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Regulating for Responsibility: Reputation and Social Media

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The framework brought forward by the United Kingdom's Defamation Act 2013 underlines a traditional hierarchy of expression in which news media is viewed as high-level speech. Though a different form, social media is a dominant means of expression. The present study explores the rationale for a more robust and forceful discussion of responsibility in speech on social media platforms. The underlying premise here is that speech should be viewed as a qualified good and that a more appropriate paradigm is one found in the phrase freedom to participate.

Keywords: defamation, responsibility, user-generated content

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I. Introduction

The imperative in recalibrating the balance between rights and responsibilities is recognizable in the regulation of new technology. Social media, as an example of user-generated platforms, allow an unprecedented scope for expression and the question of regulation has been a matter of debate.¹ Speech has traditionally been justified by the argument of the good in free speech. With social media, this premise has been challenged anew.²

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¹ See for example, D. Mac Síthigh, 'The mass age of internet law' (2008) 17 *Information & Communications Technology Law* 79-94 [Mac Síthigh].

² The focus is on comments by identified individuals on social media; that is, persons who have made remarks on social media platforms but who have not employed an alias or anonymized identity. There are further significant issues regarding anonymous remarks and legal responsibility. For example, the Joint Committee on the Draft Defamation Bill, *First Report: Draft Defamation Bill* HL 203, HC 930-I (2011-

Discussions of responsibility often combine legal and philosophical considerations.³ Regarding legal responsibility,⁴ libel law is concerned with the liability of those who are responsible for harming another's reputation. The notion of responsibility is attenuated, however, by a belief that curbing free speech in any way begins a descent down the proverbial slippery slope; hence a pronounced reluctance to approach the drop. So important is freedom of expression that sanctions will not be imposed on remarks considered rude, unwarranted or even unfair. This means that the morality of speech is not a compelling basis for curbing remarks when regulating for legal responsibility.

The current work discusses responsible use of social media and focuses on remarks published on social media platforms.⁵ English law (common law and in particular the Defamation Act 2013) will be used because the law has been reformed to expand protection of free expression at a time of enormous technological advancement in platforms for free speech. The topic contains different aspects and it is unpacked in this paper in the following manner. First, the framework for assessing impugned speech on these platforms depends largely upon defamation law. There are difficulties with defamation as a foundation; such as the vagaries of defining what is libel law and the troubled parameters set by the Defamation Act 2013. While the debate on what is the focus of libel law will likely persist, the problems presented by the statute betray a less than useful set of assumptions for a piece of twenty-first century legislation. Second, presumptions grounding the current state of the law are explored; that is, the ideas of free speech as an absolute good and social media speech as a less important form of speech.⁶ Overall, the reformed English law of defamation has established a new dilemma. While it advances what may be called the freedom to participate, it does so along quite traditional lines. The current law not only ignores how social media (as one example of a user-generated platform) actualizes in a remarkable manner the notion of participation in democracy, but it also undermines the elements of responsible publication evident in the law it replaced.

2012) [Joint Committee Report], [102] commented: 'Anonymity may encourage free speech but it also discourages responsibility'. This topic is explored in other publications such as A. Vamialis, 'Online defamation: confronting anonymity' (2013) 21 *International Journal of Law and Information Technology* 31-65.

³ Space does not permit an extended philosophical discussion of responsibility. Guidance on this point has been taken from the opening remarks in P. Cane, *Responsibility in Law and Morality* (Oxford: OUP, 2002). Discussions on the topic of responsibility generally flow from H.L.A. Hart's taxonomy (a) role-responsibility, (b) causal-responsibility, (c) liability-responsibility, and (d) capacity-responsibility: H.L.A. Hart, *Punishment and Responsibility* 2nd edn (Oxford: OUP, 2008), 210-230.

⁴ There is much that can be done broadly in this area. For example, the notion of space may be challenged: D. Mac Síthigh, 'Virtual walls: the law of pseudo-public spaces' (2012) 8 *International Journal of Law in Context* 394-412.

⁵ Though the discussion centres on words, this does not ignore the potential for pictures as a form of speech.

⁶ On the latter point, speech on social media falls within the rather disparaged area of user-generated content which one author has claimed is 'destroying our culture': A. Keen, *The Cult of the Amateur* (London: Nicholas Brealey, 2007). Another commentator has called social media a 'disease': R. Sanvenero, 'Social media and our misconceptions of the realities' (2013) 22 *Information & Communications Technology Law* 89-108, 90.

II. The lingering problem: the role of defamation law

Many users of social media contend these platforms are the equivalent of engaging in a conversation.⁷ For example, in *Pridgen v University of Calgary*⁸ the claimant argued: ‘things that are said on here are not designed to be held up to intense scrutiny, it is merely the equivalent of having an online conversation.’ There are two difficulties with defamation as a foundation: the vagaries of defining what is libel law (explored in this section); and the troubled parameters set by the Defamation Act 2013 (explored in the immediately following section).⁹

The title of Professor Barendt’s often-cited article summarizes the on-going dilemma, ‘What is the point of libel law?’¹⁰ The twenty-first century version seems eager to protect a wide-range of speech. The current law (both common and statutory) suggests defamation regulate free speech in a light touch manner ensuring a marketplace of ideas with only minimal restrictions on what may not be published. And yet, there remains the lingering right to protection of reputation, embedded in Article 8 of the European Convention on Human Rights.¹¹

The defamation framework remains a challenging one to fit under the traditional tort considerations.¹² For this reason the concept of responsibility in this tort is discussed in a different manner. In libel law, the scandalous comment is protected to ensure the greater good of unencumbered discussion. Lord Steyn in *Reynolds v Times Newspapers Ltd.*¹³ foreshadowed this state of the law: ‘freedom of expression is the rule and regulation of speech is the exception requiring justification. The existence and width of any exception can only be justified if it is underpinned by a pressing social need. These are fundamental principles governing the balance to be struck between freedom of expression and defamation.’ In contrast, consider the following statement of tort law and responsibility:

The basis of the driver’s being held responsible ... is the driver’s careless injuring of the pedestrian. The same is true for a judgment entered against a manufacturer on a claim by a consumer who is injured by a poorly designed product, for a private citizen defamed by a

⁷ A point reiterated in the UK: see for example S. Birkbeck, ‘Can the use of social media be regulated?’ (2013) 19 *Computer and Telecommunications Law Review* 83-85, 83.

⁸ 2012 ABCA 138, [32]

⁹ Libel has been actionable *per se* but it is contended that with all claimants now needed to meet the threshold of seriousness in s.1 of the Defamation Act 2013 this is no longer the case. And so, what is characterized as converting libel into slander is to say that social media, as an online conversation, is a transcript of a conversation and as such places the ‘speakers’ in a more actionable position.

¹⁰ (1999) 52 *Current Legal Problems* 110-125 [Barendt]. The question remains unanswered as attested to by more recent publications: for example D. Howarth, ‘Libel: Its purpose and reform’ (2011) 74 *Modern Law Review* 845-877 [Howarth]; A. Mullis & A. Scott, ‘Reframing libel: taking (all) rights seriously and where it leads’ (2012) 63 *Northern Ireland Legal Quarterly* 5-25. The current reform package appears to fail in answering this question.

¹¹ The adjective lingering is used here because the present state of the English law raises the potential for a ruling from Strasbourg reminding domestic courts of the balance between the two applicable rights.

¹² This is not to overlook the persist challenges posed by discerning the objectives of tort: J. Morgan, ‘Tort, Insurance and Incoherence’ (2004) 67 *Modern Law Review* 384-401; K. Oliphant, ‘Tort Law, Risk, and Technological Innovation in England’ (2014) 59 *McGill Law Journal* 819-845.

¹³ [2001] 2 AC 127 (HL) [*Reynolds*], 208.

magazine, for an investor defrauded by a swindler, and for a child molested by a caretaker.¹⁴

In each of these examples, save the one about defamation, there is a clearly wrongful act committed by a defendant. To defame is also a wrongful act, but the boundary is not synergistic with moral wrongs.¹⁵ Speech garners greater latitude in English law because of its perceived value to society. In the above listing, then, the defamer stands out as one category of wrongdoer who sits uneasily with the others.

Further distancing of libel from tort are questions surrounding the nature of reputation. Advocates of greater protection for free speech rely on the relativism of reputation to undercut protection for that right.¹⁶ They argue protection for reputation should be limited because it is essentially a private issue and free speech is a public right.¹⁷ To these points Howarth's response may be proffered:

The content of reputations might well change as social and cultural conditions change, but that does not alter the fact that, at every moment throughout those changes, individuals have reputations the loss of which would do them harm. Even if individuals have no legitimate expectations that social and cultural conditions will remain unchanged, they do have a legitimate interest in the maintenance of their reputations for the time being.¹⁸

The tension is between the protection of two rights – one deemed public and the other viewed as private. The crux of the difficulty in answering the question ‘what is the point of libel law?’ is set within the law's mandate to balance these competing interests. And yet, legal developments in the UK have undercut the equal regard given to both protection of speech and reputation.¹⁹ Intensifying the issue, the multiple platforms of social media are emblems of free speech and, as a corollary, a challenge to reputational concerns (as well as giving rise to other considerations such as privacy).²⁰

¹⁴ J.C.P. Goldberg & B.C. Zipursky, ‘Tort Law and Responsibility’ in J. Oberdienk, *The Philosophical Foundations of Tort Law* (Oxford: OUP, 2014), 17.

¹⁵ Historically, an award of damages in defamation is made once liability is established and no defences are found to be applicable: D. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford: OUP, 1999), 115. The punitive nature is evident in this remedy but this is not a complete characterization for there is much ground to be covered before liability is established and defences are found in applicable.

¹⁶ User-generated content on the internet would seem to only further imperil reputation. danah boyd's term ‘persistent’ embodies the challenges here: d. boyd, ‘Social Network Sites as Networked Publics: Affordances, Dynamics, and Implications’ in Z. Papacharissi (ed) *Networked Self: Identity, Community, and Culture on Social Network Sites* (New York: Routledge, 2011), 39-58.

¹⁷ The wording of Binnie J in the Canadian Supreme Court decision of *WIC Radio Ltd v Simpson* [2008] 2 SCR 420, [2], steels these critics: reputation is the ‘regrettable but unavoidable road kill on the highway of public controversy’.

¹⁸ D. Howarth, ‘Libel: Its purpose and reform’ (2011) 74 *Modern Law Review* 845-877, [Howarth], 849. Reference should also be made to Lord Nicholls' remark in *Reynolds* that ‘Protection of reputation is conducive to the public good’: *Reynolds*, 201. Daniel Solove contends that reputation and freedom are interlinked: D.L. Solove, *The Future of Reputation* (New Haven: Yale University Press, 2007).

¹⁹ For an extended investigation see G. Phillipson, ‘The “global pariah”, the Defamation Bill and the Human Rights Act’ in D. Capper (ed.), *Modern Defamation law: Balancing Reputation and Free Expression* (Belfast: Queens University Belfast Press, 2012), 147-190 [Phillipson].

²⁰ With the prevalence of social media, it is posited that a positive reputation will be of increasing value where the commentator is viewed as a reliable and independent source of opinions and information.

III. Troubled framework

The Defamation Act 2013 is not an ideal source for those seeking guidance on responsible regulation of social media use.

As legislation passed in the midst of remarkable technological advances in communication, the Act underwhelms. A defence for internet service providers (s.5) is the extent of acknowledgement of contemporary communications.²¹ It deals more with anonymised defamatory remarks. The defence for website operators continues from the existing common law.²² The common law found liability where ‘there [was] knowing involvement in the process of publication of the relevant words.’²³ Section 5(3) of the statute²⁴ bears a similarity to the decision of the Court of Appeal in *Tamiz*.²⁵ This is noteworthy when one considers that, through the 2013 Act, Parliament has overruled common law developments in two widely used defences. To be so readily informed by the common law here contributes to the *mélange* that is the Act. The impression arising from the Act is that the drafters believed online defamation would likely arise where the commentator hid behind anonymity. As will be seen, the Act places commentators using their own names in a better position, but only to an extent.

With the Defamation Act 2013, Parliament has reset the common law and created a new baseline. It may be that guidance is derived from decisions prior to the Act’s passage, but their influence of these decisions is intentionally muted.²⁶ The defence of honest opinion in s. 3 (which replaces the defence of fair comment)²⁷ illustrates this. The Act requires the defendant to show that: (1) the statement complained of is a statement of opinion;²⁸

²¹ Section 5 works in tandem with s.10 which permits an action against an individual other than the author, editor or publisher only if ‘the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher.’ The Act also recognizes publication on a website in s.13. The *Electronic Commerce Directive* Dir. 2000/31/EC brought into force in the UK by the *Electronic Commerce (EC Directive) Regulations 2002* SI 2002/2013 are also relevant in this instance.

²² See *Godfrey v Demon Internet Ltd* [2001] QB 201 (QB); the distinction made by Eady J. in *Bunt v. Tilley* [2006] 3 All ER 336 (QB) [*Bunt*], [12]: ‘[the defendant] had actively chosen to receive and store the newsgroup exchanges containing the posting, and it could not be accessed by its subscribers. It was within its power to obliterate the posting’; and subsequent decisions such as *Metropolitan International Schools v Google and others* [2009] EMLR 27 (QB), *Davison v Habeeb* [2011] EWHC 3031 and *Tamiz v Google* [2013] EWCA Civ 68 [*Tamiz*].

²³ *Bunt*, [23].

²⁴ (2) It is a defence for the operator to show that it was not the operator who posted the statement on the website.

(3) The defence is defeated if the claimant shows that—

- (a) it was not possible for the claimant to identify the person who posted the statement,
- (b) the claimant gave the operator a notice of complaint in relation to the statement, and
- (c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.

²⁵ The Court in *Tamiz* (at [16]) found that the capacity to moderate (i.e. remove specific comments) does not equate to liability. Subsequently, s.5(12) states: ‘The defence under this section is not defeated by reason only of the fact that the operator of the website moderates the statements posted on it by others.’

²⁶ Professor Phillipson has suggested that there are four avenues which courts may take regarding case law preceding the Act; though he also cites the Government’s view that this body of law would be for guidance: Phillipson, 162.

²⁷ Section 3(8).

²⁸ Section 3(2).

(2) the basis of opinion is generally or specifically referred to;²⁹ (3) that an honest person could have held the opinion.³⁰ According to s.3(4), in order to qualify for the defence, a defendant would need to show that an honest person could hold the same opinion either (a) based on facts in existence at the time of publication or (b) based on any privileged statement published prior to the impugned comment. The troubling aspect arises in (a) with the weakening of the sufficient factual basis requirement for the opinion. In *Joseph v Spiller*³¹ Lord Phillips wrote of the importance of the factual underpinning of comments at common law when he questioned how ‘a defendant can base a defence of honest opinion on a fact that was not instrumental in his forming the opinion that he expressed by his comment.’³² A less useful control mechanism is found in the 2013 Act: the commentator need only point to facts in existence at the time of the comment being made and it remains an open question whether the author needs to have known of them at the relevant moment. The Explanatory Notes to the Act do not require a connection between any relevant fact or facts and the formation of the (impugned) opinion. Despite the Notes’ suggestion, a link between the existing case law and the ‘requirement that “an honest person” must have been able to hold the opinion’ is at best tenuous.³³ The broadened spectrum of commentary provides a breadth of protection by way of applicable defences because the author will need to only find ‘any fact which existed at the time the statement complained of was published’.³⁴

The public interest (which was a key aspect of the common law fair comment defence) has been muted in the statutory defense, although whether or not the matter is one of public interest remains a question for determination based on the facts of the case. It is now less clear whether public interest is a pre-requisite for statutory protection. The query stems from s.3(4)(b) which permits a privileged statement to form the basis of a comment attracting the defence; such a statement would include (based on s.3(7)(a)) an item protected by the defence of publication on a matter of public interest (set out in s.4 of the Act). The overlap between the two defences will be returned to after outlining the public interest defence.

Section 4 of the Act contains the new defence of responsible publication on a matter of public interest and is intended to replace *Reynolds* privilege.³⁵ A defendant qualifies under this provision where the impugned statement was on a matter of public interest and the publication was handled in a responsible manner. There are subjective³⁶ and objective³⁷ elements to this provision.³⁸ The breadth afforded to this defence is wider than

²⁹ Section 3(3).

³⁰ Section 3(4).

³¹ [2010] UKSC 53.

³² *Spiller*, [95]. The point was reiterated by the Court of Appeal in *Cammish v. Hughes* [2012] EWCA Civ 1655, [23].

³³ Defamation Act 2013, Explanatory Notes, [23].

³⁴ Section 3(4)(a).

³⁵ As identified in section 4(6): ‘The common law defence known as the Reynolds defence is abolished.’

³⁶ ‘(b) the defendant reasonably believed that publishing the statement complained of was in the public interest.’

³⁷ ‘(a) the statement complained of was, or formed part of, a statement on a matter of public interest’

³⁸ Defamation Act 2013, Explanatory Notes, [30].

that for the common law defense of honest opinion: ‘For avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.’³⁹ Section 4(3) adds a notable (though confined) limitation.⁴⁰ The House of Lords Select Committee examining the draft bill drew attention to an earlier version of the provision that repeated the non-exhaustive list provided by Lord Rodger in *Reynolds*. The Committee was concerned that the list would be viewed as a test and therefore repeat the circumstances outlined by the House of Lords in *Jameel (Mohammed) v. Wall Street Journal Europe (SPRL)*;⁴¹ that is, the list was not to be applied strictly but as a guideline.⁴² (The provision also appears to preclude the court from finding that the publication was negligent in some way.) Again, a difficulty arises. Verifying facts (a hallmark of responsible publication) is not a necessary step to statutory protection. The Act does not outline a defence for facts that were checked. It says, in this situation, there is no need to check facts at all. In the social media context, s.4(3) could be viewed as beneficial to free discourse. If the platform permits users to freely contribute to discussions as they arise, a requirement for each contributor to check facts would seem to be onerous, if not chilling.

As a summary comment, opinion is the darling of the Defamation Act 2013. Together sections 3 and 4 draw attention to opinions as speech; a matter underlined by s.4(5). The framework change promulgated by the legislation is a shift from what may have been called ‘responsible journalism’ (where decisions such as *Reynolds*, *Jameel* and *Flood v Times Newspapers Ltd.*⁴³ spoke of free speech under a loose rubric of responsibility) to one of reasonable belief where authors of impugned comments need only have a reasonable belief as to the public interest and accuracy of the remarks. Hugh Tomlinson QC has written of the foreseeable difficulties:

a person can reasonably believe that the publication of a statement is in the public interest without taking steps to verify its truth . . . if, for example, a journalist is told by a source that he believes to be reliable that a leading politician is corrupt, the journalist could reasonably believe that it was in the public interest to publish such an allegation without further investigation into its truth. It could even be argued that it was reasonable for a journalist to believe that publication is in the public interest where he has no positive belief in its truth but simply believes that because of its seriousness it is an allegation which should be published.⁴⁴

Whittled away are the remnants of concern for protection of reputation. The legislation even seems to deviate from the negligence standard. Howarth’s argument now seems to be in question: ‘As for the *Reynolds* defence, understanding the nature of the harm as

³⁹ Section 4(5).

⁴⁰ It is not clear how this provision would affect the neutrality of reporting in the reportage defense. The Explanatory Notes to the Act stated at [32]: ‘In determining whether . . . it was reasonable for the defendant to believe that publishing the statement was in the public interest, the court should disregard any failure on the part of a defendant to take steps to verify the truth of the imputation conveyed by the publication (which would include any failure of the defendant to seek the claimant’s views on the statement.’

⁴¹ [2007] 1 AC 359 (HL) [*Jameel*]

⁴² House of Lords Select Committee on the Constitution, *Defamation Bill* HL Paper 86 (London: TSO, 2012), [11]-[13].

⁴³ [2012] 2 AC 273 (SC) [*Flood*]. Though the disparity between the Court of Appeal and the House of Lords/Supreme Court in each of *Jameel* and *Flood* underlines the on-going debate regarding accepted standards.

⁴⁴ H. Tomlinson, ‘The Defamation Bill and a “Strong Public Interest Defence”’ Inforum 22 November 2013.

closer to personal injury than harm to economic interests should make it easier to see an important parallel ... between the *Reynolds* defence and the test for carelessness, or breach of duty, in negligence, albeit with the burden of proof reversed.’⁴⁵ Mullis and Scott contended that Parliament’s intention with the Defamation Act 2013 was for journalists to undertake the same efforts to corroborate a story as they would have under the common law *Reynolds* privilege.⁴⁶ The optimism of the proffered view is not necessarily shared. It remains an open question whether the common law prior to the Act’s passage would be of any force (even as guidance).⁴⁷ It must be recalled that the Defamation Act 2013 constitutes a critique of the common law of libel. Rejecting two significant defences, it resets adjudication in the area. These are necessary considerations for anyone seeking to limit freedom of expression based on the Convention right to protection of reputation. The protection of opinions under section 4 appears to adopt (as Mullis and Scott pointed out) the standard in *British Chiropractic Association v Singh*⁴⁸ over the ‘preferable’ views of Lords Hobhouse and Nichols in *Reynolds* who maintained the separation between fair comment and *Reynolds* privilege. Arguments against free speech now must be fortified so that triers of fact may be steered by the strength of reasoning in a ruling that may be viewed as contrary to the not-so-subtle tenor of the Act.

Overall, the difficulty created here is that opinions are given pre-eminence, but the responsibility to be accurate or have some factual basis is overridden. The legislation is problematic because it affords an extra layer of protection for this form of discourse. Defendants (news media who have the resources to investigate stories) will most likely plead both ss.3 and 4 as defences where opinion is an issue because of the statutory interconnection. We may ask, ‘why are there two defences’ if opinion may be protected under either.

Putting aside the unnecessary lack of clarity created by the Act, let us consider the Act as enshrining protection for inference by way of value judgements. This is laudable and perhaps even at the core of free expression: the free debate of topics and their implications; a spirited consideration of competing arguments. Was the common law not doing this already? In *Singh*, the concept was arguably entrenched within the common law. In *Spiller*, the criteria for protection of value judgements were loosened by the adoption of a more general referencing of facts within comments. There is an argument to be made that, though loose, this framework functioned because it permitted a spectrum of values to inform value judgements. In effect, it protected plurality and speech which

⁴⁵ Howarth, 868. A further query is raised in regards to the long-debated decision in *Spring v Guardian Assurance Inc.* [1995] 2 AC 296 (HL).

⁴⁶ A. Mullis & A. Scott, ‘Tilting at Windmills: the Defamation Act 2013’ (2014) 77 *Modern Law Review* 87-109, 107 [Mullis & Scott (2014)], 90

⁴⁷ Lord Brown’s explication of *Reynolds* privilege: ‘could whoever published the defamation, given whatever they knew (and did not know) and whatever they had done (and had not done) to guard so far as possible against the publication of untrue defamatory material, properly have considered the publication in question to be in the public interest?’: *Flood*, [113]; cited in Mullis & Scott (2014), 91.

⁴⁸ [2010] EWCA Civ 350.

contributed to on-going discussion. In its current form, the Act protects speech for the sake of making a comment.⁴⁹

IV. Categorising speech

Underlying the discussion of social media and libel law are the notions of higher and lower forms of speech.⁵⁰ There are two constituent elements which are explored separately below. The first is the idea that free speech is in some way an absolute good; that is, promoting an unfettered spectrum for speech is a benefit to all. The second aspect attenuates the first: social media has been viewed as a lower form of speech. In regards to responsibility, both of these views have formative impact. Free speech as an absolute good is an argument used to liberalize regulation of speech based on publication by news media. The view that social media contains speech that should not garner the same level of protection as news media contradicts the argument for free speech as an absolute good. As a result, consideration of limitations on free speech and the associated challenges of drawing boundary lines have already been underway.

(i) Challenging the idea of free speech as an absolute good

The reforms in the UK to defamation law have emphasized the value of speech itself. Arguments regarding the worth of speech are more of a slogan than a reality. We do not view all speech as being of equal value. Political speech (critical of government) has been the classic example of the good in free speech.⁵¹ In *Derbyshire County Council v. Times Newspapers Ltd.*,⁵² the House of Lords underlined the point when it ruled that government bodies could not sue in defamation because of (among other points) the potential chilling effect such a potential could have on democracy; especially as a free press is seen as essential to democracy.⁵³ These points focus on the public law aspects whereas social media speech draws particular attention to more individual legal considerations.

There has been a division in the platforms for speech that has revealed a predisposition. Traditional news media speech is held in higher regard than that of individuals on social media. And so, the notion of free speech has developed in a particular direction.⁵⁴ This

⁴⁹ The Act raises the question of how closely it protects ‘bare comments’ which were deemed beyond protection in *Spiller*, [89], where the Court identified justification as the only possible defense. Moreover the Joint Committee also recommended that bare opinions fall outside protection: Joint Committee Report, [69].

⁵⁰ J. Rowbottom, “To Rant, Vent and Converse: Protecting Low Level Digital Speech” (2012) 71 *Cambridge Law Journal* 355-383 [Rowbottom (2012)]. This work will be returned to later.

⁵¹ Professor Barendt has identified the ‘democracy rationale’ as the ‘most influential theory in the development of 20th century free speech law’: E. Barendt, *Freedom of Speech* 2nd edn (Oxford: OUP, 2005), 18, 20.

⁵² [1993] AC 534.

⁵³ A. Sen, *Development as Freedom* (Oxford: OUP, 1999).

⁵⁴ On this point see for example Eady J’s remarks in *CTB v News Group Newspapers Ltd.* [2011] EWHC 1326 (QB), [25]: ‘It may be thought that the wish of NGN to publish more about this “story”, with a view to selling newspapers and perhaps achieving other commercial advantages, demonstrates that coverage has not yet reached its saturation point. Had it done so, the story would no longer retain any interest. ... the alternative argument ... that *The Sun* should at least be allowed to tell the Claimant’s wife what it knows, or thinks it knows. This is a difficult one to follow. NGN is a media group legitimately interested in making

path, though, is not surprising when one considers that the trajectory is the product of years of litigation involving news media publishers (often as defendants).⁵⁵ Technology has prompted renewed consideration. Social media platforms have now vaulted the individual into a novel dimension that challenges the domain held by traditional news agencies. As noted by the European Court of Human Rights, social media (as a form of communication via the internet) ‘has now become one of the principal means by which individuals exercise their right to freedom of expression and information, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest.’⁵⁶

The Defamation Act 2013 maintains the hierarchy of traditional news media, situating social media as a lower form of speech (not worth regulating in concert with news media). The continuation of this paradigm challenges the notion of free speech. In their critique of the legislation, Mullis and Scott point to the lost opportunity to promote discourse in the Act’s remedies.⁵⁷ This example furthers the present critique. Section 12 permits the court to order publication of a summary of a judgment. Section 13 grants the court power to compel the taking down of material found to be defamatory. To this the authors respond: ‘Mandated discursive remedies – such as corrections, retractions, and rights of reply – could serve to vindicate reputation, to promote freedom of expression, and to secure the provision to the general public of the fullest possible information on matters of collective importance.’⁵⁸ These proposed remedies arguably better enact the good of free speech concept. They encourage dialogue using traditional media as a conduit. Their absence is just as instructive as their presence would have been. There is a corrective underpinning to these sections of the Defamation Act 2013, more regulation than stimulation. The Act holds ‘offenders’ to account through recrimination in the form of a judgment summary against the publisher, if not being mandated to take down the impugned publication. With these remedies, the Act entrenches a print media paradigm where news media publications are the definitive and final statement on a topic. Traditional media, in the Act, epitomize sources of discussion and therefore are placed in a special realm.⁵⁹ As an alternative though complementary strain, social media offers an

profits from communicating to the world at large. It surely does not aspire to the role of social worker or “relationship counsellor.” This case marked a breakdown in the injunction process as the identity of the at that time unnamed claimant was later revealed after being the subject of much internet speculation. For a summary of the events surrounding the case see A. Murray, *Information Technology Law: The Law and Society* (Oxford: OUP, 2013) [Murray], 144.

⁵⁵ Rowbottom has noted this development: Rowbottom (2012), 359. A concern with the melding of free speech and commercial interests has a long history. In their seminal article of 1890, Brandeis and Warren contended that the ‘press is overstepping in every direction the obvious bounds of propriety and of decency ... [having] invaded the sacred precincts of private and domestic life’. S. D. Warren & L.D. Brandeis, ‘The Right to Privacy’ (1890) 4 *Harvard Law Review* 193 [Warren & Brandeis], 196. The intermingling of defamation and privacy law is a compelling topic, but one which requires its own space beyond that permitted here.

⁵⁶ *Yildirim v Turkey* [2012] ECHR 2074, [56]. Mullis & Scott have also written on the notion of taking free speech seriously: A. Mullis & A. Scott, ‘Reframing libel: Taking (all) rights seriously and where it leads’ in D. Capper (ed.), *Modern Defamation law: Balancing Reputation and Free Expression* (Belfast: Queens University Belfast Press, 2012) [Mullis & Scott (2012)], 1-21.

⁵⁷ The discussion continues on from one they started in Mullis & Scott (2012), 15.

⁵⁸ Mullis & Scott (2014), 107.

⁵⁹ Perhaps this is why there is a charter regulating the UK press.

interactive version of news where print news is published to an online source and the story may be shared or posted to alternate sites with comments attached; drawing readers into stories through participation.⁶⁰ A profound opportunity has been passed up. The combination of social and news media may extend the organic nature of discussion.

(ii) Social media as a lower form of speech

The perceived lower value of social media comments reveals an inherent ranking of speech. It openly contradicts the ideal of neutrality; a fiction maintained in defamation law where formal ranking of publications has not been undertaken. Courts have only written of different readerships in considering whether a comment is defamatory.⁶¹ And yet, the public may unofficially rank publications in some manner (for example by perceived quality). This behaviour would be consistent with the marketplace of ideas concept that leaves to the individual reader such a choice.⁶² Rowbottom has provided the language of high and low level speech.⁶³ This categorization has brought the discussion further along (notably as it combines the medium of speech with a notion of its value).⁶⁴

Take the example of *Singh*; though the matter was not considered in the Court of Appeal's decision. The defendant was a respected commentator on science with what may be called respected credentials. Employing the marketplace metaphor, his remarks may be regarded as being of a high level because he has published his remarks in a news media outlet coupled with the added value of his background.⁶⁵ In contrast, the 'default' view of social media as a form of speech less worthy of protection (coupled with the presumption that remarks made on the medium are of no value) must be changed as the considerations deserve recognition of the nuanced issues. This is not to suggest, however, that social media speech should be given relaxed treatment. The 'irresponsible blogger'⁶⁶ must also be made to think before publishing a remark online. Rather, the focus is on finding the balance between the great tool of social media as a means of dialogue versus its potential as a basis for liability.

⁶⁰ The publishers' editing privileges of the comments section on their websites is an issue to be further explored.

⁶¹ See for example *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414.

⁶² D. Mangan, 'An Argument for the Common Law Defence of Honest Comment' (2011) 16 *Communications Law* 140-147, 144.

⁶³ Rowbottom (2012), 357: 'The term "high level" is adopted here to refer to expression that is professionally produced, aimed at a wide audience, is well resourced and researched in advance. By contrast, the "low level" refers to amateur content that is spontaneous, inexpensive to produce, and is often akin to everyday conversation. With "low level" communications, lower standards of responsibility will normally be expected of the speaker than of a professional mass media entity.' (357) He has also provided a diagram outlining his classification: J. Rowbottom, 'In the shadow of the big media: freedom of expression, participation and the production of knowledge online' (2014) *Public Law* 491-511 [Rowbottom (2014)], 494.

⁶⁴ The language continues the view of speech by an individual on a user-generated platform as being of a low level without noting the blurred lines created by news media using the popular spontaneous platforms available to all with online access.

⁶⁵ The European Court of Human Rights' decision in *Mosley v UK* (2011) 53 E.H.R.R. 30, [114], also suggests a ranking of speech where reporting on lurid, personal details does not attract the 'robust protection' of Article 10.

⁶⁶ Phillipson, 170.

The decision of the employment tribunal in *Crisp v Apple Retail (UK) Ltd.*⁶⁷ sets a backdrop for further elaboration. There, the tribunal upheld Apple's decision to terminate Crisp's employment for posting comments critical of the Apple workplace and its products.⁶⁸ The issue was one of misconduct and the test in English law is rather elastic. Emphasis was placed on the 'great importance of image to the company'.⁶⁹ Even though Crisp did not identify himself as an Apple employee on his *Facebook* page, the tribunal was satisfied that the friends to which these comments were accessible (Crisp had restricted the visibility of his comments to only his friends) knew that Apple employed him.⁷⁰ He also did not have control over his friends' ability to pass on the remarks.⁷¹ The claimant's freedom of expression argument was dismissed on the basis that his comments, first, were deemed unimportant to freedom of expression as compared with political opinions and, second, were damaging to Apple's reputation.⁷²

Criticism of the ruling here challenges the first basis above and elaborates on the second. The tribunal was remarkably certain that Crisp's comments were of a low level/low value and as such not worthy of protection. However, the mention of 'political opinion' as an example of higher quality speech prompts a troubling suggestion: remarks made on social media pertaining to the workplace are not sufficiently worthy of protection.⁷³ Some of the claimant's comments related to the functionality of Apple products and so the question of a public interest could have also been arguable, especially given the prominent sales of these items. Protection from reputational harm is not an absolute right, for defamation law permits challenges to reputation. In this instance, the challenge by Crisp was that Apple products may not function properly. Speech limited to remarks solely about government via conventional forms of media would be a remarkably small area for protection.⁷⁴ Although it was not an issue here, the tribunal seemed closed off to any notion of public interest in workers' speech such as whistleblowing. There may well be a public interest in discussing matters pertaining to private entities (for example, because of the products they sell to the public as consumers). The idea that only remarks analogical to political speech are to be protected stands out as unusually limited.

The sounder basis for upholding the dismissal in *Crisp* can be broadly placed under the notion of fidelity or loyalty. The claimant was at liberty to express opinions as he had but he must also have accepted the employer's response to those comments by dismissing him. Crisp's comments carried the potential to harm the company's reputation and in so

⁶⁷ ET/1500258/11 [*Crisp*].

⁶⁸ *Ibid*, [14].

⁶⁹ *Ibid*, [39].

⁷⁰ This factor must be impeachable as a determining consideration because (at least some) *Facebook* friends would presumably know some personal details such as employment history, independent of a *Facebook* profile.

⁷¹ In this case a co-worker passed on his comments to Apple: *Crisp*, [44]-[45].

⁷² *Ibid*, [46].

⁷³ This is in contrast to other jurisdictions, such as the United States, where the matter can fall under statutory protection, such as s.7 of the US National Labor Relations Act 29 USC § 151 (1935).

⁷⁴ Baroness Hale's unequivocal direction in *Jameel v Wall Street Journal Europe Sprl* [2006] UKHL 44, [147] remains applicable: 'the most vapid tittle-tattle about the activities of footballers' wives and girlfriends interests large sections of the public but no-one could claim any real public interest in being told about it.'

doing transgressed the boundaries of employee fidelity to an employer. The tone of his postings (especially if one considers that his first mention of the matter was on his *Facebook* page) went beyond the measure of mere remarks (let alone whistleblowing), as the motive was to impugn his employer.⁷⁵ *Crisp* should be the subject of significant criticism because of its casual treatment of speech on social media. While his remarks may have been low level and of little value, this ruling fell short of exploring this spectrum in a proper manner. More nuanced decision-making must be demanded, especially relating to developing media for expression.

V. Freedom to participate

The Defamation Act 2013 has created a new issue with regards to free speech which is encapsulated in the phrase freedom to participate.⁷⁶ The public's right to know has underpinned the justification for free speech where traditional news media facilitate this knowledge. With the 2013 Act, the premise has shifted to the individual's right to participate. The difference between the public's right to know and the individual's right to participate may be nuanced, but it is an important distinction to consider because the new Act takes regulation a step further away from responsibility. This is most noticeable when looking at the defence of publication on a matter of public interest (s.4). User-generated platforms (such as social media) provide the ready-made means for contribution. The subjective benchmark of the publisher believing the statement was on a matter of public interest also reinforces the participatory aspects of expression. However, the provision does not speak of responsible publication and reference to the objective test of a reasonable belief (s.4(1)(b)) falls short of acting as a control mechanism in favour of this aim. When it comes to freedom of expression, the terrain is open when one speaks of the public interest. Equally wide, unfortunately, is the potential for harm to reputation (as protected by the European Convention of Human Rights)⁷⁷ via user-generated internet platforms.

(i) Expression in social media as participation

There are different means of expression in social media. One popular form is the expression of immediate mood. To this point, the extent of user sharing of personal information has been remarkable. The cathartic undertone found on the various platforms reveals not just ease with sharing intimate details but also a desire to seek out connectedness based on shared experiences. As meritorious actions, these traits may be

⁷⁵ The European Court of Human Rights found that where the intention of the worker was to damage the employer's reputation, the speech did not contribute to social debate: *R Predota v Austria*, App. No. 14621/06, decision of 18 January 2000. A decision of the Leuven Labour Tribunal takes a similar path to that noted here: 17 November 2011, (2012) 46 *Revue du Droit des Technologies de l'Information* 79. The critical statements of a business development manager on his *Facebook* account constituted serious misconduct warranting dismissal because of the company's communications policy; his work as a manager; and finally as a result of the timing of the comments which came about when the CEO had been reassuring markets about the company's strength.

⁷⁶ Words other than participate have been debated and put aside. For example, argument (or even dispute) could be inserted. However, as Gardner has noted, the word 'has distracting overtones on both sides': Gardner, 163.

⁷⁷ *Editorial Board of Pravoye Delo and Shtekel v Ukraine* (33014/05) (2014) 58 E.H.R.R. 28, [63]

classed as self-actualisation: individuals exploring notions of identity and community. More often, self-actualisation has been a face of the ‘good’ of free speech. Still, this is not the extent of speech as social media evidences. Frequently these expressions are made so as to elicit commentary from others. In this way, expression of mood segues into the next form.

More on point for the present discussion, a statement of opinion such as a critique, ridicule or correction (this is not an exhaustive listing) is another common form of social media expression.⁷⁸ An intriguing interaction is created here and it links with the format of a defamation action. A relative relationship is established where the defendant instigates an association with another person by her comments. The claimant’s retort indicates his subjective interpretation of the remark as having crossed a boundary. The problem in defamation law, exacerbated by social media, is who has the authority to curb what we say? Defendants do not automatically accept the personal assessment of claimants. Courts stand in an authoritative role to some extent. However, when it comes to free speech, there is a curious duality: greater reluctance to cede ground with this right; and yet, the right is also acknowledged to be fettered. At its core, defamation law permits a claimant to demand of a defendant ‘why did you say that about me?’⁷⁹ Herein lies a foundation for holding a person to account for what s/he writes about someone else on social media.⁸⁰ There is a relational responsibility: we enjoy the liberty to say what we will about any other individual, but that individual has a right to call us to account for the remark.⁸¹ The responsibility arises from the relationship created by B commenting on A’s statement. In this way, defamation is part of the tort law framework because it ‘defines duties not to injure others and leaves those who have breached such duties vulnerable to their victims’ demands for responsive action.’⁸² Into this space, regulation for responsibility in social media may be inserted.

*McAlpine v Bercow*⁸³ illustrates the scenario. This decision on the issue of seriousness contains much material to be unpacked (though space does not permit such extensive

⁷⁸ The Canadian labour arbitration decisions of *City of Toronto v. TPFPA, Local 3888 v Grievance (Edwards)*, 2014 CanLII 62879 and *City of Toronto v TPFPA, Local 3888 (Bowman)*, unreported (12 November 2014) 2014 CanLII 76886 arose from an instance of correction on social media.

⁷⁹ In this manner, putting aside debate on the different forms of responsibility, Gardner’s comment that ‘the value of basic responsibility ... is instantiated in, rather than instrumentally served by, the legal process’ remains a pertinent observation: J. Gardner, ‘The Mark of Responsibility’ (2003) 23 *Oxford Journal of Legal Studies* 157-171 [Gardner], 168. The threshold of seriousness in s.1 of the 2013 Act is noted.

⁸⁰ Daniel Solove has identified punishing those who abuse such complaints as a means of maintaining some level of integrity with these complaints: D. Solove, ‘Speech, Privacy and Reputation on the Internet’ in S. Levmore and M. Nussbaum (eds), *The Offensive Internet* (Cambridge: Harvard University Press, 2011) 15-30.

⁸¹ The concept is distinguishable from others such as outcome-responsibility, as outlined by S.R. Perry, ‘The Moral Foundations of Tort Law’ (1992) 77 *Iowa Law Review* 449. While liability in both scenarios requires the pre-condition of the defendant’s voluntary action which leads to the claimant’s harm, the moral reasons for action in relation to this outcome are not necessarily present in defamation. In other words, the moral responsibility requiring the defendant to indemnify is highly debatable when speech is the impugned subject matter.

⁸² Goldberg & Zipursky, 18. This quotation is taken from the cited authors’ statement of tort law in general and adapted to show how defamation fits within tort.

⁸³ [2013] EWHC 1342 [*McAlpine*].

engagement). Despite one of the stated purposes of the Defamation Act 2013 being to reduce the influence of affluence in defamation litigation, *McAlpine* clearly demonstrates the contrary: the ability of financially secure individuals to protect themselves from social media defamation. This case also dramatizes the speed with which stories (accurate or otherwise) spread via social media. Perhaps the most troubling aspect, *McAlpine* underlines the law's lethargy in meeting the challenge posed by social media. Five hundred was the arbitrary figure the claimant set for pursuing legal action against defendants:⁸⁴ if a statement was made by an individual on his/her Twitter account linking Lord McAlpine to paedophilia and that individual had fewer than 500 followers, s/he would be asked 'only' to make a donation to charity. Those who made the impugned comments and had more than 500 followers would be the subjects of legal challenge. It must be asked: on what basis is 500 followers the threshold for legal action? In *Crisp*, the employment tribunal was satisfied that simply sharing the claimant's negative comments about his employer to any audience was a factor in upholding his dismissal. The criticism here is not directed at Tugendhat J, for he had no role in determining the 500 followers threshold. Rather, *McAlpine* underlines how litigants are steering the process with regards to social media libel⁸⁵ and that neither the common law nor Parliament are offering much guidance.⁸⁶

For the current discussion, *McAlpine* is important because it raises the question of responsibility for comments on social media. Widely reported, the offending comment was made on Twitter by the celebrity defendant – “‘Why is Lord McAlpine trending? *Innocent face*’”⁸⁷ – at a time the claimant was wrongfully (it was subsequently established) being associated with paedophilia throughout various social media (the reason his name was trending). Bercow insinuated criminal activity: ‘it is by implication a repetition of the accusation with the addition of the name which had previously been omitted.’⁸⁸ It should be of little surprise that the court found the remark to have been serious and that Bercow's defence (‘the question she asked in her Tweet was simply a question’)⁸⁹ did nothing to direct attention away from this conclusion. The ruling suggested that an individual's claim, on social media, of innocently asking a question

⁸⁴ Of interest, in the Canadian labour decision *Lougheed Imports Ltd (cob West Coast Mazda) v United Food and Commercial Workers International Union* (2010) 186 CLRBR (2d) 82, the arbitrator found that the grievors' Facebook audience of 500 was a wide one to which the derogatory comments were disseminated.

⁸⁵ A noteworthy exception, though in the privacy setting, is the #IamSpartacus response to the legal team in *CTB* who threatened to seek out offending Twitter account holders by way of a *Norwich Pharmacal* order: Murray, 145.

⁸⁶ The critique here is that surely we can develop a more advanced system than pointing to updated uses of civil procedure decisions such as *Norwich Pharmacal* orders pursuant to *Norwich Pharmacal Co v Commissioners of Customs and Excise* [1974] AC 133 (HL). This critique is not limited to the UK. A similar remark may be made of other common law jurisdictions. See for example, *The Law Society of Upper Canada Special Lectures 2012: Employment Law and the New Workplace in the Social Media Age* (Toronto: Irwin Law, 2013). The regulatory force of user policies devised by private entities such as YouTube may also be critiqued: Mac Síthigh, 82.

⁸⁷ *McAlpine*, [3].

⁸⁸ *Ibid*, [87].

⁸⁹ *Ibid*, [34].

which itself was an innuendo of criminal activity will not necessarily avoid her responsibility for publishing the remark as she had.

To this point, the difficulties have been discussed. As noted above, there is nuance to the change brought in by the 2013 Act: it does touch on a positive. Encouraging the public to participate in issues of public interest remains laudable and in some ways new technologies facilitate this laudable end. And yet, within the phrase freedom to participate is also a critique of the notion of free speech. Freedom to participate ties together free speech with responsibility in what is said. Freedom to participate takes into consideration developments in technology permitting each person to be a publisher of comments. Where the individual is now in a position similar to a publisher in the traditional understanding of defamation law,⁹⁰ so too responsibilities must be enforced: ‘freedom of expression carries with it duties and responsibilities and any person who chooses to disclose information must carefully verify, to the extent permitted by the circumstances that it is accurate and reliable.’⁹¹ The concept of freedom to participate may also be harnessed as a means compelling individuals to be informed regarding the subject matter of their comments.⁹² A discussion regarding a general responsibility to be informed when making comments on social media may prove to be a worthwhile endeavour. While an exploration is beyond the present scope, it is worth noting that there are a host of social issues within this topic. ‘Class’ is relevant here because of considerations such as socio-economic standing and educational background. For the present discussion, the critique of this part of the legislation is aimed solely at the statute’s inadequacy as a framework for responsible publication.

(ii) Participation: the intermingling of defamation and privacy law

Freedom to participate as an informing notion to the parameters of speech brings together the law’s considerations in defamation and privacy.⁹³ As stated earlier, Warren and Brandeis pioneered the conversation regarding privacy and in so doing they spoke to the connection between rights and responsibilities. Defamation and privacy have been gradually moving towards each other in the early twenty-first century.⁹⁴ These two

⁹⁰ McCloskey J made this connection in *AB v Facebook Ireland Ltd* [2013] NIQB 14, [8], where he found the content posted to the social media platform to have been comparable to publication in a leading page of a major newspaper or in a popular television programme.

⁹¹ *Heinisch v Germany* [2011] IRLR 923, [67].

⁹² The law cannot mandate being informed. As hinted at above, this is too large a landscape to legislate as socio-economic issues may play a role in the individual’s knowledge base. That noted, social media can easily permit emotional, uninformed statements which arbitrarily harm a person’s reputation to be made; an equally important consideration.

⁹³ The connection between defamation and privacy recalls the reduced role given to Article 8 in UK defamation law. Segregation of defamation and privacy can be seen in the Joint Committee Report. The argument put forward here is that while defamation and privacy (specifically the tort of misuse of private information) are separate areas in tort law, there is a connection and social media provides one example thereof.

⁹⁴ A point attested to by Eady J in *Hunt v Times Newspapers Ltd.* [2012] EWHC 1220, [13] as well as the comments of the editors of the 12th edition of *Gatley*: A. Mullis & R. Parkes QC (eds) *Gatley on Libel and Slander* 12th edn (London: Sweet & Maxwell, 2013), vi, [22.1]. Though data on actions in these two areas remain incomplete: J. Townend, ‘Closed Data: Defamation and Privacy Disputes in England and Wales’ (2013) 5 *Journal of Media Law* 31-44.

categories of law contain restrictions on what may be published online via social media. The former has been discussed at length, coming to the conclusion that there is little restriction applied by this discipline (though there is scope to better enforce responsibility).⁹⁵ Integrating free speech considerations, the common law of privacy provides some instruction.

The overlap between defamation and privacy is illustrated through the test for the tort of misuse of personal information that juxtaposes free speech with privacy considerations:

- 1) Does the claimant have a 'reasonable expectation of privacy' in respect of the information in question? If yes, then:
- 2) Does the claimant's interest in maintaining their right to informational privacy outweigh the defendant's interest in publishing the information in pursuit of their right to freedom of expression?⁹⁶

Lord Hoffmann further drew out the connection between privacy and defamation in describing this tort as a 'cause of action ... [which] focuses upon ... the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people'.⁹⁷ Under this framework, some decisions offer guidelines. For example, *McKennitt v Ash*⁹⁸ held information obtained in a confidential situation cannot be subsequently published without violating privacy rights. The defendant, a former close friend of the claimant musician, tried to publish information she obtained in confidence from the claimant. These were prime factors in the court's decision that the claimant's Article 8 rights should prevail.⁹⁹ For social media users, this decision suggests information obtained in confidence and then published may transgress Art. 8 rights. An interesting circumstance in *Rocknroll v News Group Newspapers Ltd.*¹⁰⁰ adds to the discussion. There the claimant successfully argued there was a reasonable expectation of privacy for photos of him partially naked at private party with friends and family that were subsequently posted by a fellow attendee onto the attendee's Facebook page. A newspaper later obtained these photos when *Facebook* permitted public access to pages and threatened to publish them.¹⁰¹

When there is a duty or interest in disclosing information, the decision in *Clift v Slough BC*¹⁰² illustrates that proportionality will be an operating factor. Ms Clift witnessed the damaging of some flowerbeds. She was threatened when she intervened. On the advice of the police, she called Slough's anti-social behaviour co-ordinator, Ms Rachid. The conversation went very poorly and angry words were exchanged. The claimant

⁹⁵ Based on the emphasis on privacy, a similar conclusion seems to have been reached in D.L. Solove, *The Future of Reputation* (New Haven: Yale University Press, 2007), chapter 8.

⁹⁶ As stated in a number of cases: see for example *Campbell v MGN* [2004] UKHL 22 [*Campbell*] and the extended discussion in *ETK v News Group Newspapers Ltd.* [2011] EWCA Civ 439, [10]. This tort is the renamed action for breach of confidence: *Campbell* [14]. Whether or not this tort is now separate from the equitable cause of action remains to be determined: *Vidal-Hall v Google Inc.* [2014] EWHC 13 (QB) (on appeal to the Court of Appeal).

⁹⁷ *Campbell* [51].

⁹⁸ [2006] EWCA Civ 1714 application for leave to appeal to the House of Lords refused [*McKennitt*].

⁹⁹ *McKennitt* underlined the growth of the tort from breach of confidence. See *Gatley* [22.2] for an overview of this development.

¹⁰⁰ [2013] EWHC 24 (Ch.).

¹⁰¹ This circumstance is described as arising 'increasingly often' in *Gatley*, [22.6].

¹⁰² [2010] EWCA Civ 1484 application for leave to appeal to the Supreme Court refused.

terminated the call and she subsequently wrote a very strongly worded letter of complaint about Ms Rachid's conduct. Slough investigated, and rejected the complaint. It found her behaviour to Rachid was violent and threatening. It placed a 'marker' against her name for 18 months. And her name was placed on a register of violent persons. Details were sent to those with whom Clift might have contact, and to four wide categories of people connected with Slough. Clift sued in libel. The Court of Appeal accepted that the council had an obligation to inform those other groups who provided services to Clift since she had uttered threats against a Council employee. The court ruled the council had advised an overly broad range of agencies in that Clift had been added to the Violent Persons Register and so had violated the claimant's privacy right. While overly broad dissemination may prove to be a problematic basis for determining legal protection, an important question is the interest of the intended audience.¹⁰³

If there is a guiding term for the interconnection of privacy and defamation (especially in the social media context), it may be intrusion. Writing about privacy, Mister Justice Eady¹⁰⁴ observed: 'it is important always to remember that the modern law of privacy is not concerned solely with information or "secrets": it is also concerned importantly with *intrusion*'.¹⁰⁵ The publication of information about an individual by another on his social media platform to a wide audience intrudes upon the claimant's personhood. In law, the intrusion may be viewed as a matter of privacy and/or as one of libel.

VI. Conclusion

The Defamation Act 2013 remains disappointing as a piece of twenty-first century legislation. While it contains a critique of the common law to that point in time, the Act itself does nothing to effectively guide libel law in an era of expanding forms of expression. Instead, it retains the hierarchical approach to libel where traditional news media represent the pinnacle of free speech; a remarkable notion when one considers the exponential growth of social media platforms.

The aim of the present work has been to draw out a discussion of the responsible use of social media. The Defamation Act 2013 contains a singular vision of free speech as an unqualified good. And so, one may say this is not the ideal moment for considerations looking to limit free expression. To the contrary, this is the very moment to do so. The common law has been touching on this topic ever so carefully. More pointed

¹⁰³ Though privacy was not an issue, *Ecclestone v Telegraph Media Group Ltd.* [2009] EWHC 2779 (QB) also suggests a bar. An item in the *Daily Telegraph* diary column quoted the claimant as saying that she was not a vegetarian and 'did not have much time for people like the McCartneys and Annie Lennox'. The sting, said Ecclestone, was that she was disrespectful and dismissive of McCartney and Lennox to the point of being willing to disparage them publicly for promoting vegetarianism. The *Telegraph* argued that the case should be struck out before any evidence is heard. Granting the defendant's motion, Sharp J. found the claim lacked seriousness (something which would likely be dealt with pursuant to s.1 under the 2013 Act). The curiosity of this case was that the claimant made the remarks and the publication reported them verbatim. To a similar extent, see *KGM v News Group Newspapers Ltd.* [2010] EWHC 3145, [39]: 'those who choose to conduct their quarrels in [public] take the risk that they may not be able to insist thereafter on clear boundary lines between what is public and what is private.' Within the context of responsibility, cases like these will hopefully never arise again for the claimants were the authors of their own situations.

¹⁰⁴ The seeming polarizing nature of Eady J's decisions has been hinted at in *Gatley*, vi.

¹⁰⁵ *CTB*, [23] emphasis in original.

consideration of the handmaids of free speech (rights and responsibilities) must be undertaken with a view to developing parameters for enforcement of both while recognizing the remarkable expansion of platforms for free speech.