'Free Speech is not Valued if only Valued Speech is Free': *Connolly*, Consistency and some Article 10 Concerns

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This article suggests that different free speech principles apply in cases involving 'journalists' compared to 'non-journalists', as in Connolly v. DPP. *Strict principles apply when a journalist's right to speak is threatened because the media exercise a valuable public watchdog role worth protecting even when competing interests exist. When non-journalists speak the same strict principles are absent even though speech of similar public interest may be involved. The justification for allowing interference is that such extreme and unpopular speech is not sufficiently valuable. This distinction, though superficially appealing, is troubling, not least because non-journalists might also act as public watchdog.*

1. Introduction

Article 10 of the European Convention on Human Rights,[1] which is given domestic effect by the Human Rights Act 1998,[2] declares that everyone has the right to freedom of expression.[3] The Article itself is thinly worded both as to its substance and operation, which is entirely appropriate for a clause of supranational origin; it is for the UK judiciary to interpret and develop the clause according to the tastes and needs of the UK legal system and its people.[4] Yet it remains debatable whether the principle behind Article 10 is being developed in a manner which shows that free speech is valued. Recently, it has been said that the UK judiciary's approach to free speech 'remains heavily under-theorised'.[5] In grappling with what is a large and complicated concept, the

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[1] 'the Convention'.

[2] 'the HRA'.

[3] This article makes no distinction between the terms freedom of speech and freedom of expression. As Professor Barendt has noted, there is no evidence that courts draw any distinction between the two terms either, (Eric Barendt, *Freedom of Speech*, (Oxford University Press, 2nd edn, 2005), 75).

[4] It is acknowledged that this point is debatable and, certainly, the UK judiciary are not in total agreement with such a view, Lord Bingham in particular: see *R (Animal Defenders International) v. Secretary of State for Culture, Media and Sport* (2008) UKHL 15 and compare the judgments of Lord Bingham [37] with Lord Scott [44-45]. For an excellent discussion of s. 2, HRA and varying judicial approaches to it see: Elizabeth Wicks, 'Taking Account of Strasbourg?', *European Public Law* 11, no. 3 (2005): 405.

[5] Ivan Hare, 'Crosses, crescents and sacred cows: criminalising incitement to religious hatred,' *Public Law* (2006): 521, 526.

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judiciary has been accused of 'baffling or, to be frank, obscure' reasoning.[6] The purpose of this article is not to chart the development of the principle or the general adequacy of its articulation so far since, given the complexity of free speech theory,[7] the confines of an article would be unlikely to do justice to such an enormous task.

Instead, this article seeks to draw attention to two classes of speaker, which appear to have been created by the UK courts, for which two different standards of free speech right seem to exist. These speakers are termed, for the convenience of this article, the 'journalist' and the 'non-journalist'. By 'journalist' it is meant those reporting for the traditional print and television media, no distinction is made as to whether this is at a regional, national or international level. No such distinction tends to be made by the judiciary and neither do judges tend to specify what is meant by the term 'media' or 'press' though, frequently, reference might be made to traditional forms of reporting and, likewise, the media parties involved in litigation tend to be from these traditional sources. 'Non-journalists' are those not classified as members of the 'media' or 'press'. The distinction is designed to highlight what this article argues are the dangers of classifying everyone else, whether implicitly or explicitly, as 'non-journalists'. It will be argued that those deemed 'non-journalists' do not enjoy the benefit of the same free speech right as 'journalists'. Yet this is a mistake, as it will be argued, since within this neglected category will be political pressure groups, concerned politically-minded individuals and the fast evolving culture of 'bloggers': 'non-journalists' who capture their thoughts and emotions about everyday issues and events on personal (or professional) websites. It will be argued that these non-journalists should enjoy the same free speech rights as journalists since they too may contribute to the public watchdog role traditionally reserved for 'journalists'. Of bloggers, the actions of American blogger Mayhill Fowler prove that it is possible for individual non-journalists to command the attention of the public and meaningfully contribute to the public watchdog role despite the lack of comparable resources. It was Fowler, after all, who published Barack Obama's comment from a fund-raiser that neglected, small town working-class communities are 'bitter' and 'cling to guns and religion'.[8] Fowler's report caused a media frenzy which opponent Senator Hillary Clinton sought to use to her advantage.[9]

The existence of these two classes of speaker will be highlighted by comparing two sets of cases, with particular reference to two decisions, involving the non-journalist expressing unpopular political ideas and the journalist reporting celebrity gossip. It will be argued that the present duality in approach that these cases suggest is a direct consequence of free speech cases being determined, arbitrarily, on the value that the speech or speaker is said to have or serve. This practice is troubling since it tarnishes, if not defeats,

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[6] Eric Barendt, 'Free speech and abortion', *Public Law* (2003): 580, 581.

[7] For a cynical but useful view on whether the principle of free speech can ever be adequately expressed, see Paul Horton and Lawrence Alexander, 'The Impossibility of Free Speech Principle', *Northwestern University Law Review* (1983): 1319.

[8] <www.huffingtonpost.com/mayhill-fowler/obama-no-surprise-that-ha_b_96188.html>.

[9] For example see <www.nytimes.com/2008/04/14/us/politics/14web-seelye.html>.

the unconditional term 'everyone' in Article 10 and yet this practice, if it is a conscious decision, does not seem to have been adopted for reasons that appear desirable or, even, developed. This article argues that, irrespective of the merits of the UK judiciary's articulation of free speech principle so far, Article 10 rights should be applied uniformly and consistently irrespective of the speaker's identity or profession.

Before discussing these points, it is noted that some might say celebrity gossip claims and offensive political speech prosecutions do not bear comparison since the issues in each are so different. In the former, it is for the celebrity to put up a decent 'privacy' claim under Article 8 before the media must defend itself under Article 10. A spate of recent cases has seen the celebrity unable to do so, thus the free speech claim (and its nature) is not explored.[10] This may be contrasted to the latter where establishing the free speech claim is pivotal. Likewise, in the celebrity gossip claim, where the Article 8 claim is viable, it is for the judiciary to balance two competing but equal rights[11] and since privacy is also regarded as a concept that is not yet fully articulated[12] it is perhaps to be expected that some unusual decisions may occur as the interplay between the terms is explored and mapped out. With offensive political expression, the competing aspect is likely to be the public interest in protecting morals, preserving social order or the ever vague 'rights of others'[13] exception rather than some other Convention right. Likewise, the operation of penal legislation in such cases should not be overlooked. Perhaps this makes a difference.

Yet if the right to freedom of speech applies to all then it should be the case that the same principles appear in every decision concerning Article 10, regardless of what is said and who says it, otherwise the claim, inherent in the word 'everyone', that the right to free speech is uniformly applied appears doubtful. Consequently, every Article 10 case should bare comparison. Naturally, the argument put here is more sophisticated than simple fixation on the word 'everyone'; it will be argued that the principles of Article 10 should be applied consistently. Decisions involving celebrity gossip and offensive political speech make for an interesting comparison since the principles expressed in those cases appear isolated and provide stark contrast, suggesting that the imbued value of the speaker or speech is critical to the decision. Thus, it will be argued, there is a skewed treatment at work in which the importance of the journalist's free speech right is exaggerated whilst the non-journalist's is neglected. There may be good reason why Article 10 in the UK

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[10] *John v. Associated Newspapers Ltd* [2006] EWHC 1611 (QB); *Murray v. Express Newspapers Plc* [2007] EWHC 1908 (Ch); [2007] EMLR 22.

[11] See, for example, Lord Hope, in *Campbell v. MGN* [2004] 2 AC 457: 'the effect of these provisions [Article 8 and 10] is that the right to privacy which lies at the heart of [the action] has to be balanced against the right of the media to impart information to the public. And the right of the media to impart information to the public has to be balanced in its turn against the respect that must be given to private life'. [105].

[12] See, for example, Gavin Phillipson, 'Judicial reasoning in breach of confidence cases under the Human Rights Act: Not taking privacy seriously', *EHRLR Supp (Special Issue)* 1 (2003); Brian Pillans, 'Thus far and no further. Are we saying it loud enough?' *Comms. L.* 12, no. 6 (2007): 213; Angus MacLean and Claire Mackey, 'Is there a law of privacy in the UK? A consideration of recent legal developments', *EIPR* 29, no. 9 (2007): 389; Richard Caddell, 'Privacy and confidential documents – the 'secret' diary of Prince Charles: *Associated Newspapers Ltd v. His Royal Highness the Prince of Wales'*, *Comms. L.* 12, no. 2 (2007): 68.

[13] See discussion below.

should be developed in this way but those reasons are neither forthcoming nor obvious. Instead, it seems we are without a developed free speech principle, which after eight years of the HRA is most disappointing.

2. *Connolly v. DPP*[14]

In the recent case of *Connolly*, a sole protester lost her appeal against conviction for sending graphic pictures of aborted foetuses to three pharmacies which stocked the 'morning after' pill. This behaviour was found to be 'grossly offensive or indecent' by the Crown Court and so prosecution under the Malicious Communications Act 1988 followed. The Divisional Court, dismissing the appeal, found that the right of Mrs Connolly under Article 10(1) to express her deeply held belief that abortion was murder did not outweigh the 'rights of others' exception in Article 10(2), including the pharmacy workers' 'right not to have sent to them material of the kind that she sent when it was her purpose, or one of her purposes, to cause distress or anxiety to the recipient'.[15]

The outcome of this appeal is consistent with those in *ProLife*,[16] *Hammond*,[17] *Norwood*,[18] and *Percy*,[19] which also involved suppression of (and, in most, conviction for) 'insulting' expression. Yet, though the court found the behaviour insulting, and mostly for manifest reasons, in each there was clear political behaviour involved that should not be overlooked. In *Connolly* and *ProLife*, the expression concerned abortion. In *Hammond*, it concerned homosexuality. In *Norwood*, it was immigration and/or national security fears and, in *Percy*, it concerned the American armed forces in Britain. Whilst in *Norwood* and *Hammond* the views expressed were particularly odious and in *Connolly* and *ProLife* shocking such reasons ought not to prohibit free speech protection, as European Court of Human Rights decisions have encouraged[20] (though not, necessarily, implemented).[21]

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[14] [2007] EWHC 237 (Admin).

[15] Ibid., [28].

[16] *R. (ProLife Alliance) v. British Broadcasting Corporation* [2003] UKHL 23; [2004] 1 AC 185: See Eric Barendt, 'Free Speech & Abortion', *supra*, n. 6.

[17] *Hammond v. DPP* [2004] EWHC 69 (Admin), *The Times*, 28 Jan. 2004 in which a street preacher was convicted for speeches and signs that conveyed the message homosexuality was morally wrong. See discussion in Andrew Geddis, 'Free Speech Martyrs or Unreasonable Threats to Social Peace? – 'Insulting' Expression and s. 5 of the Public Order Act 1986', (2004) *PL* 853.

[18] *Norwood v. DPP* [2003] EWHC 1564, *The Times*, 30 Jul. 2003, in which conviction followed for the display by a BNP regional organizer of a poster in the front window of his house depicting the image of WTC in flames with the words 'Islam out of Britain' and 'Protect the British People' contained within it. See discussion in Geddis, *supra*, n. 17, and also Ivan Hare, 'Crosses, crescents and sacred cows: criminalising incitement to religious hatred', (2006) *PL* 521.

[19] *Percy v. DPP* [2001] EWHC Admin 1125; [2002] Crim. L. R. 835 in which a sole protestor was convicted for standing on an American flag (her own) in front of a vehicle carrying American servicemen. Whilst her conviction was quashed on appeal, it was not done so because her protest was reasonable but rather because the Divisional Court had misdirected itself in its proportionality test including its failure to consider 'that the accused's behaviour went beyond legitimate protest' instead being 'a gratuitous and calculated insult'. See discussion in Geddis, *supra*, n. 17.

[20] The principle from *Handyside v. UK* [1976] 1 EHRR 737 is that Art. 10 applies to material that shocks and/or offends.

[21] See *Otto-Preminger Institute v. Austria* [1995] 19 EHRR 34; *Handyside*, ibid., where applications involving 'shocking and/or offending' material were defeated because, essentially, the material was shocking and/or offending. Though see, more recently, the decision in *Malisiewicz-Gasior v. Poland* [2007] 45 EHRR 21.

In *Connolly*, the Divisional Court were satisfied that Article 10(1) applied, on the basis that:

> the sending of photographs … was not the mere sending of an offensive article: the article contained a message, namely that abortion involves the destruction of life and should be prohibited. Since it related to political issues, it was an expression of the kind that is regarded as particularly entitled to protection by Article 10.[22]

However, the interference was justified under Article 10(2) because it was (i) prescribed by law by the Malicious Communications Act 1988; (ii) was in furtherance of a legitimate aim, that is, the rights of others; and, (iii) was necessary in a democratic society.

In *ProLife* it was found that the 'legitimate aim' requirement is not limited to 'strictly legal rights',[23] which explains why the House of Lords had no concerns with, effectively, inventing one. The idea was expounded that the 'rights of others' concept 'is capable of extending to a recognition of the sense of outrage that might be felt by ordinary members of the public who in the privacy of their homes had switched on the television set and been confronted by gratuitously offensive material'.[24] This principle was applied in *Connolly*. Restriction was necessary because, despite her plea to the contrary, Mrs Connolly was found, at first instance, to have intended to cause distress and anxiety.[25] Therefore, Mrs Connolly's 'right to express her views about abortion does not justify the distress and anxiety that she intended to cause those who received the photographs'.[26] Further, Dyson LJ, delivering judgment, noted that 'of particular significance is the fact that those who work in the three pharmacies were not targeted because they were in a position to influence a public debate on abortion'.[27] Expanding on this point, he noted,

> in any event, even if the three pharmacies were persuaded to stop selling the pill, it is difficult to see what contribution this would make to any public debate about abortion generally and how that would increase the likelihood that abortion would be prohibited'[28]…'disseminating material of this kind to a number of pharmacists because they sell the 'morning after pill' is hardly an effective way of promoting the anti-abortion cause.[29]

3. *A v. B plc*[30] and Similar 'Celebrity Gossip' Cases

Despite the passage of six years and some doubts expressed on certain aspects of it, the Court of Appeal decision in *A* remains an important source of free speech principles, certainly for interim relief applications, and, as has been said recently, 'it is right that it should be accorded consideration and respect'.[31] Here, the Court, led by Lord Woolf,

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[22] *Connolly*, *supra*, n. 14, [14].
[23] *ProLife*, *supra*, n. 16, [91].
[24] Ibid.
[25] *Connolly*, *supra*, n. 14, [4].
[26] Ibid., [32].
[27] Ibid.
[28] Ibid.
[29] Ibid., [31].
[30] [2003] QB 195.
[31] *John*, *supra*, n. 10, [8].

endorsed the type of strong principles that any free speech advocate would welcome. Yet, even for the advocate, it is perhaps troubling that they were used to ensure the world knew of, (then) Premiership footballer, Garry Flitcroft's extra-marital affair with two women.

In making its decision, Flitcroft's chief concern that the article would have an immediate and devastating effect on his wife and young family was found to be something the Court was in no position to rule upon.[32] The Court found that 'the degree of confidentiality to which A was entitled, notwithstanding that C and D did not wish their relationships with A to be confidential, was very modest'.[33] Therefore, although a prima facie privacy claim might be made at full trial, it was not convincing that such would justify suppressing the free speech claims of B, C and D.[34] The Court resisted the notion that details of the affair were not in the public interest, noting that:

> it is not self-evident that how a well known premiership football player...chooses to spend his time off the football field does not have a modicum of public interest. Footballers are role models for young people and undesirable behaviour on their part can set an unfortunate example.[35]

The Court also found the viability of the media as a commercial entity to be relevant. It stressed, 'the courts must not ignore the fact that if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest'.[36]

The principal doubts expressed on this case may be said to relate to the definition of public interest used, the notion of 'involuntary role model' that was applied and the relevance of the media's commercial viability to the decision. Arguably, Lord Woolf's low level application of 'public interest' is unsustainable given the decision in *Jameel*,[37] in which the House of Lords considered the meaning of the term in the context of the qualified privilege defence to a defamation claim. Their Lordships noted that this defence stems from the general obligation of publishers to report matters of real public interest which the public has a general entitlement to receive. As Baroness Hale suggests, the test of 'public interest' is not of a minimal standard in these circumstances:

> a real public interest…is very different from saying that it is information that interests the public – 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 our being told about it.[38]

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[32] *A*, *supra*, n. 30, 217.
[33] Ibid.
[34] Of C and D, the Court commented that 'although … we would not go so far as to say there can be no confidentiality where one party to a relationship does not want confidentiality, the fact that C and D chose to disclose their relationships to B does affect A's right to protection of the information. For the position to be otherwise would not acknowledge C and D's own right to freedom of expression,' ibid.
[35] *Per* Lord Woolf, ibid.
[36] Ibid., 208.
[37] *Jameel v. Wall Street Journal* [2006] 2 AC 465.
[38] Ibid., [147].

A universal application of this approach has much to commend it, not only from a privacy perspective in that it would protect citizens (not just 'celebrities') from fanciful public interest claims by journalists but also from a free speech stance since, as *Jameel* confirms, a matter of real public interest permits certain false statements to made as long as the test of responsible journalism has been met.[39] It would be a lot less pressing to insist such inaccuracies were justifiable if the public interest test was of a lesser degree.

A differently composed Court of Appeal in *McKennitt*[40] suggested that role model status, and the enhanced levels of responsibility that it is said to bring, is inappropriate for those who fiercely guard their privacy with 'the iron safeguard of a chastity belt'[41] as Ms McKennitt did. The Court in *McKennitt*,[42] also doubted the soundness of both an 'involuntary role model' principle[43] and the view 'that weight must be given to the commercial interest of newspapers in reporting matter that interests the public'.[44] That aside, the finding in *A* that media 'exposure is legitimate to demonstrate improper conduct or dishonesty'[45] holds good. In *A*, Lord Woolf also stated that

> any interference with the press has to be justified because it inevitably has some effect on the ability of the press to perform its role in society. This is the position irrespective of whether a particular publication is desirable in the public interest.[46]

Eady J, a leading high court judge and, seemingly, firm proponent of greater privacy protection in the law,[47] recently described this view as a 'general statement of law that

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[39] This test requires the media to demonstrate that reasonable steps had been taken to verify the publication. See, in particular, ibid., [111-112] and [137].

[40] *McKennitt v. Ash* [2006] EWCA Civ 1714.

[41] Ibid., [6], *per* Buxton LJ.

[42] Ibid., [60]-[66].

[43] Ibid., [65].

[44] Ibid., [66].

[45] Ibid., See, for example, *Campbell*, *supra*, n. 11, where Naomi Campbell had acted immorally by lying about her involvement with drugs and by being hypocritical in her condemnation of other models that did use drugs. That she was photographically captured attending a *Narcotics Anonymous* meeting, where she sought help for her troubles, redeemed her position enough to split the House of Lords decision in her favour. Ultimately, the moral value of her rehabilitation would seem to have outweighed the media's moral crusading in exposing her hypocrisy. By contrast, Ms McKennitt had not 'behaved disreputably or insincerely in any way' and so succeeded in her claim (*McKennitt*, *supra*, n. 40, [68], Buxton LJ affirming the first instance finding of Eady J.). Likewise, in *HRH Prince of Wales*, the intended publication of His Royal Highness's journal, detailing his private thoughts on the handover of Hong Kong to China, did not outweigh the privacy claim since 'there was no question of exposure of any kind of wrongdoing or of hypocrisy' in publication (*HRH Prince of Wales v. Associated Newspapers Ltd* [2006] EWCA Civ 1776, [137]).

[46] *A*, *supra*, n. 30, 205.

[47] *Mosley v. News Group Newspapers Ltd* (2008) EWHC 1777 (held, no genuine public interest in clandestine sensationalist reporting of FIA chief's sexual proclivity); *P v. Quigley* (2008) EWHC 1051 (held, no conceivable public interest in allowing M, an individual, to write a 'fictional' account detailing sexual antics of P & Q, two other individuals); *Prince Radu of Hohenzollern v. Houston* (2007) EWHC 2735 (held, free speech claim failed because journalist had not written a balanced account and had made serious allegations without the opportunity to respond being given); *CC v. AB* (2006) EWHC 3083 (an injunction granted to prevent disclosure of an adulterous affair; there was not necessarily any genuine public interest in the story and it was relevant that wife was acting out of spite or in revenge) cf. *A v. B plc*, *supra*, n. 30; *X v. Persons Unknown* (2006) EWHC 2783 (injunctive relief granted to a couple in public eye going through marriage difficulties), *McKennitt v. Ash*, (2005) EWHC 3003 (QB) (in which he found for Ms McKennitt, a decision reaffirmed on appeal, see discussion above). Incidentally, although not an Art. 8 decision, Eady J decided against Wall Street Europe Sprl in the first instance decision of *Jameel* (2004) EWHC 37, finding, instead for the prominent Saudi Arabian businessman and his company who had been accused by the Defendant of being monitored by the central bank of Saudi Arabia in case funds were transferred to terrorist organizations.

remains valid'.[48] Thus, the success of the media's free speech claim may not depend on establishing a public interest: 'in other words, it is not necessary to demonstrate, in the case of a tabloid publication in particular, that the contents of an article or the content of photographs is desirable in the public interest'.[49] Therefore, the question of public interest would seem to be a double-edged sword for the media. Whilst the absence of public interest does not (necessarily) affect the free speech claim (though it may assist the privacy claim), the presence of public interest most likely strengthens it (whilst also weakening the privacy claim by the same degree).

4. The Practice of Judgments Based on Value

In approaching the question of permissible interference, the European Court of Human Rights endorses what has been called a taxonomical approach[50] to free speech in which speech is classified in a hierarchical fashion. At the top of the list is political expression followed by artistic expression then commercial expression. The European Court of Human Rights is content that differing standards of justified interference may be applied to each.[51] Yet, as Lord Hoffmann has made clear in *In Re McKerr*, in interpreting and applying the Convention rights, 'their meaning and application is a matter for domestic courts, not the court in Strasbourg'.[52] The UK judiciary, therefore, has the opportunity to develop the free speech principle in such a way that it does not decide cases based on arbitrary value determinations of the speech or speaker involved. As *A* and *Connolly* (and other cases involving unpopular speech) suggest, the UK judiciary is yet to avail themselves of this opportunity. Amongst other reasons, it should seek to do so since the practice of attributing a value to speech behaviour is manifestly unsafe. The value that an audience, any audience, may derive from speech behaviour will vary and, therefore, there is a significant danger that the judiciary's estimation of that value does not represent all the manifold assessments that the audience may make. Thus, how can the judiciary be sure that its assessment of value is, in any way, reliable? It has been said by American scholar Cass Sunstein that 'it is impossible to develop a system of free expression without making distinctions between low and high value speech, however difficult and unpleasant that task may be'.[53] The truth of this observation has been severely doubted by others[54] but, regardless, it may be said that given the unreliability of an approach to free speech based on value, the UK court should consider more thoroughly whether an alternative

[48] *John*, *supra*, n. 10, [8].
[49] Ibid.
[50] Tony Martino, 'In conversation with Professor Eric Barendt: hatred, ridicule, contempt and plain bigotry', *Entertainment Law Review* (2007): 48, 51.
[51] For example, see *Casado Coca v. Spain* (1994) 18 EHRR 1. See also, Harris, O'Boyle & Warbrick, *Law of the European Convention of Human Rights*, (Butterworths, 1995), 397.
[52] *In re McKerr* [2004] 1 All ER 1049, [65].
[53] Cass. R. Sunstein, 'Low Value Speech Revisited', *Northwestern University Law Review* 83 (1989): 555, 557.
[54] In particular, see Larry Alexander, 'Low Value Speech', *Northwestern University Law Review* 83 (1989): 548.

approach would be desirable. In any event, it may be said that whatever system is adopted, it should be applied consistently.

It may also be questioned whether, in making such judgments based on value, the UK courts are consistently approaching the issue from the same perspective. In a case like *A* it would seem that the court had the readers' (or audience's) perspective (as well as the speaker's) firmly in mind, whilst in a case like *Connolly*, it would seem that the bystander's perspective[55] was dominant.[56] Admittedly, the question of which perspective should govern the judiciary's development of Article 10 is a more complex issue than can be discussed in this article but, in any event, it may be said, likewise, that whichever perspective is considered critical, that perspective should be applied consistently. This is in keeping with the wording of Article 10, which protects the right to *receive* information in addition to the right to distribute it. However, the approach undertaken in *Connolly* suggests this right to receive is limited to information that the audience wishes to receive which seems somewhat at odds, facially at least, with the idea that Article 10 extends to material that shocks and offends[57] especially in the context of political speech.[58] Article 10 thus contains an inner conflict between speaker and audience and makes the question of which interest should dominate (the speaker's or audience) an important one to decide.

In one sense, the conflict is diminished if the audience interest is not used in competition with the speaker's but, instead, is used to bolster it. However, such accommodation further emphasizes the division between popular and unpopular speech so that popular speech enjoys the benefit of (potential) extra protection based on the audience's willingness to receive whilst unpopular speech gains no such protection. Thus the audience impact may swing accordingly from a positive justification to protect speech under Article 10(1) to a negative justification to interfere with it under Article 10(2) based on whether the audience appreciates what it hears or not. This has an obvious, direct bearing on how robustly the principle of free speech can be protected.

It may be said that since the recipients in *Connolly* were members of an unwilling audience they could be considered 'bystanders'. Admittedly, the impression of detachment inherent in the term 'bystander' may seem at odds with the facts of *Connolly* since the pharmacy workers were not detached from the speech but, rather, were the target of it. However, given that the term 'bystander' in a free speech context is applied to those who hear 'speech' without necessarily wishing to, the label may be accurate. Thus in *Connolly*, it would seem the bystander's third party interest was given greater consideration than the speaker's, unlike in *A*. An argument in favour of the audience and bystander interests being diminutive of the speaker's is advanced below.

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[55] See discussion of bystander interests in Thomas Scanlon, 'A Theory of Freedom of Expression', in *The Philosophy of Law*, ed. R. M. Dworkin, (OUP, 1977), 153, (which, coincidentally, follows an article by J. Finnis entitled 'The Rights and Wrongs of Abortion', 129).

[56] For a useful discussion of how free speech theories may be constructed according to these competing perspectives, see Barendt, *Freedom of Speech*, *supra*, n. 3, 23-30.

[57] *Handyside v. UK* [1976] 1 EHRR 737.

[58] E.g, *Gunduz v. Turkey* [2005] 41 EHRR 5.

The reference to consistency in the above points does assume that the judiciary are not applying the free speech principle consistently at present. Admittedly, this charge needs to be answered. Ignoring, for the moment, any differences in procedural issues involved, it is submitted that the principles of free speech expressed in the cases discussed above are markedly different. Though it may be said that a value is placed on the speech in each instance, perhaps the clearer impression gained is that the journalist would seem to have a more robust right than the non-journalist, for reasons that will be outlined shortly. Yet, assuming for the moment that this is true, it is unclear why this should be so. Article 10 gives no special standing to the media and neither does European jurisprudence. Indeed, in *Steel and Morris v. UK*[59] the government's argument that the Applicant protesters against McDonald's restaurants should not attract the high level of protection afforded to the media on account of being non-journalists was rejected by the European Court of Human Rights as irrelevant.[60] Admittedly, the European Court of Human Rights has said much about the vital role that the media has in society as a public watchdog, as in *Jersild v. Denmark*,[61] and more recently *Tonsbergs Blad*[62] but it tends to make such statements in circumstances where journalists are imprisoned or fined for reporting on matters of genuine public interest (as in *Jersild*, where the journalist was convicted and required to pay a fine or else be imprisoned) and not, as *Steel and Morris* confirms, in order to make some distinction between journalists and non-journalists in its interpretation of Article 10. Thus the Court gives no special status to journalists within the term 'everyone'. This assessment bears some comparison with the pre-HRA UK approach. In *Spycatcher*, Sir John Donaldson MR was forthright on the point:

> I yield to no one in my belief that the existence of a free press…is an essential element in maintaining parliamentary democracy and the British way of life as we know it. But it is important to remember why the press occupies this crucial position. It is not because of any special wisdom, interest or status enjoyed by proprietors, editors or journalists. It is because the media are the eyes and ears of the general public. They act on behalf of the general public. Their right to know and their right to publish is neither more nor less than that of the general public.[63]

Likewise Bingham LJ (as he then was) stated, in the same case, 'neither the press nor any other medium of public communication enjoys (save for exceptions immaterial for present purposes) any special position or privileges'.[64]

The rhetoric of *A*, as reiterated in *John*,[65] suggests that any interference with a journalist's exercise of free speech must be justified because it will inevitably have some effect on their ability to act as public watchdog ('the *A* principle'). If there is no special status for journalists then it should be that this principle can be applied universally. In the following sections, a number of points will be made to test this assertion and so discuss

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[59] [2005] EMLR 15.
[60] *Ibid*., at [89].
[61] [1995] 19 EHRR 1.
[62] *Tonsbergs Blad as and Haukom v. Norway* (2008) 46 EHRR 30, [82].
[63] *Attorney General v. Guardian Newspapers (No. 2)* [1990] 1 AC 109 at 183.
[64] Ibid., at 218.
[65] *Supra*, n. 10.

what impact the consistent application of the *A* principle would have for non-journalists' free speech right. In doing so, it will be argued that the *A* principle should be applied consistently and, thus, the common law should not be developed to give journalists a special status under Article 10. To make these points, it will be considered, first, whether it may be said that the first part of the *A* principle – that any interference must be justified – already operates for non-journalists and so whether it is misleading to suggest some distinction is operating; second, and linked to this first point, whether the reference to 'public watchdog' renders application of the *A* principle to the non-journalist inappropriate; and, third, whether the operation of certain procedural issues require different treatment for the journalist and non-journalist.

4.1. Interferences must be justified

It is, first, useful to explore a potential rejoinder that application of the *A* principle would have no bearing on the outcome of a case like *Connolly*. In *A*, the interference with the media's free speech was not justified though it could be said that this was due to the facts not the principle behind it and had the facts permitted otherwise (e.g., if they had been closer to those in *Campbell*[66]) then an interference with the media's free speech may have been justified. In *Connolly*, the interference with Mrs Connolly's expression was justified because she had acted in a manner that deeply offended and/or disturbed a number of people. Thus, there is no distinction operating between the right of Mrs Connolly and newspaper B; Mrs Connolly was not deprived the right to free speech but the right to behave in a harmful way. So where is the problem?

The problem, so to speak, is with the identifiable though largely unspoken assumptions and perceptions which frame the court's approach to these free speech cases and, thus, promotes a different treatment of journalists compared to non-journalists. It is submitted that the influence of these assumptions and perceptions about each individual's Article 10(1) right underpins the method by which judges reach their determinations on the applicability of Article 10(2). These assumptions and perceptions, at work, manifest themselves, for the media, in the grandiose term 'public watchdog'. This gives the journalist a certain advantage: the media is a public watchdog and, thus, an important speaker. Any interference affects the journalist's ability to act in this way and, thus, the qualities of the particular news item are irrelevant to determining whether this interference is justified. This value is attributed directly to the journalist (not his output) but there is no equivalent consideration applicable for the non-journalist.

Naturally, the notion that the quality of the journalist's speech is irrelevant is an important principle. Yet the decisions in *Connolly* and *ProLife* appear most troubling because they suggest that the quality of the speech (or speaker) *is* relevant when determining the right for non-journalists. In *Connolly*, for example, the court thought it

[66] *Supra*, n. 11.

important to say that Mrs Connolly's speech could not have achieved the ends she intended. Thus the quality of the speech was relevant to the justifiability of interfering with it. This is in stark contrast to *A*, where the Court found quality to be a matter for the consumer not the court.[67] This aspect of the decision in *Connolly*, in particular, should not sit well with the free speech advocate. The guiding principle should be that if the speaker chooses an ineffective method to speak, by yelling from some lonely outcrop, that is entirely a matter for them. Instead, it seems that, when considering the justifiability of interference, a different, higher standard applies for journalists compared to non-journalists.

Yet, it may be argued, the interference in *Connolly* had little to do with quality (despite the Court's reference to it) and, instead, related to the willingness of the observer to view the images. As noted above, the 'audience' in *Connolly* were unwilling spectators who had had the images thrust upon them. This may be compared to a journalist's audience who, in buying a newspaper, say, are actively seeking to receive the journalist's views. In the event of interference, the argument can be put that there are different considerations involved when protecting an unwilling audience and depriving a willing one. This is a valid point. Yet the differences between the two types of recipient seem superficial. Consumers of the media may have tacitly accepted, through their freely-made decision to purchase, the risk of encountering information that shocks or offends them. The recipients of Connolly's information made no such choice. Yet those willing consumers of the media may argue that their decision does not rob them of their sensibilities or opportunity to object. Consider the individual who turns on the television midway through a harrowing report containing a series of shocking images. Though the consumer has agreed to expose themselves to information by switching the television on, there can be no implication of clairvoyance to know how that information will appear and whether shock or offence will follow.

Yet there are sound reasons why the media should – perhaps must – provide shocking images if the context requires it as they seek to inform the public of 'the truth'. There is no real benefit to insisting upon sanitized news-reporting; the arguments in favour of sanitization to protect the public would give licence to propaganda and misinformation. Likewise, a mature democratic society is expected to have a strong constitution in order to make informed decisions on complex moral issues such as crime, war and health (including abortion).[68] Thus, it is in the public interest to be informed, which weakens objections by citizens who feel upset following exposure to such images. It is the right of such individuals not to participate in the democratic process (or part of it) and thus that right is secured by their ability to switch off once they have formed their objection. Having made this point for the media, on the basis of the public interest in informing society, regardless of whether that society wishes to be informed or not, then it seems plausible

[67] See discussion below (n. 75).

[68] See, for example, Lord Hoffmann's speech in *R v. Central Independent Television plc* [1994] Fam 192 discussed below.

that the same argument can be made for the non-journalist. In those circumstances, the citizen has the same right not to listen and can freely choose to ignore the information they are presented with. There is a difference between being forced to endure prolonged exposure of disturbing information and the choice to disengage following indignation at the initial receipt. Once Connolly's actions were clear to the pharmacies affected her communications could have been ignored.

4.2. Relevance of the Public Watchdog Function

A further reason why this higher standard for interfering with media speech appears unsafe is that it overlooks or else ignores the capacity of the protester – or any non-journalist – to act as public watchdog. Whilst in *Connolly* the court acknowledged in passing that Mrs Connolly's behaviour was political expression, it did not examine whether this imbued Mrs Connolly with the same, or similar, type of public watchdog status that she, presumably, would have had had she been a journalist.[69] In such circumstances, it is hard to see how her speech would have been denied Article 10 protection if printed in a newspaper (which would have reached, and so affected, a great many more people than workers at three pharmacies). Further, the argument may also have been put that a mature democratic society is capable of tolerating the type of shock and offence that results from such speech (as above). Admittedly, the court may still have denied protection but given European Article 10 jurisprudence (e.g., *Jersild*, *Tonsberg Blad*) that outcome is not pressing and, arguably, it would have involved a finer balance than was evident in *Connolly*.

The argument may be put that non-journalists may also act as a public watchdog or public conscience and so the importance of free speech is not peculiar to the media. Though the media can reach a higher proportion of the public (perhaps), including those in a position to affect change, than the individual can, the media may also decline to pursue particular causes because it is not expedient, financially or politically, to do so. The media do not necessarily represent the public in their views. Though, in one sense, the media should be seen as independent and so able to report as they see fit, inevitably they are driven by market forces, which surely taints their claim to independence. Further, is it still appropriate that the media be considered an adequate representative of the public's voice? If the populace should maintain a healthy scepticism about what government says, it should also treat a corporate-driven media in the same way. Thus, the populace should be no more inclined to trust the media than the government. Accordingly, the populace requires equal free speech protection for the non-journalist in order to preserve its integrity and independence of thought, ideas and information. A robust system of free speech does not require the media to be given disproportionate protection; it requires unpopular speech to be given protection. As the dissenting judges in *Otto-Preminger* lamented, 'there

[69] E.g., as in *Jersild*, *supra*, n. 61, and *Tonsbergs Blad*, *supra*, n. 62. See discussion above.

is no point in guaranteeing this freedom only as long as it is used in accordance with accepted opinion'.[70]

Also, of the ability of the individual to reach a large audience, the role of notoriety should not be overlooked. Offensive and shocking material may provide the non-journalist with a platform that would otherwise have been unavailable had the speech been anodyne. This is particularly important for political behaviour. Despite the suggestion by the court, a letter from Mrs Connolly to her local MP would not necessarily have resulted in the media attention for her cause that she did attract using shock tactics; if anything, this approach would have been more ineffective than her actions. In any event, the notion of 'effectiveness' cannot be confined to participation in actual political debate. Take the man standing in front of the tank in Tiananmen Square.[71]

4.3. Procedural differences in determining these cases

Yet what of the procedural differences apparent in celebrity gossip cases and offensive political speech? Do they necessitate some distinction between the types of speaker? As noted, in the former, demonstration of the privacy claim is a prerequisite. For the latter, typically the appellant court is hamstrung by matters of fact decided at first instance, including determinations of intention and whether the behaviour was offensive enough to engage the penal legislation. Additionally, prosecutions that require legislation to be interpreted in accordance with Convention rights raise the politically sensitive issue of compatibility; this is not an issue typically present in celebrity gossip cases. It is not overlooked that in *Connolly*, penal legislation was in operation. Yet this should not affect the points raised in this article. If the court were to find that such legislation interfered with its ability to apply free speech principles consistently then it should issue a declaration of incompatibility[72] if it cannot read the legislation compatibly.[73] For both categories, precedent may also dictate the result.

Arguably, these matters of procedure can and must be swept away (though, of course, precedent could only be done so at the appropriate level). Section 6 of the Human Rights Act 1998 requires rights to be applied in a manner consistent with the Convention by each level of the court. As Geddis has argued, rather than apply the usual *Wednesbury* unreasonableness test, the appellant courts should ensure 'the lower court has applied the *correct* interpretation…and not merely reached a *reasonable* decision on the matter'.[74] Difficulties with the term 'reasonable' are particularly pronounced in free speech cases, especially those involving unappealing speech, since it may *always* appear reasonable to

[70] *Per* Judges Palm, Pekkanen and Makarczyk, *Otto-Preminger*, *supra*, n. 21, [3] of their dissenting judgments.

[71] It could be said this example somewhat contradicts the argument made above since it was the mass media that brought this image to popular attention, without which it would have been an ineffective message, perhaps. However, equally, it could be said that it was entirely because the protestor's action were so dramatic that the media were interested. Had he stood forlornly holding some banner, it is highly unlikely the media would have been interested.

[72] Section 4, HRA 1998.

[73] Section 3, HRA 1998.

[74] Geddis, *supra*, n. 17, 867.

deny protection to such speech because others are offended, shocked or insulted as a consequence but, arguably, that 'reasonableness' does not make the decision correct.

5. Applying the *A* Principle to *Connolly*

If it may be said that it is appropriate to construe the *A* principle for the non-journalist, the following considers whether such application would have affected the outcome in *Connolly*.

First, the form of speech would be an irrelevant consideration, as it is for the media. As the Court in *A* concluded:

> once it is accepted that the freedom of the press should prevail, then the form of reporting in the press is not a matter for the courts but for the Press Complaints Commission and the customers of the newspaper concerned.[75]

Yet how might this analysis apply to the non-journalist since, admittedly, such are not subject to scrutiny by the Press Complaints Commission. This is an important point although how critical it is may be doubtful given that the ability of the PCC to effectively scrutinize and discipline the media (where necessary) is often criticized as inadequate.[76] Newspaper customers are the media's audience as are anyone who hears the non-journalist's speech. Like the customer, the non-journalist's audience can choose to ignore that speech if it disapproves. Admittedly, in *Connolly* it was not just the form of speech but the level of distress and anxiety caused that tipped the balance. Also, it may be said that the recipients were not able to ignore the speech because they were an unwitting audience. This too is an important point, and not one that should be easily dismissed, though of the distress and anxiety caused by exposure, the approach taken in *A* provides an interesting comparison. Here, Garry Flitcroft argued that publication would cause unnecessary distress and anxiety to his wife and children. In dismissing this concern, Lord Woolf endorsed Lord Hoffmann's analysis in the *Central Television* case:

> Publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which 'right-thinking people' regard as dangerous or irresponsible.[77]

It is fair to say these words appear hollow in the context of Garry Flitcroft's sexual antics but they appear hollower still in light of *Connolly*. Applying this principle to *Connolly*, it could have been said, arguably, that societal membership demands a strong constitution for even graphic images if they have political content.

Admittedly, the graphic, shocking and unexpected nature of Connolly's speech cannot be easily dismissed. It could be said that *Connolly* should have adopted a more

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[75] *A*, *supra*, n. 30, [48].
[76] See Louis Blom-Cooper, 'Press freedom: constitutional right or cultural assumption?', *Public Law* (2008): 260.
[77] *Central Independent Television*, *supra*, n. 68, 204.

responsible approach to delivering her message and perhaps should have directly approached the media to report on her protest (or her local politician as the court suggested). Yet, the second point that might be made is that such an argument suggests the non-journalist must exercise their free speech right in a particular, restricted, way. Although this position may appear akin to that of the journalist, (who would also be at the whim of his/her editor as to whether publication occurred) arguably, such a requirement weakens the notion of free speech for the non-journalist more than the journalist. The media would have been under no obligation to listen to Mrs Connolly (she may have been dismissed as a crackpot) whereas a journalist would be better placed (though not guaranteed) to have their story seriously considered. Whilst on the one hand it may be concluded this is consistent with the principles of free speech since it is not a right to be heard or a right to demand that protests are actioned, on the other, it is troubling that a protesters outlets for free speech purposes may be so constrained.

Third, of the distress and anxiety caused, the judgment suggests some qualitative difference between sending the letters to pharmacies and doctors or politicians instead. The basis of this seems obscure. In favour of it, it could be said that doctors have stronger constitutions for this type of material whilst politicians, as the European Court of Human Rights has acknowledged, are taken to have sacrificed certain sensibilities in exchange for public office. However, the logic of this position is not entirely compelling. First, if it is permissible for pharmacy workers to object these images then it is difficult to understand why doctors and politicians cannot either. European case law confirms that politicians have a more limited right of objection to speech than others do when they accept public office[78] but the principle is usually deployed where politicians object to offensive comments about their reputation and seems rather less appropriate should they object to speech that is offensive per se and has no connection to their reputation. Second, on a practical issue, it should not be overlooked that mail sent to doctors and politicians will undoubtedly be opened by a receptionist or secretary. Likewise, an operative in the post room could have opened the letters in the event Connolly had sent them to the newspaper. In practical terms, it is difficult to see the difference between those operatives and the pharmacy workers.

Yet, had it been a newspaper or television station that had displayed these images there would have been less scope for arguing that the distress and anxiety to be caused by the images would justify their suppression. In such circumstances, the court could have applied the principle from the Court of Appeal decision in *Secretary of State for the Home Department v. Central Broadcasting Limited*,[79] where Sir Thomas Bingham MR (as he was then) held that it was unnecessary for the families of the victims of a convicted serial murderer to find his interview in a TV documentary distressing since 'all that anyone has to do is switch off the programme',[80] particularly as it contained an introductory

[78] As *Malisiewicz-Gasior*, *supra*, n. 21 reiterates.
[79] (1993) EMLR 253.
[80] Ibid., 271.

warning that some viewers may find the content troubling. Likewise, though it may seem counterintuitive, the argument that distress and anxiety would follow from viewing such images would diminish where the image was put before a larger audience since a greater range of responses and reactions could be envisaged.

6. An Undeveloped Approach to Free Speech

It is important to note, though, that this argument is not intended to say that Mrs Connolly, ProLife or anyone else should be permitted to show deeply disturbing images to whoever they like. It would be abhorrent to suggest they should. Instead, the argument is put that interference with the exercise of the right should be done on a consistent basis so that the same standard applies to the journalist and non-journalist. Determining cases by measuring or attributing a value to either the speech or speaker is inappropriate and, moreover, is inconsistent with that system. Thus, it is disappointing that these principles, from *Connolly* and *A*, may be developed in future cases as promoting some rudimentary cost benefit analysis approach to deciding free speech rights. Judges may assume that the value identified either in, or despite, the effect of the speech is determinative. In this way, the journalist will enjoy the benefit of a wide margin on account of their 'public watchdog' status unless there is something particularly unwholesome about their behaviour[81] whilst the protestor may be forced to self-censor, especially where their speech is generally held to be unappealing, since the value of shocking or offending a great many people will rarely, if ever, be thought to be valuable. Yet the word 'everyone' demands equal treatment and so the same principles must apply in all Article 10 cases. It is one thing to have a system of free speech, available to all, which is controlled by rules or standards that may appear too relaxed, too restrictive or somewhere in between. For such a system it becomes a matter of argument whether the level of control exercised by the State is appropriate or not. It is altogether a different affair to have a system that applies relaxed rules to some individuals and restrictive rules to others, so that some individuals are permitted to speak freely but others not, by reference to some overarching argument that value or values are served to society at large by such distinctions. The wording of Article 10 suggests the former system should apply but its application, certainly in the UK, evokes the latter.

If the case is to be made for this skewed treatment then the reasons for its appropriateness in the UK seem largely unarticulated and, where they are barely articulated, they seem outmoded or else opaque. The argument that celebrity gossip should be protected under a free speech clause on account of its connection to the media's role as public watchdog remains largely elusive. It seems premised on the idea that the media require such flexibility in order to promote their investigative prowess to uncover corruption, deception or immorality in those that hold power, wealth or fame. Thus, to deny

[81] E.g., as in *Campbell*, *supra*, n. 11.

journalists in a particular instance would affect, in a detrimental manner, their overall capacity to expose corruption etc., when it counts. Yet, whilst this may be convincing to some – though surely only in principle – it remains difficult to see how a Garry Flitcroft-type individual fits in. Of course, it is not forgotten that this principle comes with the caveat that journalists should not overstep the mark,[82] and may be stopped from doing so, but then we can be assured that they are unlikely to do so on many occasions since the mark seems readily capable of being washed away and redrawn somewhere else whenever the circumstances call for it. So whilst the exposure of illegal drug-taking is past the mark, if done in a manner that is too insensitive,[83] that same mark seems to disappear where extra-marital affairs – morally but not legally reprehensive behaviour – of the rich and famous are involved.[84] Admittedly, the analysis can be spun differently but these are fine distinctions that are ultimately built around the idea that a free press – another unarticulated principle by which the Judiciary tend to mean traditional media sources – requires this inflated power because it acts as a public watchdog. Yet, this idea is in danger of becoming outmoded since it overlooks both the increase of media outlets that have little or no obvious or identifiable interests in pursuing a public watchdog outlook – particularly the magazines that focus solely on celebrity gossip – and it neglects increasing concerns over the commercial viability of the printed media as it battles against internet and 24-hour television stations as the preferred news source for many people. Of this last point, arguably, newspaper editors may feel unable to devote as many column inches to political comment and debate if it is thought that celebrity gossip or commercial advertising will generate more sales. The capacity to act as public watchdog may be compromised as a consequence and thus the idea that any interference affects their ability may be misplaced.

Further, in *Connolly* and *ProLife* since the message was of a political nature, greater consideration should have been had to the principle that participation in a democratic society requires toleration of opposing views even where they are received as shocking and offending. This is a factor which should transcend any need for effectiveness. As Baroness Hale noted in *Campbell*,

> some [types of speech] are more deserving of protection in a democratic society than others. Top of the list is political speech. The free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy.[85]

If freedom of expression extends to behaviour that is shocking and/or offensive how is this to be realized as a right unless offensive political behaviour (in particular) is protected? As Scanlon has noted, freedom of expression requires 'a good environment for the

[82] *Jersild*, *supra*, n. 61.
[83] *Campbell*, *supra*, n. 11.
[84] *A*, *supra*, n. 30.
[85] *Campbell*, *supra*, n. 11, [148].

formation of one's beliefs and desires'[86] so that ideas and information may be cultivated and exchanged; it does not require ring-fencing so that only popular, orthodox or anodyne ideas and information are protected. The UK courts should heed the warning from Strasbourg that 'there is little scope under Article 10(2) of the Convention for restrictions on political speech or on debate on questions of public interest'.[87] Though the European Court of Human Rights noted that contracting states have a certain margin of appreciation in assessing whether a 'pressing social need' exists to justify interference, the court stressed that 'it goes hand in hand with European supervision [that] the [European] Court is … empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression'.[88]

It is recognized that an important argument for affording the media a wide margin is that otherwise the courts may appear too heavy-handed, causing a 'chilling effect' on speech, thus unduly restricting editorial freedom and affecting the media's public watchdog role. It would not be in the public interest if editors felt inhibited when placing stories concerning matters of genuine public concern. Yet, it may be said that if this is a relevant judicial consideration then there must be an equally pressing and corresponding principle that if the court is too heavy-handed in prosecuting those who voice political concerns (albeit using less than courteous methods) then more people may be dissuaded from passionate dissent for fear of the consequences, which would also not be in the public interest. Though one might be tempted to be dismissive of why unpopular speech should be protected, it is important to note the argument that 'free speech is of value, precisely because it enables radicals to challenge established orthodoxies and received wisdom, including our conventional understandings of what is tasteful and decent'.[89] At a general level, it is troubling that the court may deny protection for speech it dislikes and, moreover, it is troubling that it may apply a different set of rules for the media compared to the individual for reasons that are not entirely clear.

7. Conclusion

It is not enough to say that the media remain an outlet for the Connolly-type protestor who wishes to publicize their cause. There is no guarantee that the media will show any interest in a story and it is probably more accurate to say that the media's interest in such a story depends entirely on whether they can see a spin or side to it that will suit their (ultimately, financial) interests. Yet protesters like Connolly, who have passionate views on subjects deeply important to them, will still want to have their say regardless of whether the media (or doctors or politicians) are receptive to assisting them. In order to gain public attention, if that was her aim, it is no wonder protesters like Connolly resort to

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[86] Thomas Scanlon, 'Freedom of expression and categories of expression', *University of Pittsburgh Law Review* (1979): 519, 527.

[87] *Malisiewicz-Gasior*, *supra*, n. 21, [57].

[88] Ibid., [58].

[89] Barendt, *Free Speech and Abortion*, *supra*, n. 6, 590.

drastic shock tactics that are likely to grab the public's attention, if only through infamy. Naturally, this is not to say that Connolly's actions were the paradigm example of free speech but, rather, that the public interest inherent in her cause ought not to have been so apparently impotent to her free speech claim. It would not have been so easily ignored if she had been a journalist.

This article has sought to show that, at present, there is a duality operating in free speech cases where the free speech right of journalists enjoys a higher level of resistance to justifiable interference than the right of the non-journalist. An overarching solution to the problem is for the UK to determine and implement a fully theorized approach to free speech principle. However, this solution will not be easily achieved. As noted, it is beyond the scope of this article to articulate such, not least because it is a complex task that is not aided by the persistent disagreement within the global academic community of how that theory would appear. Yet this disagreement is largely irrelevant since it does not matter that global academics disagree; it only matters that the UK is able to agree on a unified approach for immediate implementation. Whether this is the judiciary's task, the executive's or Parliament's is, perhaps, debatable. Given that free speech stems from the common law, and may return to it if the next government repeals the Human Rights Act 1998 without replacing it, arguably, the judiciary are not just the best placed to deal with this but are the only government branch to be trusted with the task. Admittedly, some may find this solution inconsistent with our Parliamentary democracy. Yet the inadequacies and, frankly, dangers of allowing the democratic majority to determine the limits of permissible speech have long been recognized: as Mill said,

> I deny the right of the people to exercise such coercion, either by themselves or by their government. The power itself is illegitimate. If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.[90]

The shape of free speech, therefore, must remain exclusively the judiciary's domain. It is their duty to protect it. Admittedly, it may be overly optimistic to expect the judiciary to agree absolutely on how that unified principle may appear. The Court of Appeal and House of Lords decisions in *ProLife*[91] evidence the significant differences between judges on free speech principle. Yet, should it remain in force, the effect of the Human Rights Act 1998, arguably, is that it requires the judiciary to act as a quasi-constitutional court when determining cases involving Convention rights. From that perspective, the onus is on the judiciary to focus on the development of these Convention rights and the constitutional issues in their application rather than be lead, say, by statutory interpretation and application. Though it may be a difficult task to formulate a unified principle, it should remain their task.

A more focused solution to the problem highlighted by this article is to suggest that the UK judiciary adopt, as an initial step to a unified principle, a consistent

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[90] J.S. Mill, *On Liberty*, (London: Routledge, 1991), (1st edn, 1859), 28.
[91] *Supra*, n. 16.

approach when determining Article 10 cases so that the principles applied are universal to journalists and non-journalists. This does not require acceptance that, particularly, odious political expression has value (it is not hard to argue that it does not) but rather requires recognition of the problem: if the concept of free speech is to be valued then there is no place for judgments based on value. This may require a cultural change. It may require recognition that the need for media outlets to maintain their financial viability may compromise, or it may focus, their effectiveness as public watchdogs. Into this void, should it appear, may step the non-journalist – be that the political pressure group or the politically concerned individual or 'blogger' – each of whom may also be equally valuable public watchdogs. These individuals may wish to say things that others do not want to hear, not least because they are not an orthodox source of information. As Lord Denning once said, it may appear there is no public interest to be served in publication 'but this is where freedom of speech comes in. It means freedom, not only for the statements of opinion of which we approve, but also for those of which we most heartily disapprove'.[92] Until that idea is consistently upheld it will remain the case that free speech is not valued when only valued speech is free.

[92] *X (A Minor) (Wardship: Restriction in Publication), Re* (1975) Fam 47, 58.