Restoring Accountability in Freedom of Expression Theory: Public Libel Law and Radical Whig Ideology

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Abstract
As leading common law jurisdictions grapple with the Internet’s impact on defamation law, comparative legal scholarship has revealed long-standing problems with its underlying theoretical justifications. Specifically, public libel doctrine is commonly supported by appeals to democratic theory in the abstract. Accountability concerns most relevant to adjudicating public libel cases are thus routinely overlooked. This article aims to diagnose the causes of these theoretical inaccuracies, describe their impact on public libel law, and translate their significance for law reform. Through exploring eighteenth-century libertarian thought, we highlight the foundational importance of accountability and the checking function rationale to democratic theory and governance. An analysis of competing democratic models demonstrates significant undertheorizing that poses several problems for contemporary political speech and public interest defenses. This article suggests that, before proceeding precipitously with Internet-inspired reforms, we might benefit from reflecting upon defamation law’s impact on all aspects of our democratic values.
Restoring Accountability in Freedom of Expression Theory: Public Libel Law and Radical Whig Ideology

RANDALL STEPHENSON*

As leading common law jurisdictions grapple with the Internet’s impact on defamation law, comparative legal scholarship has revealed long-standing problems with its underlying theoretical justifications. Specifically, public libel doctrine is commonly supported by appeals to democratic theory in the abstract. Accountability concerns most relevant to adjudicating public libel cases are thus routinely overlooked. This article aims to diagnose the causes of these theoretical inaccuracies, describe their impact on public libel law, and translate their significance for law reform. Through exploring eighteenth-century libertarian thought, we highlight the foundational importance of accountability and the checking function rationale to democratic theory and governance. An analysis of competing democratic models demonstrates significant undertheorizing that poses several problems for contemporary political speech and public interest defenses. This article suggests that, before proceeding precipitously with Internet-inspired reforms, we might benefit from reflecting upon defamation law’s impact on all aspects of our democratic values.

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As judges, legislators, and legal scholars increasingly grapple with the Internet’s impact on defamation law, comparative legal scholarship has uncovered long-standing problems with its most fundamental of responsibilities. Namely, efforts to balance political criticism and personal character in public libel cases have been beset by widespread misuse of democratic free speech justifications. To be precise, courts and legislatures have defended their doctrinal approaches

3. Ibid. “Public libel” refers to the use of defamation law in cases involving defamatory statements of fact on matters of public interest published to a mass audience, where the plaintiff is a politician, public official, or influential public figure or corporation (ibid at 1).
by appealing to democratic theory in the abstract, too often emphasizing its least relevant features and overlooking the accountability concerns most applicable to adjudicating public libel cases. Affecting the various political speech and public interest defences endorsed since the US Supreme Court’s seminal judgment in *New York Times v Sullivan*, this undertheorizing has compromised public libel doctrine worldwide, resulting in arbitrary over- and under-protection of political speech and expression.

This article has three principal objectives: (1) to diagnose the causes of these theoretical inaccuracies; (2) to describe their deleterious effects on public libel doctrine; and (3) to state the significance of this impact for modern defamation law reform. Part I begins by exploring eighteenth-century libertarian thought for indications of the press’s quasi-constitutional role in holding power to account. Besides establishing precursors to contemporary notions of freedom of the press and watchdog journalism, this enquiry confirms the press’s critical function as a horizontal accountability mechanism. Unlike other extra-governmental methods, the press supplies full-spectrum accountability, capable in principle of checking all libel plaintiffs and branches of government within any form of representative democracy.

Part II proceeds by distinguishing the two democratic models at the core of our enquiry: Alexander Meiklejohn’s “self-governance” rationale and Vincent Blasi’s “checking value” of the press. As we shall see, each highlights different aspects of democratic theory and supports a distinct conception of the press, yet the two models are all too often conflated. As a result, public libel doctrine continues to reflect an improper balancing of freedom of expression.

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5. Stephenson, supra note 2, ch 1.


and reputation, overly discounting the former. Part II then examines two underlying causes of public libel law’s undertheorizing, arguing that difficulties marshalling democratic theory are due primarily to incomplete articulations of free expression’s core justifications and misguided attempts to subsume these rationales under single-valued approaches. Both have excessively marginalized the checking function of the press, the free expression justification most relevant to adjudicating public libel cases.

Part III commences by describing the deleterious effects of this undertheorizing on public libel doctrine. This problem of public libel law shows that, even in cases fundamental to democratic governance where our defamation laws must carefully balance political criticism against personal character and reputation, we have unwittingly adopted less press-friendly doctrine than required. That is, by disregarding accountability concerns and the checking function rationale, efforts to rebalance free expression against reputation have never reflected the most relevant or fully articulated aspects of democratic theory. Sound public libel doctrine, along with defamation law more generally, ultimately depends upon fully theorized free expression justifications applied to relevant disputes.

Part III concludes our enquiry by identifying five implications of this undertheorizing for defamation reform in the wake of the Internet, namely, the need to: (1) avoid one-size-fits-all answers; (2) embrace comparative law analysis; (3) reinstate accountability in democratic free expression theory; (4) insist upon a tightly argued theory—doctrine interface; and (5) recognize the etiology of legal problems in broader socio-political contexts. Above all, special attention must be paid to proposed reforms affecting government, politicians, or influential public figures and corporations. These are the plaintiffs whose use of defamation law poses the greatest threat to democratic legitimacy, and with whom the checking function’s role in promoting more press-friendly doctrine becomes crucial for holding to account our political representatives and those exercising significant power and influence in society.

I. BRITISH PARLIAMENTARISM AND THE “FOURTH ESTATE”

Before reviewing Meiklejohn and Blasi’s models, it is instructive to situate the checking function in eighteenth-century libertarian thought.8 This examination

8. The term “libertarian” refers to Britain’s Radical Whigs, political commentators associated with the British Whig faction, who were at the forefront of the radical movement in the seventeenth and eighteenth centuries. Despite finding fame and favour only later with American revolutionaries, these commentators provided impressive analyses of democratic accountability and the checking function of the press.
reveals that: (1) Radical Whig and Commonwealthmen publications contained lucid formulations of the press as a horizontal accountability mechanism; and (2) by developing substantially similar conceptions of the press’s checking function, theorists on both sides of the Atlantic established the foundational importance of accountability to democratic theory and governance.

A. PARLIAMENTARISM AND RADICAL WHIG THEORY

Britain’s Radical Whigs were first to craft systematic defences of press liberty and to defend citizens’ rights to criticize government. Developing “from the bowels of the print culture itself” throughout the late seventeenth and eighteenth centuries,9 Radical Whigs not only gave the phrase “freedom of the press” an established meaning, but also provided many of the earliest and most articulate formulations of the checking function rationale.10 While Parliament’s control of political criticism extended to prosecutions for breach of privilege by the House of Commons and (less regularly) the House of Lords,11 England’s principal response to such criticism involved a powerful antecedent to public libel: Criminal prosecutions for seditious libel.

1. CRIMINALIZING POLITICAL DISSENT

The law of seditious libel was most authoritatively pronounced in the Tuchin case.12 As Lord Chief Justice John Holt explained at the dawn of Britain’s newly

10. Ibid at 64. See also John Milton, Areopagitica: A Speech of Mr. John Milton, for the Liberty of unlicenc’d Printing, to the Parliament of England (London: Publisher Unknown, 1644).
11. Siebert, supra note 9 at 368-74.
12. (1704) 90 ER 1133 [Tuchin]. While a tiny portion of Britain’s adult population could vote at this time, this only supported the Radical Whigs’ resolve to safeguard political accountability through extra-governmental institutions. This insight is supported by public accountability scholarship, which confirms that general elections are among the weakest and least reliable accountability mechanisms, aligning voter preferences with government policy only over many years or decades. See e.g. Mark E Warren, “Accountability and Democracy” in Mark Bovens, Robert E Goodin & Thomas Schillemans, eds, The Oxford Handbook of Public Accountability (Oxford: Oxford University Press, 2014) 39 at 45. See also Bernard Manin, Adam Przeworski & Susan C Stokes, “Elections and Representation” in Adam Przeworski, Susan C Stokes & Bernard Manin, eds, Democracy, Accountability, and Representation
emerging parliamentary democracy, this offence left little room for criticizing government entities:

If men should not be called to account for possessing the people with an ill opinion of the Government, no Government can subsist; for it is very necessary for every Government, that the people should have a good opinion of it. And nothing can be worse to any Government, than to endeavour to procure animosities as to the management of it. This has been always look’d upon as a crime, and no Government can be safe unless it is punished.13

After England’s statutory licensing system “died on grounds of expediency” in the late seventeenth century,14 Radical Whigs redefined such anti-democratic views in response to rising seditious libel prosecutions. Following earlier treatises by Charles Blount (under pseudonym “Philopatris”) and John Toland,15 Matthew Tindal characterized the checking function of the press as an extra-governmental check on political power, arguing that “[t]he liberty of the Press must keep a Ministry within some tolerable Bounds, by exposing their ill Designs to the People.”16 Besides endorsing the press’s checking function, Tindal astutely forecasted the perils of government public relations and unrestrained executive power.

Arguably, “[n]o libertarian theorist … progressed beyond the no-prior-restraints concept of freedom of the press until ‘Cato’ burst upon the scene.”17 Cato’s Letters was published in London newspapers by Whig political journalists John Trenchard and Thomas Gordon.18 Though debatable

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13. Tuchin, supra note 12 at 1133-34.
14. Levy, supra note 9 at xxii. See also Siebert, supra note 9 at 260-63; J L De Lolme, The Constitution of England: In Which it is Compared Both with the Republican Form of Government, and the Other Monarchies in Europe (London: Publisher Unknown, 1822) at 172-73; Licensing of the Press Act, 1662 (UK), 14 Car II, c 33.
15. See Philopatris [Charles Blunt], A Just Vindication of Learning: or, An Humble Address to the High Court of Parliament In behalf of the Liberty of the Press (London: Publisher Unknown, 1679); John Toland, A Letter to a Member of Parliament, Shewing, that a Restraint On the Press Is inconsistent with the Protestant Religion, and dangerous to the Liberties of the Nation (London: Publisher Unknown, 1698).
17. Levy, supra note 9 at xxxii.
whether *Cato’s Letters* owed much to Tindal and earlier Radical Whigs\(^9\) when contrasted with the submissive citizenry sanctioned in the *Tuchin* case, a bold theory of political accountability was developed in their four essays published from 1720 to 1722.

In “Of Freedom of Speech: That the same is inseparable from Publick Liberty,” the authors proposed an unflinching model of free expression, challenging Lord Chief Justice Holt’s prior pronouncements:

> That Men ought to speak well of the Governours, is true, while their Governours deserve to be well spoken of; but to do publick Mischief, without hearing of it, is only the Prerogative and Felicity of Tyranny: A free People will be shewing that they are so, by their Freedom of Speech.\(^{20}\)

Trenchard and Gordon also conceived magisterial duties as consonant with fiduciary obligations, representative government being “nothing else but the Attendance of the Trustees of the People upon the Interest and Affairs of the People.”\(^{21}\) For this reason, “it is the Part and Business of the People … to see whether they be well or ill transacted.”\(^{22}\) Associating press coverage with improved disclosure of political misconduct, they reasoned:

> Misrepresentation of publick Measures is easily overthrown, by representing publick Measures truly; when they are honest, they ought to be publicly known, that they may be publicly commended; but if they are knavish or pernicious, they ought to be publicly exposed, in order to be publicly detested.\(^{23}\)

Likewise, in “Reflections upon Libelling,”\(^{24}\) the authors endorsed strengthened seditious libel defences. Liberating justification from its restriction “to private and personal Failings,” only,\(^{25}\) Cato reasoned that “[t]he exposing … of publick Wickedness, as it is a Duty which every Man owes to Truth and his Country, can never be a Libel.”\(^{26}\) In “Discourse upon Libels,”\(^{27}\) Trenchard and Gordon again implicated the corrective effect of newspapers, insisting that

\(^{19}\) Charles & O’Neill, *supra* note 9 at 1712.

\(^{20}\) Trenchard & Gordon, *supra* note 18, vol 1 at 98.

\(^{21}\) *Ibid*.

\(^{22}\) *Ibid*.

\(^{23}\) *Ibid* at 101-02.

\(^{24}\) *Ibid* at 252-61.

\(^{25}\) *Ibid* at 253.

\(^{26}\) *Ibid*.

“[w]hat are usually call’d Libels, undoubtedly keep great Men in Awe, and are some Check upon their Behaviour.”

In the end, it is hard to disagree that “Cato’s Letters was the high-water mark of libertarian theory until the close of the eighteenth century.” While not attacking seditious libels entirely (i.e., false libellous statements remained unopposed), Cato nonetheless claimed that: (1) government is grounded in fiduciary obligations owed by political representatives to the citizenry; (2) a primary obligation of citizens is to monitor and expose public misconduct; (3) freedom of speech and the press are inextricably linked to these monitoring activities; and (4) justification should constitute a complete defence to seditious libel. In fact, so comprehensive were these prescriptions for political liberty that very nearly only the press required further elaboration.

2. THE CORRECTIVE EFFECT OF THE PRESS

Another surge of libertarian thought began later in the eighteenth century, accompanied by increasing demand for press liberty. Legal historians confirm that following Cato’s Letters, the phrase “freedom of the press” was referenced “in the courts as early as 1732 and in the House of Commons in 1738.”

For instance, Father of Candor, a prominent Whig supporter and pamphleteer, reasoned that, since public officials’ posts “are not like any individual’s particular trade, profession or fortune, … [t]heir holding ought only to be quam diu bene se gesserint [during good behaviour], and of this the people at large ought to be made judges.” Indeed, when witnessing political misconduct, he observed it was “natural for [citizens] to complain, to communicate their thoughts to others, … and to remonstrate in print against the public proceedings.” Endorsing an independent and corrective press, he insisted that “[t]he liberty of exposing and opposing a bad administration by the pen is among the necessary privileges of a free people, and is perhaps the greatest benefit that can be derived from the liberty of the press.”

28. Ibid at 243.
29. Levy, supra note 9 at xxvi.
30. Trenchard & Gordon, supra note 18, vol 1 at 257.
31. Siebert, supra note 9 at 383.
32. Father of Candor, An Enquiry into the Doctrine, Lately Propagated, Concerning Libels, Warrants, and the Seizure of Papers (London: Publisher Unknown, 1764) at 31 [emphasis in original].
33. Ibid [emphasis added].
34. Ibid at 32.
Father of Candor also formulated remarkable procedural criticisms of seditious libel. Describing an *ex officio* information as “the exercise of … an unnecessary and grievous prerogative,” he cautioned that “[t]here is … no offence which is oftener prosecuted by an information, *ex officio*, than a libel.” Disapproving of “the ease and certainty of laying” an information, Father of Candor told of this practice silencing the press and intimidating printers with consequences “as terrible as a drawn sword suspended by a thread, hanging over their heads.” To protect publishers from arbitrary prosecutions and resultant libel chill, he advocated shifting to the Crown the legal burdens of falsehood and malice, a press-friendly modification not dissimilar to the actual malice rule. At last, while Father of Candor (like Cato) did not oppose seditious libels entirely, he endorsed the checking function rationale unreservedly, advising that “[a]nimadversions upon the conduct of ministers, submitted to the eye of the public in print, must in the nature of the thing be a great check upon their bad actions.”

An increasingly refined conception of the press as a horizontal accountability mechanism was advanced in the *Letters of Junius*. Published anonymously from 1769 to 1772, they contained strong arguments for press liberty and were inspired by a foreign-born legal theorist of immense creativity and insight, Jean-Louis De Lolme. In his opening “Dedication to the English Nation,” Junius celebrated the press as an essential component of libertarian thought, remarking that press liberty “is the *Palladium* of all the civil, political, and religious rights of an Englishman … . The power of King, Lords, and Commons is not an arbitrary power. They are the trustees, not the owners of the estate. The fee-simple is in US.”

Further describing how the power exercised by “King, Lords, and Commons” is actually checked, Junius appealed to “the forms and principles of our particular constitution,” insisting that “a constant examination into the characters and conduct of ministers and magistrates should be … promoted and encouraged.” In yet another strong endorsement of the checking function, the anonymous

35. *Ibid* at 9 [emphasis added].
36. *Ibid* at 7 [emphasis in original].
37. *Ibid* at 8.
40. *Ibid* at 32.
41. *Ibid* at 29.
43. *Ibid* at iv-v [emphasis in original].
44. *Ibid* at v.
45. *Ibid* at xiii.
author professed: “They, who conceive that our newspapers are no restraint upon bad men, or impediment to the execution of bad measures, know nothing of this country.”

Junius also endorsed Jean-Louis De Lolme, “a foreign writer, whose essay on the English constitution I beg leave to recommend to the public, as a performance, deep, solid and ingenious.” Considered as one of the two “most esteemed authors who have written upon the English Constitution” (alongside Blackstone), De Lolme, in The Constitution of England, examined the institutional preconditions for democratic accountability, particularly the institutional press.

A fundamental aspect of these preconditions was maintaining an adversarial relationship between government and the press. At its base, De Lolme’s analysis was premised on “the censorial power, … the exercise of which (contrary to that of the legislative power) must be left to the people themselves.” Importantly, De Lolme knew that “this power cannot produce its intended effect any farther than [it] is made known and declared,” explaining that “it is this public notoriety of all things that constitutes the supplemental power, or check.” Appealing to their corrective effect, De Lolme endorsed newspapers as the censorial power’s utmost institutional manifestation, explaining that:

As [politicians] are thereby made sensible that all their actions are exposed to public view, they dare not venture upon those acts of partiality, those secret connivances at the iniquities of particular persons, or those vexatious practices which the man in office is but too apt to be guilty of, when, exercising his office at a distance from the public eye, and, as it were, in a corner, he is satisfied that, provided he be cautious, he may dispense with being just.

Moreover, when the censorial power manifests in a strong and independent press, De Lolme expected that public officials “cannot conceal from themselves

46. Ibid at xiii-xiv.
49. Supra note 14.
50. Ibid at 170.
51. Ibid at 170-71 [emphasis added].
52. Ibid at 175.
53. Ibid at 176.
the disagreeable truths which resound from all sides,” and must “put up even with ridicule.”55 Press liberty is therefore essential because “it enables the people effectually to exert those means which the constitution has bestowed on them, of influencing the motions of the government.”56

Evaluating the censorial power’s institutionalization in England, De Lolme noted approvingly that its constitution had “allotted to the people themselves the province of openly canvassing and arraigning the conduct of those who are invested with any branch of public authority.”57 As for newspapers themselves, De Lolme reassured Britons that “it scarcely ever happens that a subject, in which the laws, or, in general, the public welfare, are really concerned, fails to call forth some able writer, who … communicates to the public his observations and complaints.”58

In the end, De Lolme provides significant insight into the checking function rationale. Identifying censorial power as the wellspring of democratic accountability, De Lolme saw the press as a vital extra-governmental mechanism for holding power to account. Underappreciated in his time, De Lolme’s scholarship was exemplary,59 as shown by the following quixotic passage on the corrective effect of the press:

In short, whoever considers what it is that constitutes the moving principle of what we call great affairs, and the invincible sensibility of man to the opinion of his fellow-creatures, will not hesitate to affirm, that, if it were possible for the liberty of the press to exist in a despotic government, and (what is not less difficult) for it to exist without changing the constitution, this liberty would alone form a counterpoise to the power of the prince.60

3. CONTAINING AND RESTRICTING POLITICAL POWER

British libertarian thought entered a final phase following unsuccessful criminal prosecutions of the publication and sale of Letters of Junius in 1770.61 Critics such as Capel Lofft, James Adair, and Robert Hall redefined freedom of speech

54. Ibid at 177.
55. Ibid.
56. Ibid at 178 [emphasis added].
57. Ibid at 171-72.
58. Ibid at 176 [emphasis added].
59. See e.g. Meyerson, supra note 47 at 312. Meyerson notes that “John Adams referred to De Lolme’s books as ‘the best defence of the political balance of three powers that ever was written.’” De Lolme was also cited by the US Supreme Court in Near v Minnesota, 283 US 697 at 714 (1931).
60. De Lolme, supra note 14 at 178 [emphasis added].
61. Siebert, supra note 9 at 385ff.
and press liberty in two respects. First, they examined the nature and effects of political power, thereby clarifying its relationship to the press. Second, they progressively disavowed verbal political crimes.

Capel Lofft’s *An Essay on the Law of Libels* contained many reflections on democratic accountability. Emphasizing the impact of unchecked ambition on governmental stability, Lofft reasoned:

> In every civil establishment that has any Constitution to lose, there is an incessant tendency to decay; the causes which produce this, power possessed and power to be acquired, wage everlasting war against the Freedom of the Whole. To reduce the excess of power as low as possible; to make it circulate so that the holders of it may be ever mindful they have a deposit, not a property; to have no member of the Community who can say he is not a sharer in its political rights; to have full information on constitutional franchises, and free investigation of public measures;—this it is to be a FREE PEOPLE.

Endorsing newspapers as the preferred means for checking political misconduct, Lofft likened the press to the “Attorney General of the People,” explaining that “[a]s a defensive, remedial effort, great may be its use: by the very apprehension that it may be used, it is a check.”

In *Discussions of the Law of Libels*, James Adair’s analysis extended to England’s political and constitutional structure. Observing that despots and governments forbid public libels only “as an atonement for the affront to his authority” or to protect “the government itself from censure,” Adair dismissed verbal political crimes as anti-democratic, concluding: “I doubt whether the mere defamation of the subject can, upon the principles of our government, ever be a public offence.”

Similarly, in *An Apology for the Freedom of the Press, and for General Liberty*, Robert Hall professed that “to suppress mere opinions by any other method than reason and argument, is the height of tyranny.” As with Adair, Hall cautiously grounded his argument in concerns with institutional design, noting that “[t]o

63. *Ibid* at 60-61.
64. *Ibid* at 60.
65. James Adair, *Discussions of the Law of Libels as at Present Received, in Which its Authenticity is Examined* (London: Publisher Unknown, 1785).
67. *Ibid* at 31-32 [emphasis added].
68. *Ibid* at 30 [emphasis added].
70. *Ibid* at 18 [emphasis in original].
render the magistrate a judge of truth, and engage his authority in the suppression of opinions, shews an inattention to the nature and design of political society.”

Exalting the press as a check on the power placed in government officials, Hall concluded: “[t]he control of the public mind over the conduct of ministers exerted through the medium of the press, has been regarded by the best writers both in our country and on the continent, as the main support of our liberties.”

B. POLITICAL ACCOUNTABILITY AND INSTITUTIONAL DESIGN

1. RUDIMENTARY COMPARATIVE ANALYSES

On the other side of the Atlantic, American theorists were likewise provoked by the *Sedition Act*, which criminalized “false, scandalous, or malicious writing” against President John Adams’s administration. Republican theorists George Hay, James Madison, and Tunis Wortman opposed this criminalization of political speech, arguing in some cases for absolutist interpretations of free expression and the press under the First Amendment.

Foremost among their concerns was discerning the institutional arrangements conducive to political accountability. George Hay’s *An Essay on the Liberty of the Press* provides an instructive example. Insisting that “freedom of the press” meant a “total exemption from any law making any publication whatever criminal,” Hay delivered rudimentary comparative law reflections on British and American political and constitutional structures.

Supporters of the *Sedition Act* claimed that freedom of the press meant only exemption from prior restraint. Hay rejected this as extreme fallacy, predicting that within one year, “a press absolutely free, would … ‘humble in the dust and ashes,’ the ‘stupendous fabric,’ of the British government.”

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71. *Ibid* at 2.
72. *Ibid* at 8 [emphasis in original].
73. *Ibid* at 8.
74. *An Act for the Punishment of Certain Crimes against the United States*, c 74, §1, 1 Stat 596 (1798).
75. *Ibid*, s 2.
80. *Ibid* at 43 [emphasis added].
more subtle analysis, Hay reasoned that “[i]n Britain, a legislative control over the press, is, perhaps essential to the preservation of the ‘present order of things’; but it does not follow, that such control is essential here.”

Speculating on America’s need for a “total exemption of the press from any kind of legislative control,” Hay noted disapprovingly that in England, “the parliament is acknowledged to be omnipotent. … In Britain there is no constitution, no limitation of legislative power.” But what escaped Hay’s notice was that parliamentarism might require a more independent, adversarial press precisely because of its limited institutional checks and balances. Without a codified constitution, judicial review of legislative enactments, or sharing of power amongst executive, legislative, and judicial branches, the press’s role in checking public officials arguably assumes greater importance for maintaining adequate accountability.

Another comparative analysis was provided by James Madison in his “Virginia Report of 1799–1800.” Madison advised that a prosecution for seditious libel “ought to produce universal alarm, because it is levelled against that right of freely examining public characters and measures, … the only effectual guardian of every other right.” Should representatives misbehave, Madison observed: “[I]t is natural and proper, that … they should be brought into contempt or disrepute, and incur the hatred of the people.”

Like Hay, Madison engaged in comparative analyses to “place this subject in the clearest light.” Noting that in Britain, “the danger of encroachments on the rights of the people is understood to be confined to the executive magistrate,” Madison argued that “[t]he representatives of the people in the Legislature are not only exempt themselves from distrust, but are considered as sufficient guardians of the rights of their constituents against the danger from the Executive.” He reasoned that “[u]nder such a government as this, an exemption of the press from previous restraint … is all the freedom that can be secured to it.” Republican governments, by comparison, “may well be supposed to require a greater freedom of animadversion than might be tolerated by the genius of such a government as that of Great Britain.”

82. Ibid at 49.
83. Ibid at 50.
84. Ibid at 49.
85. Madison, supra note 77.
86. Ibid at 371-72.
87. Ibid at 394.
88. Ibid at 386.
89. Ibid.
90. Ibid.
91. Ibid.
92. Ibid at 388.
This analysis suffers similar defects. Writing in highly abstract terms, Madison does not specify who “understood” that “danger of encroachments on the rights of the people” was confined only to Britain’s executive branch.93 Surely Lofft, Adair, and Hall would not have capitulated on this point; all were aware of prosecutions against authors and printers for offences against parliamentary privilege.94 Moreover, it is unclear how differences concerning British and American constitutions logically entail Madison’s conclusions. As with Hay, the prospect that parliamentary governments require a stronger press to expose and check official misconduct was not considered.

2. A FREE AND INDEPENDENT PRESS

Greater institutional insight was provided by Tunis Wortman’s *A Treatise Concerning Political Enquiry and the Liberty of the Press*.95 Justly hailed as “an American masterpiece, the only equivalent on this side of the Atlantic to Milton and Mill,”96 Wortman’s piece employed a comparative approach fixed in a pessimistic understanding of human nature and a profound curiosity for discerning the structural nature of free institutions.

Wortman began by positing the revisionary power of society, a concept highly resonant with De Lolme’s censorial power. Comprising each individual’s right to determine whether government had discharged its obligations, the revisionary power necessitated “that Society should incessantly maintain a species of censorial jurisdiction over its political institutions.”97 Wortman explained that “[t]he Revisionary Right of Society is not peculiar to any particular form of civil institution: it is an inherent and fundamental right of our social existence.”98

Turning to public libels, Wortman observed that “[a]n unrestricted investigation of the conduct of Magistrates, is not only a necessary preventative of the encroachments of Ambition, but it is also the only preservative of Public Liberty which can be resorted to without endangering the tranquility of a State.”99 Necessitating an independent and adversarial press, he reasoned that “Public Opinion should not only remain unconnected with Civil Authority, but be rendered superior to its control.”100 The structure of the press as a “Fourth Estate” was perhaps nowhere more clearly apprehended than by Wortman.

93. *Ibid* at 386.
95. Wortman, *supra* note 78.
96. Levy, *supra* note 9 at lxii.
97. Wortman, *supra* note 78 at 125.
98. *Ibid* at 137 [emphasis added].
99. *Ibid* at 174 [emphasis added].
100. *Ibid* at 176 [emphasis added].
Wortman unsurprisingly held the press in high regard. Noting that “[p]rinting may justly be considered as the most powerful benefactor of mankind,”\textsuperscript{101} he commended the press as the “vigilant guardian of Public Liberty, whose eye can penetrate, and whose voice be heard, in every quarter of the State.”\textsuperscript{102} Conceding with Lofft that “[a]ll Governments have an inevitable tendency to aspire,”\textsuperscript{103} Wortman defended the press in a seminal—if slightly hyperbolic—passage worth citing in full:

> It should always be remembered, that Government possesses an evident advantage and superiority over every species of opposition; it is a regular, disciplined, and organized corps; its moral and physical energies are concentrated and combined; it is capable of steady premeditation and continual design; it never loses sight of its object: but, with undeviating constancy, pursues its plans through the mazes of events, and in the midst of every obstacle. It is equally qualified to contrive and to execute: It perpetually exists, and slumbers not. Let it be added, it directs and commands all the resources of a State. Unless, therefore, some vigilant, powerful, and independent corrective is retained by Society, nothing can prevent its becoming the devoted victim of Despotism.\textsuperscript{104}

Predictably, Wortman insisted that “[t]ruth can never be a libel,” adding that “[t]he system which maintains so odious a proposition, is founded in the most palpable injustice.”\textsuperscript{105} Wortman explained: “To maintain such doctrine, is to declare open war against Political Enquiry, [and] entirely destroy the responsibility of the Magistrate.”\textsuperscript{106}

Still, despite exposing the institutional dynamics of the checking function, Wortman left unresolved the specific doctrinal implications of public libels that had intrigued Hay, Madison, and their Radical Whig predecessors, certain only of seditious libel that this “dangerous exotic can never be reconciled to the genius and constitution of a Representative Commonwealth.”\textsuperscript{107}

\section*{C. CONCLUSION}

Our review of libertarian theory reveals multiple points of interest. First, British and American theorists developed remarkably similar formulations of the press’s role in checking governmental power, thereby demonstrating its foundational

\begin{itemize}
  \item \textsuperscript{101} Ibid at 241.
  \item \textsuperscript{102} Ibid at 246.
  \item \textsuperscript{103} Ibid at 175.
  \item \textsuperscript{104} Ibid.
  \item \textsuperscript{105} Ibid at 252.
  \item \textsuperscript{106} Ibid at 253.
  \item \textsuperscript{107} Ibid at 262 [emphasis added].
\end{itemize}
importance to democracy. Second, early formulations of the checking function probed issues of political and constitutional structure and debated as to which structure maximized political liberty and press freedom. As in De Lolme's *The Constitution of England*, direct comparison with other political and constitutional structures was endorsed. Overall, compared with the mishandling of democratic models examined in Part II, this analysis demonstrates that accountability concerns were deeply embedded in early democratic theory and experience.

II. DISTINGUISHING DEMOCRATIC MODELS

A. OVERVIEW

This part begins with a detailed comparison of Alexander Meiklejohn’s “self-governance” theory and Vincent Blasi’s “checking value” of the press. Since both models are routinely conflated in public libel jurisprudence, a precise understanding of their nature and differences is essential. We then identify two causes of this confusion: (1) free expression’s incomplete “core” of justifications, and (2) misguided attempts to subsume free expression’s multiple justifications under single-valued approaches.

B. DEMOCRATIC THEORIZING IN PUBLIC LIBEL JURISPRUDENCE

1. MEIKLEJOHN’S “SELF-GOVERNANCE” RATIONALE

Alexander Meiklejohn’s self-governance rationale occupies a leading position among free expression justifications, having been quickly and uncritically transplanted from its American constitutional context to Britain.
Canada,\textsuperscript{111} and to a lesser extent, Australia\textsuperscript{112} and New Zealand.\textsuperscript{113} Yet, despite its popularity, Meiklejohnian theory is compromised not only by its absolutism and highly aspirational accounts of democratic citizenship, but also by an unavailing reluctance to recognize humanity’s shortcomings and contain its recurring abuses. Meiklejohnian theory therefore not only presents challenges as a practicable democratic model, but also appears opposed to the philosophy and principles underlying the US Constitution.\textsuperscript{114} Above all, Meiklejohn’s model contributes remarkably little to our understanding of political accountability. The democratic theory most transferrable across common law jurisdictions is thus conceivably not Meiklejohn’s, but rather the checking function, despite the former’s grip on constitutional theorizing and adjudication.

I. MEIKLEJOHN’S THEORY OF DEMOCRATIC “SELF-GOVERNANCE”

Writing in a post-war McCarthy era of political conformity and suppression of ‘dangerous’ speech, Meiklejohn’s target in his essay “Free Speech and its Relation to Self-Government” was America’s prevailing doctrine of clear and present danger.\textsuperscript{115} Although originating earlier,\textsuperscript{116} this doctrine was most famously

\begin{itemize}
\item \textsuperscript{115} Meiklejohn, Political Freedom, supra note 7 at 29ff.
\item \textsuperscript{116} Schenck v United States, 249 US 47 (1919), Holmes J.
\end{itemize}
applied by Justice Oliver Wendell Holmes Jr. in Abrams v United States,\(^\text{117}\) which set out his marketplace of ideas metaphor and underlying reasoning.\(^\text{118}\)

Foremost among Meiklejohn’s concerns was Justice Holmes’s depiction of human nature. Convinced that, despite his literary eloquence and rhetorical power, “the thinking of Mr. Holmes about the First Amendment [had] no such excellence,”\(^\text{119}\) Meiklejohn expressed grave doubt that Justice Holmes’s marketplace of ideas was anything but a “partial insight.”\(^\text{120}\) Alleging that excessive “individualism” and a pessimistic view of human nature would promote “intellectual irresponsibility,”\(^\text{121}\) Meiklejohn insisted that “[u]nder its influence, there are no standards for determining the difference between the true and the false,” and that “[t]he truth is what a man or an interest or a nation can get away with.”\(^\text{122}\)

Unpersuaded by Holmes’s depiction, Meiklejohn provided an aspirational counterpoint, arguing that “one cannot understand the basic purposes of our Constitution … unless one sees them as a good man, a man who, in his political activities, is not merely fighting for what, under the law, he can get, but is eagerly and generously serving the common welfare.”\(^\text{123}\) Reproaching Justice Holmes’s failure to recognize these “sane and solid moral principles,” Meiklejohn championed a protective role for the First Amendment, arguing that “whatever else it may mean, the First Amendment is an expression of human goodness. That amendment, in its own field, stands guard over the general welfare of the community.”\(^\text{124}\)

Contrastingly, Meiklejohn identified as the highest insight of political freedom that truth-seeking is simply instrumental to promoting democratic deliberation and the general welfare. While recognizing the First Amendment as “a device for the winning of new truth,” Meiklejohn clarified that its primary purpose was “to give to every voting member of the body politic the fullest

\(^\text{117}\) 250 US 616 (1919) [Abrams].
\(^\text{118}\) Ibid at 630. Specifically, Holmes rejected restricting opinions except when they “so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country” (ibid).
\(^\text{119}\) Meiklejohn, Political Freedom, supra note 7 at 61 [emphasis added].
\(^\text{120}\) Ibid at 73.
\(^\text{121}\) Ibid.
\(^\text{122}\) Ibid at 74.
\(^\text{123}\) Ibid at 66.
\(^\text{124}\) Ibid at 68.
possible participation in the understanding of those problems with which the citizens of a self-governing society must deal.”

Contending that freedom of expression “springs from the necessities of the program of self-government,” Meiklejohn construed the First Amendment as “a deduction from the basic American agreement that public issues shall be decided by universal suffrage.” Besides the Preamble to the US Constitution, Meiklejohn emphasized two provisions informing the First Amendment. First, the guarantee of parliamentary privilege in Article 1, Section 6 provided a “prohibition against abridgment of the freedom of speech which is equally uncompromising, equally absolute, with that of the First Amendment.” According to Meiklejohn, since parliamentary privilege is essential to representative government, public discussion of its sovereign citizens requires identical protection. Meiklejohn instructed that “[t]he freedom which we grant to our representatives is merely a derivative of the prior freedom which belongs to us as voters.”

Second, Meiklejohn claimed that the Fifth Amendment also clarifies America’s free speech commitments, which provides that “no person within the jurisdiction of the laws of the United States may be ‘deprived of life, liberty, or property, without due process of law.’” As the “liberty” referenced in the Fifth Amendment includes “liberty of speech,” Meiklejohn argued that the First and Fifth Amendments recognize two radically-different classes of utterances: Private speech, which may be abridged subject to due process guarantees, and public speech which, under the First Amendment, must receive absolute protection.

Defending this strict separation of public and private discourse, Meiklejohn insisted that the First Amendment “was written to clear the way for thinking which serves the general welfare.” Compared to Justice Holmes and Professor Zechariah Chafee Jr., who defended the clear and present danger doctrine by emphasizing its importance for balancing public safety against truth, Meiklejohn reminded Americans that “we have decided that the destruction of

125. Ibid at 75 [emphasis added].
126. Ibid at 27.
127. Ibid [emphasis added].
128. US Const pmbl.
129. Meiklejohn, Political Freedom, supra note 7 at 34-35.
130. Ibid at 36 [emphasis added].
131. Ibid [emphasis added].
132. Ibid.
133. Ibid at 37.
134. Ibid at 42.
freedom is always unwise, that freedom is always expedient. … It is a reasoned and sober judgment as to the best available method of guarding the public safety.” 136 Consequently, “no idea may be suppressed because someone in office, or out of office, has judged it to be ‘dangerous.’” 137 Meiklejohn argued that the First Amendment’s “great declaration is that intellectual freedom is the necessary bulwark of the public safety. That declaration admits of no exceptions.” 138

Consequently, Americans self-govern only insofar as their “deliberate and informed judgment-making is equipped with the power … to control and direct the pursuit of private interest in whatever way the public welfare may require.” 139 Besides unrestricted public debate, voting assumed paramount significance for Meiklejohn, who insisted that “we Americans are politically free only insofar as our voting is free.” 140 His theory demands that “our judging of public issues, whether done separately or in groups, must be free and independent—must be our own.” 141

These electoral expectations also imply substantial social responsibilities, including reinforcing education to ensure citizens have mandatory minimum levels of civic understanding. Meiklejohn advised that “[w]e shall not understand the First Amendment unless we see that underlying it is the purpose that all the citizens of our self-governing society shall be ‘equally’ educated.” 142 Accordingly, America must be “cultivating the general intelligence” of the people, a “heavy and basic responsibility” that Congress must promote. 143 Idealizing the pastoral American town hall meeting, Meiklejohn stressed not “the words of the speakers, but the minds of the hearers. The final aim of the meeting is the voting of wise decisions.” 144 In public life, “[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said.” 145 Shared understanding and effective deliberation, not direct participation, were Meiklejohn’s overriding political concerns.

For example, prior to television and the Internet, Meiklejohn criticized commercial radio, denouncing it as “not engaged in the task of expanding

136. Meiklejohn, Political Freedom, supra note 7 at 57.
137. Ibid at 79.
138. Ibid at 59 [emphasis added].
139. Ibid at 163.
140. Ibid at 116.
141. Ibid at 117.
142. Ibid at 86.
143. Ibid at 20.
144. Ibid at 26.
145. Ibid [emphasis added].
and enriching human communication,” but rather being solely “engaged in making money.”\textsuperscript{146} Arguing that the radio had corrupted “both our morals and our intelligence,” Meiklejohn insisted that this precursor to modern mass communications revealed “how hollow may be the victories of the freedom of speech when our acceptance of the principle is \textit{merely formalistic}.\textsuperscript{147}

And herein lies the self-limiting element in Meiklejohnian theory. By focusing on the moral characteristics deemed essential for self-government, Meiklejohn disregarded the well-known shortfalls in human nature that prompted America’s republican government in the first place. At last, while Meiklejohn admirably embraced the ideals of democratic rule, he contributed precious little to our understanding of democratic accountability, a seemingly inescapable conclusion after comparing his theory to the checking function of the press.

2. \textsc{Blasi’s “Checking Value” of the Press}

The dominant authority on the checking function rationale is Professor Vincent Blasi. In a well-documented review published in the American Bar Foundation Research Journal in 1977,\textsuperscript{148} Blasi advised that, along with traditional values underlying First Amendment theories, “free expression is valuable in part because of the function it performs in checking the abuse of official power.”\textsuperscript{149} While First Amendment theories developed in the early-twentieth century emphasized three values: (1) autonomy; (2) truth-seeking and diversity, captured by the “marketplace of ideas” metaphor;\textsuperscript{150} and (3) “self-government,”\textsuperscript{151} Blasi nonetheless observed that, in the 1960s and 1970s, the value relevant to free speech claims and claimants before the US Supreme Court was the Federalist-era concern of “a free press … in checking the abuse of power by public officials.”\textsuperscript{152}

I. \textsc{Constitutive Premises and Philosophical Sources}

Professor Blasi provided an authoritative definition of this checking value by classifying its five constitutive premises. Citing Radical Whigs such as Cato, Father of Candor, John Wilkes, and Junius, along with James Madison and Tunis Wortman—all advocating for a strong, independent press as a check

\textsuperscript{146} Ibid at 87.
\textsuperscript{147} Ibid [emphasis added].
\textsuperscript{148} Blasi, “Checking,” \textit{supra} note 7.
\textsuperscript{149} Ibid at 528.
\textsuperscript{151} Blasi, “Checking,” \textit{supra} note 7 at 524; Meiklejohn, \textit{Political Freedom}, \textit{supra} note 7.
\textsuperscript{152} Blasi, “Checking,” \textit{supra} note 7 at 527.
on government—Blasi sought to better understand the checking function by examining “the sources of the value, the premises on which it rests, and the ways in which it differs from other values.”

First, and most importantly, “[t]he central premise of the checking value is that the abuse of official power is an especially serious evil—more serious than the abuse of private power.” Blasi warned of government’s effects on individuals through its “significant investigative capabilities,” its ability to store and use “vast accumulations of data,” and its “capacity to employ legitimized violence.” Besides expressing concerns that the public “want[s] to believe in the trustworthiness of … officials,” Blasi warned of public officials acquiring “an inflated sense of self-importance,” and of greater social costs when “important expectations have been defeated” through official misconduct.

The checking function’s second premise involves accepting “an essentially pessimistic view of human nature and human institutions.” Professor Blasi observed that “[h]uman beings have an unmistakable tendency to hurt each other, so much so that the prevention of man-made evil can be viewed as the most important task of all political arrangements.” Although proponents of the checking function might value free expression for other reasons, their primary concern will be encouraging the press’ “modest capacity to mitigate the human suffering that other humans cause,” especially the greater human suffering “caused by persons who hold public office.”

Given the increasing size and complexity of contemporary democracies, a third premise posits a “need for well-organized, well-financed, professional critics to serve as a counterforce to government.” This requires critics proficient at “acquiring enough information to pass judgment on the actions of government,” who are “capable of disseminating their information and judgments to the general public.” Blasi cautioned that “if modern government were ever to gain complete control of the channels of mass communication or to incapacitate its professional critics in some other way, there would be no effective

153. Ibid at 529.
154. Ibid at 538.
155. Ibid at 538-39.
156. Ibid at 540 [emphasis in original].
157. Ibid at 541.
158. Ibid.
159. Ibid.
160. Ibid.
161. Ibid.
check on official misconduct," a concern highly resonant with today’s era of digital communication and surveillance.\textsuperscript{162}

The checking function also includes a fourth premise that “the general populace must be the ultimate judge of the behavior of public officials.”\textsuperscript{163} Although implying a connection to democratic theory, Blasi rightly noted that “it is the democratic theory of John Locke and Joseph Schumpeter, not that of Alexander Meiklejohn.”\textsuperscript{164} While a proponent of the checking function might be a direct democrat, “in the sense of favoring a significant participatory role for the ordinary citizen in day-to-day governance,” Blasi surmised that he or she must “be at least a Lockean democrat,”\textsuperscript{165} in that the general population defines and enforces norms relating to official misconduct.

Finally, judging government officials implies a fifth premise: “[T]hat the concept of ‘misconduct’ has meaning in the context of governmental decision-making.”\textsuperscript{166} This implies “violation by public officials of norms that transcend a wide spectrum of policy differences.”\textsuperscript{167} Professor Blasi offered the following examples: (1) fraudulent behaviour violating criminal laws, such as “embezzlement or the acceptance of a bribe”; (2) unconstitutional behaviour; (3) improper involvement in foreign affairs, including “the deliberate bombing of civilians during wartime” and “the assassination of foreign political figures”; (4) “serious misrepresentations” made to government institutions or the public; and (5) using public office to augment one’s economic position.\textsuperscript{168} All told, the checking function provides a valuable supplement to traditional freedom of expression justifications, particularly in light of the considerable gaps in Meiklejohnian theory.

II. DISTINGUISHING THE CHECKING FUNCTION FROM TRADITIONAL JUSTIFICATIONS

Refining the checking function’s significance for constitutional adjudication, Professor Blasi outlined its dissimilarities to traditional free expression values. Committed to demonstrating its theoretical independence, he insisted that the checking function “could never replace the existing First Amendment value

\textsuperscript{162} Ibid at 542.
\textsuperscript{163} Ibid.
\textsuperscript{164} Ibid.
\textsuperscript{165} Ibid.
\textsuperscript{166} Ibid.
\textsuperscript{167} Ibid.
\textsuperscript{168} Ibid at 543.
matrix but rather should be viewed as potentially a vital additional component in that constellation of interdependent values.”

Blasi first observed that a proponent of the checking function “views speech of a certain content as important because of its consequences: alerting the polity to the facts or implications of official behaviour, presumably triggering responses that will mitigate the ill effects.” Proponents of the autonomy value are, by contrast, “more concerned with the process of belief formation and communication; the value does not rest on any empirical propositions regarding the social effects of speech.” Moreover, due to autonomy’s “largely irreducible” nature, constitutional claims based on autonomy “tend to be absolute in nature.” The checking function, however, is amenable to a balancing analysis involving “competing regulatory interests.” A final difference is that the checking function “supports doctrines that makes constitutional protection a function of who is speaking and what is being said,” suggesting “a distinctive constitutional role for certain specialized countervailing forces in the society and certain specialized speech and press activities.” Thus, “a proponent of the checking value places a premium on, and … may accord extraordinary constitutional protection to, speech … concerning the behavior of public officials.”

Second, although the checking and truth-seeking values “both support the protection of speech because of its social consequences rather than on the basis of … intrinsic moral worth,” the checking function focuses on a much narrower concern; namely, scrutinizing public officials will produce more good—by preventing or containing official misconduct—than harm, such as “diminution in the efficiency of the public service or weakening of the trust that ultimately holds any political society together.” Thus, “exposing government misbehaviour might be accorded a level of constitutional protection higher than that accorded other speech activities which have only the more general effect of enhancing diversity.”

169. Ibid at 548.
170. Ibid at 546 [emphasis in original].
171. Ibid [emphasis in original].
172. Ibid at 547.
173. Ibid.
175. Ibid at 548.
176. Ibid at 551.
177. Ibid at 552.
178. Ibid at 552-53.
Blasi also noted that while the checking and truth-seeking values similarly “focus on the interests of listeners and readers rather than speakers and writers,” the checking function emphasizes a narrower need for information about what the government is doing.\(^{179}\) This outweighs public advocacy, since, for Blasi, “[t]he moral and political implications of official behavior will often be apparent without extended public debate.”\(^{180}\) Thus, “[t]he most important stage in the checking process is typically that during which the public is first made aware of what is going on.”\(^{181}\) Acknowledging the checking function as an independent free expression value should then provide greater protection for “speech activities which relate to the dissemination of information divorced from advocacy.”\(^{182}\)

Of course, Blasi accepted that distinguishing Meiklejohnian theory “requires the most extensive treatment.”\(^{183}\) Both theories focus on “political consequences of speech” and give special protection to political communications, both emphasize “readers and listeners,” and “both stem from democratic conceptions of sovereignty.”\(^{184}\) Blasi sensibly advised that “the checking value has the potential to influence First Amendment doctrine only insofar as it can be shown to have premises and implications significantly different from those of the self-government value.”\(^{185}\)

According to Blasi, the most obvious difference is that “[t]he checking value focuses on the particular problem of misconduct by government officials,” whereas the self-government theory “makes no such narrow ordering.”\(^{186}\) In fact, Meiklejohn provides absolute protection to “all speech relevant to the process by which citizens decide how to vote.”\(^{187}\) According to Blasi, “[a] proponent of the checking value does not deny that myriad harms to the body politic may be forestalled by speech activities or that many goals of a democratic system of government may be served by … certain forms of communication.”\(^{188}\) But given the dangers of official misconduct, “its prevention and containment is a goal that takes precedence over all other goals of the political system.”\(^{189}\)

179. Ibid at 553.
180. Ibid.
181. Ibid.
182. Ibid at 554.
183. Ibid at 544.
184. Ibid at 557-58.
185. Ibid at 558.
186. Ibid at 558-59.
187. Ibid at 559.
188. Ibid at 558.
189. Ibid.
Another important difference is that the checking function permits balancing the consequences of speech activities, whereas constitutional protection for “self-governing” speech must be unqualified. As discussed above, for Meiklejohn, “any limitation imposed by the agents of the people on the self-governing speech of citizens is simply an impossible notion under our political compact.” Although the checking function is consistent with private or group interest political theories, Blasi rightly observed that “the [checking] value is especially important in a society characterized to a large degree by competition and the pursuit of private satisfaction.”

Finally, Professor Blasi noted two differences of emphasis. First, Meiklejohn places “slightly more emphasis on argumentation … than does the checking value.” The checking function emphasizes “shortage of information” as the most serious issue relating to political problems. Second, the two models view social and political elites differently. Blasi rightly noted that “Meiklejohn [was] reluctant to assign a special role in the governmental system to any group of people.” Public officials were understood as “agents of the collective political will.” By contrast, since “a proponent of the checking value sees political decision-making more as a product of contending forces and counterforces,” “public officials” are seen as “potential oppressors rather than as … agents.” This view recognizes that “public officials are qualitatively different from ordinary voters” and that they can be “effectively checked … by other elite groups with similarly specialized powers, skills, and attitudes.” Besides organized political opposition, another elite counterforce is the institutional press. According to Blasi, only the checking function highlights this structural role and justifies treating “journalists differently than ordinary citizens in determining what rights are guaranteed by the First Amendment.”

As illustrated in Table 1, each model highlights different aspects of democratic governance. Specifically, where Meiklejohn emphasizes deliberative

190. Ibid at 559.
191. Ibid.
192. Ibid at 563.
193. Ibid.
194. Ibid.
195. Ibid.
196. Ibid [emphasis added].
197. Ibid.
198. Ibid at 564.
199. Ibid.
200. Ibid.
democracy and the press’s role in facilitating electoral decision making, the checking function focuses on political accountability and the liberal watchdog function of the press. Still, despite their considerable differences, legal scholars have complicated matters by failing to differentiate them. As examined below, difficulties marshalling democratic theory are due both to incomplete articulations of freedom of expression’s core justifications and misguided attempts to subsume these core values under various single-valued approaches. In both instances, the theoretical differences characterizing each model are obscured.

**TABLE 1: COMPARISON OF MEIKLEJOHN’S AND BLASI’S MODELS OF DEMOCRATIC GOVERNANCE**

<table>
<thead>
<tr>
<th>Meiklejohn’s “Self-Governance” Theory</th>
<th>Blasi’s “Checking Value” of the Press</th>
</tr>
</thead>
<tbody>
<tr>
<td>Emphasizes deliberation and promoting general welfare</td>
<td>Emphasizes accountability and exposing political misconduct</td>
</tr>
<tr>
<td>Political representatives viewed as agents</td>
<td>Political representatives viewed as potential oppressors</td>
</tr>
<tr>
<td>Idealized view of democratic rule and human nature</td>
<td>Pessimistic view of human nature and democratic institutions</td>
</tr>
<tr>
<td>Focuses on and protects all speech relevant to electoral issues</td>
<td>Focuses specifically on misconduct by government officials</td>
</tr>
<tr>
<td>Emphasizes argumentation as part of deliberative process</td>
<td>Emphasizes shortage of information about political power</td>
</tr>
<tr>
<td>Press conceptualized as a conduit for information</td>
<td>Press conceptualized as a “fourth estate” or independent watchdog</td>
</tr>
<tr>
<td>Occupies leading position among democratic freedom of expression justifications worldwide</td>
<td>Has been marginalized and discounted by judges, legislators, and legal academics</td>
</tr>
</tbody>
</table>

**C. FREE EXPRESSION’S INCOMPLETE “CORE”**

Although defamation law has long recognized freedom of expression’s significance,201 underlying free speech justifications have only recently been

recognized by courts and commentators. Despite seminal defences by John Milton and John Stuart Mill, \(^{202}\) as well as twentieth-century contributions by Justices Holmes and Brandeis of the US Supreme Court, \(^{203}\) the current popularized core of free expression justifications originated with Thomas Emerson's 1962-1963 article “Toward a General Theory of the First Amendment.” \(^{204}\) In his article, Professor Emerson explored the relationships between the First Amendment's philosophical rationales, general principles, and specific doctrines. Crucially, this American-borne analysis was supported by a far-reaching classification of four free speech rationales central to the modern “liberal constitutional state.” Emerson instructed:

> Maintenance of a system of free expression is necessary (1) as assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making, and (4) as maintaining the balance between stability and change in the society.\(^{205}\)

Eliciting Meiklejohn's democratic self-governance theory, \(^{206}\) Emerson stated ambiguously that “[t]he crucial point, however, is not that freedom of expression is politically useful, but that it is indispensable to the operation of a democratic form of government.”\(^{207}\) Stressing the American electorate's deliberative requirement for “full freedom of expression both in forming individual judgments and in forming the common judgment,”\(^{208}\) Emerson's account of democracy owed very little (if anything) to notions of democratic accountability.

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203. See Abrams, supra note 117; Whitney v California, 274 US 357 (1927).
206. See Meiklejohn, Political Freedom, supra note 7.
207. *Supra* note 204 at 883.
208. *Ibid*.
Although predating influential judgments and academic commentary endorsing watchdog journalism and the press, Emerson’s article has nevertheless assumed an authoritative status on free speech justifications, both within and—more remarkably—outside America. Unfortunately, Emerson’s free speech taxonomy was deficient from inception, notably overlooking the checking function rationale. Demonstrating the doctrinal implications of his closed inventory of free expression values, Emerson insisted that “alternative principles have no substantial support, and that our system of freedom of expression must be based upon and designed for the realization of the fundamental propositions embodied in the traditional theory.”

Emerson’s omission of accountability concerns was all the more surprising given his otherwise keen awareness of threats to political liberty in post-war America. Emerson identified the mounting impact of “industrialization, urbanization and the proliferation of organization,” each, in his view, giving rise to increasing threats to freedom of expression, which prompted his cautioning that “the danger of distorting legitimate powers for illegitimate purposes has become acute.” Building on this last point, Emerson noted significant changes centering on “the impact of mass public opinion.” Sounding more like Herbert Marcuse and the Frankfurt School than a liberal constitutional theorist, he observed that “[m]odern government strives to achieve unity and control more by the manipulation of public attitudes and opinion than by direct application of official sanctions.”


211. Supra note 204 at 886.

212. Ibid at 901.

213. Ibid at 902.

214. Ibid.

215. Ibid at 903.
But rather than highlight the institutional press as a countervailing mechanism, Emerson appealed only to the rule of law and judicial institutions for “the maintenance of a system of freedom of expression.” Therefore, despite describing concerns that would have prompted Radical Whigs into pleas for increased press liberty, concerns with democratic accountability were neither formally embedded in Emerson’s inventory of free expression justifications nor acknowledged more generally. As demonstrated by the Supreme Court of Canada, unless courts and legislatures are conversant with the checking function rationale, there is a real risk that Emerson’s inventory of core justifications could be misinterpreted as a complete code.

D. NECESSITY FOR MULTI-VALUED THEORIZING

Another barrier to democratic theorizing is worth exploring. Following publication of Emerson’s article, many legal scholars attempted to resolve perceptions of incoherence in free speech jurisprudence by subsuming traditional justifications under various single-valued approaches. Among the theoretical aspirants were Meiklejohn’s democratic “self-governance” rationale, “self-realization,” “participatory democracy,” “believing persons,” and even an adaptation of Habermas’s theory of “communicative action.” Although not all single-valued approaches were exclusionary, all necessarily marginalized lower-ranked rationales.

The most marginalized theory was the checking function of the press. In a controversial 1982 article prophetically titled “The Value of Free Speech,”

216. Ibid.
220. Redish, supra note 218; Perry, supra note 218.
221. Weinstein, supra note 218.
222. Smith, supra note 218.
223. Solum, supra note 218.
Professor Martin Redish argued that Emerson’s classic free expression justifications were best subsumed under the “one true value” of “individual self-realization.” \(^{224}\) Claiming that Emerson’s justifications were “in reality subvalues of self-realization,” Redish also targeted multi-valued approaches more generally, insisting that it was “inaccurate to suggest that ‘the commitment to free expression embodie[s] a complex of values.’” \(^{225}\) After dismissing Emerson’s core justifications, Redish observed that “Professor Blasi’s ‘checking function’ appear[ed] strikingly similar to the ‘democratic process’ value of Meiklejohn.” \(^{226}\) In an instructive case of misguided reliance on formal logic, Redish dismissed the checking function as only a derivative of “self-realization,” reasoning incautiously that “[b]ecause the checking function ultimately derives from the principle of democratic self-rule, and because that principle in turn follows from the self-realization value, the checking function is merely one concrete manifestation of the much broader self-realization value.” \(^{227}\)

The difficulties with this overly reductionist, single-valued approach are many. First, Redish’s interpretation of the checking function was curt and dismissive, failing to engage with its “constitutive premises” and Blasi’s considerable efforts to distinguish it from traditional free expression theories. \(^{228}\) Second, Redish discussed the checking function in highly abstract terms, without scrutinizing its relationship to particular doctrinal issues, such as its role in public libel doctrine. Without anchoring his discussion in paradigmatic examples of official misconduct, it is difficult to appreciate how one might prefer self-realization or any other free expression justification over the checking function for factual relevance or exegetical power.

Lastly, Redish’s argument minimized crucial distinctions between democratic self-governance and the checking function that reveal themselves principally in the context of public libels. It is precisely the factual details of official misconduct and abuse of governmental power that ensure an accurate and credible balancing of free expression against reputation. That is, it matters greatly for selecting doctrine whether freedom of expression’s side of the equation is properly weighted. Epistemologically, Redish’s argument races to progressively higher levels of abstraction at the expense of a sharper and more complete understanding.

\(^{224}\) Supra note 218 at 593.

\(^{225}\) Ibid at 594, quoting Blasi, “Checking,” supra note 7 at 538.

\(^{226}\) Ibid at 613, n 77.

\(^{227}\) Ibid at 615-16.

\(^{228}\) With few exceptions, legal scholars have cited the checking function only to conflate it with higher-level abstractions.
of the checking function’s contextual relevance and distinctive relationship to
democratic theory. Simply put, as with all abstraction, it is in consequence most
notable for what it leaves out.

Professor Michael Perry has also dismissed the checking function by
appealing to a simple criterion of whether a proposed theory adds any “additional
normative content” to freedom of expression.229 In an illustrative example of this
similarly misguided approach, Perry reasoned that since Meiklejohnian theory
“calls for protecting information and ideas useful in evaluating public policy
and performance,”230 information on abuses of authority does not add anything
further. Perry’s dismissal of the checking function is thus comprised of one simple,
highly abstract statement regarding potential overlap of information relevant to
both values. This broad and undifferentiated understanding of Meiklejohnian
theory and the checking function evidences the dangers of disregarding their
differences in emphasis and relevance to specific factual contexts. What Professors
Perry and Redish fail to consider is that the checking function might provide
uniquely sound reasons to weigh freedom of expression more heavily in some
factual contexts than in others, particularly in cases where governments,
politicians, and certain public figures attempt to use defamation law to silence
the press from publishing matters of public interest to mass audiences.

Fortunately, these methodological concerns have attracted other eminent
constitutional law scholars.231 The leading light on such matters is arguably
Professor Frederick Schauer who, in contrast to those crusading for one true
free expression theory, supports a seemingly less splendid multi-valued approach.
Although advising that “[a]ttempting to apply the first amendment without
some theoretical vision of free speech is mere stumbling in the dark,”232 Schauer
cautioned against the pitfalls of the single-valued approaches endorsed by
Professors Redish and Perry, confirming that “it is unlikely that any one theory

229. Supra note 218 at 1159.
230. Ibid at 1152, n 62. For a Canadian example, see David Fewer, “Constitutionalizing
Copyright: Freedom of Expression and the Limits of Copyright in Canada” (1997) 55 UT
Fac L Rev 175 at 193-94.
231. See e.g. Frederick Schauer, “Categories and the First Amendment: A Play in Three Acts”
A Philosophical Enquiry (Cambridge, UK: Cambridge University Press, 1982); Pierre J
Rev 671; Steven Shiffrin, “Liberalism, Radicalism, and Legal Scholarship” (1983) 30 UCLA
L Rev 1103; Frederick Schauer, “Must Speech be Special?” (1983) 78 Nw UL Rev 1284;
can explain the concept of free speech, and no reason necessarily exists to suppose that it could.\(^{233}\) Not long after, Professor Schauer concluded more definitively that “[t]o view the first amendment as being grounded in one and only one theoretical justification is a mistake.”\(^{234}\)

Columbia Law Professor Kent Greenawalt has also argued that single, unifying justifications for free expression risk either obscuring or oversimplifying its interrelated rationales. In “Free Speech Justifications,”\(^{235}\) Greenawalt posited a loose constellation of reasons, subjects, and sub-principles of free expression. Explaining the now familiar single-valued strategy of inclusion used by Professor Redish,\(^{236}\) whereby free expression values are subsumed under a broader theory, Greenawalt sensibly advised that “any reason broad enough to yield a plausible claim that it includes everything else is bound to be extremely general and vague.”\(^{237}\) Citing Blasi’s checking value as an instructive example, Greenawalt opposed the single-valued methodologies of Professors Redish and Perry, advising that “[t]he value of free speech for accountable government may be underestimated if only the relationship to individual fulfillment is addressed.”\(^{238}\)

An orientation toward practical thought is therefore paramount for Greenawalt, requiring a more bottom-up and contextual approach to constitutional theorizing. For example, when considering the checking function as a free expression value of “historical significance and central importance … powerfully developed by Vincent Blasi,” Greenawalt observed that it seemed “[c]losely linked to truth discovery and interests accommodation.”\(^{239}\) However, demonstrating the power of his prescriptions for preserving the checking function’s theoretical independence, Greenawalt stressed that “a critical press affects how officials and citizens regard the exercise of government power, subtly supporting the notion that government service is a responsibility, not an opportunity for personal advantage.”\(^{240}\)

In the end, given the alarming acts of corruption that too often typify public libel cases, Professor Greenawalt’s sensitivity to differing emphases of democratic free expression theories seems a sensible approach worth preserving.

\(^{233}\) Ibid at 276-77 [emphasis in original].
\(^{234}\) Schauer, “Public Figures,” supra note 231 at 930.
\(^{235}\) Supra note 231.
\(^{236}\) The other being “elimination,” whereby aspirants are discarded for overlapping significantly with other values (\textit{ibid} at 126).
\(^{237}\) Ibid at 126 [emphasis added].
\(^{238}\) Ibid at 127.
\(^{239}\) Ibid at 142.
\(^{240}\) Ibid at 143 [emphasis added].
III. IMPLICATIONS FOR DEFAMATION LAW REFORM

A. THE PROBLEM OF PUBLIC LIBEL LAW

This undertheorizing of democratic free expression values has had drastic effects on public libel jurisprudence. Making matters worse, when it is viewed from a comparative law perspective, there appears to be no criteria by which judges and legislators select their doctrinal approaches.\(^{241}\) Other than comprehensively rejecting the actual malice rule outside America,\(^{242}\) leading courts and legislatures effectively provide no theoretical justifications for their preferred solutions.\(^{243}\)

For example, in *Theophanous v Herald & Weekly Times Ltd*,\(^{244}\) a majority of Australia’s High Court attempted to justify its unprecedented expansion of qualified privilege principles by concluding imprecisely, “[t]he formula we favour redresses the balance to some extent in favour of the plaintiff; as much, in our view, as can legitimately be achieved without significantly interfering with free communication.”\(^{245}\) Besides dismissing US doctrine, the High Court’s reasons for judgment omitted *any* criteria by which this statement could be assessed. Similarly, the Supreme Court of Canada’s constitutional analysis in *Grant* was contained in one short paragraph. Clearly preferring a doctrinal middle road bifurcating the actual malice rule and the defence of qualified privilege, Chief Justice McLachlin concluded: “In my view, the third option, buttressed by the argument from *Charter* principles advanced earlier, represents a reasonable and proportionate response to the need to protect reputation while sustaining the public exchange of information that is vital to modern Canadian society.”\(^{246}\) Besides overlooking the checking function in its “argument from *Charter* principles,”\(^{247}\) the Court’s legal analysis also lacked evaluative criteria.

Where theoretical justifications are attempted, judges and legislators have disregarded accountability and the checking function rationale when appealing to democratic theory, thus selecting less press-friendly doctrine than required. For

\(^{241}\) Stephenson, *supra* note 2, ch 1.


\(^{243}\) See e.g. *Theophanous, supra* note 4 at 140; *Lange v Atkinson & Australian Consolidated Press NZ Ltd*, [1997] 2 NZLR 22 (HC) at 37; *Lange*, 1998, *supra* note 4 at 451, 467; *Reynolds, supra* note 4 at 203, 204, 210, 219; *Grant, supra* note 4 at paras 57, 89.

\(^{244}\) *Theophanous, supra* note 4.

\(^{245}\) Ibid at 140.

\(^{246}\) *Grant, supra* note 4 at para 86.

\(^{247}\) Ibid.
instance, in *Reynolds*,248 the House of Lords rejected a generic qualified privilege based on the actual malice rule. Lord Nicholls, who wrote the leading speech, concluded unconvincingly that the newspaper’s attempt to distinguish political discussion from other matters of public interest was “unsound in principle,”249 and “lack[ed] a coherent rationale.”250 Lord Cooke also asserted that there was “no good reason” why politicians and public officials should be subjected to greater risk of false allegations of fact in the media.251 Importantly, these claims were made without the benefits of comparative law analysis or careful reflections on the doctrinal implications of pertinent free expression justifications.252 Collectively, this undertheorizing has led to widespread over- and under-protection of political speech and expression worldwide.253

The effects of these errors intensify when a revised theoretical framework is offered for consideration. As I have proposed, by adjusting public libel doctrine (*i.e.*, press regulation) to a jurisdiction’s background accountability profile, law reform efforts must focus on assessing the cumulative effects of eight accountability mechanisms.254 Rather than adjusting public libel doctrine linearly to only one variable (*e.g.*, reputation), doctrine is selected to mitigate exposed “accountability dysfunctions,” be they deficits or overloads.255 This requires evaluating accountability networks from a systems perspective, essentially adjusting the press’s checking function to restore an optimal balance of accountability in each jurisdiction.

This is perhaps best grasped by applying this proposed framework to the United Kingdom, where it generates unexpected, but theoretically sound, reforms. As detailed elsewhere,256 despite the additional sources of information generated

248. Supra note 4.
249. Ibid at 204 (Lord Nicholls).
250. Ibid at 203 (Lord Nicholls).
251. Ibid at 219 (Lord Cooke).
252. In fact, the House of Lords overlooked an important line of Strasbourg jurisprudence consistent with the checking function rationale that it was obliged to consider under the *Human Rights Act 1998*. See *Human Rights Act 1998* (UK), c 42, s 6(1). See e.g. *Sunday Times v United Kingdom* (1979), 2 EHRR 245; *Lingens v Austria* (1986), 8 EHRR 407; *Castells v Spain*, 14 EHRR 445.
253. Stephenson, supra note 2, Part B.
254. Ibid at 186. These mechanisms consist of two groups. The “primary” mechanisms represent those relatively fixed elements of constitutional design, including: (1) parliamentary/presidential structure; (2) federal/unitary structure; (3) electoral structure; (4) legislative mechanisms; and (5) judicial review. The “secondary” mechanisms represent those comparatively dynamic elements, consisting of: (1) government auditors; (2) independent regulators; and (3) direct public access mechanisms.
255. Ibid at 170-73.
256. Ibid at 199-220.
by its mechanisms of legislative scrutiny (i.e., official reports, departmental select committees, and constituency opinion polling), Britain remains beset by widespread transparency concerns associated with its parliamentary structure and its convention of ministerial responsibility. To be exact, parliamentary systems lack the monitoring capacity of their presidential counterparts, a concern that is only exacerbated by their system of ministerial responsibility, which increases the probability that important policy making takes place “behind closed doors.”

In addition, owing to restrictions on citizen access to the Parliamentary Ombudsman, and the substantial number of exemptions undermining access to information under Britain’s freedom of information legislation, there remains considerable need for supplemental accountability mechanisms to mitigate these transparency concerns.

Given this accountability “deficit,” the most appropriate doctrinal approach for the United Kingdom is arguably a generic privilege similar to the actual malice rule. Alternatively, Britain’s new statutory defence of “Publication on Matter of Public Interest” can be adapted by adding presumptions of “public interest” and “reasonable belief” rebuttable on “clear and convincing” evidence to the contrary. Crucially, both doctrinal options provide more direct assurances for media defendants by triggering enhanced doctrinal protection to generate and report on accountability news when the subjects of their publications engage pivotal accountability concerns characteristic of the checking function rationale.

In the end, regardless of the approach taken, the problem of public libel law highlights the importance of achieving sound doctrine by exposing underlying problems obscured by differences in legal doctrine and technique, and by identifying and repairing significant disruptions in the theory–doctrine interface.

B. FIVE RECOMMENDATIONS FOR CANADIAN DEFAMATION LAW REFORM

Besides illuminating the disruptive effects of democratic undertheorizing on public libel law, our enquiry yields five recommendations for contemporary defamation law reforms.

257. Ibid at 220.
259. Stephenson, supra note 2 at 220.
261. Ibid at 224.
262. Ibid at 228.
1. **NO ONE-SIZE-FITS-ALL SOLUTIONS**

First, as evidenced by the problem of public libel law, doctrine must be adapted to different libel plaintiffs and to a jurisdiction’s distinctive institutional context. A one-size-fits-all approach is thus unacceptable since it presupposes a false-to-facts identity of structure and accountability dynamics across jurisdictions. For instance, since libel plaintiffs such as governments, politicians, and influential public figures and corporations similarly threaten democratic legitimacy, applying the checking function rationale prima facie maximizes the selection of doctrine most conducive to generating and reporting accountability news. However, this is not the end of the analysis. Appropriate doctrine must ultimately be attained using a broader framework that gauges a jurisdiction’s actual accountability profile, which may require further doctrinal adjustment. With so many independent variables to assess, a single solution is highly improbable, not only between jurisdictions, but within single jurisdictions where libel plaintiffs elicit more or less concern with political and public misconduct.

A one-size-fits-all approach is also inconsistent with recent advances in First Amendment scholarship that place renewed emphasis upon *institutions* and how they affect First Amendment jurisprudence. Arguing that First Amendment law is in crisis, Paul Horwitz’s structural institutionalism moves beyond the conventional application of acontextual rules and principles toward alternatives rooted in contextual realities and the unique characteristics of institutional actors. Besides being responsive to institutional context and changing social realities, as in public libel jurisprudence, Professor Horwitz insists that free speech principles should be developed more empirically from the bottom up.

Finally, due to our increased capacity for adapting doctrine to a jurisdiction’s institutional milieu, a contextually sensitive approach provides a much more promising basis for regulating the intricacies of global defamation regimes than imposing uniform doctrine across different forms of representative democracy.

2. **IMPORTANCE OF COMPARATIVE LAW METHODOLOGY**

A second recommendation is to recognize the importance of comparative law analysis, especially for diagnosing underlying problems that technical differences in legal doctrine routinely obscure. As evidenced by public libel jurisprudence,
it is only by adopting a comparative law perspective that the veiled issue of a missing selection theory emerges. That is, a homespun lawyer will not easily discern that significant problems exist with domestic public libel doctrine by examining their law in isolation. Rather, any underlying issues are best exposed by comparing one’s domestic law with approaches from other jurisdictions. In the end, increasing our comparative law awareness reduces risks that our domestic laws fail to reflect our constitutional values and institutional dynamics.

Similarly, given the increasing challenges of the Internet to defamation law in general, one would expect that our law making would only improve by avoiding domestic exceptionalism and seeking to understand how other nations attempt to solve similar problems through variations in libel doctrine and technique. In the end, comparative law research not only tests the soundness and efficacy of our existing laws, but also guides our reforms with utmost insight and precision.265

3. RESTORING ACCOUNTABILITY IN DEMOCRATIC THEORY

Third, it is long overdue that the checking function rationale be added to Canada’s inventory of free expression justifications. As we have seen, Canada’s current triumvirate of free expression values owes its origins to the incorporation of Professor Emerson’s core justifications in Ford v Québec (Attorney General).266 Since Emerson’s model did not specify or contain the checking function rationale, it was not picked up by the Court, leaving Canadian courts little choice but to shoehorn accountability concerns into less relevant theoretical rationales, most commonly the truth-seeking justification.

Moreover, given the importance of defamation principles to regulating press freedom, the problem of public libel law has shown that our ability to accurately balance free expression and reputation is impaired without a democratic model that highlights accountability concerns and the checking function of the press. Importantly, while accountability concerns persist regardless of whether false defamatory statements of fact are widely published in print or online forms, there is an increasing danger that, without a democratic free expression theory resonant with the checking function rationale, the ever-increasing speed and reach of digital publications will dominate the process of doctrine selection out of singular concern with technology’s detrimental effects on reputational interests.

266. Ford, supra note 210 at 764-65.
4. IDENTIFYING AND APPLYING ALL RELEVANT FREE EXPRESSION JUSTIFICATIONS

A fourth recommendation based on our enquiry into public libel law’s undertheorizing dilemma is that regardless of the doctrinal approach adopted by courts and legislatures (i.e., ad hoc balancing, categoricalism), all relevant free expression justifications must be identified, tabled, and overcome. This is particularly important where doctrinal alternatives involve the balancing of competing rights, interests, and values. As seen in the context of public libel law, any significant disjunction between defamation principles and free expression theory compromises the delicate balancing of freedom of expression against reputation. This inevitably produces arbitrary doctrine, which prevents tailoring defamation principles to reflect specific institutional contexts and jurisdictional values.

Another way to put this is to insist upon the most robust theory-doctrine interface. Why do we care? What are the underlying regulatory objectives? What are we trying to achieve? And which of our free expression justifications is most relevant? Again, in the context of public libel law, at stake was not simply whether we obtained the right balance between freedom of expression and reputation, but whether we had exposed the underlying problem that the contrasting technicalities of public libel doctrine were obscuring. This turned out to be the difficulty of tailoring press regulation to a jurisdiction’s distinct accountability profile. In the end, the degree to which we have carefully thought about the theory-doctrine interface can drastically affect the nature of the regulatory problems being identified and solved.

5. LAW IN CONTEXT

Finally, as evidenced by the problem of public libel law, contextual factors such as the rise of digital surveillance and the ongoing crisis of journalism contribute immensely to accountability dynamics and future law reform requirements. For instance, several academic disciplines have reported that over the last twenty years, traditional models of journalism have experienced a global crisis, witnessing massively reduced circulation and advertising revenues, record lay-offs of journalists and reporters, the near elimination of investigative reporting, science journalism, and local news coverage, and a concomitant rise in government public
Despite threatening the generation and reporting of accountability news and the constitutional role of the press, a primary implication of these developments is that they oblige law reform authorities to consider more liberal public libel doctrine than might otherwise have seemed appropriate. This broader perspective also ties back to the value of comparative analysis and maintaining a vigilant approach to the theory–doctrine interface. At last, developing a keen awareness for how legal problems exist in socio-political spaces not only enhances our understanding of their complex etiology, but also mitigates against inaccurate diagnoses and prescriptive reforms.

IV. CONCLUSION

As our examination of the problem of public libel law demonstrates, our ability to diagnose and understand contemporary problems falters when we encounter breakdowns in the theory–doctrine interface. In the case of public libel jurisprudence, the underlying problem involved a widespread and pervasive disregard of democratic accountability concerns and the checking function of the press. Part I demonstrates that as between Meiklejohn's self-governance theory and Blasi's checking value of the press, Britain's Radical Whigs and Commonwealthmen almost exclusively emphasized and developed concerns resonant with the checking function rationale. As our survey of British and American libertarian thought exposes, somewhere between the emergence of British parliamentarism and contemporary defamation law reforms, we appear to have forgotten the importance of democratic accountability and guarding against new and ever-encroaching threats to political liberty that our eighteenth-century predecessors understood and recorded perhaps better than at any other time.

Part II supports these observations by demonstrating that Meiklejohn and Blasi emphasized different aspects of democratic theory that support fundamentally different conceptions of the press. It also shows that difficulties marshalling democratic theory are due (at least partially) both to incomplete


269. See Beckton, supra note 111 at 584.
articulations of freedom of expression's core justifications, and misguided attempts to subsume traditional rationales under single-valued approaches. Both have disproportionately marginalized the checking function of the press, which remains the free expression value most relevant to adjudicating public libel cases and strengthening accountability in representative systems.

Finally, Part III reveals five lessons as we engage with the difficult but important task of assessing the Internet’s impact on defamation law. Besides endorsing advances in our jurisdictional, contextual, and institutional awareness of modern-day legal problems, the specific problem of public libel law reminds us that, even in cases most fundamental to a democratic society, where our defamation laws must carefully balance political criticism against personal character and reputation, we promote arbitrary doctrine at odds with our most fundamental political values. As we have seen, our strongest guarantee of sound defamation doctrine depends upon ensuring a complete inventory of fully articulated free expression justifications carefully applied to relevant issues and disputes. The effects of the Internet, however measured, cannot sidestep this basic requirement.