I start this chapter with a tale of two scandals that resulted in very different legal responses. As this chapter was being completed, media coverage in the USA and beyond was dominated by accusations of sexual assault made by several women against conservative US Supreme Court nominee Brett Kavanaugh. Plainly all the allegations were seriously defamatory, but no libel threats were issued by the nominee (even in respect of allegations not aired in the hearing itself): it is likely that, as a public figure, he would have to have shown that such allegations had been published by the media with ‘actual malice’ – knowledge of their falsity or with reckless disregard for their truth – under the famous decision in *New York Times v Sullivan* (1964), something that is extremely hard to establish. The episode has obvious echoes of the series of allegations of various forms of sexual misconduct made against President Donald Trump by numerous women; again, no defamation proceedings have been forthcoming. The scandal did not prevent the nomination of Kavanaugh to the Supreme Court but may haunt him for years; the law, withdrawn from the scene, has played no part.

Now contrast this episode with a scandal involving a prominent British Conservative politician, Lord McAlpine. In 2012, the BBC’s flagship *Newsnight* programme mistakenly linked the former senior Conservative politician to child abuse allegations. Despite not actually naming Lord McAlpine, rumours linking him to the allegations promptly took off on social media, fuelled by a badly misjudged ‘ironic’ tweet by the wife of the speaker of the House of Commons, Sally Bercow: ‘Why is Lord McAlpine trending? *Innocent face*’. As one commentator observed, that emoji was to cost Bercow £20,000 (Pelletier, 2016, p. 247). Bercow had over 56,000 followers on Twitter, some of whom retweeted her tweet, only to subsequently receive letters from McAlpine’s lawyers, threatening defamation proceedings for their republication of the libel; several apologised publicly, deleted their tweets and paid sums to charities (*ibid.*). But this episode, while showing the potential legal dangers of repeating scandalous innuendos on social media, ended very differently. Not only did McAlpine seek and obtain prompt retractions and redress from those who had libelled him, under threat of imminent legal proceedings, but the scandal then turned abruptly to pursue a different target: not the accused politician, but the media body concerned, the BBC. Despite the Corporation promptly publishing an apology and full retraction, its Director General resigned; the Head of News and her deputy ‘stepped aside’; and it was reported that senior editors at *Newsnight* faced disciplinary proceedings and possible dismissal (*Guardian*, 2012). All of this was at least partly due to the fact that McAlpine, who might...
well have been effectively blocked from bringing a defamation case by Sullivan had he been American, was able to make swift and effective use of the law of libel in England. Thus, the emerging scandal was not only rapidly knocked on the head as far as McAlpine was concerned, it was turned back against the main media body that had started it off. The scandal that mattered turned out to be, not the allegation, but the making of it.

Law and scandal: a complex relationship

This pair of contrasting episodes highlights a key theme of this chapter: that law can play very different roles in relation to scandal and that its role may often differ because of key differences between media law in the USA and in other Western democracies.\(^1\) As we saw from the Trump and Kavanaugh examples, the law may play no role at all in relation to a scandal. In the McAlpine case, in contrast, we saw how law acted as a fire-fighter, rapidly putting out the fires of scandal before they could properly take hold. But there are numerous other roles that law can play when resorted to by a scandal-beset public figure. It may help fuel a scandal via the well-known ‘Streisland effect’: when Max Mosley and Naomi Campbell, to take two well-known examples, sued British newspapers for publishing scandalous stories about their private lives (concerning a sadomasochistic encounter with sex-workers and treatment at Narcotics Anonymous respectively), their temerity in taking on the press in court, resulted, predictably, in a still greater fire-storm of publicity in which much of the press became all the more determined to shame and ridicule their targets in retaliation. Both celebrities eventually won their cases,\(^2\) with the legal costs payable by the papers far outweighing the damages awarded; this might have made the press more cautious in publishing such stories in future but hugely ramped up the publicity given to the stories in question.

This neatly illustrated the role that many accused of scandalous behaviour would like the law to play but which it did not in this case, namely a preventive one, stopping the press from publishing the story at all. Under the US First Amendment, such injunctions are practically impossible to obtain; in the UK and many European countries they may be granted depending on the merits of the individual case and the strength of any competing public interest arguments. Here the difference between law in the USA and other liberal democracies is perhaps at its strongest: injunctions, and court-ordered retractions and apologies, are nothing out of the ordinary outside the USA, but all-but unknown within it.

If we consider the case of a scandal involving criminal activity from which prosecution results, the contrasts continue. In the USA, the First Amendment seemingly prohibits any restrictions on what the press may publish before, during and after the trial (\textit{Nebraska Press Association}, 1976). If the defendant or victim are high profile, the resultant press frenzy can result in what one criminal-defence lawyer has described as

> a ‘looking-glass world’ in which witnesses routinely sell their stories to the press; ‘every scrap of . . . evidence, inadmissible or not,’ is leaked, stolen, or otherwise ferreted out and repeatedly published or broadcast; blatant and hugely damaging falsehoods are endlessly recycled in the news coverage; and ‘[t]he only consistent winners are those who feed public appetites for scandal and profit from the frenzy.

\textit{(Phillipson, 2008, p. 16)}

In the UK, and many other Commonwealth countries, in contrast, there is widespread support for the notion that in certain cases some restriction of the press may be both legitimate and necessary in order to protect the presumption of innocence and the fairness of trials. In the UK,
once a suspect has been charged or arrested, publication of material that creates a substantial risk of serious prejudice to the forthcoming proceedings is a criminal offence under the Contempt of Court Act, 1981. Such an approach has also been endorsed by the European Court of Human Rights, which draws on the common traditions of the European democracies and is in turn responsible for setting standards across all 47 states of the Council of Europe. The Court has said that:

the limits of permissible comment [in the media] may not extend to statements which are likely to prejudice, whether intentionally or not, the chances of a person receiving a fair trial.

(Worm v Austria (1997), para. 50)

Hence, while in the USA the criminal trial becomes simply part of the scandal-story – allowing the firestorm of speculation to rage unabated during the entire trial – in Commonwealth countries and many in Europe, not only during the trial itself but for the whole period from arrest up to the verdict, the presence of formal criminal proceedings acts as quite a strong restraint upon scandal-mongering in the media, putting a kind of temporary stay on direct discussions of the defendant’s guilt or innocence. The law here functions to put a kind of cordon sanitaire around the trial, discouraging the tendency for a case to end up being tried as much in the ‘court of public opinion’ as in the more formal legal proceedings.

Even in the USA, however, there is one legal tool commonly used to try to suppress scandalous stories that can be squared with the First Amendment: the confidentiality agreement. Because a confidentiality agreement represents, formally at least, a voluntary promise by an individual not to speak about a given topic, they are not regarded as a means whereby the state prevents an individual from speaking, contrary to the First Amendment. Rather the courts are seen as simply enforcing the individual’s own agreement not to speak (Volokh, 2000, pp. 1057–1063). However, as Donald Trump’s recent travails over Stormy Daniels show, at some point the public pressure to know can result in the full or partial frustration of even legally binding confidentiality agreements: instead the agreements may become a fresh source of scandal, as with the recent guilty pleas of Trump’s former lawyer, Michael Cohen, to the charge of improperly using campaign funds to pay off Daniels, shortly before the 2016 US Presidential Elections.

Moreover, while no Western country comes close to matching the sweeping exemptions from libel law that the press enjoys in relation to public figures in the USA, there are narrow but absolute exemptions in Commonwealth countries that correspond to those in the USA. For example, if the British Parliament held public confirmation hearings for its top judges, then, like anything said during ‘proceedings in Parliament’, they would enjoy absolute privilege from legal liability (Article 9, Bill of Rights, 1679); thus, any Kavanaugh-like allegations made during such proceedings would be privileged and could be reported. Similarly, New Zealand grants Sullivan-style protection to the media – but only in relation to a very narrow class of potential plaintiffs: elected public officials and candidates for such office (Lange v Atkinson, 1997).

Having sketched these initial points about the various roles law can play in relation to the reporting of scandal, and how that role differs markedly in the USA, in this chapter I go on to discuss four further, related points about the law and scandal which I also consider through a comparative lens: first, the changing function of the law when it comes to protecting privacy in the online era; second the question of whether court orders can still realistically keep ‘private facts’ secret in that era; third, the broader impact of the law on public discourse in an era of ‘fake news’; and finally the advent of a remedy specifically tailored to the crucial contemporary role the internet plays in ‘remembering’ scandals: the ‘right to be forgotten’.
Privacy law and scandal: preserving elites or protecting privacy?

We have already noted that US law demonstrates marked hostility to any privacy claims that would affect press freedom. A particularly striking example – shocking to European eyes – is Florida Star (1989), in which the US Supreme Court held that the revelation in a newspaper report of a rape victim’s name and address, resulting in her further terrorization by her assailant, was protected against a civil action by the First Amendment. But this hostility does not only manifest in the law: a recent collection of essays on scandal carries one by J. R. Stevens (2016), telling the story of the birth of US privacy law – the famous article by Warren and Brandeis (1890). Stevens, expanding on ideas postulated by literary scholars Brooke Thomas (1992) and Law Professor Dean Prosser (1960), argues that the original impetus behind the creation of US privacy law was the desire to protect class privilege against democratic pressure. Under this account, since it was the middle and working classes who were reading the new ‘yellow press’ with its celebrity gossip and photographs, Warren and Brandeis’s famous argument for the ‘right to be let alone’ becomes nothing more than an attempt ‘to legally insulate the eroding class structure by privileging the values of the upper class’, a turn to law in the attempt to ‘reinforce the existing social boundaries’ (Stevens, 2016 p. 22). This could be contested purely as historical analysis, but Stevens insists the episode is not merely of historical interest, arguing that ‘the core conditions that produced the original seminal arguments about how we consider those [privacy] boundaries appear to be occurring again (ibid., p. 25). Thus, just as, back in the nineteenth century, ‘technology changed the way personal information was disclosed by enabling the lower classes to participate more in the public surveillance process’ (via the new mass-circulation popular newspapers), the same is ‘occurring again’ now so that current arguments about privacy and publicity ‘strongly resemble the nineteenth century concerns’ of Warren and Brandeis (ibid.).

Especially in a book about scandal in the contemporary digital age, this seems a surprisingly inapposite analysis. It assumes that those concerned about privacy protection are invariably members of the elite, seeking to shield their embarrassing activities from the gaze of the mob. But one of the key changes that the online era has brought – a distinctive feature of scandal in the contemporary age – is that anyone can now be the target for intrusive mass publicity. Nowadays, images of ordinary citizens in embarrassing or compromising situations can be captured by the smartphones of other ordinary people, be placed online and go ‘viral’ within minutes in what is known in the literature as ‘lateral’ or ‘peer to peer surveillance’ (Kuehn, 2016, 120). Thus, Stevens’s argument (2016, p. 25), that technological changes have fuelled ‘a greater appetite for the surveillance of media elites . . . but . . . at the expense of the control afforded elites’, strikingly misses what is most distinctive about our era. An essay in the same volume as Stevens’s piece provides a fascinating case study of such ‘lateral surveillance’ in the service of such ‘mediated voyeurism’: the story of the New Zealand ‘office sex romp’, in which patrons in a local pub ‘recorded and distributed photos and videos of two office co-workers’ whom they happened to observe ‘having sex inside an adjacent insurance building after business hours’ (Kuehn, 2016, p. 119). The unlucky lovers were ordinary private citizens, hitherto wholly unknown to the public, but not only did the posts ‘go viral’ on Facebook and YouTube, but the story was picked up by mainstream media ‘and viewed by millions of people worldwide’ (ibid.). This was a powerful example amongst many of what may be termed the ‘democratization’ of ‘the production of celebrity, information and news and culture’, something made possible in turn by ‘the democratization of surveillance’ primarily via the use of networked smartphones that turn all citizens into potential paparazzi, able to turn ‘surveillance footage into entertainment’ via our ubiquitous social media (ibid., p. 123). This renders those unlucky enough to catch public attention liable to ‘intense monitoring and judging’ (ibid.) by a public
that can be simultaneously prurient and censorious. That this is a global phenomenon is demonstrated by the example of a scandal in China again involving private citizens: a wife caught her husband having sex with her sister in the car; the pair leaped out of the car naked and she drove off, leaving them ‘to stand before a gawking crowd armed with smartphones’. The result was predictable: ‘photos of the philanderers went viral in minutes’ (Mandell and Chen, 2016, p. 7).

It might be argued that at least the unfortunate couples in the New Zealand and China cases had taken a risk by having sex in locations in which they should have realised they could be observed. But there are still darker sides to such online ‘shaming’ in which images taken of unarguably private occasions are turned into public spectacle. As Amy Gadja notes (2015, pp. 132–134), numerous misogynistic websites in the USA openly invite the posting of ‘revenge porn’, including fully nude pictures of women, together with their name, age, city, and Facebook and Twitter account details. The literature also notes examples of those who have suddenly become the object of privacy-invading public attention in even more mundane circumstances. An extreme and notorious example is the overweight 16-year-old boy who became known as ‘Little Fatty’: a picture taken of him in the street by chance went viral in Asia with ‘hit’ rates in the tens of millions and eventual coverage in Reuters and the UK’s Independent newspaper (Cheung, 2009, p. 191). The mass media’s involvement – which tends to boost massively the publicity given to such events – comes about because cost-cutting measures and staff reductions render many media companies eager to latch on to free content (Gadja, 2015, p. 13), often gained through mining social media platforms (Kuehn, 2016, p. 126). For example, the UK’s Daily Mail (5 November 2007) published Facebook photos of drunken ‘girls’ nights out’ to a mass audience under the headline: ‘The ladettes who glorify their shameful antics on Facebook.’

Of course, such stories may also still originate in the mass media: one of the most notorious media feeding frenzies in Britain recently surrounded the disappearance on holiday of a little girl, Madeline McCann; the relentless, wall-to-wall coverage included repeated, gross libels aimed at her parents by several British newspapers; most notably, the Express papers, over a series of more than 100 stories, alleged that her parents had themselves been involved in the murder of their child or had organised her kidnapping. Once again, the McCanns were purely private citizens, thrust into the limelight only by an appalling tragedy; once again the real scandal was the media coverage, rather than the (false) stories themselves. It may be noted in passing that this episode, amongst others, casts grave doubt on the claim that English libel law was, as some newspapers argued, to blame for their abject failure to report on the Jimmy Savile sexual abuse scandal for so long (see Chapter 20 in this volume). Since the press were happy to publish hundreds of stories that they later admitted were ‘completely untrue’ about the wholly innocent McCanns, paying hundreds of thousands of pounds in libel damages to them as a result (Cathcart, 2008), it rather strains credulity to assert that it was libel law that deterred them from reporting on the amply evidenced criminal activities of Savile.

In short, the notion that privacy or libel law nowadays serves to uphold class privilege or class barriers simply misses one of the key characteristics of scandal in our digital age. Rather, the fact that lateral surveillance may now capture quite ordinary people as well as celebrities illustrates the need for a similarly internet-tailored remedy – the right to be forgotten – discussed below.

Defamation law, scandal and public discourse

While privacy law is relevant given that scandals often involve sex or other aspects of private life, the essence of scandal is generally seen as the outing of a disreputable secret. Thompson’s seminal work argued that scandal concerned breaches of ‘values, norms and moral codes’ by hitherto concealed behaviour of a kind likely to provoke public disapproval or even outrage, resulting
in damage to the reputation of those involved once the incident was publicised (Thompson, 2000, p. 13). Hence, as noted above, defamation is the area of law most obviously relevant to scandalous coverage in the media. The primary purpose of defamation is clearly to vindicate the reputation of the person falsely slurred — and to compensate them. However, both the action itself and the fact that truth is a complete defence to it arguably serve a broader societal purpose: enabling the truth of scandalous accusations to be publicly tested and decisively resolved, thus contributing towards the search for truth in public discourse — a classical rationale for free speech itself (Barendt, 2005, ch. 1). Particularly where the scandal concerns a politician or other important public figure, libel law, at least in theory, may contribute to the truth-seeking quality of public discourse more broadly. We noted above the sharp contrast between the approach of US and English law to the libelling of public figures. What then is the broader significance of these different approaches? US law proudly celebrates the Sullivan ‘actual malice’ approach, which makes it almost impossible for public figures to maintain actions in defamation, as a key aspect of America’s ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open’ (Sullivan, 1964, p. 721).

However, while the defence is designed to avoid ‘chilling’ the willingness of the media to report on allegations important to public debate, the essence of Sullivan is that, if a public figure is the target of the libel, the media body will nearly always win, even where the allegation is clearly false. This is because, as one critical commentator has put it, under Sullivan, ‘falsity is treated as the legal equivalent of truth and is accordingly endowed with protective power’ (Watson, 2002, p. 5). Particularly where the scandal involves a politician or otherwise concerns a partisan matter — as with the recent Brett Kavanaugh accusations — the danger then is that the withdrawal of law may contribute to the facts of the matter becoming very largely a matter of partisan public opinion. It was striking how in the USA and elsewhere, the degree of credibility and seriousness attributed to the various allegations against Kavanaugh correlated strongly to party affiliation: Republicans, led by Trump, downplayed the allegations and treated them sceptically at best; Democrats treated them as serious and credible. Of course, this is not unique to the USA, far from it. But the suspicion is that the Sullivan rule may exacerbate this tendency: where the scandal involves a public figure, there is no authoritative, formal means of determining the truth about a given allegation in court; hence, whether it is believed or not, may be more likely to become largely a product of partisanship. Moreover, the fact that public figures cannot, practically, hope to succeed in a libel action means that, where they claim that a given story is false, their accuser cannot even use their failure to sue in defamation as an indication that the story is probably true. Both tendencies may help deepen the rancorous partisan divide which so many observers pinpoint as a worrying feature of current US society. The inability of public figures to use libel law may also contribute to the prevalence of ‘fake news’ scandals, such as the notorious (and grossly defamatory) conspiracy theory that Democratic presidential candidate Hilary Clinton ran a pizza-restaurant child-sex ring (Robb, 2017).

In contrast, in English law, media bodies do have a form of ‘public interest’ defence where accusations turn out to be false, but to avail themselves of it, they must be able to show, not only that the relevant article concerned a matter of public interest, but that it was responsibly published. In other words, such publishers must show that they took reasonable care in researching and verifying the allegation before making it, something that generally includes contacting the subject of the allegation for comment before publication and including a summary of their side of the story. This defence, generally known as Reynolds (1999) (now codified in section 4 of the UK’s Defamation Act 2013), is a commonly accepted standard in Commonwealth countries. As a leading comparative scholar of defamation law points out, recent reforms in countries, including
Australia, Canada, Hong Kong, India, Malaysia, New Zealand, South Africa, and the UK itself mean that, where material is published to a wide audience, defamation defendants can establish a [defence] if they show that the publication concerned a matter of public or political interest and was made responsibly or reasonably.

(Kenyon, 2010, p 711, emphasis added)

This is also the approach of the European Court of Human Rights, which has clearly pursued the Commonwealth, rather than the US approach, by holding that even major public figures are entitled to reasonable protection for their reputations (Lingens v Austria, 1986). Hence the mere fact that the subject matter of a publication relates to a politician, or other topic of legitimate public interest, can never per se justifiably afford it blanket protection from defamation law if it makes false and damaging allegations. Instead, the Court has repeatedly held that journalists benefit from protection under Article 10 only where defamatory allegations are supported by an adequate factual matrix, based upon reasonable attempts to investigate their reliability (Radio France v France, 2004). This applies even where the allegations relate to ‘public figures’, including politicians (Europapress Holding, 2009), an approach that implicitly but necessarily rejects the US Sullivan approach.

Such an approach appears to place a higher value on protecting properly researched stories, which are therefore, so the argument goes, more likely to be true: it could therefore be said to place a higher value on the search for truth in public discourse, as opposed to ensuring that such discourse is ‘uninhibited’ by fear of legal liability as under Sullivan and relying on the (unregulated) ‘marketplace of ideas’ to arrive at the truth. And it is undoubtedly the case that Reynolds-style defences are much harder to prove and that politicians like Lord McAlpine can make successful use of libel law in a way that would be impossible in the USA. However, the difference is not quite as strong as first appears. For if a newspaper concedes that it cannot show the allegation it made is true, but successfully runs a Reynolds-style defence, it and the rest of the press will likely then report the outcome of the case simply as a ‘win’ for the newspaper. If members of the public learn little more than that they may well then assume simply that the allegation was true, whereas it may have become apparent during the trial that the allegation was false, or probably false, but that the paper had taken reasonable care in verifying it, and that it clearly concerned a matter of public interest. In other words, the accurate factual message that should go to the public would be that the allegation was false – or at least that the newspaper couldn’t show it to be true. But this factual message will very likely be drowned out by the legal message that the newspaper won and the claimant lost – which may have a distorting effect on public discourse. It is for this reason – as well as the fact that many claimants do not want long and costly libel proceedings but rather a swift and cheap apology and retraction – that there has been increasing calls for what are known as ‘discursive’ or speech-based remedies (such as court ordered retractions) as an alternative to the traditional reliance on damages (Kenyon, 2014). Indeed, the codification of Reynolds in the UK’s Defamation Act was originally intended to include a provision stating that the defence would not succeed if a claimant had:

asked the defendant for the publication of a correction of the statement complained of and . . . the request was unreasonably refused or granted subject to unreasonable conditions.

(Hansard, 2012)

This provision, however, disappeared from the final form of the defence adopted.
Injunctions: still keeping secrets?

When the revelation of scandal involves an invasion of privacy, the traditional remedy of choice for someone seeking to keep a story out of the news was the injunction, preventing publication of the private facts in question. However, in the online era, in which secrets can be spilled by anonymous tweeters, or those outside the jurisdiction of national courts, can injunctions still keep a secret? Following the failed attempt by various British celebrities to keep various sex scandals secret using anonymous injunctions that were eventually rendered futile (Wikipedia, 2011), many believed injunctions to have become a useless and discredited tool in the internet age. However, a recent old-fashioned sex scandal case in the UK, involving a famous entertainment artist, showed that injunctions are still valued by those seeking to keep their private lives out of the news, albeit that their purpose has arguably shifted somewhat. The case, which went up to the Supreme Court, concerned an injunction prohibiting the reporting of the identity of the persons involved in, and intimate details of, a three-way sexual encounter between a famous celebrity married man and another couple. Some publicity was given to the case in the USA and on social media and, as a result, it was very easy to discover the identity of the celebrity online; however the mass media in the UK was barred by injunction from disclosing his identity. After a complex set of decisions, the Supreme Court overturned the judgment of the Court of Appeal that the injunction was no longer worthwhile (PJS, 2016) given that the secret was now out, at least online and in the USA. The Supreme Court, however, rebutted the notion that ‘injunctions really have no sensible place in an internet age’; while agreeing that ‘if the purpose of this injunction were to preserve a secret, it would have failed’, the court observed that, insofar as its purpose is to prevent intrusion or harassment, it has not failed (ibid., para. 62). The Court was, in particular, concerned that the couple’s young children, who had not yet learned of the publicity surrounding the incident, would certainly do so if it was subject to the firestorm of publicity that would result from the lifting of the injunction and would very likely suffer harm, in the form of bullying and teasing at school. Hence, the Supreme Court concluded that the Court of Appeal had not given due weight to the qualitative difference in intrusiveness and distress likely to be involved in what is now proposed by way of unrestricted publication by the English [mass] media.

(PJS thus may be seen as reorientating privacy law decisively away from the traditional confidentiality-based notion of keeping a secret as the sole purpose of an injunction, towards the notion of preventing a firestorm of publicity with all the intrusion and harassment that can entail. The emphasis was not on preventing the scandal seeing the light of day, but on ameliorating the worst effects of its coverage.

The British press, however, bitterly protested the fact that some forms of media could publish the information with effective impunity (anonymous tweeters for example, or those outside the jurisdiction) while they could not. They argued in particular that publication in the USA rendered protection in England futile: as the Daily Mail put it, ‘British justice descended into farce last night after the identity of a celebrity who cheated on his spouse was revealed in the US but blocked here’ (6 April 2016). Had such an argument been accepted, it would have been a significant development. Since injunctions can’t generally be obtained under US law, even where a celebrity obtains a privacy injunction in the UK, they cannot prevent reporting of the story in the USA and subsequent discussion there on social media, which then immediately crosses...
national borders. Were the British press to be able to claim that it is unfair or ‘farcical’ to then prevent them from reporting it, not only would the effect of other countries’ legal protection for privacy in the face of scandal-mongering be rendered less effective, but courts accepting this argument would be allowing US law, albeit indirectly, to determine the outcome of an English case. US law – with its stark priority for free speech over both reputation and privacy – would thereby be on its way to becoming a global standard setter. PJS was thus a fascinating instance of a national court resisting this attempt to leverage the First Amendment so as to give the press in the UK greater freedom to cover a sex scandal. For now, at least, European and Commonwealth countries are maintaining their own, rather different balance between media freedom and privacy.

‘Forgetting’ a scandal: a new role for the law online

We noted above the critique of privacy law as merely an elite tool intended to maintain the privileges of the ‘upper classes’, old and new, shielding their scandalous behaviour from the judgement of the mob. One limited way in which that may be correct is in the area of access to justice: an ordinary person subjected to the kind of ‘lateral surveillance’ that we noted above will usually lack the resources to take costly legal proceedings. Alternatively, the subject of a scandal may get their injunction but still find many internet sites and hence search results that give full details of it. Or they may win damages only, or be a public figure in the USA, and thus unable to obtain any form of redress at all: while US celebrity wrestler Hulk Hogan did eventually win massive damages against Gawker over its publication of his notorious, explicit ‘sex tape’, several courts that heard the case – astonishingly to European eyes – solemnly intoned that it revealed ‘matters of public concern’ and was thus protected by the First Amendment; the injunction initially granted preventing publication of the explicit video was overturned (Gadja, 2015, p. 5). Alternatively, an individual may become concerned about personal information they themselves decided to share, and which was then shared and retweeted all over the Web. What happens if, months or years later, they want to try to ‘move on’ from the scandal or embarrassment the information may still cause? Mayer-Schönberger, author of the seminal Delete (2009), wrote of the risks of a ‘loss of forgetting’ in our online age, where huge quantities of our personal data are perfectly recalled online, turning up for years afterwards in Google searches of our names. As privacy scholar Dan Solove has put it, people want the option of ‘starting over, of reinventing themselves’, but are nowadays hampered in doing so by their ‘digital baggage’ (Solove, 2010, p. 18). In this regard, search engines of course play a crucial role, rendering information on incidents that happened years ago instantly retrievable worldwide. Further, there is a further distinctive feature of US law that hampers those wishing to contribute to the ‘forgetting’ of a scandal covered online: it grants sweeping exemptions against legal liability for the content carried by online intermediaries, so that platforms like Facebook and Twitter broadly enjoy immunity in respect of content posted by third parties. Hence even if the subject of a scandal in the USA were to win a rare privacy or libel case, they would be wholly unable to procure the removal of coverage of it from all over the Web, which would remain retrievable in search results for an indefinite period.

It was precisely to address this problem that European Union data protection law has developed the notion of ‘the right to be forgotten’, or ‘right to delete’. The now-famous Google Spain judgment of the EU’s Court of Justice (2014) – brought by a Spanish citizen aggrieved that Google searches under his name still returned a minor financial scandal from years ago – has generated (at the last count) 680,000 requests for certain results to be delisted. This has led to (at the last count) over 1.8 million URLs being removed from search results amidst considerable
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controversy, especially in the United States (Keller, 2017, p. 25). However, Google Spain itself limited the right to requesting Google and other search engines to de-list certain search results – it did not extend to deleting actual content, like Facebook posts, or media reports. This is where the new-style ‘right to be forgotten’ – Article 17 of the General Data Protection Regulation (GDPR) (2015) comes in. Like Google Spain, the GDPR will apply to at least some US companies that provide services to EU citizens involving the processing of their personal data. The right is broadly formulated and can be based not on the ground that the data targeted for removal is inaccurate or especially private, but simply that the person who had originally consented to its publication has now withdrawn their consent (GDPR, Article 17(1)(b)). Particular protection is given to certain categories of ‘sensitive’ personal data, including information relating to health, sex-life or sexual orientation. Crucially, especially in the US context, it seems clear that the new right will apply to intermediaries, such as Facebook and Twitter as well of course as the mainstream media – a position that cuts sharply across the specific US law protection such bodies enjoy, as just discussed above. The right must be balanced against freedom of expression of either or both of the data controller and (if the two are not the same) the original poster of the data (GDPR, Article 17(3)(a)).

As well as its application to intermediaries, the crucial point about this action is that, unlike traditional suits in privacy or defamation, which are typically available only to the wealthy celebrities who can afford them, the ‘right to delete’ is a remedy that anybody can use – hundreds of thousands of people have already. It is this law, above all, that may have the greatest impact on the ability of the internet to provide instant recall of a former scandalous, or merely embarrassing, episode; it may therefore turn out to be the most important legal development for decades in giving the individual a usable tool to deal with the sometimes unfairly enduring power of scandal.6

Notes
1 The contrast drawn is between the USA on the one hand and the countries of Western Europe, together with other common law countries, such as Australia, Canada, New Zealand and South Africa.
4 This has been achieved by a speech-friendly interpretation of the Communications Decency Act, § 230; see e.g. Almeida v. Amazon.com, 2006 and Pelletier (2016).
5 See the 2018 decision of the EU Court of Justice – Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftssakademie Schleswig-Holstein GmbH (C-210/16) – holding Facebook to be a ‘data controller’ for the purposes of EU data protection law.

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