

1. Introduction

The unauthorised disclosures by Chelsea Manning and Edward Snowden represent a significant turning point, indicative of a future whereby large quantities of official information can be leaked and where not only the disclosures but the discloser may traverse geographical and jurisdictional boundaries.¹ Despite this, the act of making an unauthorised disclosure or 'leak' of official information is not a new phenomenon. The United Kingdom has witnessed several high profile instances of leaking in the last 30 years.² The difference between then and now is that anonymous posting of brown envelopes containing photocopied documents to journalists has been replaced with memory sticks and online outlets to facilitate disclosure. As a consequence, the volume of leaked documents and an increased preparedness of outlets such as Wikileaks to publish documents in their pure un-redacted form has left governments and the organisations tasked with state security struggling to keep up.

The Manning and Snowden leaks provide a unique and unparalleled insight into the work of the Armed Forces, diplomatic services and intelligence services, respectively. The leaks also highlight the lack of transparency and oversight of these activities. Post 11 September 2001, there has been a marked increase in data collection and retention. Intelligence gathering and sharing has become increasingly reliant on a network of global partners.³ Whilst such collaborative efforts act as a powerful defence against acts of terror, the actions present considerable

¹ For general reading on the background to the leaks see in particular Luke Harding, *The Snowden Files: The Inside Story of the World's Most Wanted Man* (Guardian Books, 2014); Glenn Greenwald, *No Place to Hide: Edward Snowden and the Surveillance State* (Hamish Hamilton, 2014).

² For coverage of unauthorised disclosures using traditional methods see further Nicholas Jones, *Trading Information* (Politicos, 2006), and Harold Chapman Pincher, *Chapman Pincher: Dangerous to Know* (Biteback Publishing, 2014).

³ See generally, James Igoe Walsh, *The International Politics of Intelligence Sharing* (Columbia University Press, 2010) and Hans Born, Ian Leigh and Aidan Wills, *International Intelligence Cooperation and Accountability* (Routledge, 2011).

challenges to the well-established rights to privacy and freedom of expression.⁴ The threat of terrorism, at least from the perspective of the United Kingdom, can no longer be boiled down to a geographically fixed location. Terrorists can, and do, operate across multiple jurisdictional boundaries, by physical movement and by their usage of electronic communication. Moreover, individuals may increasingly become radicalised without needing to leave the comfort of their own homes. The emerging threat of so-called 'lone wolf' and 'self starting' terrorism is now a reality in the United Kingdom, placing intelligence and police agencies with finite resources under greater pressure than ever before.⁵

The Snowden revelations, in particular, identify a key problem with unauthorised disclosures, particularly where they impact beyond the domestic jurisdiction. Whilst acts of spying may be legal and otherwise accepted on justifiable policy grounds by the government and intelligence services in one jurisdiction, such acts may be in breach of another country's laws or accepted standards. As unauthorised disclosures become a globalised issue, a government employee faced with a crisis of conscience must make a judgement as to whether they should leak the information, raise the matter through official channels, or keep quiet. A leak of information may be perceived by the individual to be the best course of action in order to ensure that the concern is addressed. However, in turn, the act can also place the employee at the greatest risk of prosecution. Leaks of information impacting on multiple jurisdictions are particularly difficult to judge. Whilst the alleged activities uncovered by the leaks may be morally justified to some, they can be morally reprehensible to others. An act may be illegal in one jurisdiction and legal in another. Unauthorised disclosures of any kind frequently polarise

⁴ ECHR, Arts 8 and 10. Note that the Investigatory Powers Tribunal made its first ruling against the intelligence and security services in an action prompted by the Snowden revelations: *Liberty (National Council for Civil Liberties) and others v. Secretary of State for Foreign and Commonwealth Affairs and others* [2015] IPT/13/77/H.

⁵ A distinction highlighted in a report on the murder of Fusilier Lee Rigby by the Intelligence and Security Committee. The Committee acknowledged a new threat where simpler unsophisticated attacks involving few individuals were difficult to detect. Intelligence and Security Committee, *Report on the Intelligence Relating to the Murder of Lee Rigby*, HC-795 (2014) 237. The threat of lone wolf terrorism has been used to bolster support for increased electronic surveillance powers in the United Kingdom. For general analysis of the topic see Jeffrey D. Simon, *Lone Wolf Terrorism: Understanding the Growing Threat* (Prometheus Books, 2013).

opinion. How can the public interest in the disclosure outweigh the national security justification in keeping the information secret?

Not all work carried out by public servants concerns national security and not all unauthorised disclosures concern national security information. Not all disclosures concern information regarding wrongdoing or malpractice, some concern information regarding a course of action to which the discloser does not agree. Leaks can be released to representatives of an opposing political party to serve as ammunition to gain political advantage at the dispatch box.⁶ Leaks can originate from key government sources, some motivated by career ambition with the ultimate aim to usurp authority;⁷ others may be officially sanctioned, seen as the best possible way to reveal information to the public without an official announcement. Not all unauthorised disclosures, whether concerning policy matters or national security issues, will be met with the same response. Unauthorised disclosures by members of government and other high level officials are acted upon very differently to unauthorised disclosures by Crown servants.⁸ Crown servants face the risk of prosecution under an arguably draconian and increasingly outdated official secrets regime. Even where disclosures are made to a Parliamentary Committee, civil servants may face the risk of investigation using laws designed for countering terrorism and organised crime.⁹ The use of

⁶ Christopher Galley provides one such example. Galley leaked documents to opposition MP Damian Green, both were arrested and the charges were later dropped; Deborah Summers, 'Damian Green leaks civil servant sacked', *Guardian*, 24 April 2009.

⁷ In the Westland affair, Leon Brittan instructed an official in his department to leak parts of a letter to undermine fellow Cabinet colleague Michael Heseltine; for discussion see Dawn Oliver and Rodney Austin, 'Political and Constitutional Aspects of the Westland Affair' (1987) 40(1) *Parliamentary Affairs* 20.

⁸ For example, disclosures by Claire Short regarding allegations that the United Kingdom spied on then UN Secretary General Kofi Annan did not lead to prosecution; George Wright, Martin Nichols and Matthew Tempest, 'Short Claims UK spied on Annan', *Guardian*, 26 September 2004. Bob Quick, Assistant Commissioner of the Metropolitan Police, allowed himself to be photographed holding a document marked 'SECRET' whilst walking into Downing Street. The contents of the document were visible and prompted the need to bring an anti-terror operation forward. Quick resigned and no further action was taken; Rob Edwards, 'Bob Quick resigns over terror blunder', *Telegraph*, 9 April 2009.

⁹ Osita Mba, an employee of Her Majesty's Revenue and Customs (HMRC), made disclosures with regard to the conduct of tax investigations to the National Audit Office and two Parliamentary Committees. Mba was then made

authorised alternatives can provide an answer to this quandary of unauthorised leaking, yet the effectiveness of official mechanisms and the laws designed to protect whistleblowers remain a source of criticism and review.¹⁰

The purpose of this book is to consider the law of unauthorised disclosure from the United Kingdom perspective. Whilst the text acknowledges that this is a fast moving area, in the United Kingdom very little legislative reform has occurred to the laws which govern the unauthorised disclosure of official documents and there appears to be a lack of momentum for change.¹¹ This book will therefore provide a thorough assessment of the relevant laws in the light of a new dawn of official leaking. The text will provide an analysis of the law relating to the protection of journalistic sources, with an emphasis on new media outlets; it will consider the impact on secrecy laws, and it will provide case studies of three distinct areas, the UK Civil Service, the Security and Intelligence Services and the UK Armed Forces. These case studies endeavour to provide analysis not only of the unauthorised routes to disclosure but also consideration of authorised whistleblowing mechanisms. The text hopes to take a contemporary approach by considering not only what should happen to an individual as whistleblower but also what should happen to the information. Comparative examples of current laws and practice in a number of legal jurisdictions will be provided throughout the narrative.

This introductory chapter will define terminology before proceeding to consider well established theoretical justifications for public interest expression as well as the justifications for keeping information secret. It will draw upon sources of direct relevance to unauthorised disclosures and whistleblowing in order to provide a framework to test the adequacy of the various laws and procedures in place in the UK jurisdiction.

subject to an investigation by HMRC officials using authority obtained under the Regulation of Investigatory Powers Act 2008.

¹⁰ National Audit Office, *Government Whistleblowing Policies* (2014), available at www.nao.org.uk/report/government-whistleblowing-policies/.

¹¹ Where the intent to legislate in this area has been identified it has been left to the common law to rectify anomalies. For example, it was reported by the Intelligence and Security Committee that the government intended to amend the Official Secrets Act 1989 to remove the common law defence of duress of circumstances. The Committee identified in its subsequent report that the judgment in *R v. Hasan* [2005] UKHL 22 had removed the need for amendment. See further, Intelligence and Security Committee, *Annual Reports*, Cm 6864 (2005–06) and Cm 7299 (2006–07).

I TERMINOLOGY AND FOCUS

This text will consider the position of public servants who are designated as Crown servants by Official Secrets Act 1989, section 12. The section includes persons employed in the Civil Service, security and intelligence services and Armed Forces. This will be the main focus of the narrative. The book will also discuss Ministers of the Crown, where appropriate, as Ministers are also covered by the definition. For reasons of focus the book will not be discussing the role of police officers or government contractors.¹²

The term 'unauthorised disclosure' is featured in various sections of the Official Secrets Act 1989.¹³ In this text the author will use the term beyond the confines of its usage in the Act. The book will be discussing other Official Secrets Acts of relevance and will further be discussing the common law offence of misconduct in public office, as well as the civil tort of breach of confidence. It is therefore appropriate to define the term as simply, 'any disclosure without official authorisation'. At various points in the narrative the terms 'leaking' or 'anonymous disclosures' will be used. This will refer to instances where disclosures have been made to recipients who do not know the identity of the recipient. This should be contrasted with 'confidential disclosures'. Confidential disclosures occur when the identity of the individual is known to a journalist, investigator or conduit and information is then imparted to the general public as the recipient audience without disclosing the identity of the communicator.

The term 'whistleblowing' will be a constant feature throughout the text. The term has undoubtedly received increasing prominence over the last few years. Despite this, there is no 'universally accepted' definition.¹⁴ In academic research, Near and Miceli define whistleblowing as: 'disclosure by organisation members (former or current) of illegal, immoral or illegitimate practices under the control of their employers to persons or organisations who effect action'.¹⁵ The Australian Senate expanded on this to include 'a person or agency capable of investigating the complaint

¹² For discussion of whistleblowing and unauthorised disclosure in the police see Ashley Savage, 'Whistleblowing in the Police Service: Developments and Challenges' (2016) 22(1) *European Journal of Current Legal Issues*.

¹³ See e.g., Official Secrets Act 1989, ss. 1(4)(b), 2(1)(c), 3(2)(b), 4(2)(b).

¹⁴ David Lewis, 'What is Whistleblowing?' in David Lewis (ed.), *Whistleblowing at Work* (Athlone Press, 2001) 1.

¹⁵ Janet Near and Marcia Miceli, 'Organizational Dissidence: The Case of Whistle-blowing' (1985) 4 *Journal of Business Ethics* 1, 4.

and facilitating the correction of the *wrongdoing*'.¹⁶ Some definitions are particularly restrictive, requiring that disclosures must be made within the public domain.¹⁷

The types of information which may indicate an act of whistleblowing has taken place and what might constitute the 'public interest' is more difficult to define. In UK legislation, the Public Interest Disclosure Act 1998, which provides employment protection for those who engage in acts of whistleblowing, contains an overarching (but not defined) public interest requirement as well as limiting the types of disclosure to a number of distinct categories which relate to risks to health and safety and the environment, miscarriages of justice, breaches of legal obligations, or a cover-up of any of the matters listed.¹⁸ There is an inherent difficulty in restricting analysis of whistleblowing by Crown servants to the aforementioned categories. This is because disclosures may be made to the public domain which are of a high value to the public interest but do not indicate wrongdoing or malpractice *per se*. Vickers provides a distinction between what she calls 'Watchdog Whistleblowing' and 'Protest Whistleblowing'. 'Watchdog whistleblowing' requires the individual to disclose misconduct or wrongdoing, whereas 'protest whistleblowing' may relate to disclosures of information or policy which, whilst not unlawful, the individual raising the issues has the necessary experience to suggest that the policy complained of is the wrong course of action.¹⁹ It is suggested that situations may arise where it is difficult to ascertain whether or not the action complained of constitutes wrongdoing. It is therefore sensible for the text to encapsulate both the watchdog and protest definitions of whistleblowing whilst highlighting the distinction where appropriate. On occasion, the term 'whistleblower' has been used to describe members of the public, operators of conduit organisations and journalists. For the purpose of this book the author will use the term 'whistleblower' to refer to workers. This chapter will now consider the theoretical arguments relevant to the making of disclosures.

¹⁶ Senate Select Committee on Public Interest Whistleblowing, *In the Public Interest* (AGPS, Canberra, 1994) [2.2].

¹⁷ Frederick Ellison, *Whistleblowing Research: Methodological and Moral Issues* (Praeger, 1985) cited in Peter B. Jubb, 'Whistleblowing: A Restrictive Definition and Interpretation' (1999) 21 *Journal of Business Ethics* 77, 91.

¹⁸ See Employment Rights Act 1996, Part IVA.

¹⁹ Lucy Vickers, *Freedom of Speech and Employment* (OUP, 2002) 43.

II THEORETICAL JUSTIFICATIONS FOR WHISTLEBLOWING

General Freedom of Expression Theory

Before considering the theoretical arguments for whistleblowing, it is first necessary to acknowledge several justifications which relate to general freedom of expression theory. The first to consider is moral autonomy whereby all individuals must have an unfettered right to free expression. Consequentially, all matters of moral choice must be left to the individual who must decide whether their proposed course of action is right or wrong.²⁰ The justification is of particular relevance to Crown servants who ultimately choose whether or not to make unauthorised disclosures. However, upon entering employment, Crown servants are conditioned to be aware that certain forms of communication are restricted or considered unacceptable. From a practical standpoint, a new employee upon starting work in any organisation may agree to terms which may restrict his or her right to certain forms of expression to maintain discipline. Crown employees have additional responsibilities. Employees of the UK Civil Service must agree to the Civil Service Code which provides a contractual obligation not to ‘disclose official information without authority’; this requirement extends post employment.²¹ Employees of the security and intelligence services must sign confidentiality agreements. Service personnel are required to observe regulations relating to forces discipline. All of the above persons may be subject to the Official Secrets Acts.

Moral autonomy, whilst serving as an underpinning justification for unauthorised disclosures, does not account for the possibility of negative impact or harm to others. The argument from self-fulfilment suffers from the same difficulty. Crown servants in the United Kingdom are required to be apolitical; they can and do work for successive governments which are of a different political persuasion to their own.²² The argument from self-fulfilment advocates that individuals may become active participants in the political process, allowing them to oppose actions which would be

²⁰ Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act* (OUP, 2007) 304.

²¹ Civil Service Code, available at www.gov.uk/government/publications/civil-service-code/the-civil-service-code.

²² Evidenced by Civil Service Code, paras. 12–15, which emphasise the importance of impartiality.

detrimental to their own interests.²³ Whilst Crown servants do not face an absolute restriction on being engaged in political activities, the machinery of government would ground to a halt if servants leaked every document with which they did not agree.

Justifications for unauthorised disclosure grow stronger when arguments also take into account the benefit of the communication on the recipient audience. Raz suggests that the benefits to others are the result of the benefit the right brings to the right holder. He identifies the argument that a person's right to freedom of expression is protected not in order to protect him, but in order to protect the public good, a benefit which respect for the right of freedom of expression brings to all those who live in the society.²⁴ Barendt, in contrast, identifies that a court determining a free speech case would not ignore the speaker's interest in the ability to communicate or share his ideas or information.²⁵

The justification that freedom of expression is necessary to enhance the public good provides a strong justification for the communication of 'whistleblowing speech'. Indeed, it may be observed that whistleblowing laws focus upon acts of expression which are for the public good. The UK Public Interest Disclosure Act 1998 covers a number of broad categories whereby the disclosure of information may qualify for protection, including: a breach of health and safety; damage to the environment; a miscarriage of justice; or a breach of a legal obligation. This is further compounded by the addition of an overarching public interest requirement.²⁶

In addition to enhancing the public good, expression can enhance democracy. The argument from democracy comprises of two essential ideals. First is the notion that citizens as active participants in the democratic process require information on political issues to engage in open debate and to make informed decisions, thus government should be accountable. Second, in a democracy the government serves at the will of the people. It is therefore vital that citizens have the opportunity to freely

²³ Anthony Mason, 'The Relationship Between Freedom of Expression and Freedom of Information' in Jack Beatson and Yvonne Cripps (eds.), *Freedom of Expression and Freedom of Information, Essays in Honour of Sir David Williams* (OUP, 2000) 237.

²⁴ Joseph Raz, 'Free Expression and Personal Communication' (1991) 11 *Oxford Journal of Legal Studies* 303, 305; for an alternative view see Frederick Shauer, *Free Speech: A Philosophical Enquiry* (CUP, 1982) 105.

²⁵ Eric Barendt, *Freedom of Speech* (OUP, 2005) 13.

²⁶ Inserted into Public Interest Disclosure Act (PIDA) 1998, s. 43B by the Enterprise and Regulatory Reform Act 2013.

communicate their wishes to the government of the day so that its actions accurately reflect the will of the people. The argument places considerable emphasis on equality by suggesting that citizens have an equal right to engage in public debate and exchange information and ideas.²⁷

The sovereignty argument is not without its critics. Vickers argues that it does not provide an automatic guarantee to freedom of expression.²⁸ If this were the case, the electorate could opt for a government which doesn't uphold free speech or one which limits the expression rights of a minority group.²⁹ Vickers' solution to the sovereignty problem is to allow for wide debate of government actions, effectively enhancing democratic accountability.³⁰

The argument from democracy provides a strong justification for whistleblowing disclosures by public servants who can make a valuable contribution to the accountability process. However, if sovereignty is about control, one must consider whether ultimate power resides in the hands of the electorate or in the hands of elected representatives. Fixed Term Parliament Act 2011, section 1(3) dictates that a general election will be held every five years. Public debate may ultimately influence decisions made at the ballot box but it may not, short of a full-scale revolution, prompt immediate institutional change.³¹

As much as the argument from democracy can support public service whistleblowing it also identifies a fundamental problem. Sovereignty is about control: the executive and its departments maintain operational control of official information. Departments dictate the appropriate level of classification and can utilise a number of exemptions in freedom of information legislation to frustrate public access. The executive can control the expression rights of Crown servants. It can dictate what actions should be taken against Crown servants for leaking documents, often resulting in dismissal or prosecution. Conversely, it can decide a course of inaction where leaks originate from within government itself.

²⁷ Barendt, above n. 25, 36.

²⁸ Vickers, above n. 19, 24.

²⁹ *Ibid.* 24.

³⁰ *Ibid.* 25.

³¹ By way of illustration, Fixed Term Parliament Act 2011, s. 1(3) dictates that a general election will be held every five years.

Unauthorised Disclosures and Whistleblowing

Bok provides a well-established theory concerning whistleblowing in the context of unauthorised disclosures.³² She suggests that both unauthorised disclosures and authorised whistleblowing are similar in the sense that both modes can be used to challenge wrongdoing but they can also comprise of false accusations and personal attacks.³³ She recommends that society should draw distinctions between the types of information communicated, questioning its relevance to the public interest.³⁴ She suggests prospective whistleblowers must first consider whether the public is entitled to know the information in question or whether it comprises of personal information which should remain private; those who raise private matters on the basis that they are a threat to the public may voice their own 'religious or political prejudice'.³⁵

Bok favours internal disclosure, at least in the first instance, because it can uphold loyalties owed to both the employer and citizens.³⁶ Therefore, public disclosures should remain a last resort, where there is insufficient time to go through proper channels or when the organisation is considered so corrupt that the whistleblower will be punished if they attempt to use the regular channels.³⁷

Sagar provides a contemporary analysis drawing heavily on recent events concerning Wikileaks and examples from the United States.³⁸ He poses five conditions which he believes should be met before secrecy laws may be breached. The first is that the disclosure should reveal an abuse of public authority. Sagar recognises that an individual cannot be reliant upon their own interpretation of what wrongdoing means. He suggests that the way to rectify this is to concentrate on when the person exceeded the authority conferred to him.³⁹ Second, the disclosure must be based on clear and convincing evidence; as an unauthorised disclosure

³² Sisella Bok, *Secrets: On the Ethics of Concealment and Revelation* (Vintage, 1989).

³³ *Ibid.* 219.

³⁴ *Ibid.* 219.

³⁵ *Ibid.*

³⁶ *Ibid.* 221.

³⁷ *Ibid.* 221.

³⁸ Raul Sagar, *Secrets and Leaks: The Dilemma of State Secrecy* (Princeton University Press, 2013) 129.

³⁹ *Ibid.* 129.

may place citizens in harm's way, the act will not be justified without providing convincing evidence.⁴⁰

Third, the disclosure must not pose a disproportionate burden on national security. Sagar suggests that there may be circumstances, such as where the nation is at war or where diplomatic interests outweigh disclosure of an act of wrongdoing. He believes that only 'grave threats' rather than those which are 'vague and remote' can outweigh the disclosure of 'grave wrongdoing'.⁴¹

Fourth, the disclosure should be 'limited in scope and scale as far as it is possible to do so',⁴² a criterion which relates to whom the disclosure is made. Sagar considers disclosures to senior officials and suggests that individuals should determine if it is possible to raise the concern internally and/or with the executive branch. They should consider whether the complaint will likely be heard, the risk of retaliation or that the evidence could be destroyed.⁴³ If there is a risk, unauthorised disclosures to the public domain may be justified, but he argues that as little of the information should be disclosed as is necessary to convince citizens that wrongdoing has taken place. Fifth, he argues that the individual must be willing to disclose their identity.⁴⁴

Whilst Sagar's criteria are useful, parts of it do not readily cohere to the position of whistleblowers in the United Kingdom. With regard to Sagar's first criterion, the abuse of public authority, the United Kingdom has long encountered difficulty with identifying the limits of executive power. Executive power, unless expressly restrained by statute, is exercised under the royal prerogative. A quirk of the nation's un-codified constitution, it can be both indeterminate and unwieldy. Moreover, from a public law perspective, focussing on whether a member of the Executive has exceeded their authority would be covered by the principle of *ultra vires* in judicial review. This would not, however, account for other grounds of judicial review such as irrationality, disproportionality or a breach of natural justice.⁴⁵ In addition, Sagar's criterion are not best suited to disclosures relating to malpractice, i.e. those which concern not wrongful action but wrongful *inaction* or other working practices which, if not stopped, could cause

⁴⁰ *Ibid.* 131.

⁴¹ *Ibid.* 131.

⁴² *Ibid.* 132.

⁴³ *Ibid.* 133.

⁴⁴ *Ibid.* 135.

⁴⁵ As discussed in *Council for Civil Service Unions v. Minister for the Civil Service* [1983] 6 UKHL 409, per Lord Diplock.

harm. The Public Interest Disclosure Act 1998, therefore extends much wider than wrongdoing *per se*. It includes health and safety and harm to the environment as disclosures qualifying for protection and thus encompasses malpractice as well as wrongdoing.⁴⁶

Sagar's conception of wrongdoing is unlikely to cover instances of 'protest whistleblowing'. Sagar's criterion do not allow for disclosures which are wholly based on the subjective analysis of a prospective whistleblower. Leaks concerning policy initiatives (for example) are commonplace; often these documents do not concern wrongdoing as such, but instead reveal a course of action of which the individual, based on their experience in the workplace, believes the public should be aware. It is here that Sagar's concept of whistleblowing and the general justifications from democracy and recipient enhancement diverge. If one applies arguments from recipient enhancement or from democracy, there is a need to at least consider 'protest whistleblowing' as part of a wider theoretical framework relating to public servant whistleblowers.

It is suggested, however, that arguments from recipient enhancement are not without difficulty; for example, one should question whether Bok's recommendation that society should draw distinctions between the types of information communicated may be idealistic. According to Dean, society may not be equipped to make such a distinction. Dean's conception of society involves two types of individuals: those who 'believe through the judgments of others', and the 'few' who 'judge for themselves on the basis of the available information',⁴⁷ who may struggle to interpret the messages communicated. The value of the disclosure could be diminished whereby the recipient audience fails to grasp the importance of the information provided to them. Whilst it is not suggested that the recipient audience will lack the intellectual capacity to identify clear information exposing wrongdoing, they may lack the subject expertise to understand and interpret complex documents couched in official language without help.⁴⁸

Conversely, one should question whether a Crown servant will have the capacity to correctly weigh the potential harm of a disclosure against the potential benefit. They could consult with others within the organisation, but may feel inhibited from doing so for fear of later being exposed as

⁴⁶ PIDA 1998, s. 43B.

⁴⁷ Jodi Dean, 'Publicity's Secret' (2001) 29(5) *Political Theory* 624.

⁴⁸ For example, the *Guardian's* coverage of the Manning leaks was accompanied by a glossary of terminology used by the US Armed Forces and expert commentary to assist readers in interpreting the disclosures, see Simon Rogers, 'Afghanistan war logs: the glossary', *Guardian*, 25 July 2010.

the originator behind any subsequent leaks. Official documents may be classified at a certain level and may be accompanied by a special handling instruction to limit access but this does not provide a guaranteed indicator of the risks involved in disclosure. The prospective leaker could believe that the document will not cause harm or that it is a product of over-classification. For security reasons, unbeknown to the individual, the organisation may have only provided one segment of information which if disclosed could allow those with mal-intent to develop a whole picture. Beyond the contents of documents, classification and information garnered from organisational activity, the weighing of harm versus benefit pre-disclosure is highly subjective.

Anonymous Leaking

Faced with leaked information which purportedly originates from a government department, society cannot make an adequate assessment of the value of the speech communicated or the motivation behind the disclosure unless they understand the information communicated to them. Traditionally, the public have been reliant upon traditional media outlets to report on such material. Technological advancements have meant that vast quantities of official documents can be made readily accessible by organisations such as Wikileaks. Despite these developments, traditional media outlets still play a role in presenting and explaining the material to the public, as well as providing their own often-redacted copies of the information.

Difficulties occur when the information is provided to a journalist via a conduit, creating more distance between the source and journalist than ever before. How can journalists be certain that they are not being fed with false information without having access to the source to test the source's motives? Can society assess the value of the information communicated without knowing the identity of the source?

Bok, prefers overt acts of whistleblowing which allow for the information to be checked and the source to be challenged.⁴⁹ In weighing the positives and negatives of unauthorised versus overt disclosures, she considers anonymous whistleblowing to be safer as it can be 'kept up indefinitely' whereas the overt whistleblower 'shoots his bolt by going public'.⁵⁰ She suggests, however, that the value of the message is diminished when disclosed anonymously because the communicator

⁴⁹ Bok, above n. 32, 223.

⁵⁰ *Ibid.* 223.

cannot explain its importance.⁵¹ Writing in a time well before online disclosure outlets she expressed concern that information can pass through a number of intermediaries before being printed, it can be changed or not printed in its entirety.⁵²

Rains and Scott provide a theoretical model of receiver responses to anonymous communication in which they identify that many whistleblowers elect to remain anonymous to avoid personal or legal retribution.⁵³ In organisations where mechanisms are provided for anonymous concern reporting, they suggest that such communication has impacted on the credibility of claims and the ability of the accused to respond against them.⁵⁴ They suggest that understanding a 'source's qualifications' and 'trustworthiness' are 'central to evaluating his or her message'.⁵⁵ They argue that the identity of the source could be of 'integral importance to assessing the veracity of his or her claims'.⁵⁶

Anonymous whistleblowing highlights the competing interests of the communicator and the recipient audience. Self-identification adds credibility to the information disclosed; identity may help to maximise the value of the message, provided that the person who disclosed it is willing or is indeed able to engage in further dialogue.⁵⁷ Further dialogue or explanation may be most needed in instances of 'protest whistleblowing' where the activity complained of is not overtly clear to the recipient audience. Self-identification, therefore, principally serves recipient interests. Questions concerning credibility and value can be answered in other ways. Media commentators can provide views, the authenticity of documents could be checked via outward-facing or back channels, and the audience can make their own assessments. As Bok rightly points out, there is a problem in that the meaning and value of the initial communication can be lost in the way it is presented and reported upon.⁵⁸ There is also the problem that the whistleblower rather than the information disclosed can become the story, which may detract from the messages

⁵¹ *Ibid.* 223.

⁵² *Ibid.*

⁵³ Stephen A. Rains and Craig A. Scott, 'To Identify or Not to Identify: A Theoretical Model of Receiver Responses to Anonymous Communication' (2007) *Communication Theory* 1, 74.

⁵⁴ *Ibid.* 67.

⁵⁵ *Ibid.* 74.

⁵⁶ *Ibid.* 83.

⁵⁷ If their identity is known it may lead to arrest and the individual may be prohibited from further communication at that stage.

⁵⁸ Bok, above n. 32, 223.

communicated. The publishing of raw and un-redacted documents presents its own risks – it increases the likelihood of harm to individual and or national security and there are also no guarantees that the audience will understand the documents presented to them.

Anonymity principally serves the individual interests of the communicator, there are risks that the communicator will be discovered and will suffer some form of detrimental treatment as a result.⁵⁹ Anonymity can, however, serve recipient interests. If the information disclosed is of value, there may be a thirst for further disclosures, which if the communicator is identified and stopped he will be unable to make. To some individuals, anonymity may be seen as the most appropriate and safest option. However, the person may still be uncovered as the originator of the leaks – circumstantial matters, such as the content of the disclosure, can lead to identification.⁶⁰ Where documents have only been provided to a small number of individuals, it may be relatively easy for the authorities to track down the originator of the leaks, even where precautions have been taken. Self-identification can allow the whistleblower not only to explain the contents of disclosures but also the motivations behind them. In doing so it allows individuals to engage in political discourse. Political discourse leads to political pressure. Pressure can be exerted by supporters of the leaks in question who can argue that the individual was right to make the disclosures and should not be punished. Pressure can also be felt by the executive and its agencies who may feel it is a more sensible course of action to drop any reprisals against the leaker, first, to safeguard against any further anticipated embarrassment, and, second, to attempt to dim the spotlight of publicity on the leaks if legal action were to be pursued.⁶¹ As the next section will identify, anonymity is most problematical when considering disclosures purportedly motivated by necessity and civil disobedience where self-identification may be considered a prerequisite.

⁵⁹ Conversely, it would be difficult for a worker to argue that they have suffered detrimental treatment or dismissal for making a disclosure and to receive protection using the PIDA 1998 where contact between the communicator and recipient cannot be proven.

⁶⁰ Richard Calland and Guy Dehn, *Whistleblowing Around the World: Law, Culture and Practice* (ODAC, 2004) 8.

⁶¹ For example, prosecutors may decide on advice from the Attorney General that it would be in the public interest not to proceed with a prosecution. This can also be a preventative measure because of fears that court proceedings could reveal further information harmful to national security.

Necessity

Necessity, according to Brudner, most commonly refers to circumstances whereby someone chooses to break the law in order to avoid a greater evil.⁶² The evil, it is suggested, must present an immediate threat of harm to the communicator or to others. The appropriate circumstances are the subject of wide academic debate. For Lee, it is not enough that the commission of an offence resulted in ‘a lesser evil than the evil avoided through the violation’ – it must have been the ‘only option the individual had available to address the choice of evils he was facing’.⁶³ Alternatively, Brudner suggests necessity can be considered as a ‘momentary aberration from, rather than an expression of, the accused’s moral character’ which if accepted should lead to acquittal. Crown servants are placed in a unique position, whereby the disclosure of information may be considered necessary because of a perceived duty of care owed to citizens.⁶⁴ Determination of what constitutes the lesser evil, or the most proportionate course of action in the circumstances, requires careful consideration.

Brudner argues that necessity cannot be used as a justification where an individual ‘imposes grave risks on the health of persons, regardless of the magnitude of the net saving of lives’.⁶⁵ Transposed to the circumstances of unauthorised disclosure of government documents, the release of information identifying that an illegal war is about to take place would be justified, but the whereabouts or identities of the soldiers may not. The Crown servant would be faced with the unenviable task of determining what disclosures of information would be justifiable and to whom.

According to Howard Dennis, the necessity should be restricted to two situations: first, in an emergency situation, and, second, where there is a conflict of duty, giving rise to a ‘danger of death or serious injury’.⁶⁶ In less serious situations, he believes in regulating the ordering of harms with codified defences. Legislators can delegate the task of ordering harms to the courts. Whilst this is consistent with methods adopted by the

⁶² Anthony Brudner, ‘A Theory of Necessity’ (1987) 7(3) *Oxford Journal of Legal Studies* 340.

⁶³ Youngjae Lee, ‘The Defence of Necessity and Powers of the Government’ (2009) 3 *Criminal Law and Philosophy* 133, 141.

⁶⁴ Brudner, above n 62.

⁶⁵ *Ibid.* 365.

⁶⁶ Ian Howard Dennis, ‘On Necessity as a Defence to a Crime, Possibilities, Problems and Limitations of Justification and Excuse’ (2009) 3(1) *Criminal Law and Philosophy* 29.

European Court of Human Rights (ECtHR) to weigh competing interests by engaging in detailed proportionality analyses, domestically, the UK courts are constrained in their ability to order harms effectively using the current Official Secrets regime; and where the question of what might constitute necessity has arisen, the executive has later expressed its reluctance to codify the defence.⁶⁷ This discussion will now turn to consider civil disobedience.

Civil Disobedience

The Crown servant may feel duty bound to engage in civil disobedience as a means of pursuing a greater good. This in effect becomes an overriding obligation to act.⁶⁸ The draconian nature of the Official Secrets Act 1989 and increasing use of the common law offence of Misconduct in Public Office as an alternative to prosecution under the Official Secrets Act means that a Crown servant who decides to disclose official information without authorisation will most likely break the law as a result.

Can a Crown servant make an unauthorised disclosure on the grounds of civil disobedience? In principle, the servant could meet Perry's two objectives. The first is to disobey a law which the individual believes is forbidding them to do what they believe they must. The second is to achieve a good which is greater than the evils entailed by the disobedient act. Perry suggests the aim could be to focus attention on a law or a policy or to protect someone.⁶⁹ There is an argument to suggest that civil disobedience should go further than this – that the motivation must be to *change* law or policy, otherwise the good will not be sufficient to outweigh the disobedient act.

Anonymous disclosures are more difficult to justify on civil disobedience grounds. Rawls contends that the act of civil disobedience is both public and political; it is neither covert nor secretive.⁷⁰ Therefore, the individual should provide an explanation as to why they chose to break the law and an explanation as to why the action complained of is wrong. Whilst the discloser could provide an anonymous explanation, the

⁶⁷ This should be considered in the light of the approach taken by legislators in Canada, where Security of Information Act 2001, s. 15, contains a codified defence which takes into account acts of necessity.

⁶⁸ Henry David Thoreau, *Walden or Life in the Woods; and on the Duty of Civil Disobedience* (New American Library, 1960) 288.

⁶⁹ Michael J. Perry, *Morality Politics and Law* (OUP, 1991) 114.

⁷⁰ John Rawls, *A Theory of Justice*, 2nd edn (OUP, 1999) 374.

opportunity for the recipient audience to question the motivation behind the leak or obtain further information is diminished.

Civil disobedience is a form of ‘protest speech’. In this context, the explanation as to why the individual broke the law in raising a concern may be considered as significant as the information disclosed. Anonymous disclosures increase the proximity between communicator and recipient, particularly where the disclosures are presented in a raw form without explanation as to their significance. In some circumstances, it may be obvious to the recipient that a document contains information relating to gross wrongdoing. However, in ‘protest whistleblowing’ cases it may be more difficult to get this message across. The recipient audience may simply fail to understand the significance of the material presented to them.

‘Overt’ acts of civil disobedience place the communicator at great risk. Once identity is established negative consequences will likely follow. The making of an overt, unauthorised, disclosure can provide the servant with an opportunity to at least get their side of the story across before prosecuting authorities react. Overt acts pit the servant directly against the state and may assist the individual in garnering both political and public support. The strength of this pressure can result in criminal proceedings being dropped, or even a jury acquitting a defendant despite clear directions to the contrary.⁷¹ However, this outcome can never be guaranteed.⁷² Even if the servant escapes prosecution, the loss of security clearance and inevitable demotion or dismissal will be difficult to reverse.

Rawls identifies a concept of equal society. Civil disobedience may be regarded as a ‘stabilizing device’, a ‘healthy but illegal method of accountability’.⁷³ On this basis, disclosures to identify acts of wrongdoing or afford the electorate greater access to official information may be justified. This position is bolstered by justifications from truth or to enhance the public good, justifications which must be counterbalanced with a moral obligation to obey the law, regardless of whether it is

⁷¹ For an example of this, see further *R v. Ponting* [1985] Crim. LR 318. Discussed further in Chapter 2.

⁷² For an example see the conviction of Bradley Manning. Despite receiving support in various countries across the globe, Manning was sentenced to 35 years’ imprisonment. For analysis see further Ashley Savage, ‘35 years for Manning and time for better whistleblowing laws’ (21 August 2013), available at <https://theconversation.com/35-years-for-manning-and-time-for-better-whistleblowing-laws-17333>.

⁷³ Rawls, above n. 70.

considered to be unjust or bad. This stems from a duty to prevent risk to the legal system and the very principles that govern it.⁷⁴ In addition to their duties as a citizen, Crown servants owe enhanced, and at times conflicting, duties to the state as employer, Parliament and the general public. The Rawlsian conception of civil disobedience is problematic as it requires Crown servants to engage in overtly political action where the very nature of their employment ordinarily requires them to be apolitical.

The act of civil disobedience may be acceptable until it reaches the extent that respect for the law of the land and the constitution breaks down. Civil disobedience may appear necessary in rare and individual circumstances, but it can also undermine not only the purpose of the law in question (no matter how invalid it may appear at the time) but the rule of law as a whole. As Thoreau contends, the remedy of civil disobedience may be worse than the evil, an imbalance that should be rectified by the legislature.⁷⁵ The question of whether a Crown servant may be justified in disclosing official information without authority should therefore be dependent upon the content of the information itself and the benefits to which such disclosures may confer.

Dworkin identifies three types of civil disobedience. The first is 'integrity based', where a citizen chooses to disobey the law when he feels that the law in question is immoral. The second is 'justice based', where the individual chooses to act in order to assert a right which he feels has been wrongly denied. The third is 'policy based', where the citizen believes that a chosen policy is 'dangerously unwise'.⁷⁶ Dworkin opines that this requires the individual to believe that the policy which they oppose is 'bad for everyone, not just for some minority'.⁷⁷ Dworkin makes a distinction between persuasive and non-persuasive strategies. Persuasive strategies require the individual to attempt to convince the majority that the policy in question is wrong in order for it to 'disfavour the program it formerly favoured'.⁷⁸ In contrast, non-persuasive strategies require the individual to 'make the majority pay so heavily for its actions without having been convinced' by the need for change.⁷⁹ Non-persuasive

⁷⁴ John Finnis, *Natural Law and Natural Rights* (Clarendon, 2011) 383.

⁷⁵ Thoreau, above n. 68, 289.

⁷⁶ Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985) 107.

⁷⁷ *Ibid.* 110.

⁷⁸ Dworkin, above n. 76.

⁷⁹ *Ibid.* 111.

strategies attack the 'roots and foundations' of the principle of majority rule, because to be successful, the act requires 'minority coercion' of the majority.⁸⁰

Dworkin makes a significant distinction between different forms of policy protest, contrasting the civil rights movement in the United States with the trespass of Greenham Common in order to protest the deployment of nuclear missiles in Europe, which is a more difficult act to justify because the arguments for nuclear deployment are complex. Parallels may be drawn here to the unauthorised disclosures made by civil servant Sarah Tisdall, who disclosed information regarding the arrangements for the missiles at the base.⁸¹ Dworkin argues that such acts are going to make the general public 'pay less attention' to 'complex issues' because it will be motivated to follow the policy its leaders have adopted because any change to that policy would result in 'giving way to civil blackmail'.⁸² He identifies that there is a contrast between the types of policy and the justification for civil disobedience in which he believes that non-persuasive action taken to highlight bad economic policy may not be justified.⁸³

Unauthorised disclosures by Crown servants may result in the disclosure of information regarding what the servant considers to be a dangerous policy decision. It may be argued, based on Dworkin's hypothesis, that these disclosures should be considered as non-persuasive. However, there is a counter-argument to suggest that circumstances may arise where the information communicated is complex in nature yet the substance of the documents may be highly persuasive. Understanding of the messages can be improved with explanation by the communicator, by journalists or supporters.

Anonymous disclosures may provide the general public with information regarding bad policy decisions or even illegality but they can also be more difficult to justify on civil disobedience grounds where the communicator does not explain to the recipient audience why they oppose a particular policy. The mass disclosure of numerous documents which detail different policies is, by its nature, a non-persuasive act designed to prompt those in power to pursue a different course. The content of the information communicated and the method by which the communication takes place will therefore be highly relevant to this consideration.

⁸⁰ *Ibid.* 111.

⁸¹ *R v. Tisdall* (Unreported, 23 March 1984).

⁸² Dworkin, above n. 76.

⁸³ *Ibid.*

III JUSTIFICATIONS FOR LIMITING EXPRESSION RIGHTS

Restricting Expression which Causes Harm

It is often the case that following an act of unauthorised disclosure or public whistleblowing by an official, the immediate response by the employer and the government of the day is to identify that the act was irresponsible and has harmed national security. In considering restrictions of speech, J.S. Mill argued that the only legitimate justification for the limitation of an individual's free speech rights is the prevention of harm to others.⁸⁴ Barendt states that a free speech principle may not confer absolute protection but the principle does mean that governments must show strong grounds for interference.⁸⁵ Dworkin suggests that limitation to the right to freedom of expression may be justified if the state demonstrates 'a clear and substantial risk' that the exercise of the right will do great damage to the person or property of others.⁸⁶ The practical difficulty with disclosures pertaining to national security is that traditionally, at least from the perspective of courts in the United Kingdom, what constitutes national security is a matter for the agencies in question and the government of the day. It is difficult for the non-expert public to evaluate these claims. There has been a general reluctance by both the courts and indeed oversight bodies to question claims that an act of unauthorised disclosure has harmed or could cause subsequent harm to national security. Courts decline to forensically question the claims, in part due to fears that to do so may cause further harm to national security and because to do so may require judges to take an unwelcome step into the domain of an elected representative.

Shauer identifies that speech can and frequently does cause harm; thus, an individual saying something to a group of people may cause them to be harmful to society by disobeying the law.⁸⁷ Such reasoning can be transposed to the unauthorised disclosure of information harmful to national security. A leak of information may be useful to the 'enemy', it may also provide encouragement to colleagues working in the same field also to leak information. It may be argued therefore that the existence of

⁸⁴ John Stuart Mill, *On Liberty* (Cosimo, 2001, first published 1889) ch. 2.

⁸⁵ Barendt, above n. 25, 7.

⁸⁶ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978).

⁸⁷ Shauer, above n. 24, 10.

an Official Secrets Act which limits the freedom of expression of the Crown employee is necessary to protect the information concerned and to act as a deterrent effect.

The United States Supreme Court in *Schenke v United States* developed a 'clear and present danger' test whereby speech may be restricted when 'used in such circumstances as to create a clear and present danger that they will bring about the substantive evils which Congress has a right to prevent'.⁸⁸ The subsequent decision in *Abrams v United States*⁸⁹ adopted a 'bad tendency' principle, which enabled the restriction of speech by government if it believed that it had the sole tendency to incite or cause illegal activity. Oliver Wendel Holmes, dissenting, opined that regardless of whether the speech in question had been communicated in a time of war or any other time the principle would 'always be the same'.⁹⁰ Thus, he suggested that Congress could 'only limit the expression of opinion' where the 'present danger of immediate evil or intent to bring it about warranted the intervention'.⁹¹

The decision in *Abrams* was overturned following *Brandenburg v Ohio*. The court adopted a new standard of review which authorises the restriction of speech where the circumstances give rise to 'imminent lawless action'. Mr Justice Douglas, concurring, was critical of the 'clear and present danger' test, suggesting that application of the principle could result in decisions where 'the threats were often loud but always puny' and 'made serious only by judges so wedded to the status quo that critical analysis made them nervous'.⁹²

According to the aforementioned decisions and theoretical reasoning, in order for the state to restrict the expression of a citizen it must first establish an overriding justification, such as the prevention of harm or the security of the state. A court must have the opportunity to test this justification based upon a pre-determined analytical framework. Article 10 of the European Convention on Human Rights (ECHR) provides for such a framework. Article 10(2) provides a number of potential restrictions on the right to freedom of expression provided that they are 'prescribed by law' and 'necessary in a democratic society'. Barendt argues that 'necessary in a democratic society' can only be determined in the light of all the circumstances. The process, therefore, does not only require judges to determine the importance of the relevant state interest

⁸⁸ 249 US 49, 51 (1919).

⁸⁹ 250 US 616 (1919).

⁹⁰ *Ibid.* 628.

⁹¹ *Abrams*, above n. 89, 628.

⁹² 395 US 444 (1969).

and the degree of danger threatened by the expression but further enables them to examine the 'precise character of the speech'.⁹³ Based upon this reasoning, it is suggested that it is insufficient for the government of the day or an executive department to argue that speech ought to be restricted because it relates to national security, or is necessary to prevent crime. It must provide a justification as to why, in the particular circumstances complained of, the speech would cause harm. A court must subsequently be provided with the ability to rigorously test this justification.

Unfortunately, the doctrinal reasoning does not align itself with the current reality in the United Kingdom. In the judicial sense, whilst it is recognised that courts are required to rigorously balance competing interests and thus challenge why speech should be restricted, the Official Secrets Act 1989 and the harm tests associated with it do not allow for thorough analysis to take place; where certain sections of the Act provide harm tests, these may be easily satisfied without allowing for the determination of the benefit of any disclosure. The next section will consider the theoretical justifications for secrecy.

Concepts of Secrecy and Security

It may be suggested that the maintenance of secrecy is appropriate and necessary. Neocleous, for one, argues that the tendency towards secrecy is endemic to all states.⁹⁴ Thus, if a situation arises whereby the ideal course of action is to preserve the state it is the statesman's task to discern this course and as a consequence determine which information should be suppressed in the public interest.⁹⁵ Lustgarten and Leigh draw a clear distinction between the concepts of national security and secrecy, whereby they argue that in a democracy national security matters should be 'at the forefront of public discussion'.⁹⁶ Whether something should be secret, they suggest, should be based on a determination of the content of information rather than the position of officials.⁹⁷ On this basis, information which concerns the identity of individual agents or sources at risk of harm should be kept secret, whereas information regarding policy should not necessarily be kept secret unless these policies depend on secrecy for their success.⁹⁸ Colaresi does not distinguish between

⁹³ Barendt, above n. 25, 20.

⁹⁴ Mark Neocleous, 'Privacy, Secrecy, Idiocy' (2002) *Social Research* 69.

⁹⁵ *Ibid.* 97.

⁹⁶ Laurence Lustgarten and Ian Leigh, *In from the Cold* (OUP 1994) 30.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

‘national security’ and ‘secrecy’ but acknowledges that secrecy can be used as a category to classify both security and non-security related content.⁹⁹

In the United Kingdom it is evident that the distinction between the two concepts can be blurred. In 2008, Christopher Galley, a young civil servant working in the Home Office, was arrested for leaking documents to then opposition MP Damian Green, who was also arrested as recipient. Highly controversial searches of Green’s home, constituency and parliamentary offices ensued and the episode was justified on ‘national security’ grounds. Despite a police investigation which reportedly cost £5 million, proceedings were dropped on the basis that the leaks did not comprise of national security information and that the information concerned was neither secret nor harmful.¹⁰⁰

Bok suggests that the conflicts over secrecy between state and citizen are conflicts of power. It may be argued that the citizen’s acceptance of state secrecy, and as a consequence state power, is a natural extension of Hobbes’ concept of the social contract: the surrender of natural rights to accept the jurisdiction of the sovereign.¹⁰¹ Part of a citizen’s acceptance of secrecy – or the government’s justification for it – may lie in the inability of the public to adequately assess and understand information. Bok suggests we are limited by our ‘capacity to perceive and remember’ and that if provided with information our capacity to make judgement is ‘severely limited’ and is ‘subject to bias from all directions’.¹⁰²

In discussing justifications for secrecy in contrast to arguments for publicity, Dean identifies Bentham’s proposition that some individuals may ‘defend government secrecy’ on the basis that the public ‘lacks of capacity for judgment’.¹⁰³ Dean further develops Bentham’s reasoning, suggesting that the public is split into three classes. The first, those ‘who do not have time for public affairs’; the second, those who ‘believe through the judgements of others’; and the third ‘few’ who ‘judge for themselves on the basis of the available information’.¹⁰⁴ Dean suggests

⁹⁹ Michael P. Colaresi, *Democracy Declassified: The Secrecy Dilemma in National Security* (OUP, 2014) 46.

¹⁰⁰ Crown Prosecution Service, ‘Decision on Prosecution: Mr Christopher Galley and Mr Damian Green MP’, Press Release, 16 April 2009.

¹⁰¹ Thomas Hobbes, *Leviathan* (OUP, 2008, first published 1651) ch. 14; and Ian Mcleod, *Legal Theory*, 5th edn (Palgrave, 2010) 53.

¹⁰² Bok, above n. 32, 104.

¹⁰³ Dean, above n. 47, 649.

¹⁰⁴ *Ibid.* 649.

that it is the second class, those who believe in the judgement of others, who most require publicity to ensure that they are not misled.

Part of the difficulty is the requirement to keep a check on government control of secret information.¹⁰⁵ Neocleous identifies that civil society lacks a 'sense of equality' or 'reciprocity' with the state as it has 'no spying machine'. The best it can hope for is some kind of 'left opposition' to keep tabs on it but it will always be at a 'serious technical and organisational disadvantage'.¹⁰⁶ However, whilst he suggests that the way to combat secrecy is to combat the state collectively, Szikinger is highly critical of this assertion, identifying that it would most likely result in the collapse of the state itself.¹⁰⁷ If such action were to succeed, he suggests, greater openness based on 'collective knowledge' and 'collective efforts' would not result in 'challenging' the 'oppressive tendencies of the state'.¹⁰⁸ Fenster considers the notion of transparency by providing a modern interpretation of Bentham's Panopticon, a means of allowing the public to view the actions of their political rulers.¹⁰⁹ In doing so he identifies that the motivation for such a design is to create a structure whereby the subject is unable to recognise when he is being watched. This creates a feeling of 'permanent surveillance' leading the subject to regulate 'discipline and organise behaviour and thought'.¹¹⁰ Fenster argues that a truly 'panopticalised state' would be difficult to achieve but serves as a metaphor for transparency and open government.¹¹¹

The author suggests that the benefits associated with a 'panopticalised state', namely, that executive malpractice is less likely to occur for fear of the wrongdoer being found out, should be contrasted with the potential damaging consequences of transparency controlling behaviour. The principles of collective Cabinet responsibility and candour have been developed to ensure that members of the Cabinet may speak freely without fear that their words may result in future criticism, and so that civil servants can provide full and frank advice. The 'panopticalised' ideal, if

¹⁰⁵ As exemplified by the court's handling of secret material. See further Lord Hope, dissenting: 'secret justice at this level is really no justice at all'. *Bank Mellat v. HM Treasury (No. 1)* [2013] UKSC 38, [68].

¹⁰⁶ Neocleous, above n. 94, 86.

¹⁰⁷ Istvan Szikinger, 'Privacy, Secrecy, Idiocy: A Response to Mark Neocleous' (2002) 69 *Social Research* 1.

¹⁰⁸ *Ibid.*

¹⁰⁹ Mark Fenster, 'Seeing the State: Transparency as Metaphor' (2010) 62 *Admin. L. Rev.* 669.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

implemented, could have a detrimental impact on the machinery of the state, resulting in delayed or hesitant decision-making or decisions made which do not best serve the public interest. In the national security sphere, it has been suggested that the benefits of transparency may be diminished where agencies are effectively forced into the spotlight and thus construct policies to garner political support.¹¹² At the other end of the spectrum, Bok identifies that the notion of 'collective secrecy' can diminish the sense of 'personal responsibility for joint decisions' resulting in 'skewed' or 'careless judgement' and the taking of 'needless risks'.¹¹³

The aforementioned doctrinal analysis identifies that a delicate balance must be achieved between the need to communicate official information to the public and the need to keep certain information secret. Whilst similarities may be drawn between justifications for and against publicity and justifications to promote and restrict expression, there are differences. Publicity primarily and predominantly serves community interests, whereas expression, and in particular the justifications for autonomy and individual enhancement, can serve the interests of the communicator alone. The concepts of publicity, national security and secrecy are primarily matters for the government of the day and its organisations. However, these responsibilities, if not properly discharged, can lead to over-classification, misuse of secrecy or mislabelling of national security matters. As Lustgarten and Leigh have established, the Hobbesian concept of security would support an authoritarian regime.¹¹⁴ If Hobbes' sovereignty argument is to have any place in modern democratic society, citizens must be provided with sufficient information to appreciate how the executive and its agencies are working in practice. Instances of wrongdoing or malpractice are unlikely to be uncovered unless the executive and its agencies acknowledge and publicise their mistakes or they are uncovered by official (via parliamentary, regulatory or enforcement) or unofficial (media and investigative journalist) scrutiny channels. Whistleblowers can provide assistance to these channels; however, in

¹¹² See generally Anthony Glees and Philip H.J. Davies, *Spinning the Spies: Intelligence, Open Government and the Hutton Inquiry* (Social Affairs Unit, 2004). Conversely, the Intelligence and Security Committee's efforts to televise evidence sessions attended by the directors of the intelligence agencies can arguably be seen as an advancement in openness, see session of 7 October 2013. A transcript of the evidence is available at the ISC's website, <http://isc.independent.gov.uk/public-evidence?offset=10>.

¹¹³ Bok, above n. 32, 109.

¹¹⁴ Lustgarten and Leigh, above n. 96, 9.

doing so they place themselves at risk of reprisal or criminal sanction. It is suggested that in determining the expression rights of whistleblowers, care must be taken to identify potential harms caused by a disclosure because this can serve as an initial indicator as to the harm which the whistleblower may incur as a result.¹¹⁵

Whilst Mill's justification to restrict expression which causes harm provides a useful starting point, it should be acknowledged that if we are to equate harms caused by the expression to potential harm caused to the whistleblower, a more detailed appreciation of what information may cause harm, which recognises the breadth of work undertaken in the different spheres of Crown service and the rights and responsibilities attributed to those spheres, must be provided. The author will now propose a communitarian approach to reconcile these considerations.

A Communitarian Approach to Unauthorised Disclosures

It is necessary to align the various competing theoretical positions to the practical realities of working life. Unauthorised disclosures may be justified on the grounds of autonomy in its purist form, however, without consideration of the impact of the disclosure by an employee creating both personal and organisational risks. Communitarianism grounds the rights of individuals in the context of the community to which they belong.

Etzioni provides a liberal communitarian perspective when considering leaks to the press.¹¹⁶ In doing so, he identifies that a balance should be struck between individual rights and social responsibilities; he suggests that neither concept can trump the other and thus eschews the advocacy argument which would allow the strongest competing claim to succeed over the weakest.¹¹⁷ Etzioni's liberal communitarian stance instead requires a balance between the public's 'right to know' and national security.

The liberal communitarian perspective is preferable to general expression theory in the sense that it provides consideration of an individual's responsibility to the community. It is therefore suggested that this provides scope for a more detailed determination of competing interests

¹¹⁵ It is acknowledged that the justification for any subsequent proceedings against a whistleblower may not reflect the reality and that responses may be excessive in contrast to the content of information disclosed.

¹¹⁶ Amaiti Etzioni, *The New Normal: Finding a Balance Between Individual Rights and the Common Good* (Transaction, 2015) ch. 1.

¹¹⁷ *Ibid.*

beyond the Millian speech versus harm principle. Etzioni's concept, however, concerns a balance between the public's right to know and national security, thus conflating the arguments from publicity, secrecy and expression. Whilst there are similarities between the concepts of publicity and expression they are two different, albeit complementary, ideals. If we are to conflate the principles, discussion of the general expression theory earlier in this chapter identified arguments for recipient enhancement, truth and democracy. The situation is therefore arguably more complex than a choice between raising a concern or not because of a responsibility to the community.

It is suggested that a Crown servant will need to effectively consider two communities. They have both an obligation to their *intramural community*, by virtue of their employment position, and a pre-existing obligation to the *extramural community*, by virtue of their status as citizens in democratic society.

Case for Intramural Communities

Citizens do not leave the extramural community as a result of gaining employment in public service. However, several indicators suggest that they join intramural or sub-communities which result in the modification of rights and responsibilities. First, all Crown servants, regardless of organisation, sign the Official Secrets Act 1989; many if not all will sign express confidentiality agreements and will be subject to implied duties of confidence; all Crown servants undergo some form of vetting, from the lowest level 'baseline personnel security standard' to the highest 'developed vetting' clearance needed to work in positions involving intelligence and national security matters. The very nature of the work Crown servants undertake and the information they are party to places them in a different position to that of an ordinary citizen. Crown employees develop a unique insight into public life and a skill-set which would not otherwise be available to the ordinary citizen. The special status of public servants has been identified by the European Court of Human Rights in a body of case law which suggests that upon entering employment, public servants agree to a voluntary restriction of their ECHR, Article 10 rights in respect of their work.¹¹⁸

¹¹⁸ *Vereniging Rechtswinkels Utrecht v. Netherlands*, Application No. 11308/84, ECtHR, 13 March 1986; *Glazenapp v. Germany*, Application No. 9228/80, ECtHR, 26 August 1986; *Rommelfanger v. Germany*, Application No. 12242/86, ECtHR, 6 September 1989.

Unauthorised disclosures of information can present both risks and rewards to both the servant's intramural community and the extramural community. They can challenge wrongdoing and lead to greater openness and accountability and they can cause reputational damage to the organisation and cause potential harm to individuals. Whilst the aforementioned paragraph highlights similarities across the spectrum of Crown employment, differences in the nature of employment in the Civil Service, the security and intelligence services and Armed Forces suggest the need to identify 'community specific' challenges relevant to these groupings. As Crawford suggests, the scope of freedom of expression ought to vary between communities on the basis that moral standards are at their most meaningful when 'rooted in community traditions and notions of the common good'.¹¹⁹ Individuals working in the three groupings have different responsibilities due to the nature of the work that they undertake; moreover, they are required to conform to different rules concerning workplace discipline. Unauthorised disclosures from those particular organisations are likely to engage different benefit/harm analyses. Whilst it is acknowledged that the nature of public employment will result in some cross-sector harms overlapping, it is necessary to identify three distinct intramural communities. These intramural communities will be the subject of three case studies later in the text.

Civil Service

The first community concerns the Civil Service. Civil servants are obliged to observe the Civil Service Code, the Official Secrets Acts and common law restrictions on speech. Civil servants in particular positions of influence may be required to observe further, more rigorous, standards of political impartiality.¹²⁰

The government, and in particular, government Ministers, need to maintain trust in the Civil Service to deliver their objectives. If civil servants leak information there is a danger that this trust will be eroded. At the highest level, the government operate a policy of candour in Cabinet meetings. Candour is seen as essential. If Ministers fear their words will be leaked they will be inhibited from making important decisions.

Leaks concerning national security may place individuals or the public as a whole at risk. Leaks about politically sensitive negotiations with

¹¹⁹ Mark Crawford, 'Regimes of Tolerance: A Communitarian Approach to Freedom of Expression and its Limits' (1998) 48 *University of Toronto Faculty of Law Review* 4.

¹²⁰ For further discussion see Chapter 5.

other states are likely to result in lost confidence and reputational harm. Leaks of commercially sensitive information may harm state interests and impede the ability of the United Kingdom to compete on a world stage.

Security and intelligence services

The second intramural community concerns the security and intelligence services. Employees of the security and intelligence services face the most stringent vetting procedures of all Crown servants, known as 'developed vetting'. The restriction on expression increases as does the risk of prosecution for the making of an unauthorised disclosure. Employees in this community are subject to a lifelong ban on speaking about their work unless they are able to obtain prior authorisation. Employees are also subject to confidentiality agreements enforceable before the civil courts.¹²¹

An unauthorised disclosure may lead to a loss of confidence in the agency and subsequent reluctance of intelligence partners and agencies based in other jurisdictions to share information. By convention, agencies do not openly discuss the recruitment of informants on the basis that to do so would discourage future recruitment. Disclosures regarding the identities or information obtained by informants would likely discourage others from coming forward in the future. By convention, agencies neither confirm nor deny information relating to their activities and where leaks do occur, the security and intelligence services are left in the difficult position of attempting to deal with the fall out whilst maintaining this.¹²²

Armed Forces

The third intramural community concerns the armed forces. In the UK Armed Forces, the restriction on expression is at the highest level to maintain discipline. Expression is restricted both inside and outside of the organisation, with strict rules on engagement with the media and use of social networking. Service personnel are subject to a rigid command structure where individuals higher up the chain of command have more opportunity to engage in overt public expression than the lower ranks.

¹²¹ See generally *Attorney General v. Blake* [2000] UKHL 45.

¹²² For example, see the stance taken by the government and security and intelligence services in *Liberty and others v. GCHQ and others* [2014] UKIP-Trib. 13_77-H. As a comparator see Department of Defense (US), 'Information Security Program', DoD Directive 5200.1, 10-101 (C) which instructs staff to neither confirm nor deny leaks to the media.

The risk of prosecution for unauthorised disclosure is slightly lower than the security and intelligence services because service personnel are generally not subject to Official Secrets Act 1989, section 1,¹²³ and leaks are likely to be covered by sections relating to damaging disclosure tests, however the risk is still high. Unauthorised disclosures may be harmful to the community if they identify operational matters (such as troop movements) or information concerning the capability of forces which is not known to opposing forces. Unauthorised disclosures are likely to undermine discipline which is seen as a fundamental requirement in armed service, particularly in times of conflict. Paradoxically, service personnel risk disciplinary sanctions and potential breaches of military law if they communicate concerns internally.

IV WHEN CAN UNAUTHORISED DISCLOSURES BE JUSTIFIED?

Crown servants face a myriad of competing community interests. Whilst it is clear that they observe community-specific values upon entering their respective intramural community, it is suggested that the basic values obtained as a result of being a citizen in democratic society may come into conflict with activities conducted within the intramural community. An unauthorised disclosure can be defended when the interests of society so clearly outweigh the need to keep the information secret that there is no option but to disclose. Because all Crown servants face strong obligations of loyalty to their respective intramural communities, it is suggested that the information in question must identify matters which fundamentally conflict with societal values, where the problem has been raised internally but has not been rectified or because the culture of the organisation is so rotten that the very fabric of the intramural community will break if something isn't done. Society should seek to support these disclosures. Public and political support can provide a degree of protection to the communicator. However, the fact remains that unauthorised disclosures require a subjective assessment by the communicator who must be prepared to face an inevitable subjective assessment by the recipient audience. Justification for protection and assessment as to the value of the information will always be a consideration *post facto*, meaning that the position of the whistleblower will always be uncertain.

¹²³ Unless notified by a Secretary of State.

Where possible it is suggested that individuals should therefore consider unauthorised disclosures as an avenue of 'last resort'.

V CONCLUSION

The argument from moral autonomy provides a strong justification for the right of individuals to raise concerns, in particular the right to make unauthorised disclosures of official information. In exercising the right to moral autonomy, the individual would not feel inhibited by social norms, legal restrictions or contractual obligations. The difficulty with the argument is that by bypassing the restrictions placed upon the individual as an employee or a citizen in democratic society, the argument fails to consider the practical realities of modern life. Upon entering employment, Crown servants agree to abide by rules of conduct in relation to political activities, legal obligations in relation to the law of confidence and the Official Secrets Acts, and the implied contractual term existing in all contracts of employment that the employer and employee will maintain trust and confidence. Failure to abide by the aforementioned restrictions is likely to result in the civil servant losing his or her employment, or being prosecuted under the Official Secrets Acts.

The argument that whistleblowing communication enhances the individual may be more easily justified. The communication of a political policy which is legal and which does not identify wrongdoing may still be justified to allow the individual to become a participant in political debate. The arguments from moral autonomy and to enhance the individual share close similarities in that both may provide strong justifications to allow 'protest whistleblowing'. As neither argument requires a benefit conferred upon the recipients of the information, it is submitted that anonymous whistleblowing would be justified.

Neither argument, however, allows for consideration as to the value of the communication to the recipient audience or to wider public debate. Such communication may be harmful to colleagues or to democratic society as a whole. The argument that freedom of expression is justified to enhance the public good provides a stronger justification for whistleblowing speech, because it concentrates on the contribution the communication makes to society as a whole. The discovery of truth will provide an important justification for whistleblowing, particularly where members of the public have been misled. Where there has been a cover up of information or if false information has provided, the Crown servant may be best placed to provide such information.

The argument from participation in a democracy supports the argument from truth. In a democratic society it is vital that citizens are provided with sufficient information to engage in and enhance political debate, to decide who to elect based upon clear and informed decision-making, and ultimately so that they can be aware on what actions are taken in their name. The arguments from truth and from democracy identify benefits to both the communicator of the information and the recipient audience. The argument that citizens should have a right of access to information is closely linked to the justifications from truth and democracy. Ultimately, where information has been suppressed from the public and such information could lead to truth or a better more informed electorate, a Crown servant may be justified in releasing such information. In these cases the interests of the extramural community will prevail.¹²⁴ Conversely, information which discloses the private lives of individuals may not provide a contribution to the public debate and the disclosure of such material should be questioned.¹²⁵

In a theoretical justification for whistleblowing, the public interest in the speech communicated is as important as the act of whistleblowing itself. Thus, as Bok identifies, society must test the information to determine whether it is in the public interest. Determination of the value of the information is central to considering whether the suppression of whistleblowing speech may be justified. Both Barendt and Dworkin identify that governments must show strong grounds for interference, a clear and substantial risk that the speech will harm people or property. The unauthorised disclosure of national security information may cause grave harm to individuals and may provide a justifiable restriction on speech but must be tested and weighed against the benefit of the disclosure. The disclosure of secrets which are not harmful to national security may still be harmful to the public interest if routine disclosure leads to a 'panopticalised' regime whereby public officials feel unable to make decisions in the national interest for fear of recrimination, undermining the purpose of government in democratic society. Conversely, the disclosure of national security information as an act of necessity must be counterbalanced against the disclosure of bureaucratic secrecy. Where necessity is used as a justification, the act should not create more harm to individuals than the threat the whistleblower is trying to prevent.

¹²⁴ It can also be argued that the intramural community may also benefit by strengthening the long-term integrity of the organisation.

¹²⁵ According to Bok, above n. 32, 219.

The difficulty with information perceived to be confidential or pertaining to national security is that the act of interpreting the speech and balancing the public interest in the information often takes place *post facto*. It is therefore submitted that before deciding to make an unauthorised disclosure, a Crown servant should consider what official channels are available. Thus, external, unauthorised disclosure should be considered as a last resort, where the official mechanisms available cannot deal with the concern, are not viable or may lead to suppression of the speech, or where the matter is urgent and there is not time to use those official channels.

Where unauthorised disclosures are made to the public, the individual should identify himself to the audience and should be available to explain the contents of the information and his motivations for the disclosure. This should be preferred as an alternative (where possible) to anonymous leaking. Anonymous leaking may prevent the recipient audience from making an assessment as to the value of the information communicated. It may therefore be detrimental to the aims identified in the justifications from truth and from participation in a democracy. Anonymous leaking should be reserved to 'last resort' situations where the individual feels that she or he will suffer grave reprisals for raising the concerns if identified.