



INTERNATIONAL MEDIA LAW (LL208)

Course duration: 54 hours lecture and class time (Over three weeks)

LSE Teaching Department: Department of Law

Lead Faculty: Dr Andrew Scott

Pre-requisites: Introduction to Legal Methods or Equivalent

INTRODUCTION AND OVERVIEW

This course examines key aspects of the legal and administrative regulation of the media, and the rights framework within which journalistic practice occurs.

It focuses on three areas or 'blocks': the regulation of publication to protect private interests (reputation and privacy); the regulation of publication in defence of a range of public interests, and the facilitation and control of pre-publication newsgathering practices.

These three blocks comprise:

- *the regulation of content to protect private interests.* This involves a focus on the personal interests in privacy, confidentiality and reputation, and includes consideration of the torts of defamation (libel) and misuse of private information.
- *the regulation of content in the public interest.* This involves a focus on prejudice to legal proceedings through media publicity, the publishing of offensive content, publication of sensitive material affecting national security, and concerns with political impartiality. It includes consideration of the law of contempt, blasphemy and related public order offences, official secrets and terrorism legislation, and broadcasting bans on certain forms of speech.
- *the regulation of newsgathering practices.* This involves consideration of the use of harassing, deceptive and surreptitious methods by journalists (for example, door-stepping, phone-hacking and undercover reporting), the protection of journalists' sources (including technological circumvention), and access to state-held information (freedom of information and open justice).

Throughout the course, the lecture sessions are used to explain the law and regulation applicable to each theme, to develop international comparisons, and to introduce the case study seminar problems. The course uses English law and regulation (as informed by European human rights law) as the default teaching vehicle, but at all stages interrogates and compares equivalent laws in North American, European, and other comparable jurisdictions.

In addition, a number of external speakers (leading lawyers from media organisations and private legal practice) will present to and engage with the student group, allowing students practical insights related to the

material covered in teaching sessions. The aim of the lecture sessions is to allow students to appreciate and to assess a range of contentious themes in the area of media law, freedom of expression, and freedom of the press.

The classes are problem-based. They trace an unfolding, large-scale media 'story' (which begins with the untimely death of a celebrity designer), with aspects of this story being used to place students in the position of media lawyers supervising publication and/or journalistic practice or responding to publications on behalf of private clients affected. Through this device, and in groups, students analyse the law and regulation relevant to each different aspect of media law. The aim here is to allow students to develop the detailed legal knowledge that would allow them to assess media compliance and potential liability.

READING

The course relies on three main texts, all of which are made available to students electronically through the Moodle platform and/or the LSE library:

- Parkes and Mullis (eds), *Gatley on Libel and Slander* (12th rev edn, London: Sweet & Maxwell, 2015).
- Hare and Weinstein (eds), *Extreme Speech and Democracy* (Oxford University Press, 2009).
- Millar and Scott, *Newsgathering: Law, Regulation and the Public Interest* (Oxford University Press, 2016).

Students are also supplied with full lecture notes through the online Moodle platform. Thus, there is no need for students to purchase any course materials or textbook. A small number of short, additional readings relevant to each theme are also made available through the Moodle platform.

COURSE THEMES

The themes of lectures and classes in each block of study will be as follows:

- Introduction and Overview
- Theme 1: Reputation and Defamation I (elements of the claim)
- Theme 2: Reputation and Defamation II (defences)
- Theme 3: Misuse of Private Information I (reasonable expectation of privacy)
- Theme 4: Misuse of Private Information II (the ultimate balancing test)
- Theme 5: Prejudicial Publicity and Contempt of Court
- Theme 6: Regulating for Political Neutrality
- Theme 7: Regulating to Avoid Harm and Offence

- Theme 8: Terrorism and National Security
- Theme 9: The Protection of Journalists' Sources and Materials
- Theme 10: Access to State Information I (freedom of information)
- Theme 11: Access to State Information II (access to courts and court documents)
- Theme 12: Regulating Surreptitious Journalistic Practice

ASSESSMENT

Summative assessment on the course comprises two elements. Students will be set one coursework essay on a theme selected by the student and agreed with the course convenor. It will be open to students to devise their own topic, or to select from a number of set titles. Each student will be afforded the time to discuss prospective themes with course teachers. The maximum length of this essay will be 2000 words.

The second aspect of the summative assessment for the course will take the form of an examination paper. The examination will build on the extended problem that forms the focus of class discussion, and will require students to provide advice to one or more of the parties whose interests or practices have been implicated in the problem scenario.

Formative assignments building towards the examination paper will be set and discussed in each of the seminars. In part, the lecture series is oriented towards guiding students in the selection of coursework essay themes.

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TEACHERS

Dr Andrew Scott is an Associate Professor in the Department of Law at the LSE. He researches and teaches courses on Public Law and Media Law. He is an author of a number of leading texts in these areas, his work has been cited often in court and by Parliamentary committees, and he has advised the BBC Trust, the Irish Competition Authority, and the NI Law Commission among other public authorities. He has been a Senior Fellow of the University of Melbourne, an Academic Fellow of the Inner Temple, and a visiting professor at the Universities of Muenster and Trier. See further: <http://www.lse.ac.uk/collections/law/staff/andrew-scott.htm>

THEME 1: REPUTATION AND DEFAMATION I (ELEMENTS OF THE CLAIM)

The media are in the business of telling stories. Stories about people, companies and other organisations can have a harmful impact. They can also be false. The laws of libel (written/permanent form of expression) and slander (spoken/transient form) offer one means by which an individual can seek to vindicate his or her reputation following a false and defamatory slur. Defamation law is not an exact science, however, and the risks of action may sometimes prompt media companies not to publish. The desire to avoid legal risks may see not only material that cannot be stood up 'spiked', but also material that journalists consider to be accurate but which they cannot definitively prove to be so. It may also result in journalists simply never writing about some people or organisations, or even avoiding altogether some topics. If defamation law is too 'claimant friendly', it may prevent the telling of stories that should be told.

This theme sketches how the law of libel bites on media practice, places libel in its constitutional / rights frame, and sets out what a libel claimant must prove in order to bring a claim. We will investigate the nature of interests in reputation and the mechanisms through which such interests are protected. This will involve consideration of the key elements of any claim that may be brought under the law of libel. We will consider the English law of libel and compare its basic features with the laws of other jurisdictions in order to understand the ramifications of choices made over the design of the law. We will seek to understand whether - and if so how - substantive defamation law imposes a 'chilling effect' on media publication, and will ask whether this is a 'bad' thing.

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Guiding questions

- What is 'reputation'? Is it a characteristic of a person, or a publicly-generated commodity? What is one's interest in reputation? How is it generated? Is it valuable?
- What does it mean to 'defame' or 'libel' a person? Will every defamatory statement be actionable?
- What must a claimant prove when bringing a libel action? How does this set of requirements differ as between England and Wales and other jurisdictions?
- Must a claimant prove that what has been said/written/broadcast is false? If not, why not? Must a claimant prove what damage has been caused by the false and defamatory statement? For what types of harm will damages be available?
- Why do claimants sue in defamation? Why might claimants not sue? What other avenues are open to claimants to seek vindication?
- Are there any potential claimants who are not legally able to sue? Should there be?
- What is meant by the 'chilling effect' of libel law? Why might such a chilling effect be desirable? Why might it

be problematic? If such a chilling effect does exist, how - in general terms - does it come about?

Core reading

- Lecture Note 1: Defamation – Elements of the Claim
- Parkes and Mullis (eds), *Gatley on Libel and Slander* (Rev 12th edn, London: Sweet & Maxwell) - paragraphs identified as especially important in the lecture note
- Mullis and Scott, 'Tilting at Windmills: the Defamation Act 2013' (2014) *Modern Law Review*, 77(1), 87-109

Possible essay themes

- Does it make sense for Article 8 ECHR (the right to respect for one's private and family life) to extend to cover reputation (a quintessentially "public" artefact)? What are the ramifications for defamation law of the recent extension of the Article 8 ECHR to cover reputation?
- Should corporations be free to sue for defamation? Is "corporate reputation" different in character to the reputation of individuals?
- "The law of libel is simply not 'fit for purpose' in the social media age". Discuss.

THEME 2: REPUTATION AND DEFAMATION II (DEFENCES)

Defamation law provides a number of bases on which defendants can seek to avoid liability. A story may damage the reputation of its subject. If such damage is 'warranted', however, then the law will not move to preserve an inflated reputation. Primary among these defences are 'truth' (justification - proving the substantial truth of what was published), 'honest opinion' (honest or fair comment - showing that the statement was 'only' comment or opinion, and that it was genuinely held), and 'publication on a matter of public interest' (formerly Reynolds privilege, now showing that there had been a reasonable belief that publication was in the public interest). Beyond these, various forms of 'privilege' have been developed by the courts or introduced by statute to protect statements made on particular occasions (or the reporting thereof).

Building on the first theme on defamation, in this theme we will investigate the defences available to a media company (or other defendant) against whom a libel action is brought. This will involve identification of the key defences in defamation law as they bear on publication and broadcasting of information by journalists, media organisations and others. We will seek to understand whether - and if so how well - such defences allay the 'chilling effect' on media publication. We will compare the defences available in English with those (variants) available in other jurisdictions and ask whether the law adequately recognizes and safeguards freedom of expression.

Guiding questions

- What defences are available to a person or organisation defending a libel action? Explain briefly how each defence operates.
- What distinguishes statements of fact from comments, opinions or value judgments?
- Which of these defences may potentially be of particular value to a media defendant? What factors influence the choice as to which defence(s) should be run in a given case?
- To what extent does the defence in section 4 of the Defamation Act 2013 differ from *Reynolds* privilege? Has the public interest defence offset the risks of the chilling effect of libel actions?
- What approaches to libel in the public interest context have been adopted in other jurisdictions? Do any of these offer a preferable approach?
- Might any of the mean defences be made simpler? more effective?

Core reading

- Lecture Note 2: Defamation II – Defences
- Parkes and Mullis (eds), *Gatley on Libel and Slander* (Rev 12th edn, London: Sweet & Maxwell) - paragraphs identified as especially important in the lecture note
- Bosland, Kenyon and Walker, 'Protecting inferences of fact in defamation law: fair comment and honest opinion' (2015) *Cambridge Law Journal*, 74(2), 234-260

Possible essay themes

- Is the statutory defence set out in section 4 of the Defamation Act 2013 equivalent to the pre-existing *Reynolds* privilege? If so, would it have been preferable for a malice / good faith-based defence (akin to the US-approach in *New York Times v Sullivan*) to have been introduced in the Act?
- Could the defence of fair comment / honest opinion be made to do more work in defence of free speech?

THEME 3: MISUSE OF PRIVATE INFORMATION I (REASONABLE EXPECTATION OF PRIVACY)

In this and the following theme, we will investigate the nature of interests in personal privacy, and the mechanisms through which such interests are protected specifically as against intrusion by media organisations (the breadth of privacy issues outside of the media context - including matters such as state surveillance, interference with communications, and online security - fall outside the scope of this study).

The primary focus for these themes is the extent and nature of legal protection offered to privacy in the British courts. We will also consider the approach adopted in the United States in the context of a different style of rights framework, in Germany, and in Australia (where a new tort has recently been proposed by the Australian Law Reform Commission). We will consider issues such as different conceptions of the proper content of any abstract 'right to privacy'; the relationship between the ECHR catalogue of rights and domestic law; the relevant Strasbourg jurisprudence, and the introduction and development of a judicial law of privacy in the UK (the attempt made by the courts to fashion protection for privacy out of existing legal causes).

Initially, aside from considering the generality of the emergent privacy law, the main focus will be on the first stage analysis undertaken by the British courts: determination of the 'reasonable expectation of privacy'.

Guiding questions

- What is privacy? Why is it important? In what ways might (people working for) the media intrude on privacy? Offer illustrations if possible.
- Has the threat of intrusions on privacy become greater, or changed in character, in any way since the advent of digital technologies?
- How had the publication of private information been regulated under British law prior to the introduction of the Human Rights Act?
- How is privacy protected under the European Convention (in the context of media publication)?
- What is the relationship between the new 'claim for misuse of private information' and the pre-existing equitable cause of action for breach of confidence?
- Bearing in mind the outcomes of cases in this area, can you offer a summary of the types of information to which a prima facie reasonable expectation of privacy will be understood to attach?
- What factors may limit any prima facie 'reasonable expectation of privacy'?
- When might information be deemed to be already in the 'public domain' such that there will be no reasonable expectation of privacy therein?
- In terms of determining whether information is private and/or already in the public domain, is it appropriate to treat photographs or film differently to information conveyed by textual means? Is a photograph not merely a means of 'saying a thousand words'?
- Should children be treated differently to adults, or should 'Joe Soap' be treated differently to a public figure in respect of the identification of what information relating to them is private?

Core reading

- Lecture Note 3: Privacy I – Generality and Reasonable Expectation of Privacy

- Parkes and Mullis (eds), *Gatley on Libel and Slander* (Rev 12th edn, London: Sweet & Maxwell), ch 22
- Scott, 'Dimensions of Privacy in the Tort of Misuse' (forthcoming, 2016)

Possible essay themes

- Has the concept of the "reasonable expectation of privacy" morphed away from a focus on information that is private in character, to information the disclosure of which would be harmful in a variety of ways?
- Has the concept of the "reasonable expectation of privacy" morphed away from a focus on information that is private in character, to information the disclosure of which would be harmful in a variety of ways?
- "The public domain concept in the tort of misuse is uncertain and unhelpful and should be jettisoned". Discuss.
- Should children be treated differently for the purposes of the tort of misuse? Why?

THEME 4: MISUSE OF PRIVATE INFORMATION II (THE ULTIMATE BALANCING TEST)

In this theme we will continue to investigate the nature of interests in personal privacy, and the mechanisms through which such interests are protected specifically as against intrusion by media organisations. The primary focus for this class will be on the availability of 'defences' to the media organization for 'intrusive' publication. Such defences involve either argument that material that would appear to comprise private information should not be so considered, or that - notwithstanding the private nature of the information concerned - it should nonetheless be deemed publishable.

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Guiding questions

- what does the 'ultimate balancing test' in claims for misuse of private information involve? what is being balanced? who does the balancing? will the balancing exercise always be undertaken in the determination of a claim? is it possible to 'balance' privacy interests against freedom of speech?
- what do judges mean when they refer to the 'parallel analysis' that must be undertaken during the second stage of privacy claims? why do they insist that there can be no 'presumptive priority' of freedom of speech over privacy rights?
- are all privacy interests equal? will some information be treated as being more private than other information? should it be? what types of information are understood generally to be of particular poignancy?
- are the interests of third parties – for example, spouses and children - ever relevant to the assessment of privacy claims? should they be?

- does it matter who wants to tell the story?
- how is the 'public interest' to be understood? what is the relationship of the public interest to 'freedom of expression'? if it is possible to introduce a public interest argument, does this act as a 'trump card' in the analysis?

Core reading

- Lecture Note 4: Privacy II (the ultimate balancing test)
- Parkes and Mullis (eds), *Gatley on Libel and Slander* (Rev 12th edn, London: Sweet & Maxwell), ch 22

Possible essay themes

- Should 'role models' or 'public figures', however that category is defined, automatically be accorded more limited privacy rights than other people? if so, why?
- Is there a public interest in the correction of previous misrepresentations? in the exposure of hypocrisy? if so in either case, why so?

THEME 5: PREJUDICIAL PUBLICITY AND CONTEMPT OF COURT

Fair trials and a free press are both fundamental components of the democratic polity. In the normal run of things, the first of these principles is underscored by the principle of open justice (the notion that if the citizenry are to have faith in the impartiality of the legal system, and hence to observe the rule of law, then they must be informed of the details of its operation both in general and in particular cases). In normal circumstances, openness and fair trials are supportive aspirations. On occasion, however, it may be that the fairness of a trial might be undermined if external influences are brought to bear on those - especially jury members - involved in its administration.

In legal terms, this tension can be cast as a potential conflict between Article 10 and Article 6 rights (the latter comprising the right to a fair and impartial tribunal). The law of media publicity contempt is one means by which this potential conflict is managed in the UK. It is not clear that the existing regime is operating, effective or ultimately fit for purpose. As well as considering the English law in this area, we will note and interrogate the very different approaches adopted towards this concern in other major jurisdictions.

Guiding questions

- What is the law of contempt generally, and what purposes is it intended to serve? Give examples of ways in which contempt of court can be perpetrated?

- What is the source of law on prejudicial publicity contempt in England today? Since when has this been the case? Why was the law introduced?
- What do you understand by the 'strict liability rule'? Describe the basic features of this rule.
- What should we understand by the concept of 'substantial risk' in this context? What factors may have a bearing on the court's assessment of the degree of risk posed by a given publication?
- What is meant by the concept of 'serious impediment or prejudice'? When will legal proceedings be considered to be 'active' for the purposes of media publicity contempt?
- What defences to a charge of contempt are open to the media?
- What other measures are available to the courts / others who are keen to minimise the risk of prejudice caused to legal proceedings? Are such measures likely always to be effective? If not, when not?

- What criticisms have been made of the operation of the law of contempt in England and Wales? Do you agree or disagree with the complaints raised?
- Why might it be argued that the existence of the internet has undermined the operation of the law of contempt?
- What are the ramifications of the 'change' in approach adopted by the current Attorney-General relative to the attitude adopted by his predecessor(s)?
- What empirical evidence exists to support the continuation of a pre-emptive law of contempt? What evidence exists to suggest that it may be unnecessary, or misfocused? What has been the experience of other jurisdictions?

Core reading

- Lecture Note 5: Prejudicial media publicity and the law of contempt
- Grieve, 'Contempt – A Balancing Act', Speech delivered at City University, 1 December 2011 (available [here](#))
- Brandwood, 'You Say "Fair Trial" and I say "Free Press": British and American approaches to protecting defendants' rights in high profile trials' (2000) *New York University Law Review*, 75, 1412-1451
- *Attorney General v Associated Newspapers Ltd & MGN Ltd* [2012] EWHC 2029 (Admin)
- *Attorney General v MGN Ltd* [2011] EWHC 2074 (Admin)
- *Attorney General v Associated Newspapers Ltd & News Group Newspapers Ltd* [2011] EWHC 418 (Admin)

Possible essay themes

- “Juries are robust, self-correcting bodies. Hence the purported benefits of the law of contempt are superfluous, while its downsides are real and problematic”. Discuss.

THEME 6: REGULATING FOR POLITICAL NEUTRALITY

'Political speech' is often said to be the most significant form of speech in a democracy, and hence is deemed worthy of the most stringent protection in rights regimes. Indeed, one of the strongest justifications underpinning the concept of rights to freedom of expression is precisely the notion that the ability to express political views and perhaps to change the minds of others on appropriate policy choices is the signal feature of and vital to the functioning of liberal democracy. There will always be an interest on the part of those in positions of power to limit the scope of political critique. In the US, recognition of the dangers inherent in this fact has resulted in a heavy emphasis on the inappropriateness of government regulation of the content of speech. It is not clear that this perspective is mirrored in legislative or regulatory approaches to media publication in the UK.

In this theme, we will consider the commitment to political impartiality in broadcast programming. This is a markedly different premise from that familiar to newspapers. The commitment is reflected in the charter expectations of the BBC, and of the licence commitments of broadcasters more generally. While noting this general scene, we will focus particular attention on one specific context: the prohibition on paid-for access to the airwaves. This will involve consideration of two House of Lords decisions: *ProLife Alliance* and *Animal Defenders International*, which concern alternative solutions to the same basic problem faced by NGOs with a political agenda that they would like to see aired on broadcasting platforms. In addition, we will note and investigate the early divergence between the UK judges and their Strasbourg counterparts in this respect, and then reflect on the judgment in *Animal Defenders International v UK*.

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Guiding questions

- In what ways is the regime for regulating the broadcast component of the political public sphere distinct from that for other platforms? How can one account for the differences?
- By what means are political advertisements excluded from broadcast platforms? How are we to understand the concept of the 'political' in this context?
- What has been the attitude of the British courts to claims generated by the prohibition on political advertising? How well have the courts' approaches aligned with Article 10 ECHR?
- In your view, was the Government right to assert, and the House of Lords right to accept, that a less restrictive rule would be impossible to conceive, or at least to design with efficacy? If not, how might a rule on political advertising be designed so as to pose a lesser / proportionate restriction on freedom of speech?
- Has the approach of the Strasbourg court in the context of political advertising been consistent over time?

Core reading

- Lecture Note 6: Regulating for Political Neutrality
- Ó Fathaigh, Ban on Political Advertising Does Not Violate Article 10: Animal Defenders International v. UK, *Strasbourg Observers*, 24 April 2013 ([here](#))
- Lewis, Animal Defenders International v UK: A Case of Fruitful Dialogue, or of Strasbourg Losing its Nerve?, *Oxford HR Hub*, 25 April 2013 ([here](#))
- English, Strasbourg ties itself in knots over advertising ban, *UK Human Rights blog*, 23 April 2013 ([here](#))
- Rowbottom, 'A surprise ruling? Strasbourg upholds the ban on paid political ads on TV and Radio', *UK Const. L. Blog*, 22 April 2013 ([here](#))
- Scott (2003) 'A Monstrous and Unjustifiable Infringement?': Political Expression and the Broadcasting Ban on Advocacy Advertising. *Modern Law Review*, 66(2), 224-244

Possible essay themes

- Did the Strasbourg court get it right on the broadcast ban on political advertising?

THEME 7: REGULATING TO AVOID HARM AND OFFENCE

In this theme, after reviewing the general regime by which press and media content is regulated to prevent the giving of gratuitous offence, we will focus on a case-study of an area in which press articles and/or media programming might result legal intervention. This is the tendency of religious groups to seek to utilise legal and regulatory mechanisms to respond to, perhaps to censor, politico-cultural 'products' with which they disagree. Such attempts have been much in evidence in recent times.

Consider responses to the play *Behti*, the BBC's airing of *Jerry Springer the Opera - the Movie*, the *Jyllands-Posten* or *Charlie Hebdo* cartoons and so on. This type of response is arguably nothing new (see, for example, the *Rushdie Affair*), but perhaps in the current climate it is of greater concern. Certainly, it has become more of a focus both for comment in the mass-mediated public sphere and for legislators. This study focuses in on the UK government's criminalisation (through Parliament) of incitement to religious hatred (and more recently, incitement of hatred based on sexual orientation), the attempt to bring blasphemy proceedings against the BBC on account of its airing of *Jerry Springer the Opera*, and the repeal of the blasphemy law. Strasbourg jurisprudence offers an important backdrop to this discussion.

In respect of such areas of controversy - and related themes such as hate speech - it is incumbent on government, Parliament, regulators and the public to develop appropriate and measured accommodation of divergent viewpoints if those with extremist tendencies are not to reject peaceful means of conveying their messages to the detriment of the rule of law.

Guiding questions

- What is 'offensive' media content? Why is media content of given types liable to be offensive to some and not to others? Is there a meaningful distinction to be drawn between offense based upon race / gender / sexual orientation / religious conviction / appearance? Is there, and should there be, a 'right' not to be offended? Should we strive not to offend others? Must we?
 - Is there a liberal bias in the media?
 - What has been the attitude of the Strasbourg court over time to restrictions placed upon freedom of expression on account of the religious convictions of others (see *Handyside v UK* (by implication); *Otto-Preminger Institut v Austria*; *Wingrove v UK*; *I.A. v Turkey*) ? Article 9 ECHR covers the right to freedom of thought, conscience and religion: how important has this right been in the analysis of restrictions on freedom of speech? When, if ever, should this right come into play?
 - How is offensive content regulated in the broadcasting context? Was the Gaunt decision correct?
 - What is now the position on the law of blasphemy in the UK? How did this situation come to pass? Are 'group defamation' laws likely to be appropriate legislative measures?
 - Describe the features of the offence of incitement to religious hatred? How does it compare to the equivalent law on incitement to racial hatred? Have the concerns of the media and others that the new religious incitement law would limit importance cultural expression been adequately met? Does the law adequately protect those holding religious convictions from offence? What limitations of the law, if any, can you identify?
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- Some commentators expressed the concern that introduction of the new law on incitement was a 'slippery slope': have equivalent laws been legislated subsequently to defend against offence taken on other grounds? If so, is this a problem?
 - Does British law adequately reflect such important underlying principles as should inform legislative intervention in this area?

Core reading

- Lecture Note 7: Avoiding Harm and Offence
- Pinto (2010) What Are Offences to Feelings Really About? A New Regulative Principle for the Multicultural Era. *Oxford Journal of Legal Studies*, 30(4), 695-723 (available [here](#))
- Dworkin (2006) The Right to Ridicule. *New York Review of Books*, 23 March (available [here](#))
- Hare (2006) Crosses, Crescents and Sacred Cows: criminalising incitement to religious hatred. *Public Law*, Aut, 521-538

Possible essay themes

- "The Strasbourg approach to the regulation of content deemed offensive by some groups on grounds of religion has been craven. Free speech in a democratic society positively requires a robust approach facilitating

the airing of competing worldviews. Only in very unusual circumstances can the requirements of public order or the defence of religious sensibilities be such as to compel restrictions on the publication of challenging content". Discuss.

- Are blasphemy laws preferable to the "public order approach" to the regulation of offensive content?

THEME 8: MEDIA, TERRORISM AND NATIONAL SECURITY

Perhaps the primary function of the state is to secure internal stability and freedom from external threats. There is a high public interest in national security. The tension between national security and freedom of the press plays out in a number of contexts. With regard to publication, it can be important for the state to ensure that journalists do not release otherwise secret information that might prove valuable to enemy combatants or terrorist organisations. Moreover, the state may sometimes seek to limit the publicity afforded to 'dissident' views, in the hope of avoiding risks of proselytisation.

Precisely how the state might attempt to prevent the airing of such information is open to debate. A range of options have been attempted over time, with varying degrees of both success and appropriateness. The aim of this class is to review a number of such approaches and to consider their efficacy.

In this last theme on regulating publication we focus on two distinct interests on the part of the state in limiting publication so as to defend national security, particularly in the context of terrorist threat. First, we consider the tools available to government to prevent publication of information by journalists that might somehow assist 'enemies of the state'. This will involve primarily a review of the longstanding DSMA-notice regime (as recently revised). Secondly, we will consider attempts by government to stem publicity regarding dissident perspectives in the hope that 'impressionable' individuals will not be persuaded to adopt antagonistic attitudes. Here we will consider the erstwhile broadcasting ban on the speech of Irish terrorist organisations and their supporters, the more recent advent of anti-terrorism laws that are extremely broad in scope, and elements of the current 'counter-extremism' strategy.

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Guiding questions

- What is a DSMA-Notice (nb there are two answers to this question)? Who issues such notices? What themes might they cover? Who might be the recipient of such a notice? What is the legal effect of such a notice?
- Describe the role and functions of the DSMA Committee and the Secretary to the Committee. Who is involved in the institution and why? What are the origins of the regime? To what extent are the objectives that underpin this regime legitimate? Is the character of the system defensible? What dangers attend the existence of such forms of 'regulation'? Why is a more strictly 'legal' approach not preferred? Is the regime 'quaintly' or 'uniquely' British?
- What alternatives might there be to the DSMA-Notice regime? Have such alternatives ever been deployed?

- Describe the basic features of the section 1 and 2 offences in the Terrorism Act 2006.
- In what ways might these provisions limit media freedom? What criticisms have been raised regarding the provisions? Are such criticisms legitimate? Are such laws 'rights-compliant'?
- Is the underpinning purpose of laws of this nature acceptable in a democratic state?
- Describe the basic features of the UK government's current 'counter-extremism' strategy.
- In what ways does the strategy involve the extension of legal and/or regulatory powers?
- What does the government hope to achieve by these extensions? What objections have been raised against this element of the wider strategy?
- What legal powers are available to restrict the broadcasting of dissident viewpoints?
- The actual deployment of these powers with regard to various groups affiliated with Irish terrorist organisations was widely criticised, both as overly restrictive of free speech and media freedom, and as counter-productive more generally: explain such criticisms, and assess the extent to which they are valid.

Core reading

- Lecture Note 8: Media, Terrorism and National Security
- Barendt (2009) Incitement to, and Glorification of, Terrorism, Hare and Weinstein (eds) *Extreme Speech and Democracy* (Oxford University Press), ch. 22
- Choudhury (2009) The Terrorism Act 2006: Discouraging Terrorism, Hare and Weinstein (eds) *Extreme Speech and Democracy* (Oxford University Press), ch. 23
- DSMA Regime webpage (linked from Moodle)
- *R v Secretary of State for the Home Dept, ex parte Brind* [1991] UKHL 4

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Possible essay themes

- Should the UK government's counter-extremism strategy include the introduction of new legal powers to limit access to dissident ("extremist") speech that does not incite violence or glorify terrorism?
- Is there any workable or desirable alternative to the DSMA regime?
- Is speech that glorifies terrorism acceptable?

THEME 9: THE PROTECTION OF JOURNALISTS' SOURCES AND MATERIALS

In this first theme concerning journalists' relationships with their sources, we will consider why journalists may wish to protect the identities of their sources (indeed, why for many journalists this is considered an absolute and cardinal rule), and ask what interests are at stake in the context of courts' decisions on whether they should be obliged to disclose such information or to provide other journalistic materials. We will review what

powers there exist for private parties to require journalists to provide such information, when courts will insist that this is done, and what the ramifications of failure to comply may be for the journalists concerned.

In this context, we will consider the relevance of both 'Norwich Pharmacal orders', and section 10 of the Contempt of Court Act 1981. More broadly, in addition to reviewing the position on source protection taken in the domestic courts, we will assess the perspective of the European courts, and seek to identify what factors are - and what factors should - be considered to the question of mandated disclosure.

In the second part of the focus on the legal responses to the protection of sources and journalistic materials, we will consider the particular measures instituted in the UK and the US to provide protections for journalists and others and/or to provide for access to journalists' sources and materials. The discussion will include a particular focus on powers in the context of policing and the response to terrorism. We will assess whether the powers afforded to the state to access evidence in these areas are adequately limited so as to preserve media freedom to the maximum extent that is compatible with protection of the national interest. We will find that the powers afforded to the police are sometimes extremely broad in nature, and that journalists face criminalisation for any failure speedily to inform on their sources or to provide other information deemed useful to police inquiries. The potential impact on media freedom and the propensity of sources to engage is palpable.

We will also consider the practical impact of surveillance powers on the legal protections afforded to journalists (a matter of latent concern for some time but which was blown open in both the US and UK in the wake of Snowden and (in the UK) of revelations arising out of the 'Plebgate affair'. We will note the current policy debate on surveillance powers and the impact of such practices on media freedom.

Guiding questions

- Why do journalists need to rely on sources? Why might a source desire that their identity remain secret? What ramifications might acceding to such a request have for the journalist concerned? Should journalists use secret sources?
- Why might a person be motivated to 'whistle-blow'? Should the whistle-blower's motivation be of concern to the journalist?
- Why might a private party be interested in discovering the identity of a journalist's source(s)?
- Should journalists be free to protect the anonymity of sources where such persons may have committed tortious or criminal acts to the detriment of other parties discussed in journalist's publications / broadcasts?
- Does the protection of journalists' sources preserve / protect a public or a private interest? Is it important which perspective is adopted on a given case?
- What measures have been introduced in the UK in order to secure protection for journalists' sources? What prompted the introduction of legislation?
- What factors should be relevant to the question of whether disclosure is required?

- What limitations can be identified in the operation of the relevant UK law? Is the law fit for the purpose of protecting sources?
- If the police and other investigating authorities can easily access records of a journalist's communications, can legal source protections effectively protect his or her contacts? What evidence is there that such circumventions have been perpetrated? Can alternative legal protections be instituted to evade the risk of exposure of sources by technological means?

Core reading

- Lecture Note 9: Protection of Journalists' Sources and Materials
- Millar and Scott, *Newsgathering: Law, Regulation and the Public Interest* (Oxford University Press, 2016), chs 3-5.

Possible essay themes

- 'Source protection laws do not allow the social and political importance of investigative journalism to be adequately taken into account. British judges have been forever too willing to see the freedom of the press subordinated to more immediate concerns'. Discuss.
- Is technological circumvention of source protections a problem that can be fixed?

THEME 10: ACCESS TO STATE INFORMATION I (FREEDOM OF INFORMATION)

In this theme we focus on the law governing the interaction of media organisations and government, specifically as this relates to journalists' ability to obtain information regarding policy development and state performance.

On one level, the relationship between the state and the media is uncontroversial. The concept of 'open government' chimes well with the ready provision of information by public authorities to the media and through them to the public at large. On occasions, however, Government Ministers and/or officials may be less than willing to see the 'civilising light of publicity' fall upon their endeavours. This may be for good reason (in service of the protection of other important interests), or in pursuit of less honourable motives.

Perhaps, that a Government should seek to draw a cloak of secrecy around its activities is only to be expected. The primary goal that it pursues is to retain public power. In a democracy, to achieve this it must retain the confidence of the public. This requires success on two fronts: the Government must perform well both in substantive terms, and in the public justification of its policy choices. Inevitably, a successful government will do both, so that while "medium and message may not be the same thing... they are synergistic and commonly indistinguishable" (Sedley). The allegation levelled at modern governments in many liberal democratic states is

that they emphasise presentation over genuine achievement to such an extent that they must disguise the true nature of intentions, and seek to manoeuvre the public into agreement with their objectives by stealth. Instrumental action of this nature actively requires a high degree of secrecy.

As background to the theme, we will note more subtle methods of influencing media practice as exercised by Government. Perhaps unfairly, the current administration is seen by some as an exemplar in the use of presentational techniques: 'spin-doctoring', 'new management' and so on.

The concerns of the class are then pursued through the study of laws whose purported function is to allow access to government-held information. The Freedom of Information Act 2000 has now been in force for over five years. The class will consider how far its use in practice confirms the potential limitations in the law that were perceived and debated during its pre-legislative and legislative phase. It will also review journalists experience of using the Act in the period of its operation.

One particular recent decision of the UK Supreme Court regarding the 2000 Act is given especial attention: *Kennedy v Charity Commission* (2014). This judgment was interesting for the attempt by counsel, rejected by the majority, to domesticate a development in Article 10 ECHR that had gained credibility at the Strasbourg court (that A10 includes a right of access to information held by the state). Instead, the Supreme Court conjured a 'common law principle of open government'. The origins and parameters of this principle are uncertain. It has already been deployed in lower courts however and its ramifications could be significant.

Guiding questions

- What are the appropriate limits of government secrecy? What justifications can you offer for state openness?
- Why, and to what extent, do governments engage in 'news management'? What examples of such practices can you offer? What risks are there in such practices?
- How and when was the FoI regime put in place in the UK? in other jurisdictions?
- Describe the basic features of the FoI regime. On its face, do you consider the UK FoI regime to be adequate / appropriately circumscribed?
- Why might the FoI regime be of particular interest to journalists? Have journalists found the regime useful in practice? What criticisms have there been of journalists' use of the Act? Illustrate your answer where possible.
- What might the future hold in terms of practice under the 2000 Act and/or amendment to the regime?

Core reading

- Lecture Note 10: Access to State Information - Freedom of Information
- Millar and Scott, *Newsgathering: Law, Regulation and the Public Interest* (Oxford University Press, 2016), chs 8-9.

Possible essay themes

- “Journalists have made much use of the Freedom of Information Act, but oftentimes their attempts have been frustrated by a bureaucracy that regrets the introduction of the Act and seeks means of undermining its potential”. Discuss.
- Critically analyse the Court of Appeal judgment in *Evans v Information Commissioner*.
- Critically analyse the speeches of their Lordships in *Kennedy v Charity Commission*. You may wish to divide the judgments among the members of the group. What was the factual background to the case, what was the primary legal question at hand, and how had the counsel for Kennedy (Sunday Times) argued the case?

THEME 11: ACCESS TO STATE INFORMATION II (ACCESS TO COURTS AND COURT DOCUMENTS)

Open justice is widely understood as a *sine qua non* for democracy and the rule of law. In this theme we will consider a number of themes in the interaction between journalistic newsgathering and the justice system. One focus is on access to the courts and to court documentation, in particular in the context of moves towards ‘secret justice’ in service of national security concerns. This includes public access to courts through the deployment of communications technologies (televising the courts, and the use of text-based technologies in court). A further theme focuses on questions of access to participants in the administration of justice: judges, the police and prisoners.

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Guiding questions

- What is meant by the principle of ‘open justice’? Does it extend beyond facilitating scrutiny of the justice system to allowing knowledge of the substantive content of disputes underpinning trials themselves?
- Are there courts to which journalists should not have access? Why? Are there courts to which journalists do not in fact have access?
- What is gained by the televising of court proceedings? What is lost?
- What dangers arise in relationships between journalists and judges?
- Describe the relationship between journalists and the police? Is this one of antagonism or symbiosis? Which should it be? Why?
- Should journalists have access to prisons and prisoners?

Core reading

- Lecture Note 11: Access to State Information – Open Justice
- Millar and Scott, *Newsgathering: Law, Regulation and the Public Interest* (Oxford University Press, 2016), ch 10.

- Thompson (2011) Does the Open Justice Principle Require Cameras to be Permitted in the Courtroom and the Broadcasting of Legal Proceedings? *Journal of Media Law*, 3(2), 211-236

Possible essay themes

- “The rules on access to courts and access to court documents are a confusing hotchpotch that require the introduction of a single, consistent set of principles”. Discuss.
- Is it advisable for proceedings in courts to be filmed and broadcast. To what extent is this currently possible in England and Wales? Should such practice be expanded or reduced? Why?
- Should journalists be free to gain access to prisoners who may wish to communicate some message, perhaps regarding their innocence or some other matter of public importance, to a wider public. To what extent is this currently possible in England and Wales? Are the rules adequate? Why?

THEME 12: REGULATING SURREPTITIOUS JOURNALISTIC PRACTICE

Undercover investigation has been a notable feature of journalism since the first days of the institutionalised press. It has been used for high-minded purposes and low grade scandal-mongering. Such practices raise significant ethical questions, especially for journalists in jurisdictions where there is heightened sensitivity to notions of objectivity.

Legal questions intersect with notions of ethical practice in a number of areas. On one hand, we might ask whether it is appropriate for journalists to engage in or tend towards 'entrapment' of their subjects into perpetrating (criminal) behaviours in which they may not otherwise engage; whether and when subjects should be able to argue that they should evade criminal responsibility, and if not, whether the journalists themselves should be implicated on account of their abetting or procuring of crime.

On the other hand, we might ask whether it can ever be legitimate for journalists to argue that they should not themselves be held liable for criminal or tortious behaviours which they have perpetrated in order to expose iniquity or abuse of power in the public interest. Should there in other words, be a law-breaking privilege for journalists?

While historically there has been little cognisance taken of the legal regimes governing surreptitious behaviour and little enforcement thereof, the phone-hacking scandal has changed both the level of knowledge and the propensity to enforce permanently. In addition, the courts and legislature have become seized of the perceived need to develop laws to constrain poor practice and to defend 'proper' journalistic activity.

Guiding questions

- What types of journalistic behaviours might fall foul of the criminal law? With regard to each possible criminal offence, what are the basic features of the offence?

- With regard to each possible offence, at least as far as public interest journalism is concerned, do the basic features of the offence include any suitable defence? An explicit 'public interest' defence? a 'reasonable excuse' defence? Might some other feature of the offence be interpreted in such a way as to allow a public-spirited journalist to escape liability?
- Insofar as there is no available defence, journalists will be compelled to rely on prosecutorial discretion or similar. To what extent does the exercise of such discretion involve reflection on the public interest purpose of journalism?
- Should journalists be able to rely on a generic public interest defence or privilege? What arguments lie on either side of the debate? What is at risk if journalists are able to escape liability for prima facie criminal behaviour? How might such a defence be constructed so as to avoid abuse?
- How far do general civil laws might apply to newsgathering behaviour, specifically the data protection regime and the developing claim for misuse of private information. Why has the data protection regime not 'bitten' on journalistic newsgathering? Why is there reason to think that it may do so in future? How has the claim for misuse of private information developed so as to pose compliance threats to journalism? Does this developing claim pose particular threats to journalistic newsgathering?

Core reading

- Lecture Note 12: Regulating Surreptitious or "Law-Breaking" Journalistic Practices
- Millar and Scott, *Newsgathering: Law, Regulation and the Public Interest* (Oxford University Press, 2016), chs 2, 13, 15-16 (skim)
- Leveson, *An Inquiry Into the Culture, Practices and Ethics of the Press: Report* (HC 780, London, Stationery Office, 2012), J2[6.1]-[8.7]

Possible essay themes

- "Journalism is so important that its practitioners require a specific public interest defence". Discuss.



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