be established where there is a *prima facie* MOPI or data protection claim? As now discussed, this is unclear.

(ii) Can an Arguable Claim be an Abuse?

A critical issue with the 'nub' cases is the conceptual difficulty of deeming a case purely about reputation when there is a *prima facie* claim in MOPI or data protection. MOPI and non-inaccuracy data protection claims, while protecting reputation to some degree, clearly extend to other interests, which are encapsulated in their establishing criteria. So, it seems inherently wrong to accuse any claimant who establishes a reasonable expectation of privacy, or the use of their personal data, of being solely concerned with reputation. If the claimant fails to establish these criteria, then they might be so accused. However, that claim could already be struck out under the 'no reasonable prospects' ground.

The *McKennitt* 'abuse' ground is only coherent if there are cases in which a claimant has reasonable prospects of establishing MOPI or data protection which can be struck out because they are solely about reputation. It is unclear from the caselaw that this is so. Rather, the caselaw's overall tenor is that if the claimant has a valid claim in MOPI or data protection, they are necessarily concerned with other rights and interests rather than just reputation.

One possibility is that only data protection claims based on accuracy pose a problem. The courts seem to have rejected this, however. In *Prince Moulay*, a defamation claim was brought over news articles indicating the claimant orchestrated a plot to sabotage the King of Morocco.¹¹⁴⁶ After the trial judge rejected the claimant's initial alleged defamatory meanings, the claimant submitted new meanings and sought permission to amend to add a claim of wrongful data processing – particularly breach of the accuracy principle.

The judge dismissed the new meanings as having 'the appearance of contrived meanings, fashioned so that an action in defamation can be pursued when ... [the Prince's] real complaint is that the article was inaccurate.'¹¹⁴⁷ The defendant objected to the application for permission to add the data protection claim, arguing that it was 'an attempt to fashion a remedy for damage to reputation where the law of defamation did not provide one', making it a disproportionate interference with their Article 10 ECHR rights and impermissible under the *Jameel* test, among other matters.¹¹⁴⁸ The judge rejected this, seeing 'nothing contrary to principle in allowing a DPA claim to proceed in combination with a defamation claim' and positing that 'it was arguable that the Prince had a principled interest in ensuring an accurate record of his political activities'.¹¹⁴⁹

The Court of Appeal reversed the first instance decision on the grounds that the words were capable of defamatory meaning. However, they agreed with the decision to allow the addition of the data protection claim, stating the judge was right 'not to attempt to identify any broad overarching principle which should apply where it is sought to join defamation and DPA claims'.¹¹⁵⁰ Simon LJ stated 'I would accept that doubts have been expressed about the necessity and proportionality of advancing parallel claims and remedies, when damaging information has been published which is not defamatory,'¹¹⁵¹ but agreeing with the contention that '[t]he different causes of action are directed to protecting different aspects of the right to private life: the relevant provisions of the DPA include the aim of protection from being subjected unfairly and unlawfully to distress'.¹¹⁵²

The interest identified by the High Court is separate from that which defamation protects. Indeed, it fits the characterisation of data protection as dealing with epistemic concerns:

¹¹⁴⁶ *Prince Moulay* (n 1118).

¹¹⁴⁷ *Ibid* [19].

¹¹⁴⁸ *Ibid* [21].

¹¹⁴⁹ *Ibid* [22].

¹¹⁵⁰ *Ibid* [42].

¹¹⁵¹ *Ibid*.

¹¹⁵² *Ibid*.

claimants act as proxy for the public interest in data protection, while in defamation they act in their own (primarily) deferent reputational interests. It may not exist in every case – for example, the court might not deem a non-public figure claimant to have a principled interest in an accurate public record of their private lives. This might be a basis for identifying some inaccuracy-based data protection cases which are ‘all about’ reputation.

Conversely, the Court of Appeal’s identified interest is puzzling and less convincing. It seemingly applies to every inaccuracy case, since plausibly any claimant might be distressed by reputation-affecting errors in recordkeeping. It leads to the conclusion that no inaccuracy claim is solely about reputation. Additionally, the court did not explain why the claimant is entitled not to be distressed. This risks undesirable overlap with the reputational interests that defamation protects – for example, if the claimant is distressed only because of the reconstitution of their identity. *Prince Moulay* therefore does not indicate any class of data protection case which will be deemed solely about reputation.

The MOPI claims do not shed any greater light. In *Hannon*, for example, Mann J focused on whether there were other claims which were greater than *de minimis*.¹¹⁵³ This must always be the case where there is an arguable MOPI or data protection claim. After all, both carry a separate damage award designed to reflect the harm to the claimant’s privacy and/or data protection rights,¹¹⁵⁴ which is unlikely to be characterised as a *de minimis* addition. It might be argued that a MOPI claim is *de minimis* where the privacy intrusion is trivial. However, a trivial privacy claim is overwhelmingly likely to fail outright since the seriousness of intrusion and triviality of the information are core factors in establishing a reasonable expectation of privacy. So, a *de minimis* MOPI claim is better characterised as a MOPI claim falling within the ‘no reasonable prospects’ strike-out ground. Meanwhile, an inaccuracy-based data protection claim might be deemed *de minimis* over a defamation claim asserting falsity, but not if the claimant has a separate right to a corrected public record or to avoid distress.

Notably, in *Hannon*, Mann J apparently doubted whether there was a reasonable expectation of privacy on the facts. The incidents took place in a plane’s passenger cabin which he described as ‘a place where members of the public have voluntarily collected together, but they have not done so in the expectation of any privacy’.¹¹⁵⁵ However, he considered a reasonable expectation of privacy at least arguable. That *Hannon* was not struck out for abuse,

¹¹⁵³ *Hannon v News Group Newspapers Ltd* (n 748) [22].

¹¹⁵⁴ *Gulati (CA)* (n 737737) [48].

¹¹⁵⁵ *Hannon v News Group Newspapers Ltd* (n 748) [101].

despite being borderline as to the existence of a reasonable expectation of privacy, reinforces the idea that no arguable MOPI claim is abusive.

In *NT1 & NT2*, Warby J accepted that ‘the protection of reputation is a significant and substantial element of NT1’s claim and of his motivation.’¹¹⁵⁶ However, he continued that ‘it would be wrong to draw too sharp a distinction between the protection of reputation on the one hand and private life on the other ... injury to reputation can engage the protection of Article 8 of the Convention’.¹¹⁵⁷

In any case, Warby J considered the claim to extend to areas of private life beyond reputation, though he did not specify how.¹¹⁵⁸ Accordingly, he concluded that the data protection and MOPI claims were not an attempt to avoid defamation’s limits.¹¹⁵⁹ Rather, reputation’s prominence to the claim was better accounted for in other ways, for example by treating them as relevant to accuracy and the existence of a reasonable expectation of privacy.¹¹⁶⁰ Without further elaboration, Warby J held that the abuse claim regarding *NT2* failed for the same reason.¹¹⁶¹

ERY, another criminal conviction case, is another example. The defendant attempted to have the MOPI claim struck out on abuse grounds,¹¹⁶² since the claim would have failed for truth (and possibly public interest) if brought in defamation.¹¹⁶³ In a short rejection, Nicol J stated that the

difficulty for the Defendant in advancing this argument is that in many cases there has been an overlap between privacy and defamation. A threatened publication may jeopardise both the claimant’s reputation and his privacy. It is no answer to an application for an injunction to restrain a threat to the claimant’s reasonable expectation of privacy that he could, alternatively, have pleaded a cause of action in defamation.¹¹⁶⁴

Nicol J then stated he did not agree that the nub of the claim was ‘protection of reputation’, arguing it was insufficient for abuse that the claim had a reputational element.¹¹⁶⁵ However, as explained in this work’s discussion of the role of criminality in MOPI claims, this

¹¹⁵⁶ *NT1 & NT2* (n 11) [63].

¹¹⁵⁷ *Ibid.*

¹¹⁵⁸ *Ibid* [64].

¹¹⁵⁹ *Ibid.*

¹¹⁶⁰ *Ibid* [65]

¹¹⁶¹ *Ibid* [177].

¹¹⁶² *ERY* (n 673) [66].

¹¹⁶³ *Ibid.*

¹¹⁶⁴ *Ibid* [67].

¹¹⁶⁵ *Ibid* [68].

was not merely a claim with a reputational element. It was a claim where the reputational element was the dominant factor establishing the reasonable expectation of privacy. This makes it difficult to conceive of a case where a reasonable expectation of privacy is arguable but still abusive.

This leaves *Terry* as the only case where the facts were deemed (potentially, and in any case *obiter*) solely about reputation. However, later cases have reinterpreted *Terry*¹¹⁶⁶ as a case where the MOPI claim was doomed to fail because it lacked reasonable prospects of success. Tugendhat did not think the claimant had a reasonable expectation of privacy in the mere fact of the relationship, and while he conceded there might have been an expectation had there been a credible threat to publish specific details about it, there was no such threat.

On this interpretation, *Terry* was obviously solely about reputation: the claimant failed to establish that any other claim based on alternative interests had reasonable prospects of success. It is perhaps a strained reading of *Terry*, however. Strictly, Tugendhat was applying the s.12(3) and *quia timet* tests, so he only decided the MOPI/confidence claim was ‘unlikely’ to succeed rather than completely hopeless. Even on a more literal reading, however, *Terry* does not settle the question of whether an abuse argument could succeed where the ‘no reasonable prospects’ argument fails, since it was not a strike-out claim and the tests specific to striking out were not discussed.

However, the alternative reading of *Terry*, and the idea that an arguable MOPI or data protection claim is never abusive, is reinforced by the reasoning in *GYH*, the claim concerning a sex worker accused of having an STD.¹¹⁶⁷ The claimant brought claims in MOPI, defamation, and harassment. Among other matters, the High Court was asked to apply the nub of the claim argument, highlighting the strong reputational harm suffered and the claimant’s concern for the impact on her business.

Warby J explained that a claimant seeking to rely on MOPI to enforce a commercial reputation might fall afoul of an application for abuse of process because commerciality undermines the case for a reasonable expectation of privacy, but not necessarily: and not here, as sexual information is quintessentially private.¹¹⁶⁸ Of course, if this analysis is correct, abuse

¹¹⁶⁶ *Hannon v News Group Newspapers Ltd* (n 748) [53]; *ERY* (n 673) [67].

¹¹⁶⁷ *GYH v Persons Unknown* (High Court) (n 691).

¹¹⁶⁸ *ibid* [39].

is irrelevant: if the information is not private, the claim falls to be struck out as lacking reasonable prospects of success.

Overall, then, it is unclear what *McKennitt* adds to the law, or whether it is truly possible for an arguable MOPI or data protection claim to be struck out for the sole reason that the court considers a defamation claim more appropriate. A key problem is that the courts have not really considered the similarities and differences in the philosophical and policy bases for defamation, MOPI, and data protection. They seem tripped up by the fact that reputation, or some aspect or function of it, is protected by Article 8 ECHR – a core part of the justification for both MOPI and (to some extent) data protection.

Accordingly, they wish to both affirm two potentially contradictory ideas. The first is that defamation is the sole appropriate cause of action for reputation claims. The second is that it is legitimate to seek to protect one's reputation using alternative causes of action, since reputation is part of Article 8, or that the fact that a case is dominated by reputational concerns does not mean that connected aspects of Article 8 are not invoked and important. Resultantly, the abuse test in *McKennitt* appears largely redundant, and the discussion surrounding it merely a symbolic discussion of the interests involved rather than practically significant. This neatly illustrates the danger of reputation being undertheorized in the law.

III. Bonnard v Perryman

The *Bonnard* rule is significant, as Foster argues, because it deprives the claimant of the right to stop the information entering the public domain – and so avoid reputational damage altogether.¹¹⁶⁹ It prioritises the public's right of access to information, with any harm rectified *ex post* via damages.¹¹⁷⁰

The near-impossibility of obtaining an interim injunction to restrain potentially true speech in defamation emphasises the delineating role of truth to its underlying conception of reputation. As North J's stated in *Bonnard*, 'unless an alleged libel is untrue, *there is no wrong committed.*'¹¹⁷¹ It is not simply that speech is a countervailing interest which can override reputation – true speech does not affect the claimant's right to reputation under defamation law

¹¹⁶⁹ Steve Foster, 'Freedom of expression, prior restraint and section 12 of the Human Rights Act 1998' (2004) Cov LJ 86, 89.

¹¹⁷⁰ *Fraser v Evans* [1969] 1 QB 349, 360.

¹¹⁷¹ *Bonnard v Perryman* (n 1102) 284 (emphasis added).

at all. *Bonnard* goes some way to counterbalance the fact the reverse burden of proving truth, additionally.

However, *Bonnard*'s later extension to other defences (particularly privilege, which does not require truth) goes beyond merely emphasising that truth bounds the reputational interest. It entrenches the general importance of the public interest or free speech as outweighing certain kinds of reputational claim. As argued in previous chapters, MOPI and data protection likely embody a form of reputation that can be outweighed by speech as a countervailing interest. So, one might expect that where the core of an alternative claim like MOPI or data protection is the protection of these forms of reputation, the *Bonnard* rule would apply. This may be the case, but it is far from clear.

The possibility of *Bonnard* applying to other claims brought seemingly to evade defamation's limitations is not a new idea. There were *dicta* to this effect prior to the introduction of s.12(3) HRA.¹¹⁷² However, the problems with the *McKennitt dicta* replicate themselves: even in these early cases, there was reason to doubt *Bonnard* was actually applicable to a *prima facie* alternative case.

For example, in *Gulf Oil*, the parties were in a contract dispute and one spread leaflets and hired an aircraft banner to publicly accuse the other of breaching the contract.¹¹⁷³ The claimant sought an interim injunction based on conspiracy to injure. While the court countenanced the possibility of *Bonnard* applying to such an action where the truth of the words was uncontested,¹¹⁷⁴ they held this would not apply where there was a serious question to be tried as to whether conspiracy to injure's requirements were met (which they were on the facts).¹¹⁷⁵

This was because, while defamation law would perceive no wrong from the publication of true words, if there was a *prima facie* case of conspiracy to injure the law recognised the commission of a different wrong: '[i]n such a case the court can, and in my view should, proceed on the same principles as it would in the case of any other tort.'¹¹⁷⁶ In other words, that the conspiracy to injure claim met the *American Cyanamid* criteria precluded *Bonnard*'s application.

¹¹⁷² *Gulf Oil v Page* [1987] Ch 327, 334; *Service Corporation International Plc v Channel Four Television Corporation* [1999] EMLR 83, 89-90.

¹¹⁷³ *Gulf Oil v Page* (n 1172).

¹¹⁷⁴ *Ibid* 334.

¹¹⁷⁵ *Ibid* 333.

¹¹⁷⁶ *Ibid*.

Similarly, the High Court in *Service Corporation International* held *Bonnard* could apply to an alternative cause of action which was ‘in reality a claim brought to protect the plaintiffs’ reputation and the reliance on the other cause of action is merely a device to circumvent’ *Bonnard*.¹¹⁷⁷ That case concerned a defendant seeking to air footage taken by an undercover employee showing malpractice at the claimant’s funeral home. The court held the actions brought – breach of confidence, copyright and trespass – were merely an attempt to avoid *Bonnard*.¹¹⁷⁸

However, its reasoning was based on the absence of a *prima facie* case for these alternative causes of action. The claimant failed to identify any confidential information and there was clear authority that an undercover cameraman owed no duty of confidence: the claimant’s counsel explicitly ‘conceded that a claim in confidence could not justify the grant of the relief sought on this application.’¹¹⁷⁹ Trespass on the funeral homes’ grounds might justify damages and an injunction against returning, but could not in principle result in an injunction against showing the film footage (which the claimant, again, conceded).¹¹⁸⁰ Meanwhile, the copyright claim was based on the claimant owning copyright in the film as the undercover cameraman’s employer: the court held there was ‘no arguable case’ that the relevant provisions of the Copyright, Designs and Patents Act 1988 would lead to this result.¹¹⁸¹ So, the claimant failed to establish the *American Cyanamid* criteria long before the issue of *Bonnard*’s application became live.

Finally, *Microdata Information Services*¹¹⁸² explicitly affirmed the claimant’s right to seek an interim injunction in an alternative cause of action without running afoul of *Bonnard*: ‘The mere fact a plaintiff’s case can be framed in defamation, albeit it is actually based on a different cause of action, is not of itself a sufficient justification for applying the rule ... if in reality the case is not one of defamation properly so called’.¹¹⁸³ On the facts, the court considered the case clearly not one of defamation – though it did not give reasons why, they had already decided that there was a *prima facie* case of unlawful interference with contract.

Accordingly, the pre-MOPI/data protection caselaw provides no clear authority that a claimant can meet the *American Cyanamid* or s.12(3) test (as applicable) for an alternative

¹¹⁷⁷ *Service Corporation International Plc v Channel Four Television Corporation* (n 1172) 90.

¹¹⁷⁸ *Ibid.*

¹¹⁷⁹ *Ibid.*

¹¹⁸⁰ *Ibid.*

¹¹⁸¹ *Ibid* 91.

¹¹⁸² *Microdata Information Services Ltd v Rivendale Ltd* [1991] FSR 681.

¹¹⁸³ *Ibid* 686.

cause of action and yet fail because *Bonnard* is applied. Non-MOPI /data protection claims brought post-HRA follow the same pattern. For example, in *Khan*, a harassment claim, the court held that the claimant had failed to meet the s.12(3) threshold *before* concluding that the ‘nub’ of the claim was reputation protection.¹¹⁸⁴

The idea that *Bonnard* might extend to MOPI was first raised in *Browne*,¹¹⁸⁵ relying on the *McKennitt dicta* in support of the claim that ‘one cannot obtain an easier route to an injunction preventing publication, where the gravamen of the complaint is as to reputation, by merely choosing another cause of action’.¹¹⁸⁶ On that basis, *Bonnard* applied where ‘the true object of the complaint is the protection of reputation.’¹¹⁸⁷ However, this was *obiter*, since on the facts the claimant did not meet the s.12(3) requirement in the relevant areas (though somewhat confusingly the court ‘bore in mind’ *Bonnard* when applying the s.12(3) test¹¹⁸⁸).

The second instance was mooted in *RST*, where the claimant was blackmailed by a woman he previously paid for sex.¹¹⁸⁹ The claimant sought an injunction based on MOPI. After explaining *Bonnard*, Tugendhat J noted that ‘I am concerned as to whether the claim in this case is properly to be regarded as a claim to protect the applicant’s privacy, or whether it is a claim brought to protect his reputation’¹¹⁹⁰ because an injunction should not be granted if ‘the real issue at stake is one of reputation’.¹¹⁹¹

Nevertheless, Tugendhat J concluded that s.12(3) applied and was met. There was little discussion of why: though Tugendhat noted in the abstract that ‘the status of reputation’ within Article 8 was unclear (referring to the *Karakó/Pfeifer* debate),¹¹⁹² he did not explain how that applied to the present case or what aspects of the facts led him to that conclusion. Rather, he left the general issue to a future court ‘at some point’.¹¹⁹³ Tugendhat addressed the issue again a year later in *Terry*.¹¹⁹⁴ However, as discussed above, while he plainly thought that *Bonnard* could be relevant to a MOPI claim brought to subvert defamation, he did not specify its exact

¹¹⁸⁴ *Khan v Khan* [2018] EWHC 241 (QB) [75]-[76].

¹¹⁸⁵ *Lord Browne of Madingley v Associated Newspapers* (n 653).

¹¹⁸⁶ *Ibid* [30].

¹¹⁸⁷ *Ibid* [29].

¹¹⁸⁸ *Ibid* [60].

¹¹⁸⁹ *RST v UVW* [2009] EWHC 2448 (QB).

¹¹⁹⁰ *Ibid* [20].

¹¹⁹¹ *Ibid* [24].

¹¹⁹² *Ibid* [28].

¹¹⁹³ *Ibid* [33].

¹¹⁹⁴ *Terry* (n 696).

relevance and his discussion was *obiter* since he thought the alternative claims failed the s.12(3) and *quia timet* tests.

In *ERY*,¹¹⁹⁵ the defendant argued ‘the Claimant is not entitled to an injunction because his claim is really to restrain a defamatory statement (viz that he is being investigated by the police)’: something which was strictly true.¹¹⁹⁶ Nicol J responded that

The difficulty for the Defendant in advancing this argument is that in many cases there has been an overlap between privacy and defamation. A threatened publication may jeopardise both the claimant’s reputation and his privacy. It is no answer to an application for an injunction to restrain a threat to the claimant’s reasonable expectation of privacy that he could, alternatively, have pleaded a cause of action in defamation.¹¹⁹⁷

He continued, ‘[t]here is a reputational element to [the claim], but, since that is the case with many privacy cases, that does not take the Claimant far enough.’¹¹⁹⁸

LJY concerned a public figure who received an anonymous blackmail letter threatening to reveal private information to media outlets which would damage his reputation and career.¹¹⁹⁹ He sought an injunction based on harassment, MOPI, and defamation. Warby J relied on the *McKennitt dicta* in support of the proposition that ‘the Court applies the more demanding defamation rule if it detects “cause of action shopping”’: including the rule in *Bonnard*.¹²⁰⁰ Unsurprisingly, he continued ‘[t]he authorities do not reveal any touchstone or any very clear criteria by which the Court is to discern whether a claimant is engaging in abuse of this kind’.¹²⁰¹ However, beyond stating that a claimant who expressly based their claim on defamation was not an ‘obvious candidate’ for accusations of action-shopping,¹²⁰² and that the rule probably did not apply to blackmail claims,¹²⁰³ there was little further discussion: Warby J agreed the claimant met the criteria for *Bonnard* in the event that it applied.¹²⁰⁴

Finally, when discussing circumstances relevant to a reasonable expectation of privacy, the Supreme Court in *ZXC* stated that

¹¹⁹⁵ *ERY* (n 673).

¹¹⁹⁶ *Ibid* [66].

¹¹⁹⁷ *Ibid* [67].

¹¹⁹⁸ *Ibid* [68].

¹¹⁹⁹ *LJY v Persons Unknown* (n 1109).

¹²⁰⁰ *Ibid* [42].

¹²⁰¹ *Ibid* [43].

¹²⁰² *Ibid*.

¹²⁰³ *Ibid* [47].

¹²⁰⁴ *Ibid* [44].

‘a person actually convicted of a criminal offence ... or investigated and found to be a former KGB officer ... , cannot complain of the foreseeable consequence of a loss of reputation or of any personal, social, psychological and economic suffering as a result.’¹²⁰⁵

This is curious, since ordinarily information’s truth or falsity is irrelevant to the reasonable expectation of privacy. Consequently, the courts have not developed means of assessing the information’s truth or falsity in the MOPI context. This might be dismissed as forming part of the court’s anomalous approach to criminal convictions, but it raises issues for pre-charge allegations and injunctions. For example, if the defendant accuses the claimant of a crime, and the claimant is presently being investigated but has yet to be charged, this is quintessentially private information. However, if the police then decide to charge, the information (apparently) becomes quintessentially public. Only later rehabilitation and the passage of time will render it private once more.

If, at the former stage, the defendant insists that the investigation will vindicate his allegation, are they entitled to resist an injunction on *Bonnard*-type grounds pending its outcome? It is unclear, and the Supreme Court’s *dicta* does not help resolve the issue. It is suggested here that this is unlikely: this outcome would severely undermine the courts’ attempts to discourage pre-charge naming of suspects and would require them to assess likely truth and falsity at the interim stage in a manner for which there is currently no precedent, making the treatment of criminal information even more starkly anomalous.

There has not been any attempt to argue *Bonnard* should apply to data protection cases, likely since most reputation-affecting data protection cases are likely to involve journalism and so be subject to an outright stay. However, the *Stunt* cases¹²⁰⁶ makes clear that the courts see data protection as a separate, gated-off regime, making it unlikely *Bonnard* is relevant to cases to which s.176 of the 2018 Act is inapplicable. *Stunt* concerned the 1998 Act’s predecessor to s.176, s.32(4).¹²⁰⁷ The claimant was a wealthy businessman married to one of the daughters of an ex-Formula One chief executive, claiming regarding a newspaper group’s publication of articles on his public appearances and business activities. The relevant actions were data protection, harassment, and MOPI. Pursuant to s.32(4), the defendant sought a stay.

¹²⁰⁵ *ZXC* (Supreme Court) (n 674) [122].

¹²⁰⁶ *Stunt v Associated Newspapers Ltd* [2017] 1 WLR 3985: Affirmed on appeal: [2018] EWCA Civ 1780.

¹²⁰⁷ Section 32(4) was worded materially the same as s 176 for present purposes.

The High Court granted the stay, but importantly, stayed only the data protection claim. The court noted that s.32(4) ‘was intended to be an important provision as part of the substantive balancing exercise between protecting the article 10 rights of freedom of expression for journalistic purposes and protecting the data protection rights recognised in the Directive’.¹²⁰⁸ Despite this, the court stressed that ‘it applies only to claims under the 1998 Act’, and this is not the ‘primary means’ by which the law gives effect to other interests (particularly privacy).¹²⁰⁹ Accordingly, the stay provisions were ‘only of significance’ where there is no other remedy but a data protection claim, which the court considered rare.¹²¹⁰ No substantive reasoning was given as to why s.32(4) did not apply to the other actions – this was just assumed.

Stunt was subject to an ECJ referral, but the claimant went bankrupt before this could be resolved. Given the s.176 provision is materially the same as s.32(4), one might expect it to be clear authority on that provision’s meaning. If so, this indicates the courts see data protection as its own, ringfenced regime – making it unlikely they would apply *Bonnard* to those cases falling beyond s.176. This makes sense – the modern data protection regime is specifically designed to balance interests and risks in the digital age, and it is unlikely the legislatures involved intended a 200-year-old common law rule to affect the careful statutory balance. Indeed, the data protection regime deliberately envisages a greater capacity for restraint than the common law actions, for example via the data subject’s right to object (even if watered down in the search engine cases) and demand restriction of processing.

There is therefore no evidence that *Bonnard* can actually be applied to a MOPI or data protection case which meets the s.12(3) threshold. To the extent that the courts have indicated that it can, this seems based on the same ‘abuse’ principle as *McKennitt*: the ‘nub’ being either falsity or reputation. The problem with this approach is that if the *McKennitt* principle applies, then the non-defamation claims should be struck out, rather than allowed to proceed but subject to the *Bonnard* rule.

It is also unclear, as Barendt points out, why the rule in *Bonnard* is privileged above all the other harsh limitations of defamation.¹²¹¹ There has been no serious argument that, for

¹²⁰⁸ *Ibid* [50].

¹²⁰⁹ *Ibid* [57].

¹²¹⁰ *Ibid*.

¹²¹¹ Eric Barendt, ‘An Overlap of Defamation and Privacy?’ (2015) 7 JML 85, 88.

example, the one-year limitation period should apply in reputation-centric MOPI or data protection claims.

The injunction cases therefore bear the same confusion as strike-out cases. They seek to simultaneously assert that other actions cannot trespass on defamation's supposedly exclusive reputational domain, while also seeing it as legitimate to seek to protect one's reputation or other interests using MOPI or data protection.

IV. Overall Analysis

Examination of the overlap caselaw reveals the dangers of under-theorising reputation in law. There were many *dicta* cited in previous chapters in which the courts explicitly acknowledged that (some form of) reputation is protected within MOPI and data protection. However, the overlap decisions seem to contradict this and instead assume that MOPI and data protection protecting reputation is something to be suspicious of, insisting on some nebulous situation in which these two actions would impermissibly encroach onto defamation's territory.

Practically, however, this discussion does not come to much: it is difficult to identify even a hypothetical case in which the courts would strike out an arguable MOPI or data protection claim as an abuse of process or apply *Bonnard* to them. The courts' reasoning seems purely symbolic. The perceived need for such symbolic rhetoric arguably stems from the failure to recognise that there are many different forms of reputation and that it is not necessarily problematic for a MOPI or data protection case to be 'solely' about reputation provided it is not the same form of reputation protected by defamation. One suspects that if the courts properly articulated the values at the core of these three causes of action, the need to discuss the possibility of abuse or applying *Bonnard* to other causes of action would fall away.

Chapter 8: Conclusion

I. Findings

This thesis articulated the eight main theories of reputation, their underpinning conceptions of social life, and examined which are embodied in four areas of law: criminal defamation, civil defamation, MOPI and data protection. This chapter summarises its conclusions and discusses the resultant implications.

(i) The Theories

The first theory, epistemic reputation, embodies a consequentialist society which cares about individuals' ability to access information which enables pro-social judgements according to the wider community's norms. It requires a unipolar law (in which the wrong is interference with reputation, without the need to show further consequences) with an absolute truth defence (with exceptions regarding anti-social information use).¹²¹² It would countenance falsity where necessary to avoid the chilling effect. Its remedies would focus on correction of false information, with the State as primary enforcer or the injured party acting as proxy for the public interest in a civil claim.

The second theory, social norm theory, is similarly consequentialist. Reputation's value is ensuring unpaid norm enforcers perform their role correctly and do not cause the community to waste costs punishing innocent social actors. Truth would be an absolute defence, save for a possible rehabilitation-based exception. The law might tolerate false statements to avoid chilling effect. It would focus on correcting false information, possibly by State enforcement but also potentially using individuals as proxies. It might differ from an epistemic-based law by setting seriousness thresholds or requiring proof of wasted social costs – reflecting its bipolar nature.

The third theory, proprietary reputation, is situated within a market-based society which values reputation's inherent economic value. The law would distinguish between marketable and non-marketable areas of life, caring only for the former, but not between the wider community and sub-communities. It would likely not countenance falsity, though conceivably a limited form of public interest defence might exist. Truth would be a defence where the

¹²¹² E.g., where a rehabilitated person continues to be ostracised.

relevant market does not value reputations based on false facts or there is a limited public interest. Its remedies would be limited to pecuniary awards.

The fourth theory, deferent reputation, belongs in a society concerned for citizens' right to dignity and which sees internal identity as primarily socially-constituted. It protects reputation because certain reputational attacks damage internal identity, as objectively constituted under the wider community's norms. So, statements which provably risk the target's identity would be unlawful, making available pecuniary and non-pecuniary civil remedies. Truth would be an absolute defence, save for potential rehabilitation-based exceptions. The law would not necessarily countenance false statements, but might provide defences to avoid the chilling effect. These defences should be more limited than under a consequentialist law, however.

The fifth theory, sociality, is similarly found in societies concerned with individual rights – this time their fundamental interest in forming social bonds with the wider community. The law would provide a private action with the full range of remedies, provided the target could prove their social bonds were endangered. It would not necessarily treat truth as relevant or countenance falsity. However, such a society might deem speech a countervailing fundamental interest since it also plays a role in forming social bonds. If so, the law would either treat truth as a discretionary element or precondition of a 'public interest' defence.

The sixth theory, Post's 'aristocratic honour', can be split into two sub-theories. The first, perceived honour, exists with a society which highly values the integrity of ascriptively-allocated social roles. Only statements indicating someone is unsuitable for their role would be actionable, false statements would never be tolerated, and truth would only be a defence if the accusation is already publicly known. The law would reflect the State's concern with its own integrity and social order, and would likely be State-enforced (possibly criminally).

The second, Arthurian honour, is situated in a society which values individuals' ability to project their own public truth, based on the assumed characteristics of those with particular ascriptive traits. This society deems individuals to have a personal right to satisfaction when their public truth is challenged, so its remedies would focus on providing satisfaction. Truth and falsity play no role.

The seventh theory, virtuous honour, is based in a society which believes that individuals with particular ascriptive characteristics should aspire to exemplary action corresponding with those traits to be entitled to self-esteem. The relevant law condemns any statement falsely claiming a person has behaved unvirtuously or which falsely denies a person's ascriptive

characteristics. It would entitle the target to remedies based on damage to their self-esteem and entitlement to self-esteem, like emotional damages. Truth would be a full defence, save if the society believes honour can be rehabilitated. The law might never countenance false speech, but could conceivably have limited defences to avoid the chilling effect if the society values speech as a countervailing interest.

The final theory, cultural honour, is situated in a society which believes that retributive action – including potentially violence – is a proper response to public disrespect. This society might be content to allow people to take reputational matters into their own hands, but equally may want to ensure that only ‘proper’ retributive action happens: for example, if retributive violence often gets out of hand or the State believes people should only seek satisfaction through particular means or rituals. Such a law would aim to provide official, State-sanctioned channels for retributive, satisfactory action, and truth or falsity would be irrelevant.

(ii) The Actions

a) *Criminal Defamation & Scandalum Magnatum*

The origins of legal protection of reputation are the 1275 criminal offence of *scandalum magnatum*, and its corresponding civil action. This offence, explicitly based on maintaining a social order of monarchy and aristocrats, allowed those entitled in English society to assert their own public truth, labelling dissenting voices as ‘lies’ regardless of their truth and falsity. It embodied Arthurian aristocratic honour, with some bleed from perceived aristocratic honour’s concerns about maintaining the contemporary social order.

It was followed by the long-standing but now-defunct offence of criminal libel. In its initial incarnation, criminal libel is best understood as an attempt by the State to manage the population’s cultural honour concerns: reducing incentives for retributive violence. This need degraded along with English society’s declining acceptance of retributive action as a proper response to reputational attacks: reflected in increased defences for public interest speech and newspapers, decreased caseload, and, ultimately, its abolition.

b) *Civil Defamation*

Early slander laws, while technically consistent with proprietary reputation, were probably not deliberately attempting to protect reputation. Rather, slander originated in the action on the case, designed to protect people from interference with external proprietary entitlements

inflicted by way of words. Libel, meanwhile, likely split from the action on the case accidentally, but was always directly concerned with reputation *per se*. Slander's requirements mostly converged with libel by the 1800s, save for retaining the special damages requirement. So, while modern slander (like libel) is about protecting reputation directly, it retains anomalous requirements and exceptions which probably do not actually sound in reputational theory.

Turning to their shared elements, defamation's history reveals a confused picture with many themes. This is unsurprising given defamation is far older than MOPI and data protection, subject to centuries of evolution to suit changing values and legal structures. Nevertheless, dominant theories arise: deferent reputation, epistemic, and social norm theory.

The best fit is deferent reputation, as not only does the language of dignity commonly feature in defamation cases, but it can account for most of its actionability requirements, defences (particularly the interest-delineating role of truth) and the courts' approach to damages which privileges reputation's internal aspect. It is an imperfect fit, as more speculative reasoning is needed to explain the actionability of non-moral, non-voluntary statements. Those elements might equally be explained by the fact that civil libel's definition of 'defamatory' derived partially from the criminal actions – indicating that some (outdated) elements of concern with cultural honour still mark the law. Additionally, many aspects of defamation represent the countervailing interest of speech – particularly the public interest defence, the s.1(1) serious harm test, and the *Jameel* 'real tort' grounds of striking out.

Meanwhile, epistemic and social norm theory also fit civil defamation's actionability requirements and defences, though epistemic reputation theory struggles to explain the *Thornton* requirement that the attack move a hypothetical reasonable person to act on their changed opinion. Meanwhile, social norm theory cannot easily explain the actionability of non-normative statements. As consequentialist theories, both fit the overall tenor of defamation's defences, and both can explain the role of truth as delineating the reputational interest. They fit less well than deferent reputation in explaining the law's approach to damages, however, particularly the law's emphasis of reputation's internal dimension.

Some aspects of the law remain incongruous with all three theories. For example, the offer to make amends introduces an element of satisfaction in some cases. That correction orders are only available at the summary judgement stage is also odd – all three theories would probably

demand they be available across the board. However, these elements are best explained by historical accident and the limits of political compromise.

c) MOPI

MOPI is caught in a state of conceptual confusion stemming from its attempt to merge Article 8 ECHR concerns with the existing breach of confidence action. The ECtHR recognises reputation as linked to or a part of the right to respect for private life. However, there is division over its precise role: as a fundamental part of the individual's private life being part of their personal identity, or merely a potential (but insufficient) way to raise private life concerns. Reputation's role in private life is important, as different roles gesture at different conceptions of reputation.

The first role, taken by the ECtHR in *Pfeifer*, takes a deferent reputation approach. Reputation is part of private life because an attack on reputation is an attack on the target's autonomously developed personality (which is crucial to private life). The second role, per *Karakó*, treats sociality as part of private life, such that only reputational attacks impacting strong ties fall under Article 8.

MOPI evidences a similarly confused approach as the ECtHR. Reputation is indirectly relevant to actionability, through the relevance of emotional distress and impact on the claimant in determining whether they have a reasonable expectation of private life. The former could incorporate impact on the target's personal identity (indicating deferent reputational concerns), while the latter is more concerned with sociality – particularly given the courts' concern with whether the information is 'embarrassing'. Indeed, the latter consideration can make the information's reputation-affecting nature sufficient to raise a reasonable expectation of privacy where all other factors are ambivalent.

This is particularly evident in the courts' approach to pre-charge criminal information, where even quintessentially public information about (allegedly) publicly committed, public natured, crimes are deemed essentially private. This is seemingly because of their high impact on reputation, and the consequent impact on the target's identity and sociality interests. However, the courts have been inconsistent – post-charge and conviction information does not benefit from the same presumption. This is likely because public interest considerations (particularly in open justice) bled into MOPI's first limb via the need for the claimant's expectation to be 'reasonable'. However, the fact that pre-charge information is

quintessentially private, and the possibility for convictions to later become private through rehabilitation still indicates that severe reputational impact can make information private.

Overall, however, that MOPI excludes identity-affecting reputational effects in business life, and that it can contemplate broad liability for the publication of true statements, indicates that it best fits sociality theory. The language of deferent reputation is commonly used in judicial *dicta*, and themes of epistemic reputation also exist in the court's balancing of Article 10 against the reasonable expectation of privacy – particularly in the law's treatment of false impressions. However, the substantive operation of the law best matches sociality.

A remaining unclear area in MOPI is reputation's role in damages, which manifests in three ways. Firstly, MOPI provides a unipolar 'diminution of right'-based head of damage for loss of dignity, which seemingly overlaps with deferent reputation-inflicted damage to identity but also incorporates sociality concerns. Secondly, MOPI awards damages for distress – but there is a judicial split in the High Court between Nicklin J in *ZXC* and Warby J in *Sicri* as to whether this includes distress caused by loss of reputation.

Thirdly, there is judicial split in the High Court over whether reputational loss is a specific head of recoverable loss. Mann J indicated (*obiter*) that it is, in two separate cases, though his *dicta* are ambiguous. Nicklin J in *ZXC* and Warby J in *Sicri* deemed them unrecoverable. The Supreme Court's *obiter dicta* in *ZXC* seemingly disapproved of Warby J's reasoning, but did not settle the matter.

This lack of clarity stems from lack of analysis over what conception of reputation MOPI protects (if any). If deferent reputation, the claimant is sufficiently compensated by the loss of dignity award: there is no further need for a second reputational award, and sociality-based factors should be removed from the calculation of the dignity award. In other words, Warby J's overall conclusions would be correct, even if he did not reason in deferent reputation terms. If sociality, then a separate award (and removing reputational concerns from the loss of dignity award) might be justified, but not necessarily.

d) Data Protection

The core of data protection's values is good data management. Unsurprisingly, it takes a heavily consequentialist approach to balancing harms, risks, and opportunities in data flows. This is embedded in all its principles and remedies – even the fact it is primarily State-enforced. Though this likely stems from its origins as a law concerned with the impact of mass data use

on privacy (and so the appropriate way to manage data to mitigate this, or at least ensure only justified intrusion), data protection evolved to encompass all facets and benefits of ‘good’ use of data beyond its potential privacy impact. The modern law is a nuanced and multi-faceted one-stop-shop for regulating what wider society deems pro-social information use.

Accordingly, those aspects of data protection law which bear on reputation-protection best embody the epistemic theory: the focus is ensuring that there is sufficient accurate record of information to enable pro-social judgements in all areas of life, business and governance. Its assessment of what information is required to make a pro-social judgement flows through its principles of relevance, the legal *vires*, the heightened requirements for sensitive forms of data, and the courts’ incorporation of rehabilitative principles when assessing delisting requests. As expected, it has keen concern for issues of chilling effect – particularly via the special purpose exceptions. It applies this concern in a more fine-grained manner than MOPI and defamation: particularly as regards statements demonstrably proven false after publication and the remedies available. Therefore, data protection is a rare instance in which not only is there a dominant theory of reputation embodied within its principles, but the fit is exceptionally good and other theories do not have anywhere near the same thematic relevance.

Nevertheless, there is evidence that the courts have inadequately considered reputation’s role when dealing with remedies. Unlike MOPI, post-GDPR courts have thought it uncontroversial that reputational damages are available as a separate head of damages (provided the loss is adequately proven). This can be justified from an epistemic perspective, given the deterrent effect of forcing an attacker to internalise the social costs of their actions. However, the courts have given no thought to what is required to obtain reputational damages, given that data protection does not, unlike defamation, require the data subject to prove loss of reputation in the eyes of a reasonable person specifically. While the courts have yet to explicitly address the issue, it appears possible for a data subject to claim damages for loss of reputation in the eyes of an immoral community. This is not something an epistemic reputation-protecting law should do. Once again, ambiguity and problems arise from reputation’s under-theorisation.

(iii) Overall Analysis

The above conclusions indicate that the three causes of action do not, on the whole, directly protect the same conceptions of reputation. Tweaking certain requirements might be necessary

to eliminate what overlap exists,¹²¹³ but defamation appears primarily based on deferent reputation, MOPI on sociality, and data protection on epistemic reputation. This leads to the ultimate conclusion that the law does not, for the most part, impermissibly overlap.

Each of the relevant theories is also based on compatible notions of social life. Sociality and deferent reputation are both based on a rights-based society with concern for individual fundamental interests and the development of autonomous personalities. Epistemic reputation is easily compatible with such a conception of social life. Its consequentialist conception of ‘the good’ implicitly accepts the value of individual autonomy and self-development, since it treats access to information as a tool to achieve these aims. So, only a purist notion of the relationship between citizens and the State, which insists the law should embody only one conception of social life, would see the present state of affairs as wholly unsatisfactory.

This garners little sympathy for the gallons of judicial ink mooted the possibility of striking out MOPI and data protection claims, or applying the *Bonnard* rule, where they supposedly impermissibly overlap. It gives greater insight into why judges have struggled to articulate any real criteria for identifying impermissible overlap. It appears to stem from the courts’ failure to appreciate that reputation is not a monolithic concept – there are different forms which different actions can protect to varying degrees. So, the courts feel compelled to simultaneously state that it is impermissible for MOPI or data protection to be entirely about reputation, while simultaneously sanctioning their overlap in both words and practice. This thesis provides the basis to sweep away the language of overlap and the *dicta* in *McKennitt*, and simply rely on the ordinary striking out rules (particularly *Jameel* and the ‘no reasonable prospects of success’ grounds) to determine when it is permissible for the three claims to run in tandem.

Nevertheless, this dissertation identified several areas of internal inconsistency in the three causes of action, which might guide future efforts at reform. Regarding defamation, the definition of ‘defamatory’ is tainted by cultural honour concerns from criminal libel, making it possible for statements imputing non-moral, non-voluntary matters to be defamatory. The appropriateness of this might be questioned. In the post-pandemic era, it is clear there must be some recourse for accusations of disease, but it is suggested that these are better handled by MOPI. Similarly, the need for pecuniary loss (or an exception) in slander stems from its origins

¹²¹³ For example, by narrowing the actionability requirements to limit or remove those elements which seem mostly based on sociality in defamation, like the non-voluntary, non-moral elements of defamatory meaning.

as an action on the case, and not from its modern purpose in protecting deferent reputation. Accordingly, excising these two features of the law would make defamation more coherent.

Meanwhile, this thesis indicates how the controversy over reputational damages in MOPI and data protection ought to be resolved. Since deferent reputation is mainly defamation's realm, MOPI should move towards greater consistency with sociality theory. This should drive it to remove sociality concerns from the 'loss of dignity' award (leaving that solely to reflect loss of privacy) and instead award a separate head of reputational damages to reflect loss of ability to form social bonds. Meanwhile, a separate award for reputational damages is justified under data protection's epistemic concerns, but the courts need to clarify whether this relates solely to the claimant's reputation in relation to the wider 'right-thinking' community, or also niche sub-communities with potentially anti-social views.

II. Future Research

This thesis' project could be extended across a wider range of causes of action. Other actions sometimes also feature in reputation-heavy claims and risk being subject to the confusing reasoning of *McKennitt*, whereby an unclearly defined impermissible 'overlap' is said to exist and shape the law in an inscrutable fashion. Of particular concern are malicious falsehood and (increasingly) harassment.

Additionally, this thesis' analysis is limited to those actions, and the elements of those actions, most suitable to natural persons seeking to defend their reputation. Other actions may be of more use to legal persons (particularly malicious falsehood).¹²¹⁴

The reputational interests underlying defamation's protection of corporate reputation are also likely different, given that legal persons must now prove serious economic harm and (without an internal dimension) cannot rely on theories like deferent reputation to bolster their claim to reputational rights. Indeed, the justification for protecting a legal person's reputation depends at least partially on one's theory of the corporate form. For example, any theory which deems the corporate form a fiction would have to reject any theory based on an internal dimension, while realist theories might not. Similarly, if the law adopts a consequentialist approach, the consequentialist calculations relevant to a legal person are likely different than those applicable to a natural person.

¹²¹⁴ Especially as data protection is unavailable to legal persons and the same is probably also true of MOPI.

This might lead to the ideal law applicable to natural persons looking different to that applicable to legal persons, even if based on the same reputational theory. Further research might even reveal that legal persons' reputation should not be protected by the same actions available to natural persons. Accordingly, there remains more work in properly theorising reputation's role in law, though it is hoped this thesis provides a rigorous starting point.

Table of Cases

A v B [2004] 2 AC 406

AB v Chief Constable of British Transport Police 2022 WL 16727153

ABC (A mother) v The Chief Constable of West Yorkshire Police [2017] EWHC 1650 (QB)

ABC v Palmer [2022] EWHC 3128 (KB)

Adam v Ward [1917] AC 309

Al Rajhi Banking & Investment Corporation v The Wall Street Journal Europe SPRL [2003] EWHC 1776 (QB)

Alexander Vassiliev v Frank Cass & Co [2002] EWHC 1169 (QB)

Ali v Channel 5 Broadcast Ltd [2018] EWHC 298 (Ch)

Ali v Channel 5 Broadcast Ltd [2019] EWCA Civ 677

Amann v Switzerland App no 27798/95 ECHR 2000-II

Ambrosiadou v Coward [2011] EWCA Civ 409

AMC v News Group Newspapers Ltd [2015] EWHC 2361 (QB)

American Cyanamid Co (No 1) v Ethicon Ltd [1975] UKHL 1

Ameyaw v McGoldrick [2020] EWHC 3035 (QB)

Anar Mahmudov, Nargiz Mahmudova v Maria Luisa Goni Sanzberro [2021] EWHC 3433 (QB)

Aniekan Mary Boyo v Lloyds Bank Plc [2019] EWHC 2279 (QB)

Anon (1535) YB Trin 27 Hen VIII fo 14 pl 4

Anon (1557) B&M 699

Anon (1564) Dalison 63, pl 23

Anon (1568) HLS MS 1180(1)

Anon (1580) LI MS Misc 488, p 76

Anonymous, 2 Salk 694, 91 Eng Rep 587 (KB, 1697)

Argyll v Argyll [1967] Ch 302

Armoniene v Lithuania [2009] EMLR 7

Attorney General v Guardian Newspapers [1987] 1 WLR 1248

Attorney General v Guardian Newspapers [1990] AC 109

Austin v Culpeper (1683) 2 Show KB 313, pl 322 (KB)

Aven v Orbis Business Intelligence Limited [2020] EWHC 1812 (QB)

AXB v BXA [2018] EWHC 588 (QB)

Axel Springer v Germany Application no 39954/08 [2012] EMLR 15
Axon v MOD [2016] EWHC 787 (QB)
Banks v Cadwalladr [2022] EWHC 1417 (QB)
Barnabas and Traunter (1640) Rolle Abr I p 37 pl 15 (KB)
Barron v Vines [2015] EWHC 1161 (QB)
Barrow v Lewellin (1616) 80 Eng Rep 211, Hobart 62
Barrymore v NGN [1997] FSR 600
Bell v Thatcher (1675) Vent 275
Berezovsky v Michaels [2000] 1 WLR 1004
Berkoff v Burchill [1997] EMLR 139
Boaler v The Queen (1888) 21 QBD 284
Boardman v Phipps [1967] 2 AC 46
Bocock v Enfield Rolling Mills [1954] 1 WLR 1303
Bokova v Associated Newspapers Ltd [2019] QB 861
Bonnard v Perryman [1891] 2 Ch 269
Bonnick v Morris [2003] 1 AC 300
Botta v Italy (1998) 26 EHRR 241
Bottomley v Brougham [1908] 1 KB 584
Branson v Bower [2001] EWCA Civ 791
British Chiropractic Association v Singh [2010] EWCA Civ 350, [2011] 1 WLR 133
British Gas Trading Ltd v Data Protection Registrar [1999] CLY 823
Bromage v Prosser (1824) 1 Car & P 475, 171 ER 1362
Brook v Montague (1605) Cro Jac 90 (advocates)
Broome v Cassell & Co Ltd [1972] AC 1027
Buivids (C-345/17) (ECJ, 14 February 2019)
Bull v Desporte [2019] EWHC 1650 (QB)
Burton v Board [1929] 1 KB 301
Bushell's Case (1674) 1 Mod 119
Campbell v MGN Ltd [2004] 2 AC 457
Campbell v Spottiswoode (1863) 3 B & S 769
Canada Goose UK Retail Ltd v Persons Unknown [2020] EWCA Civ 303
Carol Yvonne Carruthers v Associated Newspapers Limited [2019] EWHC 33 (QB)

Carpenter's Case (1558) Gell's Reports fo 49
Carr v Hood (1808) 1 Camp 355
Carrie v Tolkien [2009] EWHC 29 (QB), [2009] EMLR 9
Carter and Smith, Mich 11 Car BR
Charleston v News Group Newspapers [1995] 2 AC 65
Charlotte Church v MGN Ltd [2012] EWHC 693 (QB)
Charterhouse Clinical Research Ltd v Richmond Pharmacology Ltd [2002] EWHC 2745 (QB)
Chase v News Group Newspapers Ltd [2002] All ER (D) 20
Chatterton v Secretary of State for India in Council [1895] 2 QB 189
Chauvy v France Application No 64915/01 (2005) 41 EHRR 29
Cheng v Tse (2000) 3 Hong Kong Court of Final Appeal Reports 339
Cheng v Tse Wai Chan Paul [2001] EMLR 31
Clay v Roberts (1863) 8 LT 397
Clearcourse Partnership Acquireco Ltd v Jethwa [2022] EWHC 1199 (QB)
Clift v Slough BC [2010] EWCA Civ 1484
Cockayne v Hodgkisson (1833) 5 C & P 543
Coco v Clark [1968] FSR 415
Cole v Turner (1704) 90 ER 958
Cooper v Lawson (1838) 8 Ad & E 746
Cooper v Turrell [2011] EWHC 3269 (QB)
Corbin v Mercin (1669) 84 Eng Rep 166
Coulter v Sunday Newspapers Limited [2016] NIQB 70
Cox v Information Commissioner and Home Office [2018] UKUT 119 (AAC)
Coys Ltd v Autocheris Ltd and others [2004] EMLR 25
Crawford v Middleton (1662) 1 Lev 82
Criminal proceedings against Bodil Lindqvist (C-101/01) [2003] ECR I-12971
Cropp v Tilney (1964) 90 Eng Rep 1132, Holt, KB 422
Cuddington v Wilkins (1646) Hob 67 & 81
Cutler v Dixon (1585) 4 Co Rep 14b
Dakhyl v Labouchere [1908] 2 KB 325
Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems (C-311/18) (ECJ, 2020)

Davyes v Gardiner (1593) 4 Co Rep 16v
Dawkins v Lord Paulet (1869) LR 5 QB 94
De Maudsley v Palumbo [1996] FSR 447
Dibdin v Swan & Bostock (1793) 1 Esp 28
Dorset Flint & Stone Blocks Ltd & Others v Moir & Others [2004] EWHC 2173 (QB)
Douglas v Hello [2008] 1 AC 1
Douglas v Hello! [2001] QB 967
Doyle v Smith [2018] EWHC 2935 (QB), [2019] EMLR 15
Duchess of Sussex v Associated Newspapers Ltd [2021] EWCA Civ 1810
Duchess of Sussex v Associated Newspapers Ltd [2021] EWHC 273 (Ch)
Dudley v Phillips [2022] EWHC 930 (QB)
Duke of Brunswick v Harmer [1849] 14 QB 185
Durant v FSA [2003] EWCA Civ 1746
E Hulton & Co v Jones [1910] AC 20
Earl of Lincoln v Roughton, Cro Jac 196, 79 Eng Rep 171 (1608)
Earl of Peterborough v Sir John Mordant, 1 Ventris 60, 86 Eng Rep 42 (1670)
EC v Sunday Newspapers Limited [2017] NIQB 117
Economou v de Freitas [2018] EWCA Civ 2591, [2019] EMLR 7
Edem v Information Commissioner [2014] EWCA Civ 92
Edward's Case, Cro Eliz 6 (1661)
El Naschie v Macmillan Publishers Ltd [2012] EWHC 1809 (QB)
ERY v Associated Newspapers [2016] EWHC 2760 (QB)
Esther Ruth Baker v John Alexander Melvin Hemming [2019] EWHC 2950 (QB)
Ferdinand v MGN Ltd [2011] EWHC 2454 (QB)
Flood v Times Newspapers [2013] EWHC 4075
Flood v Times Newspapers Limited [2012] UKSC 11
Flood v Times Newspapers Ltd [2010] EMLR 8
Foster v Jessen [2021] NIQB 56
Foulger v Newcomb (1866-67) LR 2 EX 327
Fowler v Dowdney (1838) 2 M & Rob 119
Franchi v Franchi [1967] RPC 149
Francome v Mirror Group Newspapers [1984] 1 WLR 892

Frank Kofi Otuo v Watch Tower Bible and Tract Society of Britain [2019] EWHC 1349 (QB)
Fraser v Evans [1969] 1 QB 349
G & E v Norway Application nos 9278/81 and 9415/81 (1983) 35 DR 30
Gastrell v Townsend (1591) Cro Eliz 239, pl 8 (QB)
Gathercole v Miall (1846) 15 M & W 319
GC v CNIL (C-136/17) [2019] ECLI:EU:C:2019:773
Gee v Pritchard (1818) 2 Swans 402
George v Cannell [2021] EWHC 2988 (QB)
Gilham v MGN Ltd [2020] EWHC 2217 (QB)
Gillick v British Broadcasting Corporation and Another [1996] EMLR 267
Gillick v Brook Advisory Centres (No 1) [2001] EWCA Civ 1263
Gleaves v Deakin [1980] AC 477
Gleaves v Insall [1999] 2 Cr App 466
Glyn v Weston Feature Film Co [1916] 1 Ch 261
Goldsmith v Pressdram [1977] QB 83
Google Spain SL v Agencia Espanola de Proteccion de Datos (C-131/12) [2014] QB 1022
Grace v Black Horse Ltd [2014] EWCA Civ 1413
Gray's Case (1582) LI MS Misc 488 fo 106 (QB)
Green v Associated Newspapers [2004] EWCA Civ 1462
Green v Associated Newspapers [2004] EWHC 2322
Greenstein v Campaign Against Antisemitism [2021] EWCA Civ 1006
Grinyer v Plymouth Hospitals NHS Trust (2012) 125 BMLR 1
Gubarev v Orbis Business Intelligence Ltd [2020] EWHC 2912 (QB)
Gulati v MGN [2015] EWCA Civ 1291
Gulati v MGN [2015] EWHC 1482 (Ch)
Gulf Oil v Page [1987] Ch 327
Guriev v Community Safety Development (UK) Ltd [2016] EWHC 643 (QB)
GYH v Persons Unknown [2017] EWHC 3360 (QB)
GYH v Persons Unknown [2018] EWHC 121 (QB)
Haire v Wilson (1829) 9 B & C 643
Haji-Ioannou v Dixon [2009] EWHC 178 (QB)
Hamilton v Al Fayed [2000] 2 All ER 224

Hannon v News Group Newspapers Ltd [2014] EWHC 1580 (Ch)
Hannon v NGN [2015] 6 WLUK 846
Harris and Smith, Mich 9 Car BR
Harrison v Thornborough (1714) Gilb Cas 114 (QB)
Hayden v Duckworth [2020] EWHC 1033 (QB)
Hedley v Barlow (1865) 4 F & F 224
Herczegfalvy v Austria Application no 10533/83 (1993) 15 EHHR 437
Herver v Dowson (1765)
Higinbotham v Wipaporn Teekhungam [2018] EWHC 1880 (QB)
Hird v Wood (1894) 38 Sol J 234
Holley v Smyth [1998] 2 WLR 742
Holt v Astgrigg (1607) B&M 704
Horrocks v Lowe [1975] AC 135
Housden v Stoyton (1568) B&M 698
HRH Prince of Wales v Associated Newspapers Ltd [2006] EWCA Civ 1776, [2008] Ch 57
Humfry and Stutfield, Pasch 13 Car BR
Hunt v Star Newspaper [1908] 2 KB 309
Hunt v Times Newspapers Ltd [2013] EWHC 1868 (QB)
Huth v Huth [1915] 3 KB 32
Ireland and Smith, 1 Brownl 12 (1651), 2 Brownl 166 (1651)
Ittihadieh v 5-11 Cheyne Gardens RTM Co Ltd [2017] EWCA Civ 121
Jack Monroe v Katie Hopkins [2017] EWHC 433 (QB)
Jameel v Dow Jones & Co Inc [2005] QB 946
Jameel v Wall Street Journal Europe SPRL [2006] UKHL 44
Jeames v Rutletch (1599) 4 Co Rep 17 (QB)
John v Associated Newspapers [2006] EWHC 1611 (QB)
Johnson v Evans (1799) 3 Esp 32
Johnson v Medical Defence Union Ltd 2007 WL 880937
Jones v Pollard [1996] EWCA Civ 1186, [1997] EMLR 233
Jones v Skelton [1963] 1 WLR 1362
Joseph v Spiller [2011] 1 AC 852
K v NGN [2011] 1 WLR 1827

Karakó v Hungary Application No 39311/05 (2011) 52 EHRR 36
Keith Singh v Joseph Weayou [2017] EWHC 2102 (QB)
Kelly v Sherlock (1865-66) LR 1 QB 686
Kemsley v Foot [1952] AC 345
Kendillon v Maltby (1842) Car & M 402
Khader v Aziz [2010] EWCA Civ 716
Khan v Khan [2018] EWHC 241 (QB)
Khuja v Times Newspapers [2017] UKSC 49
King and Lake (1683) 86 Eng Rep 289, 2 Vent 28
King v Lake (1670) Hardres 470, 145 ER 552
Kneafsey v Independent Television News Ltd [2013] EWHC 4046 (QB)
Kroon v Netherlands Application no 18535/91 (1995) 19 EHRR 263
Lachaux v Independent Print Ltd [2015] EWHC 2242 (QB), [2016] QB 402
Lachaux v Independent Print Ltd [2017] EWCA Civ 1334
Lachaux v Independent Print Ltd [2019] UKSC 27, [2020] AC 612
Lake v Hatton (1617) Hobart 253
Langlands v John Leng & Co 1916 SC (HL)
Law Society v Kordowski [2014] EMLR 2
Lewes v Roberts (1661) Hardres 203, pl 1
Ley v Hamilton (1935) 153 LT 384
Leyman v Latimer (1877) 3 Ex D 15
Leyman v Latimer (1878) 3 Ex D 352
Lightfoot and Piggot, Hill 5 Car BR
Lindon v France Application no 21279/02 (2005) 41 EHRR 14
Lisle-Mainwaring v Associated Newspapers Ltd [2017] EWHC 543 (QB)
LJY v Persons Unknown [2017] EWHC 3230 (QB)
Lloyd v Information Commissioner 2021 WL 00641656
London Artists Ltd v Littler [1969] 2 QB 375,
Lonrho v Fayed (No 5) [1993] 1 WLR 1489
Lord Browne of Madingley v Associated Newspapers [2008] QB 103
Lord Townsend v Dr Hughes (1677) 2 Mod 150
Louisa Donovan v Kate Gibbons [2014] EWHC 3406 (QB)

Loutchansky v Times Newspapers Ltd [2002] 1 All ER 652
Lyon v Daily Telegraph [1943] 1 KB 746
M&N MacKenzie v News Group Newspapers (High Court, 18 January 1988)
Malone v Metropolitan Police Commissioner [1979] Ch 344
McKennitt v Ash [2006] EWCA Civ 1714
Merivale v Carson (1887) 20 QBD 279
Microdata Information Services Ltd v Rivendale Ltd [1991] FSR 681
Midlands Electricity Plc v Data Protection Registrar [2001] CLY 3705
Miller v David (1873-74) LR 9 CP 118
Millett v Corbyn [2021] EMLR 19
MM v UK [2012] ECHR 1906
Monroe v Hopkins [2017] EWHC 433 (QB), [2017] 4 WLR 68
Mosley v News Group Newspapers Ltd [2008] EMLR 20
Moulton v Clapham (1639) 1 Sir Wm Jones' R 431
Mulkern v Ward (1872) LR 13 Eq 619
Murray v Express Newspapers [2008] EWCA Civ 446, [2009] Ch 481
Nasir Mehmood (Butt) v Dunya News Limited [2022] EWHC 905 (QB)
Nevill v Fine Art and General Insurance Co Ltd [1897] AC 68
Newstead v London Express Newspapers Ltd [1940] 1 KB 377
Norman and Symons, Mich 11 Car BR
Nowak v Data Protection Commissioner (C-434/16) [2018] 1 WLR 3505
NT1 & NT2 v Google LLC [2018] EWHC 799 (QB)
Nwakamma v Umeyor [2020] EWHC 3262 (QB)
Olsson v Sweden Application no 10465/83 (1989) 11 EHRR 259
Onslow v Horne (1771) 3 Wils KB 177
Onwude v Dyer [2020] EWHC 3577 (QB)
Österreichischer Rundfunk (C-139/01) [2003] ECR I-4989
OT v Vyriausioji tarnybinės etikos komisija (C-184/20) (ECJ, 1 August 2022)
P v Wozencroft [2002] EWHC 1724 (Fam)
Peter Walker & Son, Limited v Hodgson [1909] 1 KB 239
Petrina v Romania Application No 78060/01 (ECtHR, 6 April 2009)
Pfeifer v Austria Application No 12556/03 (2009) 48 EHRR 8

PJS v News Group Newspapers Ltd [2016] UKSC 26, [2016] AC 1081
Poliard and Irmshaw, Cro Eliz 582 (1661)
Popham (1593) 79 Eng Rep 1155
Powell and Rayner v United Kingdom Application no 9310/81 (1990) 12 EHRR 355
Praed v Graham (1889) 24 QBD 53
Prebble v Television of New Zealand [1995] 1 AC 321
Prince Albert v Strange (1849) 2 De g & Sm 652
Prince Moulay Hicham Ben Abdullah Al Alaoui of Morocco v Elaph Publishing Limited [2017] EWCA Civ 29
Proctor v Bayley (1889) 42 ChD 390
Quartz Hill Consolidated Gold Mining Company v Beall (1882) 20 ChD 501
Quinton v Peirce [2009] EWHC 912 (QB)
R (Coughlan) v N&E Devon Health Authority [2000] All ER 850
R (Marper) v Chief Constable of the South Yorkshire Police [2004] 1 WLR 2196
R v Almon (1770) 5 Burr 2686, 98 ER 411
R v Beare (1698) 1 Ld Raym 414, 91 ER 1175
R v Burdett (1820) 4 B & Ald 95, 106 ER 873
R v Chief Constable of Greater Manchester Ex p Coombs 2000 WL 877768
R v Deverell (1889) 86 LT Jo 300
R v Gutch (1829) M&M 433
R v Hind [1966] Crim LR 100
R v Hollingberry (1825) 4 B&C 329
R v Labouchere (1884) 12 QBD 320
R v Langley (1704) 91 Eng Rep 769, 3 Salk 190
R v Lewes Crown Court [1974] 1 WLR 196
R v Mid Glamorgan Family Health Services Authority [1993] PIQR P426
R v Newman (1853) 1 El & B1 558
R v Penny (1687) 1 Ld Raym 153
R v Wells Street Stipendiary Magistrate [1978] 1 WLR 1008
R v Wicks (1936) 25 Cr App R 168
Rachel Riley, Tracy Ann Oberman v Myrna-Jane Heybroek [2020] EWHC 1259 (QB)
Radio France v France Application no 53984/00 (2005) 40 EHRR 29

Raj Dhir v Bronte Saddler [2017] EWHC 3155 (QB)
Randal and Beale, 2 Rol Rep 24SC (1675)
Rantzen v Mirror Group Newspapers (1986) Ltd [1994] QB 670
Re JR188's Application for Judicial Review [2022] NIQB 55
Re S [2005] 1 AC 593
Re TU v Google LLC (C-460/20) (2022) ECLI:EU:C:2022:271
Re TU v Google LLC (C-460/20) (Advocate-General Pitruzzella, 7 April 2022)
Reid v Price [2020] EWHC 594 (QB)
Reynolds v Times Newspapers Ltd [2001] 2 AC 127
Richard Rufus v Paul Elliott [2015] EWHC 807 (QB)
Richard v BBC [2018] EWHC 1837 (Ch), [2019] 2 All ER 105
Riley v Murray [2021] EWHC 3437 (QB)
Rily and Lewis, Hill 15 Car BR
Robin Cammish v Clive Hughes [2012] EWCA Civ 1655
Rodney Goldsmith v Michael Bissett-Powell [2022] EWHC 1591 (QB)
Roman Abramovich v Harpercollins Publishers Limited, Catherine Belton [2021] EWHC 3154 (QB)
Rosenblatt v Baer, 383 US 75 (1966)
Roshdale v Thorne (1382) Selden Soc Vol 88 p 22
Rotaru v Romania App No 28341/95 [2000] ECHR 192
Rotuli Parliamentorum
RST v UVW [2009] EWHC 2448 (QB)
Rubber Improvement Ltd v Daily Telegraph Ltd [1964] AC 234
Rudd v Bridle [2019] EWHC 893 (QB)
Russell v Haward (1737) Dyer 26
Ryneš v Úřad (C-212/13) (ECJ, 11 December 2014)
S and Marper v United Kingdom Application Nos 30562/04 and 30566/04 [2008] ECHR 1581
S v Gloucestershire County Council [2000] 3 All ER 346
Sakho v World Anti-Doping Agency [2020] EWHC 251 (QB)
Samuel Collingwood Smith v Esther Ruth Baker [2022] EWHC 246 (QB)
Sarah James v Julian Saunders [2019] EWHC 3265 (QB)
Savile v Jardine (1795) 126 Eng Rep 686

Sayed Zulfikar Abbas Bukhari v Syed Tauqeer Bukhari [2022] EWHC 173 (QB)

Scott v LGBT Foundation Ltd [2020] EWHC 483 (QB)

Scott v Musial [1959] 2 QB 429

Scott v Stansfield (1868) LR 3 Exch 220

Seaga v Harper [2008] UKPC 9, [2009] 1 AC 1

Serafin v Malkiewicz and others [2020] UKSC 23

Service Corporation International Plc v Channel Four Television Corporation [1999] EMLR 83

Shelley Films v Rex Features [1994] EMLR 134

Shevill v Presse Alliance [1996] AC 959

Sicri v Associated Newspapers Ltd [2020] EWHC 3541 (QB), [2021] 4 WLR 9

Sim v Stretch [1936] 2 All ER 1237

Smith and Grady v United Kingdom Application Nos 33985/96 and 33986/96 (2000) 29 EHRR 493

Soane v Knight (1827) M & M 74

Someşan v Romania Application No 45543/04 [2013] ECHR 1150

South Hetton Coal Company, Limited v North-Eastern News Association, Limited [1894] 1 QB 133

South Lanarkshire Council v Scottish Information Commissioner [2013] UKSC 55, [2013] 1 WLR 2421

Sparowe v Heygrene (1508)

Stanhope v Blith (1585) 4 Co Rep 15a

Stephens v Avery [1988] Ch 449

Stoicescu v Romania Application no 9718/03 [2011] ECHR 1193

Stuart v Bell [1891] 2 QB 341

Stunt v Associated Newspapers Ltd [2017] 1 WLR 3985

Stunt v Associated Newspapers Ltd [2018] EWCA Civ 1780

Sutcliffe v Pressdram Ltd [1991] 1 QB 153

Sutherland v Stopes [1925] AC 47

Tabart v Tipper (1808) 1 Camp 350

Tareq Al Baho, Andrew Pinnell, Sheika Salem Homood AL-Jaber AL-Sabah v Asad Ali Meerza [2011] EWHC 2984 (QB)

Taylor and Tolwin, SP Lat 218 (1661)

Tchenguiz v Imerman [2010] EWCA Civ 908

Teal Swan v Associated Newspapers Ltd [2020] EWHC 1312 (QB)
Tereza Burki v Seventy Thirty Limited [2018] EWHC 2151 (QB)
Terri Ann Davies v Gavin Paul Carter [2021] EWHC 3021 (QB)
Terry v Persons Unknown [2010] EWHC 119 (QB)
The Capital and Counties Bank v Henty & Sons (1882) 7 App Cas 741
The Case de Libellis Famosis (1606) 5 Co Rep 125a, 77 ER 250
The Queen on the Prosecution of the Earl of Lonsdale v Yates (1883) 11 QBD 750
The Queen v Adams (1888) 22 QBD 66
The Queen v Holbrook and Others (1877) 3 QBD 60
The Queen v Munslow (1895) 1 QB 758
The Queen v The Lord Mayor of London (1886) 16 QBD 772
Thomas v Pearce [2000] FSR 718
Thompson v Shackell (1828) M & M 187
Thorley v Lord Kerry (1812) 4 Taunt 355
Thorley's Cattle Food Company v Massam (1877) 6 ChD 582
Thornton v Telegraph Media Group Ltd [2010] EWHC 1414 (QB)
Three Rivers District Council v Governor and Company of the Bank of England [2003] 2 AC 1 (HL)
Tietosuojavaluutettu v Satakunnan Markkinapörssi OY, Satamedia (C-73/07) [2008] ECR I-09831
Townsend v Google [2017] NIQB 81
Triaster Limited v Dun & Bradstreet Limited [2019] EWHC 3433 (QB)
Trimingham v Associated Newspapers [2012] EWHC 1296 (QB)
Trin 16 Car 2
Triplark Limited v Northwood Hall (Freehold) Limited, Philip Whale, David Wismayer [2019] EWHC 3494 (QB)
True Vision Productions Ltd v Information Commissioner EA/2019/0170
Turcu v News Group Newspapers Ltd [2005] EWHC 799 (QB)
Turley v Unite the Union [2019] EWHC 3547 (QB)
Turnbull v Bird (1861) 2 F & F 508
Utting's Case (1566)
Valeo Vision SA v Flexible Lamps Ltd [1995] RPC 205
Vidal-Hall v Google [2015] EWCA Civ 311, [2016] QB 1003

Volker und Markus Schecke (C-92/09 and C 93/09) [2010] ECR I-11063
Von Hannover v Germany (No 2) [2012] ECHR 228
Von Hannover v Germany App No 59320/00 [2004] EMLR 21
Wainwright v United Kingdom Application No 12350/04 (2007) 44 EHRR 40
Warnes and Robson v Forge [2020] 4 WLR 91, [2020] EWHC 1496 (QB)
Watkin v Hall (1867-68) LR 3 QB 396
Weatherston v Hawkins (1786) 1 Term Rep 110
Weller v Associated Newspapers [2015] EWCA Civ 1176
Weller v Associated Newspapers Ltd [2014] EWHC 1163
Woodward v Hutchins [1977] 1 WLR 760
Wright v Granath [2022] EWHC 1181 (QB)
Wright v Ver [2020] EWCA Civ 672
XKF v BBC [2018] EWHC 1560 (QB)
Yavuz v Tesco Stores Limited, Tesco Plc [2019] EWHC 1971 (QB)
YS v Minister voor Immigratie, Integratie en Asiel (Cases C-141/12 & C-372/12) [2015] 1 CMLR 18
YXB v TNO [2015] EWHC 826 (QB)
ZXC v Bloomberg [2019] EWHC 970 (QB)
ZXC v Bloomberg LP [2020] EWCA Civ 611
ZXC v Bloomberg LP [2022] UKSC 5, [2022] 2 WLR 424

Table of Legislation

1816 Bill for Securing the Liberty of the Press
Administration of Justice (Miscellaneous Provisions) Act 1933
Administration of Justice Act 1920
Administration of Justice Act 1925
An Act to Amend the Law of Evidence (The Evidence Act) 1851
Bill of Rights 1689
Civil Evidence Act 1968
Civil Procedure Rules
Civil Procedure Rules Practice Directions

Civil Rights of Convicts Act 1828

Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (adopted 28 January 1981, entered into force 1 October 1985) ETS 108

Coroners and Justice Act 2009

Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31

Council Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L119/1

Data Protection Act 1998

Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019, SI 2019/419

Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2020 SI 2020/1586

Defamation Act 1952

Defamation Act 1996

Defamation Act 2013

Enterprise Act 2002

European Convention on Human Rights

Fair Trading Act 1973

Human Rights Act 1998

Inquiries Act 2005

Judicature Act 1873

Law of Libel Act 1888

Law of Libel Amendment Act 1888

Legal Services Act 1990

Libel Act 1843

Limitation Act 1980

Newspaper Libel and Registration Act 1881

Parliamentary Commissioner Act 1967

Privacy Act 1988 (Australia)

Privacy Act 2020 (New Zealand)

Privilege of Parliament Act 1512

Rehabilitation of Offenders Act 1974

Senior Courts Act 1981

Statute Law Revision Act 1887

Statute of Westminster of 1275 (3 Edw 1)

Bibliography

I. Books

The Standard Library Cyclopaedia of Political, Constitutional, Statistical and Forensic Knowledge (Henry G Bohn 1848)

Aplin T and Bosland J, 'The Uncertain Landscape of Article 8 of the ECHR: the Protection of Reputation as a Fundamental Human Right?' in AT Kenyon (ed), *Comparative Defamation and Privacy Law* (CUP 2016)

Baker J, *Introduction to Legal History* (5th edn, OUP 2019)

Baker J, *Sources of English Legal History* (2nd edn, OUP 2013)

Barendt EM, *Libel and the Media: The Chilling Effect* (Clarendon Press 1997)

Bowman J, *Honor: A History* (Encounter Books 2006)

Buller F, *Introduction to the Law Relative to Trials at Nisi Prius* (W Strahan and M Woodfall 1772)

Cooley CH, *Human Nature and the Social Order* (Charles Scribner's Sons 1922)

Council of Europe, *Handbook on European Data Protection Law* (European Union 2018)

D'Anvers K, *A General Abridgment of the Common Law: Volume 1* (J Walthoe 1705)

Driver J, *Consequentialism* (Routledge 2011)

Erdoş D, 'The Development of European Data Protection Law and Regulation' in D Erdoş (ed), *European Data Protection Regulation, Journalism, and Traditional Publishers: Balancing on a Tightrope?* (OUP 2019)

Fifoot CSH, *History and Sources of the Common Law: Tort and Contract* (Stevens & Sons Ltd 1949)

Gerstein R, 'Intimacy and Privacy' in Ferdinand Schoeman (ed), *Philosophical Dimensions of Privacy: An Anthology* (CUP 1984)

Hawkins W, *A Treatise of the Pleas of the Crown* (Eliz Nutt 1716)

Hoffman D and Rowe J, *Human Rights in the UK* (4th edn, Pearson 2013)

Holt FL, *The Law of Libel* (W Reed 1812)

Hudson W, 'A Treatise on the Court of Star Chamber' in F Hargrave (ed), *Collectanea Juridica: Vol 2* (Clarke and Sons 1791)

Hudson W, *Treatise of the Star Chamber* (Collectanea Juricada 1621)

Ibbetson DJ, *A Historical Introduction to the Law of Obligations* (OUP 1999)

Kaufman WRP, *Honor and Revenge: A Theory of Punishment* (Springer Science & Business Media 2012)

Lloyd I, *Guide to the Data Protection Act 1998* (Butterworths 1998)

Lloyd I, *Information Technology Law* (9th edn, OUP 2020)

Masum H and Tovey M, *The Reputation Society* (MIT Press 2015)

McGonagle T and Andreotti O, *Freedom of Expression and Defamation* (Council of Europe 2016)

McNamara L, *Reputation and Defamation* (OUP 2007)

Mill JS, *On Liberty* (Longman, Roberts, & Green Co 1869)

Milo D, *Defamation and Freedom of Speech* (OUP 2008)

Mitchell P, *The Making of the Modern Law of Defamation* (Hart Publishing 2005)

Moreham NA, 'The Nature of the Privacy Interest' NA Moreham and M Warby (eds), *Tugendhat and Christie: The Law of Privacy and the Media* (3rd edn, OUP 2016)

Nietzsche F, 'The Wanderer and His Shadow' in F Nietzsche, *Human, All Too Human* (RJ Hollingdale ed, CUP 2004)

Odgers WB, *A Digest of the Law of Libel and Slander* (Stevens and Sons 1881)

Olsthoorn P, *Honor in Political and Moral Philosophy* (State University of New York Press 2010)

Parker AA, *The Mind and Art of Calderón: Essays on the Comedias* (CUP 1988)

Parkes R, 'Privacy, Defamation, and False Facts' in NA Moreham and M Warby (eds), *Tugendhat and Christie: The Law of Privacy and the Media* (3rd edn, OUP 2016)

Pila J and Torremans PLC, *European Intellectual Property Law* (2nd edn, OUP 2019)

Plucknett TFT, *A Concise History of the Common Law* (5th edn, Liberty Fund Inc 2010)

Solove D, *Understanding Privacy* (Harvard University Press 2008)

Sommers T, *Why Honor Matters* (Basic Books 2018)

Tully J, *An Approach to Political Philosophy: Locke in Contexts* (CUP 1993)

II. Periodicals

'The Pre-Thorley v Kerry Case Law of the Libel-Slander Distinction' (1955) 23 University of Chicago Law Review 132

Barber N, 'A Right to Privacy?' [2003] PL 602

Barendt E, 'An Overlap of Defamation and Privacy?' (2015) 7 JML 85

Bennett TDC, 'Why so serious? Lachaux and the threshold of 'serious harm' in section 1 Defamation Act 2013' (2018) 20 *Journal of Media Law* 1

Busuttill G and McCafferty P, 'Interim Injunctions and the Overlap between Privacy and Libel' (2010) 2 *J Media L* 1

Chiappetta V, 'Trade Marks: More than Meets the Eye' (2003) *U ILL JL Tech & Pol'y* 35

Cruise CL, 'Protecting the Reputation of Defamation Law: How Defamation Law Can Remain Justified in an Age of Globalized Communications, Science, Human Rights and Democratic Values' (2012) 2 *Southampton Student L Rev* 77

Dove E and Chen J, 'What does it mean for a data subject to make their personal data "manifestly public"?' (2021) 11 *IDPL* 107

Engelmann JM, Herrmann E and Tomasello M, 'Concern for Group Reputation Increases Prosociality in Young Children' (2018) 29 *Psychological Science* 181

Erdos D, 'An Accurate Thumbnail of European Data Protection and Search Engine Indexing? Exploring C-460/20 TU, RE v Google LLC (2022)' (2023) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4381553> accessed 14 March 2023

Erdos D, 'Beyond 'having a domestic'? Regulatory interpretation of European Data Protection Law and individual publication' (2017) 33 *Computer Law & Security Review* 275

Erdos D, 'Comparing constitutional privacy and data protection rights within the EU' (2022) 47 *EL Rev* 482

Foster S, 'Freedom of expression, prior restraint and section 12 of the Human Rights Act 1998' (2004) *Cov LJ* 86

Fridman GHL, 'Malice in the Law of Torts' (1958) 21 *Modern Law Review* 484

Fu G and others, 'Young children with a positive reputation to maintain are less likely to cheat' (2016) 19 *Developmental Science* 275

Gibbons T, 'Defamation Reconsidered' (1996) 16 *OJLS* 587

Hariharan J, 'Damages for reputational harm: can privacy actions tread on defamation's turf?' (2021) 13 *JML* 186

Hartshorne J, 'The need for an intrusion upon seclusion privacy tort within English law' (2017) 46 *CLWR* 287

Henderson GM, 'Defamation: the offer of amends defence - a lamb in lion's clothing?' (2009) 14 *Comms L* 46

Heymann L, 'The Law of Reputation and the Interest of the Audience' (2011) 52 *Boston College Law Rev* 1341

Howarth D, 'Libel: Its Purpose and Reform' (2011) 74 *MLR* 845

Johnson J, 'A theory of the nature and value of privacy' (1992) 6 *Pub Aff Q* 271

Julie Inness, *Privacy, Intimacy and Isolation* (OUP 1992)

Jylkkä J, Härkönen J and Hyönä J, 'Incidental disgust does not cause moral condemnation of neutral actions' (2021) 35 *Cogn Emot* 96

Kaye JM, 'Libel and Slander – Two Torts Or One?' [1975] 91 LQR 524

Kokott J and Sobotta C, 'The distinction between privacy and data protection in the jurisprudence of the CJEU and the ECtHR' (2013) 3 International Data Privacy Law 222

Koutsias M, 'Privacy and data protection in an information society: how reconciled are the English with the European Union privacy norms?' (2012) 18 CTLR 261

Lamb M, 'The Role Model Argument: A Fundamentally Flawed Concept' (2017) 5 NEL Rev 21

Lassiter JC, 'Defamation of Peers: The Rise and Decline of the Action for Scandalum Magnatum, 1497-1773' (1978) 22 American Journal of Legal History 216

Lassiter JC, 'Scandalum Magnatum: The "Scandal of Magnates" in English Law, Society, and Politics' (MA Thesis, College of William and Mary Virginia, 1974)

Lovell CR, 'The "Reception" of Defamation by the Common Law' (1962) 15 Vanderbilt Law Review 1051

Lynskey O, 'Deconstructing data protection: the "added-value" of a right to data protection in the EU legal order' (2014) 63 ICQ 569

McLean A and Mackey C, 'Is there a law of privacy in the UK? A consideration of recent legal developments' (2007) 29 EIPR 389

Meeler D, 'Is information all we need to protect?' (2008) 91(1) The Monist 151

Milinski M, 'Reputation, a Universal Currency for Human Social Interactions' (2018) 317 Phil Trans R Soc V 1

Mitchell P, 'The Foundations of Australian Defamation Law' (2006) 28 Sydney Law Review 477

Mulheron R, 'A Potential Framework For Privacy? A Reply To Hello!' (2006) 69 MLR 679

Mullender R, 'Defamation, fair comment and public concerns' (2010) 69 CLJ 443

Origgi G, 'A Social Epistemology of Reputation' (2012) 26 Social Epistemology 399

Parfitt M, 'A global regime for data protection regulation: a cross-border analysis of the challenges of privacy ideas and coercion' (2020) 25 Cov LJ 82

Posner R, 'Social Norms and the Law: An Economic Approach' (1997) 87 American Economic Review 365

Post RC, 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986) 74 California Law Rev 691

Rachels J, 'Why Privacy is Important' [1975] Phil & Pub Aff 323

Ray RR, 'Truth: A Defense to Libel' (1931) 2279 Minnesota Law Review 43

Rudkin T and Pearce C, 'Forum Shopping in the 21st Century' (2014) 25 Ent LR 73

Sewell C, 'More serious harm than good? An empirical observation and analysis of the effects of the serious harm requirement in section 1(1) of the Defamation Act 2013' (2020) 12 JML 47

Spencer JR, 'Criminal Libel - A Skeleton in the Cupboard' [1977] Crim LR 465

Swakman V and others, 'Reputation-Based Cooperation: Empirical Evidence for Behavioral Strategies' (2016) 37 *Evolution and Human Behaviour* 230

Tan D, 'The Reynolds privilege revitalised' (2013) 129 *LQR* 27

Terraji S, 'A Theory of Norm Compliance: Punishment and Reputation' (2013) 44 *Journal of Socio-Economics* 1

Terravecchia GP, 'The Imperative of Reputation Between Social and Moral Norms' (2017) 13 *Phenomenology & Mind* 184

Veeder VV, 'The History and Theory of the Law of Defamation. I' (1903) 3 *Columbia Law Review* 546

Vick DW, 'An Opportunity Lost: The United Kingdom's Failed Reform of Defamation Law' (1997) 49 *Federal Communications Law Journal* 621

Wade W, 'Horizons of Horizontality' [2000] *LQR* 217

Warren A and Dearnley J, 'Data Protection Legislation in the United Kingdom' (2005) 8 *Information, Communication and Society* 238

Weinert E, '£120,000 damages for Mr Lachaux of Defamation Act s.1 fame for serious failure of responsible journalism' (2021) 32 *Ent LR* 259

Weinert E, 'Don't bother with libel: sue for privacy instead following *Bloomberg v ZXC*' (2022) 33 *Ent LR* 149

Wisneski DC and Skitka LJ, 'Moralization Through Moral Shock: Exploring Emotional Antecedents to Moral Conviction' (2016) *Personality and Social Psychology Bulletin* 1

Wragg P, 'Protecting Private Information of Public Interest: Campbell's Great Promise, Unfulfilled' (2015) 7 *JML* 225

Wragg P, 'Recognising a Privacy-Invasion Tort' (2019) *CLJ* (upcoming)

Zadro L, Williams K and Richardson R, 'How Low Can You Go? Ostracism by a Computer is Sufficient to Lower Self-Reported Levels of Belonging, Control, Self-esteem, and Meaningful existence' (2004) 40 *Journal of Experimental Social Psychology* 560

III. Other

(i) EU Materials

Article 29 Working Party, 'Annex 2 Proposals for Amendments regarding exemption for personal or household activities' (*Europa.eu*, 27 March 2013) <https://ec.europa.eu/justice/article-29/documentation/other-document/files/2013/20130227_statement_dp_annex2_en.pdf> accessed 1 December 2022

Article 29 Working Party, 'Appendix: Core topics in view of the trilogue' (*Europa.eu*, 2015) <<https://ec.europa.eu/justice/article-29/documentation/other->

document/files/2015/20150617_appendix_core_issues_plenary_en.pdf > accessed 28 February 2023

Article 29 Working Party, ‘Guidelines on the Implementation of the Court of Justice of the European Union Judgment on “Google Spain and Inc v Agencia Espanola de Proteccion de Datos (AEPD) and Mario Costeja Gonzalez” C-131/12’ (*Europa.eu*, 24 January 2020) <<https://ec.europa.eu/newsroom/article29/items/667236/en>> accessed 2 January 2023

Article 29 Working Party, ‘Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC’ (*Europa.eu*, 9 April 2014) <https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp217_en.pdf> accessed 2 January 2023

Article 29 Working Party, ‘Opinion 4/2007 on the concept of personal data’ (*clinicalstudydatarequest.com*, 20 June 2007) <<https://www.clinicalstudydatarequest.com/Documents/Privacy-European-guidance.pdf>> accessed 10 January 2023

Commission of the European Communities, *Commission Communication on the protection of Individuals In relation to the processing of personal data In the Community and Information security* (Com(90) 314, 13 September 1990)

Council of Europe, ‘Resolution (73) 22 on the Protection of the Privacy of Individuals vis-à-vis Electronic Data Banks in the Private Sector’ (*COE*, 26 September 1973) <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680502830>> accessed 1 December 2022

EDPS, *A Preliminary Opinion on Data Protection and Scientific Research* (EDPS 2020)

European Data Protection Board, ‘Guidelines 5/2019 on the criteria of the Right to be Forgotten in the search engines cases under the GDPR’ (*Europa.eu*, 7 July 2020) <https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_201905_rtbsearchengines_afterpublicconsultation_en.pdf> accessed 1 March 2023

(ii) UK ICO Materials

ICO, ‘Data protection and journalism code of practice’ (*ICO.org.uk*, 6 July 2023) <<https://ico.org.uk/media/for-organisations/documents/4025760/data-protection-and-journalism-code-202307.pdf>> accessed 17 October 2023

ICO, ‘Principle (c): Data minimisation’ (*ICO.org.uk*, 2023) <<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/principles/data-minimisation/>> accessed 3 January 2023

ICO, ‘Principle (d): Accuracy’ (*Ico.org.uk*, 2023) <<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/principles/accuracy/#challenge>> accessed 1 January 2023

ICO, ‘Vital Interests’ (*ICO.org.uk*, 2023) <<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/vital-interests/>> accessed 1 January 2023

ICO, 'Public Task' (*ICO.org.uk*, 2023) <<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/public-task/>> accessed 1 January 2023

ICO, 'Special category data' (*ICO.org.uk*, 2022) <<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/special-category-data/>> accessed 25 November 2022

ICO, 'What is special category data?' (*ICO.org.uk*, 2022) <<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/special-category-data/what-is-special-category-data/>> accessed 1 January 2023

ICO, 'What are the Conditions for Processing?' (*ICO*, 2022) <<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/special-category-data/what-are-the-conditions-for-processing/>> accessed 20 October 2022

ICO, 'Reference Notes' (*ICO.org.uk*, 6 July 2023) <<https://ico.org.uk/media/for-organisations/documents/4025761/data-protection-and-journalism-code-reference-notes-202307.pdf>> accessed 2 October 2023

(iii) Parliamentary and Law Commission Materials

HL Deb 1891, vol 353, cols 865, 891-892

HL Deb 1952, vol 177, col 1093

HL Deb 1992, vol 541, cols WA35-36

HL Deb 24 March 1983, vol 440, cols 1285-86

Joint Committee on Human Rights, *Legislative Scrutiny: Defamation Bill Seventh Report of Session* (2012-13, HL 84, HC 810)

Law Commission, *Criminal Libel* (Law Com No 84, 1982)

(iv) Academic Materials

Erdos D, 'Data Protection and the 'Media' After Leveson' (Draft Paper for the Oxford Workshop on Media Law After Leveson, 12 April 2013)

Henley A, 'Criminal records and the regulation of redemption: a critical history of legal rehabilitation in England and Wales' (PhD Thesis, Keele University 2017)

Origi G, 'On the Epistemic Value of Reputation: The Place of Ratings and Reputational Tools in Knowledge Organization' (*CiteSeer*,] 26 February 2010) <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.329.7087&rep=rep1&type=pdf>> accessed 8 October 2018

Origgi G, 'What is Reputation' (*Edge*, 5 November 2015) <https://www.edge.org/conversation/gloria_origgi-what-is-reputation> accessed 20 October 2018

(v) Miscellaneous

Bett J, 'OnlyFans model gives fans control of her life – and they make her dump her boyfriend' (*Mirror.co.uk*, 4 October 2022) <<https://www.mirror.co.uk/news/weird-news/onlyfans-model-gives-fans-control-28149690>> accessed 3 November 2022

Boyle D, 'Ashley Madison hack' *The Telegraph* (19 August 2015) <<https://www.telegraph.co.uk/news/11811356/Ashley-Madison-hack-live.html>> accessed 27 December 2022

Inform, 'Libel, Damages and the "Remedial Gap": a declaration of falsity?' (*Inform.org*, 27 July 2013) <<https://inform.org/2013/07/27/libel-damages-and-the-remedial-gap-a-declaration-of-falsity/>> accessed 20 June 2022

Othello Act 3, Scene 3, 155–161