An Assessment of the Criminal Law's Protection of Privacy and Reputation Rights

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Abstract

This thesis seeks to provide a critical assessment of the criminal law's protection of two fundamental interests: privacy and reputation. While protection of these interests is traditionally rooted in the civil law and there has been considerable scholarship in this context, the extent to which the criminal law upholds and protects these interests remains under-researched. This is particularly so in Scotland, where much of the criminal law continues to be part of the common law and has developed from historical principles and precedents.

This is an appropriate time at which to carry out this research. Privacy and reputation interests have become increasingly valuable and are recognised as fundamental rights, receiving protected status in international human rights instruments. These interests have nevertheless become more vulnerable to harmful conduct and subject to greater levels of interference. Technological advancements, the growth of social media, and the collection and retention of personal data all pose significant threats to privacy and reputation.

These developments have been accompanied by some legislative intervention in Scots law (e.g. the introduction of offences combatting stalking, the non-consensual distribution of intimate images, stirring up hatred). While these offences may have some bearing on privacy and reputation, there has been no principled consideration of how these interests are specifically protected (nor how they ought to be protected) by the criminal law. Moreover, despite recent reform of defamation law in Scotland resulting in the introduction of the Defamation and Malicious Publication (Scotland) Act 2021, this did not take account of the role that may be played by the criminal law.

This research seeks to address these shortcomings by establishing a normative basis for protecting these interests through the criminal law. It argues that there is scope for the criminal law to play a greater role in regulating violations of three interests: informational privacy, physical privacy, and reputation. This argument is developed, firstly, by reference to fundamental criminalisation principles (wrongfulness, harmfulness and culpability) and, secondly, the impact that this may have in terms of conveying the seriousness of such wrongs and facilitating practical improvements for victims of privacy and reputation violations. It is concluded that this would overcome some of the existing limitations in the legal mechanisms through which these rights are protected, as identified through a detailed evaluation of relevant criminal and civil wrongs undertaken in this thesis.

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Declaration

"I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution."

Robbie Reid

Table of Contents

1. Introduction

1.1 Research context and background

"As speech has flourished amidst the rapidly expanding media environment, privacy and reputation have correspondingly suffered"[1] and "come under siege".[2] It has become far easier to damage (whether intentionally or not) a person's privacy and reputation interests. Harmful conduct may range from a relatively minor social media post in which information is revealed about an individual, or a false statement is made about them, to a large-scale release of highly sensitive information (such as medical or financial records). While technological advancements continue to be rapid, "privacy laws and policies have been slow to adapt to these new technologies".[3] This is not exclusive to this area and has been seen in relation to other forms of wrongdoing, such as sexual offences[4] or financial crimes[5] perpetrated using technology. This is just as relevant to reputation and "several aspects of our modern society contribute to making it harder to protect one's reputation".[6] Indeed, as one author has bleakly suggested:

> "the right of reputation has never been more important than it is in our information driven society and its importance is likely to continue to increase. Further, it has never been more difficult to protect one's reputation than it is today and doing so is not likely to get any easier".[7]

Thus, privacy and reputation have accordingly become increasingly fragile assets. It is no longer the case that these interests are linked to a particular class of individuals as has historically been the case. As society evolved from the Victorian era of respectability and secrecy to one in which the press and media enjoy increasing powers and freedoms to report on the lives of individuals, these interests came to be the preserve of the wealthy and famous, who have largely been the focus of this area of law in the last century.[8] Technological advancements have provided people with numerous benefits, including the ability to interact

[1] P M Garry, "The erosion of common law privacy and defamation: reconsidering the law's balancing of speech, privacy, and reputation" (2020) 65 Wayne Law Review 279 at 280.
[2] ibid at 279.
[3] J D Lipton, "Mapping online privacy" (2010) 104 Northwestern University Law Review 477 at 479.
[4] E.g. electronic voyeurism, the non-consensual distribution of intimate images, "deep-faking".
[5] E.g. cyber-frauds, hacking, money-laundering.
[6] D J B Svantesson, "The right of reputation in the Internet era" (2009) 23 International Review of Law, Computers & Technology 169 at 169.
[7] ibid at 176.
[8] This can largely be seen from the status of the pursuers in some of the leading civil cases in this area: these are outlined in Chapter 7.

more easily, share information, and communicate to wider audiences. However, an unintended consequence of this is that it is not only much easier to harm another person's privacy and reputation interests, but that the harm itself may be far greater in magnitude and have a more significant impact on the victim. This therefore makes it a particularly appropriate time at which to assess the ways in which privacy and reputation are protected.

In terms of the legal recognition of these interests, privacy and reputation typically form part of an individual's personality rights, and their protection is consequently rooted in the civil law. Much of the literature is written from this perspective. Why then is the present research being grounded in the criminal law?

First, in addition to technological advancements, the growing discussion around other wrongs may be relevant. Recent academic debate and legislative action on voyeurism,[9] image-based sexual abuse,[10] stalking[11], and domestic abuse[12] have thrust privacy and reputation into the spotlight.

Secondly, there is a dearth of literature regarding the criminalisation of these fundamental interests. The criminal law's role has generally been neglected in academic scholarship and (at least in common law systems) "privacy has been regarded as a creature of private law, not public law".[13] This is despite extensive recent academic engagement with questions and principles of criminalisation.[14] Part of the reason why these interests have been neglected in the criminal sphere is because they do not neatly correspond to recognised offence categories. Moreover, the development of civil (delictual) actions for misuse of private information,[15] defamation,[16] and malicious publication,[17] as well as increasing public law regulation of personal data,[18] and protections stemming from international human rights,[19] has restricted the potential ambit of the criminal law in this sphere.

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[9] Sexual Offences (Scotland) Act 2009 s 9.
[10] Abusive Harm and Sexual Behaviour (Scotland) Act 2016 s 2.
[11] Criminal Justice and Licensing (Scotland) Act 2010 s 39.
[12] Domestic Abuse (Scotland) Act 2018.
[13] P Alldridge, *Relocating Criminal Law* (2000) 108.
[14] E.g. R A Duff, *The Realm of Criminal Law* (2018); D N Husak, *Overcriminalization: The Limits of the Criminal Law* (2007); A P Simester and A von Hirsch, *Crimes, Harms and Wrongs* (2011).
[15] *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457; *C v Chief Constable of the Police Service of Scotland* [2020] CSIH 61.
[16] Defamation and Malicious Publication (Scotland) Act 2021 Part 1.
[17] ibid Part 2.
[18] E.g. Data Protection Act 2018.
[19] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), Article 8 (Right to private and family life); Human Rights Act 1998.

Thirdly, the wider issue of the relationship between the criminal and civil law has been neglected in Scots law. However, what can be seen from a review of criminal offences is that there is – at the very least – incidental protection of these interests in criminal law, with clearer protection in some cases. For example, in the context of recent offences created by legislation, there has been little to no assessment of how criminal offences may uphold privacy or reputation rights. Even in the civil law, there has been no mention of the ways in which the criminal law may be utilised to protect an individual's privacy and reputation. It is against this backdrop that this thesis examines the research questions outlined below.

1.2 Research aims and questions

The research aims of this thesis are:

(1) To provide a conceptual account of the value and content of privacy and reputation interests;

(2) To chart the historical protection of privacy and reputation interests in Scots law;

(3) To assess the key differences between the aims, structures, institutions and features of the civil and criminal law;

(4) To outline and evaluate the ways in which (i) Scots criminal law, and (ii) Scots civil law currently protects privacy and reputation rights; and

(5) To propose a normative basis for the criminal law's protection of privacy and reputation rights.

In meeting these aims, a varied methodological approach will be taken. The primary approach is doctrinal, with a focus on the assessment of the current criminal and civil wrongs protecting privacy and reputation. This will involve a detailed analysis of the relevant legal wrongs and rules and evaluate the extent to which they protect privacy and reputation rights. In addition to this, the thesis draws on a range of theoretical, philosophical and historical literature throughout, the rationales for which are outlined in the rest of this introduction. This multifaceted approach ensures that analysis of the legal rules is informed by the historical origins from which they can be traced, as well as the wider body of legal and philosophical literature on privacy and reputation. This in turn seeks to strengthen both the assessment of the legal framework and the development of a normative basis for the criminal law's protection of privacy and reputation rights later in the thesis.

The thesis is divided into three parts. Part 1 of the thesis seeks to develop a conceptual foundation for an analysis of privacy and reputation rights. Part 2 will develop this analysis by charting the historical protections of these rights in Scots law and by presenting an account of the differences between the criminal and civil law. Part 3 assesses the extent to which the criminal and civil law in Scotland protect these rights and proposes a normative basis for the protection of these rights.

In Part 1, Chapter 2 will begin by critically examining the underlying values of these interests. This will be done by first explaining the value of these interests: why are they so valuable? From this, a distinction will be drawn between moral and legal rights. It will be shown that the characterisation of privacy and reputation as fundamental legal rights goes some way in justifying an assessment of the ways in which the criminal law does and should protect these rights. This is also important in explaining why these rights are currently protected through human rights instruments, the content of which will be outlined in Chapter 7.

The focus of this chapter will then turn to what happens when legal rights are violated. There will be an analysis of the harms that may be suffered when one's privacy and reputation rights are infringed. It will later be shown that the primary guardian of these rights (the civil law) only goes so far in remedying harms and that the principal form of redress is monetary compensation, which may be inadequate in these circumstances.

Finally, Chapter 2 will outline the extent to which the two interests interconnect. It will be shown that there are similarities in the ways in which they are protected in law. That is not to say that all privacy violations will result in damage to one's reputation, nor is the converse true. However, it may sometimes be difficult to separate and distinguish between the harms suffered. It will additionally be shown that there is a degree of overlap in the criminal law's protection of these interests and that existing privacy wrongs often involve an element of accompanying reputational harm.

Following this conceptual groundwork, Chapter 3 turns to the question of definitions and the content of these rights. The key starting point is with the backwards looking question: how have privacy and reputation traditionally been defined? There are two elements to this. The first of these is how the concepts have been defined by reference to philosophical works.

The second is how these concepts are defined in a more practical sense: how are privacy and reputation defined in the legal sphere?

This, to some extent, builds on the distinction made in the previous chapter between moral and legal rights. The focus of philosophical literature is typically on how privacy and reputation are defined in an abstract sense, while legal works and instruments necessarily consider how legal rights to privacy and reputation are defined. The focus in the chapter is on privacy rights and the reason for this is that these rights have attracted far greater scholarly attention and that there is less consensus on the meaning of privacy. By contrast, there is general agreement as to the meaning of reputation.

The conclusion of this examination of the literature in this area is that privacy is a multi-faceted interest. While typically conceived of as a private law right, "as the notion of self has grown increasingly psychological, so to the right to privacy has had to extend beyond a simple proprietary right".[20] Indeed, it will be shown that the right to privacy encompasses a range of interests and that it is a valuable right that ought to be recognised in itself. For the purposes of this thesis, privacy as a legal right will be treated as comprising two categories: informational privacy and physical privacy.

It will be shown that reputation may be defined in terms of the ways in which others view us and is necessarily dependent on others. In other words, reputation is only valuable to the extent that we exist in a community.

Part 2 of the thesis moves away from the conceptual notions of privacy and reputation by grounding these interests in Scots law. This is a necessary foundation for the later argument that the criminal law should play a greater role in protecting these interests. Chapter 4 seeks to chart the historical development of the protection of privacy and reputation rights in Scots law. The chapter shows the historical relationship and commonality between civil and criminal actions in Scots law from the institutional period and the influence of Roman law. This explains the development of the current law and demonstrates the extent to which the protection of these rights has been shaped by both civil and criminal regulation.

Chapter 5 builds on the historical account provided in the previous chapter by further examining the differences between the criminal and civil law. In a general sense, there are clear differences in the overarching aims of the two systems. It will be shown how these are

[20] Alldridge, *Relocating Criminal Law* (n 13) 108.

translated into the structures, rules, processes, and outcomes of each system. This is important in explaining why it is that the civil law has become the primary guardian of these rights and provides a platform from which to later assess the suitability of each system in protecting privacy and reputation rights.

Chapter 6 offers a detailed account of the criminal law's protection of privacy and reputation rights. As one commentator has observed:

> "privacy has largely been regarded as raising issues of civil, not criminal, law. The idea that criminal law and criminal justice have anything much to do with privacy is a far more recent idea, and has not gained too much purchase in the courts".[21]

This is particularly so in the context of substantive law: "the criminal law has seldom used the concept of privacy in defining its proscriptions".[22] This may be contrasted with criminal procedure, where there is a much greater emphasis on the privacy and reputation rights of individuals.

In then examining the ways in which these interests are protected by the criminal law, the focus will be on the substantive criminal law's protection. In other words, what are the specific offences that can be rationalised as protecting the victim's privacy and reputation interests? From this, the chapter will assess the extent to which each offence protects privacy and reputation, and the elements of these interests that are protected.

A similar exercise is undertaken in Chapter 7, but in the context of the civil law. This chapter evaluates the role of the civil law (and particularly the law of delict) as the primary guardian of privacy and reputation rights. The focus will be on the following actions: misuse of private information, breach of confidence, defamation, malicious publication, and malicious prosecution. It will be shown that Scots law has traditionally recognised reputation wrongs, which can be charted back to their historical roots, whereas (aside from breach of confidence) privacy wrongs have only been recognised following the incorporation of the European Convention on Human Rights through the Human Rights Act 1998. The result is that protection of privacy is generally limited to informational privacy at the expense of other categories. While reputation has been historically protected in Scots law, recent reform of defamation and the abolition of "verbal injury" as a category of wrongs (being

[21] ibid.
[22] A Roberts and M Richardson, "Privacy, punishment and private law" in E Bant, W Courtney, J Goudkamp, and J M Paterson (eds), *Punishment and Private Law* (2021) 83 at 83.

replaced with malicious publication) represent a shift from these roots in favour of alignment with English law. The result is a more limited protection of reputation through the civil law, which may make it increasingly difficult for individuals to bring actions for the harms they have suffered.

Chapter 8 offers a normative basis for the criminal law's protection of privacy and reputation rights. Various questions are posed in this chapter, and these will be answered by reference to the arguments developed in the rest of the thesis.

(i) Can these wrongs be more appropriately characterised as public rather than private wrongs?
(ii) What is the moral character of privacy and reputation wrongs?
(iii) What would the impact of increasing criminalisation in protecting privacy and reputation interests be?

From this, it will be concluded that privacy and reputation interests have been largely neglected in criminal law scholarship and reform. Existing criminal wrongs causing harm to one's privacy or reputation interests either centre on ad hoc instances of wrongdoing or can be explained by reference to a more convincing rationale than the protection of these interests. Moreover, much of the debate surrounding privacy continues to concern the misuse of private information, while the protection of reputation has almost entirely been subsumed into the law of defamation. The result is that there are shortcomings in both the breadth of the law's coverage and in the reasonably restrictive manner in which the law protects these interests. There is consequently scope for the criminal law to more effectively regulate privacy and reputation wrongs beyond its existing offences and to address some of these shortcomings. This would be an appropriate means of dealing with the most culpable types of wrongdoing that have the potential to cause significant harm to an individual's privacy or reputation interests. Such a case may be made where the wrong may be characterised as a "public" wrong, be worthy of moral censure, appropriately address the harms experienced by victims, and satisfy the aims of the criminal law.

The thesis will conclude with an assessment of the likely impact of criminalisation in this area (including a reflection on potential over-criminalisation concerns) before identifying future directions in which this research may be taken.

PART 1

2. Privacy and Reputation: Values, Rights, Harms and Wrongs

2.1 Introduction

The purpose of this opening chapter is threefold. In the most general sense, it first aims to establish the value of privacy and reputation. It then seeks to show how privacy and reputation rights may appropriately be characterised as fundamental rights. Finally, it examines the relationship between the two and aims to show the degree of interconnectedness that exists. These aims will highlight the significance of privacy and reputation interests and show why it is appropriate to consider the criminal law's protection of these interests alongside one another.

Before addressing these aims, however, it is necessary to consider some wider issues. The first of these relates to the question of terminology, and particularly the use of terms such as "interests", "values", "rights", "harms", and "wrongs". While these terms may appear to be used interchangeably, it is important to acknowledge the differences between them in this context.

As a starting point, how do we distinguish between interests and rights? Put simply, "interests" is a broader term than rights but has no distinct legal meaning.[1] Weir nevertheless gives some content to this term and explains that "there are several good things in life, such as liberty, physical integrity, land, possessions, reputation, wealth, privacy, dignity, perhaps even life itself. Lawyers call these goods 'interests'."[2] Descheemaeker describes interests "are emanations of their human nature" and proceeds to draw a distinction between interests and legally recognised interests, stating that the latter will "form a sphere of juridical protection around [the former]".[3] While there may be difficulties in identifying a catalogue of interests, classifying them, and determining when the law should protect them, the "notion of an interest is

[1] P Cane, "Rights in private law" in D Nolan and A Robertson (eds), *Rights and Private Law* (2011) 35 at 35.
[2] T Weir, *A Casebook on Tort* (10th edn, 2004) 6.
[3] E Descheemaeker, "Protecting reputation: defamation and negligence" (2009) 29 Oxford Journal of Legal Studies 603 at 606.

straightforward enough".[4] "Interests" will accordingly be used in a very broad sense in this thesis to refer to the concepts of privacy and reputation, including as values and rights. The meaning of "rights" will be explained at section 2.3 below but will specifically be used when referring to identifiable legal rights to privacy and reputation. Before this, the chapter will offer an account of privacy and reputation as "values".

2.2 Values

To begin with, privacy and reputation are both interests that are recognised as being fundamental in our society. This is acknowledged through the protection they are afforded in domestic law and at an international level.[5] However, why they are protected as such requires an analysis of the underlying value of privacy and reputation. Evaluating each interest will allow us to better understand the rights we have and the harms that may be caused by violations of these rights. This in turn offers a sound conceptual foundation from which to assess how these rights ought to be protected.

In this section, it will be argued that privacy's value may be grounded in both individual and social justifications relating to individual autonomy, relationships with others, and the democratic functioning of society. Reputation's value, on the other hand, is more easily derived from social justifications given its importance in how others view us and in co-ordinating social interactions.

2.2.1 Privacy

Starting with privacy, it may seem self-evident to say that it is an essential element of living in a democratic society,[6] but what value does it have? Inness

[4] ibid.
[5] The civil law's protection of privacy and reputation will be examined in detail in Chapter 7.
[6] K Hughes, "The social value of privacy, the value of privacy to society and human rights discourse" in B Roessler and D Mokrosinska (eds), *Social Dimensions of Privacy: Interdisciplinary Perspectives* (2015) 225 at 228-229.

observes that the "philosophical literature on privacy contains a fundamental disagreement about its value"[7] and this section will attempt to set out the different accounts that have been offered. These can be grouped into two broad categories: individual and social.

The former suggests that privacy is inextricably linked to autonomy,[8] which is defined as the "moral freedom of the individual to engage in his or her own thoughts, actions and decisions".[9] Roberts grounds privacy's value in individual or personal autonomy[10] (despite acknowledging other relevant values),[11] noting that autonomy "makes a person the sovereign authority over her or his own life".[12] Moore states that privacy rights "erect a moral boundary that allows individuals the moral space to order their lives as they see fit",[13] while Bloustein views privacy as playing a key role in safeguarding individuality, protecting an individual's dignity and personality.[14] These are very individualistic conceptions of privacy. Privacy is of great value to the individual; it allows a person to flourish, grow, develop, think, create and to have the freedom to live their life as they see fit. Thoughts can remain private, information can be selectively shared and withheld, interactions can be made with others, intimate details protected; the list goes on. Privacy is therefore key in upholding other interests such as liberty. Without privacy, individuals would lack the freedom to do or think as they see fit. From a liberal perspective, privacy (especially relating to access) enables individuals to generally live their own lives away from others without this impairing the liberty of others.[15] Some authors go as far as stating that the right to privacy is derived from liberty rights,[16] while

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[7] J C Inness, *Privacy, Intimacy and Isolation* (1996) 22.
[8] Most notably with control-based accounts of privacy: see section 3.2.3(c).
[9] K Gormley, "One hundred years of privacy" (1992) 5 Wisconsin Law Review 1335 at 1337.
[10] P Roberts, "Privacy, autonomy and criminal justice rights: philosophical preliminaries", in P Alldridge and C Brants (eds), *Personal Autonomy, the Private Sphere and Criminal Law: A Comparative Study* (2001) 49 at 57.
[11] Roberts refers to respect for human dignity and preventing abuses of power, giving the example of a coma patient with no autonomy who nevertheless has privacy: ibid at 58.
[12] ibid at 59.
[13] A Moore, "Privacy, speech and the law" (2013) 22 Journal of Information Ethics 21 at 23.
[14] E J Bloustein, "Privacy as an aspect of human dignity: an answer to Dean Prosser" (1964) 39 New York University Law Review 962 at 971-973.
[15] A Allen, *Unpopular Privacy: What Must We Hide?* (2011) 17.
[16] See section 3.2.2(b).

others argue that it is a "species of the right to liberty".[17] Thus, irrespective of how privacy is characterised or defined, what is clear is that there is value to the *individual*.

Notwithstanding this, some tension can be found in the literature between those authors who view privacy as being of value to the individual, and those who see it as a social value.[18] The traditional view is that privacy is "an individualistic right…that the individual holds in opposition to the interests of society".[19] This is consistent with those conceptions outlined above that ground privacy in autonomy. Yet Solove suggests that this characterisation diminishes privacy's value when it comes to balancing it against other rights such as free speech or security, which are typically treated as of value to society as a whole.[20] Instead he characterises privacy as a social good since its function is to protect an individual from society's intrusion. This is supported by other commentators. Hughes – building on Regan's argument[21] – states that

> "privacy is a social value because it is a common value (shared by individuals), it is a public value (of value to the democratic political system) and it is a collective value (technology and market forces make it increasingly difficult for any one person to have privacy unless everyone has a minimum level of privacy)".[22]

As a public value, privacy may be viewed as a pillar of democracy and plays a key role in promoting democratic governance.[23] This is supported by Moore, who suggests that privacy rights prevent oppression and that totalitarian regimes must restrict these rights if they are to maintain power.[24] This may be through measures such as monitoring citizens to prevent dissent or failing to allow for

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[17] J Angelo Corlett, "The nature and value of the moral right to privacy" (2002) 16 Public Affairs Quarterly 329 at 332.
[18] D J Solove, "The meaning and value of privacy", in B Roessler and D Mokrosinska (eds), *Social Dimensions of Privacy: Interdisciplinary Perspectives* (2015) 71 at 78. See also D E Pozen, "Privacy-privacy tradeoffs" (2016) 83 University of Chicago Law Review 221 at 221.
[19] Hughes (n 6) at 225.
[20] Solove (n 18) at 78. See also Moore (n 13) for an overview of the value of free speech.
[21] P Regan, *Legislating Privacy* (1995).
[22] Hughes (n 6) at 225.
[23] ibid at 228; R Gavison, "Privacy and the limits of the law" (1980) 89 Yale Law Journal 421 at 455.
[24] Moore (n 13) at 24.

privacy at the ballot box. Once again, the relationship between privacy and liberty rights is evident here. Moreover, this is of significance in determining legal responses to the protection of privacy. The greater the societal justification for privacy rights, the more convincing the argument that the criminal law should play some role in the protection of these rights.[25]

The social value of privacy also extends to relationships with others. Rachels argues that privacy enables us to form and maintain social relationships because it allows us to alter the way we act when with different individuals.[26] Beyond basic social interactions, privacy has been further justified on the basis that it is necessary for intimacy.[27] Gerstein argues that "intimate relationships simply could not exist if we did not continue to insist on privacy for them",[28] while Fried similarly states that privacy is a requirement for such relationships:

> "privacy is not just one possible means among others to insure some other value…it is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and trust. Privacy is not merely a good technique for furthering these fundamental relations; rather without privacy they are simply inconceivable. They require a context of privacy or the possibility of privacy for their existence".[29]

This is a bold statement by Fried, which on its own offers a strong account as to why privacy is needed. Inness also relies on personhood as a justification for privacy and suggests that privacy "acknowledges our respect for persons as autonomous beings with the capacity to love, care and like – in other words, persons with the potential to freely develop close relationships".[30]

Furthermore, it can be difficult to ascertain the value of privacy given the multi-faceted nature of privacy itself. Gavison argues that even in the different circumstances in which privacy is relied upon, its value can be explained by "the

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[25] See the argument developed in section 8.3.1(b).
[26] J Rachels, "Why is privacy important?" (1975) 4 Philosophy and Public Affairs 323 at 326.
[27] J C Inness, *Privacy, Intimacy and Isolation* (1996); C Fried, "Privacy" (1968) 77 Yale Law Journal 475; R S Gerstein, "Intimacy and privacy" (1978) 89 Ethics 76.
[28] ibid Gerstein at 76.
[29] C Fried, "Privacy" (1968) 77 Yale Law Journal 475 at 477.
[30] Inness, *Privacy* 95.

promotion of liberty, autonomy, selfhood, and human relations, and furthering the existence of a free society".[31] She therefore categorises these justifications for privacy as being both individualistic and societal.[32] Solove similarly argues that privacy's value varies according to the privacy interest in question.[33] This relational approach to privacy has been termed "pluralistic privacy"[34] by Pozen, with privacy being treated not as a single interest, but as comprising multiple distinct (albeit related) interests. The relational approach does not endeavour to propose a common, defining feature of privacy, nor does it seek to carve out necessary and sufficient conditions that must be satisfied for us to say that privacy is invoked in a given situation.[35] As will be shown below, the relational approach has particular appeal when dealing with privacy as a legal right and can be a helpful means of distinguishing between individual privacy *actions*.

In assessing privacy's value, philosophical debate has turned on whether or not privacy is characterised as a deontological or consequentialist (or utilitarian)[36] ideal.[37] Those advocating a deontological characterisation of privacy usually rely on Kantian ethics.[38] They view privacy as having intrinsic value because of the respect that ought to be afforded to human beings as autonomous agents.[39] This means that privacy is viewed as being of value in itself; "intrinsically valuable things are usually held to be those things that have value regardless of any benefits they bring to other objects".[40] Thus, personhood, autonomy and dignity based justifications of privacy are typically premised on a deontological understanding of privacy.[41] An example of this is Fried's definition (cited above) in which he attributes privacy's value to promoting relationships

[31] Gavison (n 23) at 423.
[32] ibid at 444.
[33] Solove (n 18) at 80.
[34] Pozen (n 18) at 225.
[35] ibid at 226.
[36] E.g. see the works of David Hume, Jeremy Bentham, and John Stuart Mill.
[37] D Lindsay, "An exploration of the conceptual basis of privacy and the implications for the future of Australian privacy law" (2005) 29 Melbourne University Law Review 131 at 144; Inness, *Privacy* (n 27) 95-96.
[38] These ideas are set out in two Kant's leading works: *Critique of Pure Reason*, 1st edn, (1781), 2nd edn (1787), and *Groundwork of the Metaphysics of Morals* (1785).
[39] Inness, *Privacy* (n 27) 95-97.
[40] N Agar, *Life's Intrinsic Value: Science, Ethics, and Nature* (2001) 4.
[41] Lindsay (n 37) at 144; Inness, *Privacy* (n 27) 95-96.

(including respect, love, friendship and trust), but views this not as a means to an end. Rather, he argues that privacy is necessary for their very existence.[42] Norrie similarly characterises privacy in this way, claiming that it "is a fundamental human interest, like liberty, with which it has in common that it is an essential pre-condition for the development of our personality and talent".[43] Moreover, Witzleb suggests that the treatment of privacy as a fundamental right grounded in human rights instruments (outlined later in this chapter) can be explained by similar deontological rationales.[44]

This broader argument relies on the underlying value of privacy being applicable in the various instances in which privacy is engaged. Solove argues that this is not the case and that deontological justifications premised on privacy's intrinsic value in furthering "self-creation, independence, autonomy, creativity, imagination, counter-culture, freedom of thought, and reputation" do not hold in respect of all privacy interests.[45] Solove therefore views privacy in an instrumental sense.[46] Instrumental values are those that "possess worth by virtue of their propensity to bring about some other valuable state of affairs".[47] Thus, on this basis, privacy is treated as a means to an end, it is of value because of the role it plays in promoting other values.

How then can these competing rationales be reconciled? A consequentialist approach (or at least specifically a utilitarian one) supports the idea that privacy rights may be undermined where this would result in another desirable outcome being achieved.[48] As explained below, privacy should not be regarded as an absolute right; there are circumstances where it is appropriate to limit or infringe one's privacy. However, even the most valuable rights may be qualified.[49] As

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[42] Fried (n 29) at 477.
[43] K McK Norrie, "The *actio iniuriarum* in Scots Law: romantic Romanism or tool for today?" in E Descheemaeker and H Scott (eds), *Iniuria and the Common Law* (2013) 49 at 66.
[44] N Witzleb, "Justifying gain-based remedies for invasions of privacy" (2009) 29 Oxford Journal of Legal Studies 325 at 348.
[45] D J Solove, "Conceptualizing privacy" (2002) 90 California Law Review 1087 at 1145-46.
[46] ibid at 1144-45.
[47] Agar, *Life's Intrinsic Value* (n 40) 4.
[48] Lindsay (n 37) at 149; Witzleb (n 44) at 348.
[49] E.g. the right to liberty.

a result, a dual characterisation has found favour in leading common law judgments on privacy,[50] with the reasoning being "primarily informed by deontological impulses" but "clearly qualified by some powerful, consequentialist concerns".[51] This reflects the reality that privacy is highly valuable but that privacy rights often require to be balanced against other considerations, whether this be policy concerns (such as the "public interest") or the rights of others (such as freedom of expression).

Solove consequently adopts a contextual approach in which he argues that there is no over-arching value of privacy, but rather that its value changes and depends on the privacy practice in question.[52] However, in each context, privacy is a means of achieving valuable ends. Related to this is the idea that privacy's value is subjective. There are two points to be made here. The first is that privacy is contextually dependent. The second is that privacy may be of different value to different people. While privacy may be welcomed in some circumstances, in others we may view it as being used for morally wrongful purposes. This is supported by Roberts' observation that increases in privacy do not necessarily equate to increases in privacy's underlying value(s)[53] (in his case, autonomy). Similarly, if privacy is a good that is fundamental for preserving democracy and preventing abuses of process, then it would be wrong to say that a high level of privacy would always promote this value. This could lead to such a degree of secrecy that there is less transparency and therefore threaten democratic processes. Roberts also argues that the converse is equally true.[54] Losses of privacy ("reductions in privacy" may be a better term) are not always detrimental to an individual's – or even society's – interests.

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[50] T D C Bennett, "Emerging privacy torts in Canada and New Zealand: an English perspective" (2014) 36 European Intellectual Property Review 298 at 300, citing *Jones v Tsige* 2012 ONCA 32 (CA (Ont)) and *C v Holland* [2012] NZHC 2155 (HC (NZ)).
[51] ibid at 300, citing *Jones v Tsige* 2012 ONCA 32 (CA (Ont)) and *C v Holland* [2012] NZHC 2155 (HC (NZ)).
[52] Solove (n 45) at 1145-46.
[53] P Roberts, "Privacy, autonomy and criminal justice rights: philosophical preliminaries" in P Alldridge and C Brants (eds), *Personal Autonomy, the Private Sphere and Criminal Law: A Comparative Study* (2001) 49 at 64.
[54] ibid at 64.

This does not mean that privacy has negative value. Privacy ought to be regarded as a positive concept[55] and care must be taken not to conflate privacy's value with the value of acts justified by privacy.[56] The language we employ when talking about "enjoying" privacy or having our privacy "violated" or "invaded" is morally loaded.[57] This is also significant when it comes to limiting our privacy. That privacy is a presumptive moral good is supported by the burden of proof generally being on an individual trying to restrict another's privacy.[58] This is in contrast to reputation, which is morally neutral; one can talk of having a good or bad reputation. Thus, privacy's value can be said to be dependent on both the surrounding context and the individual whose privacy is engaged.

On this note, is has been argued that "privacy is not an unqualified human good".[59] Privacy can be invoked in certain situations in order to shield abuse. While this may be the case in a number of contexts, this is particularly prominent in domestic settings; "as many feminists argue, privacy and 'the private' are at best problematic and at worst implicated in the systematic oppression of women".[60] As explained above, this is not to diminish the underlying value of privacy, but is a criticism of the way in which a privacy claim is being invoked[61] (i.e. that matters occurring in an individual's private dwelling should not be subject to state interference or regulation).

2.2.2 Reputation

Turning to reputation, Robert Post (whose work on reputation is described as "without question the benchmark in contemporary commentary and critique")[62]

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[55] By contrast to e.g. isolation, which is inherently negative.
[56] Inness, *Privacy* (n 27) 45.
[57] ibid 44.
[58] ibid.
[59] P Alldridge, "The public, the private and the significance of payments" in P Alldridge and C Brants (eds), *Personal Autonomy, the Private Sphere and Criminal Law: A Comparative Study* (2001) 79 at 81.
[60] M Weait, "Harm, consent and the limits of privacy" (2005) 13 Feminist Legal Studies 97 at 97.
[61] See section 3.3.
[62] L McNamara, *Reputation and Defamation* (2007) 37.

suggests that although its value is often assumed, it is something of a mystery.[63] Unlike privacy, "reputation has been inexplicably neglected by philosophy: no entries until recently in philosophical dictionaries, few scholarly monographs devoted to the concept".[64] This means that there has been modest discussion of its underlying value and moral foundations. As will be shown later, this is similarly the case in respect of defining reputation.[65]

It has been remarked that "reputation is valuable and it is prima facie wrongful to impair it".[66] But why is reputation treasured as such? At a basic level, Reid notes that reputation is of great significance for two reasons: it determines how others view us and how we value ourselves.[67] In doing so, it also guides our choices; we rely on the reputations of others when making everyday decisions (e.g. when purchasing goods and services).[68]

How have academics conceptualised this interest? Notwithstanding Roscoe Pound's characterisation of reputation as being part of the broader category of "interests of personality",[69] he places it under the heading "right of property",[70] specifically "incorporeal property".[71] Interests of personality are said to be of "the individual physical and spiritual existence" and are distinguished from "domestic interests" ("the expanded individual life") and "interests of substance" ("the individual economic life").[72] However, Pound goes on to state that "defamation infringes both personality and substance, since one's reputation is an asset as well as a part of his personality".[73] Warren and Brandeis broadly agree that "the wrongs and correlative rights recognized by the law of slander

[63] R C Post, "The social foundations of defamation law: reputation and the constitution" (1986) 74 California Law Review 691 at 692.
[64] G Origgi, "Reputation in moral philosophy and epistemology", in F Giardini and R Wittek (eds), *The Oxford Handbook of Gossip and* Reputation (2019) 69 at 70.
[65] See section 3.2.3(b).
[66] E Descheemaeker, "Protecting reputation: defamation and negligence" (2009) 29 Oxford Journal of Legal Studies 603 at 609.
[67] E C Reid, "Protection of personality rights in the modern Scots law of delict", in R Zimmermann and N R Whitty (eds), *Rights of Personality in Scots Law: A Comparative Perspective* (2009) 248 at 262.
[68] Origgi (n 64) at 69-70.
[69] R Pound, "Interests of personality" (1915) 28 Harvard Law Review 343 at 347.
[70] ibid at 353.
[71] ibid at 354.
[72] ibid at 349.
[73] ibid at 349.

and libel are in their nature material rather than spiritual",[74] commenting that although there is the potential for compensation in respect of mental harm, this is merely an extension of an individual's right to the protection of their property.[75]

Let us take as an example a successful divorce lawyer who is accused by a local newspaper of harassing several recently divorced clients. When people hear about this the lawyer notices a drop in his business and this results in a loss of revenue. The link between his reputation and the financial loss they suffer is clear. However, the harm does not stop here. They are likely to suffer in other ways: their pride may be damaged, their esteem may be lowered, they may no longer be invited to social events with colleagues, their legacy as a successful lawyer may be ruined. This straightforward example shows the way in which reputation intersects financial interests and personality interests.

Consistent with this, McNamara puts forward two distinct conceptions of reputation in terms of "property" and "personality".[76] This accords with Post's leading analysis in which three values are identified as underpinning reputation: property, honour and dignity.[77] These relate to the losses that an individual may sustain when their reputation is harmed. Given that reputation has the potential to cause patrimonial loss and has economic value, there must be some property value in reputation. Honour and dignity, on the other hand, relate more to how we view ourselves. The rule that damages (for solatium) can be claimed for reputational harm, even where there is no patrimonial loss, additionally shows that reputation – at least as a legal interest – has additional value. In addition to this, Aplin and Bosland put forward a fourth justification: sociality,[78] which has attracted support among contemporary commentators.[79] Post's three values

[74] S Warren and L Brandeis, "The right to privacy" (1890) 4 Harvard Law Review 193 at 197.
[75] ibid.
[76] McNamara, *Reputation* (n 62) 37, 38.
[77] Post (n 63) at 693.
[78] T Aplin and J Bosland, "The uncertain landscape of Article 8 of the ECHR: the protection of reputation as a fundamental human right?" in A T Kenyon (ed), *Comparative Defamation and Privacy Law* (2016) 265 at 271-273, drawing on the work of Howarth in D Howarth, "Libel: its purpose and reform" (2011) 74 Modern Law Review 845.
[79] E.g. see D Howarth, "Libel: its purpose and reform" (2011) 74 Modern Law Review 845; L A Heymann, "The law of reputation and the interest of the audience" (2011) 52 Boston College Law Review 1341.

(property, honour and dignity) will now be considered in turn, followed by an examination of the sociality value.

(a) Property

Starting with property, there is a clear link between reputation and property. Norrie and Burchell trace the value of reputation back to Roman law and note that even then this was viewed as a "valuable commodity", which, if violated, could result in both "sentimental loss" and "patrimonial loss".[80] Thus, there are clearly both commercial and social advantages to having a positive reputation.[81] This has an impact on our ability to enter into commercial transactions and engage in social interactions with others. Reputation therefore has a strong economic value.[82] This value is twofold. First, individuals may expend resources in order to maintain or achieve a positive reputation:

> "we often allow people to buy their reputations. People may legitimately pay a genealogist or a biographer to uncover or disseminate favorable information. Corporations, which on occasion have been blackmail victims, frequently pay for image advertising, designed to enhance their reputations or merely to protect their reputations in the face of public attack".[83]

This is particularly evident in an online context, where individuals and businesses "are clearly dependant on their reputation to a much greater degree than their offline counterparts – online you simply do not have the same possibilities of building trust through means such as location, shop structure, etc".[84] Indeed, Svantesson points to online rating systems as evidence of this.[85]

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[80] J Burchell and K McK Norrie, "Impairment of reputation, dignity and privacy", in R Zimmermann, K Reid, and D Visser (eds), *Mixed Legal Systems in Comparative Perspective* (2005) 545 at 547.
[81] T Gibbons, "Defamation reconsidered" (1996) 16 Oxford Journal of Legal Studies 587 at 590.
[82] F Davis, "What do we mean by 'right to privacy'?" (1959) 4 South Dakota Law Review 1 at 9.
[83] J Lindgren, "Unravelling the paradox of blackmail" (1984) 84 Columbia Law Review 670 at 688.
[84] D J B Svantesson, "The right of reputation in the Internet era" (2009) 23 International Review of Law, Computers & Technology 169 at 170.
[85] ibid.

Secondly, "a good reputation increases one's expected payoff in future interactions with others".[86] This is because others are able to make a judgment about an individual based on their past conduct, which helps determine whether they choose to interact with them.[87] This idea of reputation having a coordinating function in society was recognised by Adam Smith,[88] who is credited with being one of the earliest authors to suggest this,[89] in contrast to preceding works focusing more on the link between reputation and honour.[90]

Thus, where reputation differs from privacy is that, for the most part, it is not something that arises naturally, but rather is something that is achieved or earned.[91] We may talk of someone building up a positive reputation or being of good character.[92] An example would be an individual's creditworthiness, skills, or qualifications.[93] Reputation consequently has a "market value"[94] and is of "material worth".[95] Moreover, the fact that organisations can bring actions in cases where their reputation is harmed supports the view that reputation has economic value.[96]

However, reputation's value cannot only be explained by reference to economic factors. Indeed, there is declining support among academic commentators regarding the relevance of property as a basis for reputation.[97] Howarth suggests that this conception is premised on an outdated view of individuals being connected through the marketplace and confuses the core harms of reputation with the consequential economic harms.[98] While this may be over-stating the position (it may sometimes be difficult to detach the

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[86] T Pfeiffer, L Tran, C Krumme and D G Rand, "The value of reputation" (2012) 9 JR Soc. Interface 2791 at 2791.
[87] Origgi (n 64) at 72.
[88] A Smith, *The Theory of Moral Sentiments* (1759) 411.
[89] Origgi (n 64) at 72.
[90] ibid at 71.
[91] Cf Descheemaeker (n 66) at 609: "The (implicit) starting point here is that individuals are deemed reputable by default: reputation is something that is given to them as a matter of course and might then be lost, rather than a good they need to earn for themselves".
[92] While the term "reputation" may seem neutral, "reputable" itself has come to have positive connotations. In contrast, "honour" (discussed below) is an inherently positive value.
[93] Post (n 63) at 693.
[94] ibid at 695.
[95] McNamara, *Reputation* (n 62) 46.
[96] Descheemaeker (n 66) at 609. Cf Aplin and Bosland (n 78) at 268.
[97] Howarth (n 79) at 853; Heymann (n 79) at 1342.
[98] ibid Howarth at 853.

economic harms from the harm to reputation itself), there is merit to the suggestion that reputation is not solely connected to property and economic harms. Consistent with this, Post argues that honour and dignity may additionally underpin reputation,[99] with McNamara grouping these together under the general heading of "personality".[100]

(b) Honour

Post begins by stating that there is an "ancient tradition which views the worth of reputation as incommensurate with the values of the marketplace".[101] One reason for this is that reputation plays an important role in protecting an individual's sense of honour.[102] What is meant by honour? Post views it as "the personal reflection of the status which society ascribes to his social position".[103] Dan-Cohen similarly notes that it is "of social origin: it derives from and reflects one's social position and the norms and attitudes that define it".[104] By suggesting that honour is fixed and related to one's standing,[105] Post advocates a narrow – and possibly outdated – understanding of honour. McNamara is critical of this, stating that "hierarchical honour dominates to the exclusion of other forms or dimensions of honour"[106] and that "hierarchy and superiority do not adequately explain the meaning(s) of honour".[107] Thus, Post's conceptualisation of honour is, at best, incomplete. However, it is also less relevant to contemporary society,[108] "on the ground that we now live in societies (at least publicly) committed to social equality".[109]

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[99] Post (n 63) at 693.
[100] McNamara, *Reputation* (n 62) 38.
[101] Post (n 63) at 699. This seems an appropriate place in which to refer to the oft quoted line from *Othello*: "Reputation, reputation, reputation! O, I have lost my / reputation! I have lost the immortal part of myself, and what/ remains is bestial" (Cassio, Act 2, Scene 4, 262–64).
[102] Cf Descheemaeker (n 66) at 609, who claims that "there is no perceptible difference of meaning between the two [reputation and honour]".
[103] Post (n 63) at 700.
[104] M Dan-Cohen, "Introduction: dignity and its (dis)content" in J Waldron and M Dan-Cohen (eds), *Dignity, Rank, and Rights* (2012) 3 at 4.
[105] Post at 700.
[106] McNamara, *Reputation* (n 62) 44.
[107] ibid 48.
[108] G Origgi, *Reputation: What it is and Why it Matters* (2018) 10.
[109] Howarth (n 79) at 852.

Honour may now be understood as encompassing other characteristics such as a person's trustworthiness or morality rather than social status alone, the latter of which is more linked to class. An individual may have little social standing but great honour insofar as they are well respected by others, can be trusted, and are of good morals. Honour therefore remains important in explaining reputation's value, even if this is in a different way to that envisaged by Post.[110]

(c) *Dignity*

Turning to the last of Post's suggested values, dignity is described as being "our own sense of intrinsic self-worth".[111] Post explains this by reference to the judgment of Justice Stewart[112] in the US Supreme Court decision of *Rosenblatt v Baer*, who states that:

> "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty".[113]

While disagreement exists in the literature as to what dignity means, it has developed historically from being treated as something akin to honour and standing.[114] Previously, only certain high-ranking individuals were treated as capable of having dignity. This could be those who held political positions or had important roles in society, as opposed to ordinary citizens. Waldron believes that our modern understanding of dignity can be derived from its historical origins.[115] Rather than it being linked to rank and status, its meaning

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[110] Cf ibid at 853, where it is said that "commentators have not, however, taken this route".
[111] Post (n 63) at 710.
[112] ibid at 707.
[113] *Rosenblatt v Baer* (1966) 383 U.S. 75, 92 per Stewart, J.
[114] J R Wallach, "Dignity: the last bastion of liberalism" (2013) 4 Humanity 313 at 315; M Rosen, *Dignity: Its History and Meaning* (2012) 11. This makes sense from an etymological perspective given its similarity to the word "dignitary": see Wallach at 315.
[115] J Waldron, "Dignity and rank" in J Waldron and M Dan-Cohen (eds), *Dignity, Rank, and Rights* (2012) 13 at 14.

is premised on the "high and equal rank of every human person".[116] This development has been referred to as the "expanding circle" of dignity; it is something that very few people initially had but that has come to be viewed as a universal value.[117] Dignity's status as a universal value is evident from references made to it in various human rights instruments,[118] such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.[119] Thus, dignity can be seen as representing a minimum standard for the treatment of human beings.[120] It is a concept that may be invoked in order to ensure the availability of equal rights for all humans, regardless of their standing or character.[121] On this note, Rosen suggests that while some authors view it as "rhetorical wrapping paper for a set of substantive rights-claims",[122] it has a more expansive meaning.[123] This is dependent on the meaning of "respect", and particularly what is meant by "respecting one's dignity". A distinction can be made between "respect-as-observance" and "respect-as-respectfulness".[124] On the one hand, respect for dignity could simply mean that one's right to dignity is respected (we do so by not infringing another's right). On the other, it could entail acting in a manner that is "substantively respectful" (we do so by actively treating another with respect).[125] By advocating a "respect-as-respectfulness" conception of dignity, the term is given meaning beyond simply acting as the foundation for human rights. Dignity represents a core part of our self and ensures that our value as a human is recognised and protected in two ways. First, upholding dignity in this way may mean the difference between treating an individual as a human and treating them as an animal. Secondly, it marks out symbolic harms where contempt is shown for an individual's personhood.[126]

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[116] ibid at 14, 22.
[117] Rosen, *Dignity* (n 114) 8.
[118] Wallach (n 114) at 313.
[119] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[120] Wallach (n 114) at 316.
[121] ibid at 317.
[122] M Rosen, "Dignity past and present" in J Waldron and M Dan-Cohen (eds), *Dignity, Rank, and Rights* (2012) 79 at 95.
[123] ibid at 95-96.
[124] ibid at 94-95; Rosen, *Dignity* (n 114) 57-58.
[125] Rosen, "Dignity past and present" (n 122) at 95.
[126] ibid at 96.

Although a universal value, dignity has been shown to be highly individualistic; it relates to our status as a human and our sense of self-worth. Given that reputation's significance usually rests on the opinions or judgments of others, does this mean that its value is less convincingly explained by reference to dignity, as opposed to honour and property? This does not seem to be the case. Insofar as an act of indignity represents a lessening of human worth, reputation is of value in safeguarding our dignity. When our reputation is lowered, we may perceive that our value as a human is diminished.

Post explains that our individual personality is comprised of both a private and public element of our self[127] and that our identity is formed as a result of continuous interactions with other members of society.[128] As a result, the "dignity that defamation law protects is thus the respect (and self-respect) that arises from full membership in society".[129] As our identity is constituted, at least in part, by the judgments of others, where respect for this identity is communicated by our peers, [130] our identity and sense of self-worth is validated. Where respect is not communicated, this may impact on our subjective assessment of our private identity, as this is dependent on the respect of others. This may affect our integrity and leave us feeling incomplete as a person; our own conception of our self and our "private self" is no longer confirmed by the rest of the community.[131]

Moreover, in terms of worth, this can also be linked not only to how we view ourselves, but more importantly, how we view *others' perceptions* of ourselves. Origgi describes one aspect of reputation as being a "reflection of ourselves that constitutes our social identity and makes how we see ourselves seen integral to

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[127] Post (n 63) at 708.
[128] ibid at 709.
[129] ibid at 711.
[130] These communications are what Post – relying on the work of Goffman – refers to as "rules of deference and demeanour". Put simply, rules of deference are acts through which appreciation is communicated from one person to another. Rules of demeanour are acts through which an observation or assessment of a person's character is communicated from one person to another. See Post ibid at 709, referring to E Goffman, *Interaction Ritual* (1967) 47. See also E Goffman, "The nature of deference and demeanour" (1956) 58 American Anthropologist 473.
[131] ibid at 710.

our self- awareness".[132] Our perception of the views of others has the potential to invoke feelings of "shame, embarrassment, self-esteem, guilt, pride".[133] Thus, the knowledge that our standing has been diminished may be relevant in contributing towards the indignity we suffer. Origgi explains that Smith – in addition to arguing for reputation as a material interest – recognised a dimension of reputation related to the need for self-love and even stemming from human vanity.[134] Returning to the example above concerning the divorce lawyer, it is this knowledge that their peers may think less of them or reject them, and that their good name has been damaged, that may make them feel less worthy. This reduction in self-worth, alongside the lack of respect that may be afforded to them, can be rationalised as contributing towards a feeling of indignity.

The importance of reputation in upholding one's dignity can therefore be seen in terms of an individual's intrinsic feeling of self-worth, their status as a human, their desire to be treated with respect by virtue of this status, and their own awareness of the judgments of others.

(d) Sociality

Finally, reputation is "inherently social":[135] it is "a social creation dependent on intergroup communication".[136] One of its core functions is that "it helps us to form and maintain social bonds".[137] The interest has consequently been described as "part of the bedrock of sociality, without which we are less happy and less healthy".[138]

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[132] Origgi *Reputation* (n 108) 4.
[133] ibid.
[134] Origgi, "Reputation in moral philosophy and epistemology" (n 64) at 72, referring to A Smith, *The Theory of Moral Sentiment* (1759) 411.
[135] A T Kenyon, "Defamation, privacy and aspects of reputation" (2018) 56 Osgoode Hall Law Journal 59 at 71.
[136] Heymann (n 79) at 1342.
[137] Howarth (n 79) at 849.
[138] ibid at 853.

Unlike privacy, it is less obviously linked to autonomy, given that individuals have little direct control over reputation.[139] It therefore has significant social value, as is evident from the preceding assessment of reputation's value. Part of this social value also lies in the ability to express and conduct oneself in different settings. For example, "many people have a reputation in the town they live and a completely different reputation online. Indeed, many people have a range of reputations online".[140] In light of increasing globalisation, reputation is increasingly a "means by which distant and diverse peoples can know and cooperate with each other".[141] It can accordingly be a proxy for human interactions in itself. This is similarly the case in the context of trade, with some individuals having a distinct business or professional reputation, in contrast to their personal reputation. It will later be shown that this is related to privacy. The degree of privacy that individuals have enables them to have varying reputations.

This section has shown that reputation is a both a valuable commodity and an integral part of our self, which "cannot be fully explained by only one justification".[142] This account has examined three key interests that are safeguarded and promoted by reputation, as well as outlining the underlying importance of reputation as a social good. Reputation not only affects our economic interests but is also relevant to our personhood and our ability to interact meaningfully with those around us. While damage to reputation may result in financial loss, this is only one component that may be harmed. In some instances, the more serious harm may be that which extends beyond our material interests and diminishes our sense of honour and standing in society, and even more fundamentally, our dignity and human worth.

To summarise, what we can see from this account is that privacy and reputation share both individual and social elements, which explain their value. Reputation

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[139] Heymann (n 79) at 1342.
[140] Svantesson (n 84) at 170.
[141] P M Garry, "The erosion of common law privacy and defamation: reconsidering the law's balancing of speech, privacy, and reputation" (2020) 65 Wayne Law Review 279 at 317.
[142] D Milo, *Defamation and Freedom of Speech* (2008) 42.

may be more obviously explained by social factors given that it is a product not of the individual, but rather the surrounding community.[143]

As this thesis proceeds to outline the nature of privacy and reputation rights that we have, the underlying values of these rights play an important role in shaping the form, content and legal protection of these rights.

2.3 Rights

Having offered some accounts of the value of privacy and reputation, in moving towards the content of privacy and reputation, it is important to examine what are meant by privacy and reputation *rights*.

Cane identifies three questions related to rights,[144] which this section will seek to answer in the context of privacy and reputation.

(1) What does it mean to say we have rights?
(2) What are rights for?
(3) And what rights do we have?

Starting with the first of these, the following definition of "rights" is helpful:

> "It is obvious that rights are more than the consideration of a value. They are in some way the institutional specification of our values. A general right specifies the protection of a particular value such as autonomy, privacy, or free association as a peremptory reason. By doing so, a right offers some guidance to citizens and officials and fixes what is required by that value, in terms of acts or omissions, and in terms of what should be done in case of its violation."[145]

Rights can be separated into two categories: moral rights and legal rights. This section will set out the difference between these two species of rights before

[143] Garry (n 141) at 316.
[144] Cane (n 1) at 36.
[145] P Eleftheriadis, *Legal Rights* (2008) 79.

showing that privacy and reputation should appropriately be characterised as fundamental rights.

2.3.1 Moral rights

What do we mean by moral rights? A typical definition is that they are "rights whose existence depends on principle and fact, not on social recognition or enforcement".[146] Davis notes that the fundamental feature of a moral right "is that it involves an important interest, an interest that can be connected to some other value".[147] Feinberg states that "a man has a moral right when he has a claim the recognition of which is called for…by moral principles or the principles of an enlightened conscience".[148] Pound views these as being natural rights that may be given legal protection by the state, but that are not created as such.[149] Practice has been "to deduce natural rights from a supposed social compact or from the qualities of man in the abstract or from some formula of right or justice".[150] These rights can therefore be said to have a normative character; they are rights that ought to be protected by the state.[151] Given the nature of these rights, they can be characterised as "rights in rem" and are enforceable against society as a whole.[152]

This does not mean that just because we recognise something as a moral right, a corresponding legal right exists. Davis gives the example of fidelity in a relationship.[153] While we may have a moral right that our spouse is faithful to

[146] D Lyons, *Rights, Welfare and Mill's Moral Theory* (1994) 3.
[147] S Davis, "Privacy, rights and moral value" (2006) 3 University of Ottawa Law and Technology Journal 109 at 114.
[148] J Feinberg, *Social Philosophy* (1973) 67.
[149] Pound (n 69) at 343.
[150] ibid at 346.
[151] ibid.
[152] Angelo Corlett (n 17) at 332.
[153] Davis (n 147) at 113.

us, there is no legal right that we can invoke should they indeed be unfaithful.[154] Conversely, it does not follow that all legal rights are necessarily moral rights.[155]

2.3.2 Legal rights

What then are legal rights? It may go without saying that a defining feature of a legal right is that the right has some sort of legal basis or justification. The foundational analysis of legal rights[156] is that undertaken by Wesley Hohfeld.[157] While Hohfeld acknowledges that "right" is often used "generically and indiscriminately to denote any sort of legal advantage, whether claim, privilege, power, or immunity",[158] he characterises a legal right more formally as being a claim that someone has against another (a "claim right").[159] In terms of Hohfeld's scheme of rights, this means that the other person has a corresponding duty in respect of the person's right. For example, we may say that A (an individual) has a right to privacy. This means that B (another individual/the rest of society) has a duty not to infringe A's right to privacy. This analysis is supported by Raz who states that:

> "X has a right if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty".[160]

What is important in distinguishing between moral and legal rights is the claim that can be made in respect of each right. It has been said that a

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[154] Although legal consequences may nevertheless flow from this (e.g. affording the wronged party with a legal ground for divorce).
[155] Although it weakens the case for a legal rule if such a rule has an unsound moral basis. Davis states that the "commonly held view is that any law that is adopted should either be morally acceptable or morally neutral": Davis (n 147) at 114. Moreover, a legal right may be *morally* defensible by virtue of it in itself being a legal right. This can be attributed to law's role in co-ordinating activities in society.
[156] M H Kramer, *A Debate Over Rights: Philosophical Enquiries* (2000) 8.
[157] W N Hohfeld, "Fundamental legal conceptions as applied in judicial reasoning" (1917) 26 Yale Law Journal 710.
[158] ibid at 717.
[159] ibid.
[160] J Raz, *The Morality of Freedom*, (1986) 166.

> "claim is often described as an argument that someone deserves something. A right is then a justified claim; justified by laws or judicial decisions if it is a legal right, by moral principles if it is a moral right".[161]

In terms of privacy, MacCormick states that "there can be no other conception of a right of privacy than as being a claim-right",[162] and "such a right presupposes as correlative a duty incumbent on some other person".[163] In summary:

> "the right of privacy is a right which sustains a series of claims against a large, perhaps indefinite, group of other people all of whom owe me the duty not to intrude upon some aspect or aspects of my life and affairs…To confer upon people legal protection of their privacy is, in effect, to invest in them certain rights against other people, and to impose upon other people correlative duties of non-intrusion in the affairs of the people protected".[164]

The rationale for the right – whether by reference to legal principles or moral principles – is significant in determining if a right can be said to be moral, legal, or both.

Furthermore, while a distinction can be drawn between moral and legal rights, one can also be drawn between positive and negative rights. A positive right is a right to do something. This may be, for example, a right to pursue something or achieve something.[165] A negative right, on the other hand, is a right not to be subjected to something.[166] Thus, a person may have a positive right (i.e. "a right to do X") and a negative right (i.e. "a right against someone not to do X").[167]

Each of these may be relevant to privacy. Irrespective of how privacy is defined, one can say that an individual has a positive right to privacy, meaning

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[161] J W DeCew, "The scope of privacy in law and ethics" (1986) 5 Law and Philosophy 145 at 147.
[162] N MacCormick, "A note upon privacy" (1973) 89 Law Quarterly Review 23 at 24.
[163] N MacCormick, *Legal Right and Social Democracy* (1982) 174.
[164] ibid.
[165] An example would be the right to marry.
[166] An example would be the right not to be subjected to torture.
[167] These are described respectively as "being free to" and "being free from": J Holvast, "History of privacy" in V Matyáš et al (eds), *The Future of Identity in the Information Society* (2008) 13 at 16.

that they have an entitlement to privacy in respect of something. An individual may also have a negative right to privacy, which essentially protects them from unwanted interference with a relevant privacy interest. Where there is significant disagreement is over the scope and content of privacy rights. It is additionally possible that the way in which privacy is defined could have an impact on whether the right is characterised as positive, negative or both.

When it comes to reputation, the right is more often (or easily) expressed in a negative sense. One has a right that their reputation is not unjustifiably harmed by another. However, it is questionable as to whether one has a *right* to (a positive) reputation.[168] Reputation can be more appropriately viewed as an interest to which a right may be attached:

> "A person does not have a right as to how others evaluate him or her—that is, as to the conclusion that they reach—nor should such a right exist. Rather, the legal position should be that people are not evaluated on the basis of false facts. In other words, I do not have any right as to what you think of my conduct or statements. You can think what you like. But I do have an interest that your evaluation of me not be based on false facts".[169]

This is supported by Descheemaeker, who states that:

> "the term 'right' in respect of entities like reputation, physical integrity or the enjoyment of one's land is misleading. It is for instance not true that we have a 'right to reputation' if by this is meant that we have an entitlement, good against the world, not to have our reputation violated by someone else's conduct. What we do have is a right that it should not be violated in a wrongful manner".[170]

As is the case with most rights, privacy and reputation rights are not absolute.[171] There may be circumstances in which these rights may be

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[168] Gibbons (n 81) at 593.
[169] Kenyon (n 135) at 74.
[170] Descheemaeker (n 66) at 605, fn 2.
[171] W A Parent, "Privacy, morality, and the law" (1983) 12 Philosophy & Public Affairs 269 at 278.

justifiably infringed. An example that is likely applicable to most societies is where the infringement is in the interest of national security or for the protection of others. This is because although privacy and reputation evidently have value, they may come into conflict with other rights or interests that also have value. As will be shown in the rest of this chapter, this is relevant in identifying when these rights are violated, and when such violations are legal wrongs.

In particular, the right that often requires to be balanced against privacy and reputation rights is the right to free speech (or freedom of expression). Freedom of expression is undoubtedly important. Its rationales lie broadly in safeguarding democracy, supporting the marketplace of ideas and flow of true information, and promoting human dignity.[172] It consequently holds a similar status to privacy and reputation; it is protected through key international law instruments such as the European Convention on Human Rights,[173] and is a qualified right: it can be restricted where it infringes one's privacy or reputation.[174] This position is explained by Voorhoof, who states that:

> "the State, including the judicial authorities, have a positive obligation to ensure protection for individuals against false allegations or breaches of privacy by the media, damaging individual persons' reputation or honour. But judges of course have to balance this obligation with the interests related to the right of freedom of expression and the public's right to be properly informed on public issues".[175]

2.3.3 Fundamental rights

Having outlined the value and nature of privacy and reputation rights, it will now be shown that these are fundamental rights in both a descriptive and a normative sense.

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[172] Milo, *Defamation* (n 142) 55-56. See also Chapter 3 generally; E Brandt, *Freedom of Speech* 2nd edn (2007) 6-7. See also Chapter 2 generally.
[173] E.g. European Convention on Human Rights (ECHR), Article 10.
[174] ECHR, Article 10(2).
[175] D Voorhoof, "Freedom of expression versus privacy and the right to reputation: how to preserve public interest journalism" in S Smet and E Brems (eds), *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony* (2017) 148 at 152.

What is meant by "fundamental right"? This is not a term of art, but it is used in the Universal Declaration of Human Rights, which provides that:

> "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".[176]

A distinction may be made between (legal) rights, constitutional rights, and human rights.[177] The former typically regulate relationships between individuals (natural and legal persons), whereas the other two regulate the relationship between the citizen and state.[178] Fundamental rights appear to sit somewhere between constitutional rights and human rights.[179]

Beever explains that there are two elements to a fundamental right. The first of these is that the right must be of great importance. This means that it can only be permissibly infringed in exceptional circumstances. The second is that the right ought to be recognised as a "foundational legal value".[180] The right is accordingly fundamental if it is (a) inviolable and (b) foundational.[181]

"Foundational" means that these rights are typically protected in law through constitutional documents.[182] These rights are "entrenched".[183] While there is no written constitution in the UK, there are what may be described as "constitutional or quasi-constitutional instruments", the most notable example being the Human Rights Act 1998,[184] which implements the European Convention on Human Rights into the domestic law of jurisdictions in the UK. Such instruments do not contain all rights, but rather contain only the most fundamental of rights.[185]

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[176] United Nations Universal Declaration on Human Rights, Article 8.
[177] B van der Sloot, "Legal fundamentalism: is data protection really a fundamental right?" in R Leenes, R Brakel, S Gutwirth and P Hert (eds), *Data Protection and Privacy: (in)visibilities and infrastructures* (2017) 3 at 13.
[178] ibid.
[179] ibid at 18.
[180] A Beever, "Our most fundamental rights" in D Nolan and A Robertson (eds), *Rights and Private Law* (2011) 63 at 63.
[181] ibid at 64.
[182] ibid.
[183] ibid.
[184] ibid.
[185] ibid.

That privacy and reputation are enshrined in international treaties to which the UK is a signatory further emphasises the elevated status of these rights.[186] In the context of the ECHR, Article 8 "clarifies that privacy is a substantive and enforceable right, and not merely a fundamental value or interest",[187] and it "puts beyond doubt the existence of privacy as a fundamental human right that the state is bound to respect and protect".[188] As a result, "privacy is considered as one of the fundamental constitutional and internationally protected values".[189]

Reputation "is a 'core' interest which has been at the forefront of the law ever since ideas of protected interests have been in operation".[190] Moreover, "most, if not all, legal systems place emphasis on the protection of the right of reputation. Indeed, such a right is constitutionally protected in some states".[191] The extent to which this interest has historically been protected and entrenched in both domestic and international law will be examined in Chapters 4 and 7 respectively.

To summarise,

> "privacy and reputation are key elements within personal autonomy and dignity, which are foundational concepts within European fundamental rights and are reflected in the provisions of the European Convention on Human Rights and the European Union Charter of Fundamental Rights".[192]

This reflects the account offered earlier in this chapter. While other fundamental rights are obviously protected through the criminal law, this is less evident with privacy and reputation rights. Given the significance of these legal

[186] As outlined at section 7.2.
[187] Witzleb (n 44) at 348, n 151.
[188] ibid at 348.
[189] M Šepec, "Revenge pornography or non-consensual dissemination of sexually explicit material as a sexual offence or as a privacy violation offence" (2019) 13 International Journal of Cyber Criminology 418 at 422.
[190] Descheemaeker (n 66) at 608.
[191] Svantesson (n 84) at 170.
[192] P Keller, *European and International Media Law* (2011) 314.

rights, the rest of this chapter will now assess the harms that may be caused by these rights being violated.

2.4 Harms

Finally, what do we mean by privacy and reputation harms, and how do we distinguish between harms and wrongs? Taking harms as the starting point, it is important to give some background to what is meant by harming another's interest (or simply "causing harm"). Feinberg distinguishes between harms (the setback of an interest or interests)[193] and wrongs (in a normative sense).[194] To cause harm to another does not necessarily entail wrongfulness, with Feinberg stating that "not all invasions of interest are wrongs, since some actions invade another's interests excusably or justifiably, or invade interests that the other has no right to have respected".[195] An example of this would be a harmful activity that sets back an individual's interest(s), but to which an individual consents.[196] This may be described as causing harm to the individual but cannot be said to be a wrong.[197] This is key to understanding the distinction between the concepts or interests of privacy and reputation, and the corresponding legal rights.[198] As Hogg explains, not all privacy invasions equate to an actionable breach of one's privacy rights.[199] Similarly, one may be said to have experienced an interference with their reputation, but this is distinct from the content of a reputation right (i.e. a right not to have one's reputation *unjustifiably* damaged).

The most prominent consideration of harm is by Mill, who articulated what is known as "the harm principle".[200] This provides that:

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[193] J Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others* (1987) 33.
[194] ibid 34.
[195] ibid 35.
[196] Cf *R v Brown* [1994] 1 AC 212.
[197] Feinberg, *The Moral Limits of the Criminal Law* (n 193) 35.
[198] M A Hogg, "The very private life of the right to privacy" in *Privacy and Property*, Hume Papers on Public Policy, vol 2 no 3 (1994) 1 at 3.
[199] ibid.
[200] This is examined in further detail in section 8.3.1(a).

> "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others".[201]

In particular, "understanding the way 'harm' is constituted in and through law is critically important if we are to understand why certain kinds of injury are occluded or ignored".[202] This will be considered further later in the thesis in assessing when the criminal law may justifiably protect privacy and reputation rights.

How do we assess the impact of harms? Simester and von Hirsch suggest that "the kind of adverse effect that counts as harm occurs through the impairments of some resource…over which the harmed person has a legitimate claim".[203] These resources share three features: they "tend to subsist over a longer term", "typically affect or are capable of affecting the quality of a person's life", and "have an objective dimension, in as much as the existence of a resource is ordinarily independent of the person's consciousness".[204]

Von Hirsch and Jareborg's taxonomy of harms comprises physical integrity, material support and amenity, freedom from humiliation, and privacy or autonomy.[205] Greenfield and Paoli draw on this and state that "harms can take the form of damages to functional integrity, material interests, reputation or privacy".[206] Reference to "functional integrity" in the latter is broader as this includes physical and psychological losses,[207] while their taxonomy specifically takes account of reputation rather than "freedom from humiliation".

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[201] J S Mill, *On Liberty* (Cambridge University Press, 2012) 134, 135.
[202] M Weait, "Harm, consent and the limits of privacy" (2005) 13 Feminist Legal Studies 97 at 107.
[203] A P Simester and A von Hirsch, *Crimes, Harms and Wrongs* (2011) 37.
[204] ibid.
[205] A von Hirsch, and N Jareborg, "Gauging criminal harms: a living standard analysis" (1991) 11 Oxford Journal of Legal Studies 1.
[206] V A Greenfield and L Paoli, "A framework to assess the harms of crime" (2013) 53 The British Journal of Criminology 864 at 868.
[207] ibid at 869.

Regarding privacy harms, Citron and Solove propose a typology of harms comprising physical harms, economic harms, reputational harms, discrimination harms, relationship harms, psychological harms, autonomy harms.[208] It is interesting to note that reputational harms are here included as a subset of privacy harms, and this relationship between the two will be examined further below. Others elements of privacy harms are that they may appear individually minor, may be numerous, and may make victims increasingly susceptible to future harms; these are issues that current legal responses to privacy struggle to adequately address.[209]

In terms of reputation, harms "arise from actions or events affecting others' view of the individual"[210] and entail "injury done to the individual in his external relations to the community, by lowering him in the estimation of his fellows".[211] These harms may therefore be social: "loss of reputation brings with it the pain of the threat of social isolation and rejection. Actual social isolation and rejection, in turn, constitute further harm to something fundamental in human life".[212] Howarth even points to more extreme consequential harms flowing from damage to one's reputation, such as the potential psychological impact of ostracism and even the risk of suicide.[213]

A distinction may be drawn between what may be termed "factual" (or harms per se) and "normative" harms or losses.[214] Just because we experience factual harm, it does not necessarily mean that this will be recoverable under the civil law or recognised by the criminal law. What is accordingly legally significant

[208] D K Citron and D J Solove, "Privacy harms" (2022) 102 Boston University Law Review 793 at 831. Note that reputational harm may be a consequence of primary privacy harms. For more on the relationship between the two see section 2.6 below. The converse may can also be true and in some circumstances reputational harm may result in harm to private life for the purposes of the ECHR, Article 8: see Kenyon (n 135) at 70-71. For the overlap between Article 8 and reputation see section 7.2.2.
[209] Citron and Solove at 816.
[210] Greenfield and Paoli (n 206) at 869.
[211] Warren and Brandeis (n 74) at 197.
[212] Howarth (n 79) at 850.
[213] ibid at 849-850.
[214] J N E Varuhas, "Varieties of damages for breach of privacy" in J N E Varuhas and N A Moreham (eds), *Remedies for Breach of Privacy* (2018) 55 at 56-57.

is a "cognizable harm", which is a harm "that the law recognizes as suitable for intervention".[215]

In a legal context, Descheemaeker identifies three harms stemming from breach of privacy that may generally be compensated for: pecuniary loss, mental distress, and the loss of privacy itself.[216] Pecuniary loss is typically absent from privacy actions[217] and cases are typically "dotted with references to such harms, from 'distress to 'hurt' or 'injured' 'feeling[s]'. to 'pain', 'embarrassment' or 'humiliation'".[218] These harms may appropriately be placed under the heading "mental distress", which is "an umbrella category encompassing them all".[219] There is additionally now authority supporting the award of damages for "the loss of privacy…as such",[220] even where there is no additional compensable harm. This supports the idea that privacy is valuable in and of itself.[221]

Reputation similarly "protects a good which is both non-pecuniary and immaterial. By 'non-pecuniary' is meant that its infringement is not susceptible of immediate valuation in money. By 'immaterial' is meant that the loss represented by its being encroached upon is intangible, contrary for example to loss of limbs, which is also non-pecuniary but is a tangible loss".[222]

Finally, the development of modern technology and the online sphere have transformed the privacy and reputational harms that individuals may suffer;[223] "privacy itself may not be "something new" but changing technologies and social conditions have resulted in new potential for invasion of the private sphere".[224] In the case of reputation, the Scottish Law Commission noted in their Report on *Defamation* that:

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[215] Citron and Solove (n 208) at 800.
[216] E Descheemaeker, "The harms of privacy" (2015) 7 Journal of Media Law 278 at 281.
[217] ibid at 281-2.
[218] ibid at 283.
[219] ibid.
[220] *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch) per Mann J at 168.
[221] This is considered further in section 3.2.2(b), in which reductionist accounts of privacy are opposed.
[222] Descheemaeker, "Protecting reputation" (n 66) at 610.
[223] Šepec (n 189) at 422.
[224] E C Reid, *The Law of Delict in Scotland* (2022) para 20.88.

> "Whilst the internet has allowed people to communicate far more effectively and much more widely than ever before, it has also meant that reputations can be quickly and, in some cases, unfairly tarnished".[225]

Furthermore, the potential scale, reach, and permanence of the harms make these increasingly pervasive:

> "An additional characteristic of the digital age is that once certain statements, information, or images are made public online, the information will stay available or pop-up again. It remains difficult, technically, but also from a legal point of view, to have these statements, information, or images promptly removed from the public sphere or public access, because of breach of privacy or defamatory content".[226]

Thus, in both cases, the changing nature of the conduct and the development of technology have meant that where privacy and reputation wrongs are committed in these ways, "many of the harms suffered are not of the traditional economic nature that is usually the focus of our legal system".[227] This has implications for the ways in which these harms should be redressed,[228] which will be considered further later in the thesis.[229]

To summarise, it has so far been shown that privacy and reputation are fundamental rights, breaches of which may cause significant harms:

> "injuries may go well beyond material harm or loss of confidence in professional abilities and extend to severe emotional distress and embarrassment felt because of intrusions into personal life and exposure to public curiosity and ridicule. It is injuries of this kind that give breach of privacy and loss of reputation their universal recognition, albeit in

[225] Report on *Defamation* (Scot Law Com No 248, 2017) 1.1.
[226] Voorhoof (n 175) at 151.
[227] J D Lipton, "Mapping online privacy" (2010) 104 Northwestern University Law Review 477 at 507.
[228] ibid.
[229] See Chapter 8 generally.

many different forms, as harms to vital aspects of human identity and social standing".[230]

Why do these matter? The nature of the harm is important in ensuring that the law responds to wrongdoing and provides redress in a sufficient and appropriate manner.[231] As noted above, it is only those harms that arise from unwarranted breaches (or violations) that ought to be considered when assessing the legal response. This will now be explained further.

2.5 Wrongs

Building on this, a difference can be discerned between one's privacy being engaged, losses of privacy, violations, breaches or infringements of privacy, and privacy wrongs. Gavison believes that the difference between these concepts is vital in promoting the need for privacy and uses the terminology "losses of privacy", "invasions of privacy", and "actionable violations of privacy".[232] This is sensibly viewed in a hierarchical sense by Gavison with each being a subset of the previous category.[233]

Two observations may be made concerning Gavison's structure. First, this structure can just as easily be applied to reputation as to privacy. Secondly, a fourth subset can be inserted before even considering losses of privacy. As noted at the outset of this section, one can talk of either privacy being engaged or the condition of privacy, this being – in a descriptive sense – a situation where we would say an individual has some degree of privacy. This would be relevant before a loss of privacy has occurred. For example, we would say that an individual (*X*) lying on their bed in their bedroom enjoys a degree of privacy, likewise a patient (*Y*) has a degree of privacy when consulting their doctor. In terms of reputation, we may say that an individual's (*Z*) reputation interest is

[230] Keller, *Media Law* (n 192) 307.
[231] This will be examined further in Chapter 8.
[232] Gavison (n 23) at 423.
[233] ibid.

engaged when they apply for a new job. We can envisage privacy and reputation interests being engaged in any number of situations.

However, this does not tell us when an individual loses privacy or reputation. *X* may lose privacy when lying in their bed when they open their windows and passers-by have the potential to see inside their bedroom. Similarly, *Y* may lose privacy when their doctor examines them in order to provide a diagnosis. *Z's* reputation may be lowered when they turn up late for their interview and the interviewer infers from this that *Z* has poor timekeeping. What is important to stress here is that losses of privacy and reputation do not necessarily equate to violations of privacy and reputation. An individual may voluntarily relinquish control of something private or may act in such a way as to lower their own reputation. The extent to which they enjoy privacy or reputation in such circumstances is diminished but it would be incorrect to say that their privacy or reputation interests have been "breached", "infringed" or violated".

Thus, "breaches", "infringements" or "violations" are collectively different insofar as they are characterised more as being the reduction or loss of one's privacy or reputation without one's consent (or even knowledge). An example of this may be where the police place surveillance cameras in *X's* bedroom in accordance with a lawfully obtained warrant to gather evidence relating to the commission of a crime. If *Y* was to collapse during the medical examination because of a suspected heart attack and the doctor had to quickly remove *Y's* clothing in order to use a defibrillator, we may say this is a violation of *Y's* right to privacy. In *Z's* case, if a reference was provided by a previous employer which stated that *Z* had a history of being late for work and this was supported by a number of warnings having been issued to *Z*, we may say that *Z* has suffered some sort of violation in respect of their reputation interest.

In each of these examples it is appropriate to describe the loss of privacy or lowering of reputation as being a breach, infringement or violation of the relevant interest, notwithstanding that there may have been some justification for this.

Finally, "privacy wrongs" or "reputation wrongs" are instances where an individual's privacy or reputation rights are unjustifiably breached. In such cases there will be no lawful justification for such a breach, and in accordance with Gavison's hierarchy, the wrong may be described as an "actionable" one.[234] An example of this may be where an electrician carrying out work in *X's* bedroom installs cameras so that they can clandestinely watch *X*. An example in *Y's* case may be where the doctor recounts the story of *Y's* medical examination to their friends and discloses personal information relating to *Y* in the course of narrating this tale. In the case of *Z*, a reputational wrong may be suffered when *Z's* previous employer also notes in their reference that *Z* was caught stealing from the employer's till, despite there being no evidence to support this nor any record of such an incident.

From a legal perspective two of these dimensions are most significant. First, establishing in which situations there is a legal right to the protection of one's privacy or reputation. Secondly, establishing the circumstances in which breaches of these legal rights constitute a legal wrong. In approaching this task, Moore sets out a number of factors that may be relevant in distinguishing privacy wrongs from losses or violations of privacy.[235] These are motive, magnitude (duration, extent and means), context, consent, and public interest.[236] These considerations can be seen as shaping both criminal and civil law responses to these wrongs, which will be assessed later in the thesis.

2.6 The relationship between privacy and reputation

The final aim of this chapter is to explain the relationship between privacy and reputation. The relationship is a complex one and this section will show how the two rights are connected and why it is appropriate to consider these alongside one another. In demonstrating the link between the two, it is useful to first begin with a note on the conceptual relationship.

[234] ibid.
[235] Moore (n 13) at 36-37.
[236] See section 8.3.3.

Privacy and reputation may be viewed as two sides of the same coin:

> "defamation should be understood to concern an interest in not being evaluated based on false facts, while privacy should be understood as an interest in not being evaluated based on private facts".[237]

It is specifically this relationship between reputation and private information that is key. That is not to say there is no interaction between reputation and other aspects of privacy, but that informational privacy is the privacy interest most obviously connected to reputation.[238] This is explained by Posner, who states that:

> "A person's reputation is other people's valuation of him as a trading, social, marital, or other kind of partner. An asset potentially of great value, it can be damaged both by false and by true defamation. These possibilities are the basis of the individual's incentive both to seek redress against untruthful libels and slanders and to conceal true discrediting information about himself - the former being the domain of the defamation tort and the latter of the privacy tort."[239]

On the other hand, "the concept of reputation is not similarly intertwined with that of privacy as seclusion" (i.e. physical or territorial privacy).[240] By defining privacy in terms broader than informational privacy (or secrecy) alone, it becomes less directly concerned with reputation.

In addition to the conceptual overlap, the relationship between the two is reflected in the legal sphere. In the context of legal actions, "defamation and privacy have been gradually moving towards each other in the early 21st century".[241] This is remarked upon by Kenyon, who notes that:

> "defamation and privacy law had not often been addressed together in detail in the past. Issues of privacy were absent (or were only briefly

[237] Kenyon (n 135) at 78.
[238] R A Posner, "Privacy, secrecy and reputation" (1979) 28 Buffalo Law Review 1 at 5.
[239] ibid at 6.
[240] ibid.
[241] D Mangan, "Regulating for responsibility: reputation and social media" (2015) 29 International Review of Law, Computers & Technology 16 at 25.

considered) in books on journalism and law, for example. That has gradually changed. Similarly, twentieth-century law reform reports on defamation often left privacy aside".[242]

As privacy law has developed, this has offered some protection for reputation, particularly in cases of informational privacy:[243]

> "Privacy in the form of protection against intrusion, for example, would be generally quite separate from reputational interests. Rather, the point is that where material is published, it may give rise to privacy claims that relate to aspects of reputation".[244]

Given that informational privacy dominates the civil law of privacy in Scotland (most notably through the action for misuse of private information)[245] this is significant.

Moreover, the interconnectedness can also be seen through the protection of privacy interests by the historical action for verbal injury. As will be explained further in Chapter 4, this action

> "extended not only to false statements, but also to insults impugning the dignity of the victim, and to disclosure of an embarrassing truth such as illness or past misdemeanour, in other words, wrongs that would align with the law of privacy today".[246]

The legal overlap is just as evident in human rights law, most notably through the dual protection offered by Article 8 of the ECHR.[247] The ECtHR has repeatedly held that reputation is part of the right to private and family life.[248] Despite this, it is important not to conflate the two:

> "Strasbourg has held that reputation and private life are conceptually distinct interests: it is the external evaluation of a person which makes

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[242] Kenyon (n 135) at 65.
[243] ibid at 60.
[244] ibid at 61.
[245] This action is examined in section 7.3.2.
[246] E C Reid, "Making law for Scotland: the Defamation and Malicious Publication (Scotland) Act 2021" (2024) 28 Edinburgh Law Review 42 at 43.
[247] See section 7.2.2 for further discussion of this.
[248] See the judgments in *Axel Springer AG v Germany* (2012) 55 EHRR; *Denisov v Ukraine* (No. 76639/11, 2018); *Pfiefer v Austria* (No. 12556/03, 2007).

up their reputation and, therefore, reputation per se is not related to private life."[249]

Indeed, this is a key difference between the two interests. A privacy violation does not require any sort of evaluation to be made. It is the violation itself which is wrongful.

Finally, further similarities may be seen in respect of the harms of privacy and reputation wrongs. While this has been noted above in terms of the factual harms suffered, there is also a more technical element here. Returning to the question of legally compensable harms, there is the practical issue of whether damages for reputational harm be recovered in actions for breach of privacy (and vice versa)?[250] This very issue has been raised recently in three leading English decisions concerning media reporting of suspects accused of (but not charged with) crimes.[251] While it has been argued that suspects are protected as a result of the presumption of innocence,[252] this view has been criticised.[253] This is because the presumption of innocence is a legal presumption that does not guarantee that members of the public will regard the suspect as innocent.[254] The position has now been clarified by the Supreme Court in *Bloomberg v ZXC*.[255] In upholding the Court of Appeal's earlier finding[256] that the subject of a police investigation has a reasonable expectation of privacy before being charged with any offence,[257] the Supreme Court stated that:

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[249] Kenyon (n 135) at 62, citing Aplin and Bosland (n 78) at 266.
[250] J Hariharan, "Damages for reputational harm: can privacy actions tread on defamation's turf?" (2021) 13 Journal of Media Law 186 at 187.
[251] *Richard v BBC* [2018] EWHC 1837 (Ch); *Sicri v Associated Newspapers Ltd* [2020] EWHC 3541 (QB); *Bloomberg v ZXC* [2022] UKSC 5, [2022] 2 W.L.R. 424.
[252] *Khuja v Times Newspapers Ltd and Others* [2017] UKSC 49, [2019] AC 161 per Lord Sumption at para 33, quoting Lord Rodger in *In re Guardian News and Media Ltd* [2010] 2 AC 697 at para 66: "the law proceeds on the basis that most members of the public understand that, even when charged with an offence, you are innocent unless and until proved guilty in a court of law. That understanding can be expected to apply, a fortiori, if you are someone whom the prosecuting authorities are not even in a position to charge with an offence and bring to court".
[253] *Khuja* per Lord Kerr and Lord Wilson (dissenting) at paras 44 and 56.
[254] ibid per Lord Kerr and Lord Wilson (dissenting) at paras 47-56.
[255] [2022] UKSC 5, [2022] 2 W.L.R. 424.
[256] *ZXC v Bloomberg* [2021] QB 28.
[257] *Bloomberg v ZXC* per Lord Hamblen and Lord Stephens at paras 144-146.

> "A person's reputation will ordinarily be adversely affected causing prejudice to personal enjoyment of the right to respect for private life such as the right to establish and develop relationships with other human beings".[258]

They further clarified that there is reasonable expectation of privacy in respect of such information and that while this is not unqualified, it should be treated as a "legitimate starting point"[259] for any assessment by the court.

This followed on from the judgments in the factually similar cases of *Richard v BBC*[260] and *Sicri v Associated Newspapers Ltd*.[261] In the high-profile former case, the singer, Sir Cliff Richard, raised an action against the BBC on the basis that they had violated his right to privacy by reporting that he was being investigating by the police and had his property searched in connection with allegations of historical sex abuse. Over the course of a two year investigation, Richard was never arrested or charged. In finding in favour of Richard, the court noted that it is:

> "quite plain that the protection of reputation is part of the function of the law of privacy as well as the function of the law of defamation. That is entirely rational. As is obvious to anyone acquainted with the ways of the world, reputational harm can arise from matters of fact which are true but within the scope of a privacy right".[262]

The facts were similar in *Sicri v Associated Newspapers Ltd*, in which a man raised an action based on breach of privacy after having been identified on the MailOnline website following his arrest in connection with the 2017 Manchester Arena bombing. Although the claimant was arrested, he was subsequently released without charge. It was held that the claimant had a reasonable expectation of privacy in respect of the fact that he had been arrested. However,

[258] ibid at para 108.
[259] ibid at para 144.
[260] [2018] EWHC 1837 (Ch).
[261] [2020] EWHC 3541 (QB).
[262] *Richard v BBC* at para 345.

in order to recover damages for reputational harm, the court stated that an action for defamation must be raised. The judgement provided that:

> "the claim for compensation in respect of reputational harm is – in the technical sense – an abuse of process. By that I mean that it involves the use of a cause of action for an inappropriate purpose, and in a way that obstructs the court's ability to do justice".[263]

This demonstrates an unwillingness by the courts to award compensation for damage to reputation in an action concerning breach of privacy (specifically misuse of private information).[264] This suggests that in order to claim damages for reputational harm, a separate defamation action must be raised.[265] That the pursuer must raise two actions in respect of a single wrongful act appears unduly onerous and reflects the complicated relationship between the civil law's protection of privacy and reputation interests.

In addition to this, it has been observed that "the case law in this area is in a confusing state, with different judges adopting different positions on whether, and on what basis, reputational harm damages can be awarded in privacy claims".[266] While it was hoped that this would be clarified by the Supreme Court in *Bloomberg*,[267] the quantification of damages did not form part of the appeal.[268] However, the court did express "reservations about the extent to which quantification of damages for the tort of misuse of private information should be affected by the approach adopted in cases of defamation".[269]

To summarise, while "both [privacy and reputation] are about protection from harms arising from published speech",[270] privacy may encompass more than this, as will be outlined in the next chapter. This will consider the ways in which

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[263] *Sicri* at para 166.
[264] ibid at para 163.
[265] ibid.
[266] Hariharan (n 250) at 187.
[267] ibid at 197, fn 63.
[268] *Bloomberg v ZXC* per Lord Hamblen and Lord Stephens at para 79.
[269] ibid.
[270] U Cheer, "Divining the dignity torts: a possible future for defamation and privacy" in A T Kenyon (ed), *Comparative Defamation and Privacy Law* (2016) 309 at 310.

privacy and reputation may be (and should be) defined. It will be shown that difficulties may arise in trying to identify the content and parameters of legally recognisable privacy or reputation rights.

2.7 Conclusion

This chapter has outlined the value of privacy and reputation and offered several theoretical justifications for these rights. Privacy has been shown to be of significant value to individuals, while enabling us to engage in meaningful social, business and intimate relationships. It similarly plays a role in promoting democratic practices; it provides us with a private sphere from which we may avoid unwanted state intrusion and interference into our lives. Reputation has similar value. Relying on Post's threefold conceptualisation of reputation, it has been shown that reputation's value may be rooted in property, honour and dignity. In addition to these justifications, it was suggested that there is a social justification for reputation, as it allows us to form relationships with those around us (or online) who are dependent on reputation as a means of evaluating us.

Building on these accounts, privacy and reputation have been shown to be fundamental (moral and legal) rights that, when violated, can cause a range of harms. These harms are not always easily compensable, despite it typically falling to the civil law remedy of damages to do this. There may be some overlap between the harms in terms of financial losses and psychological harm (e.g. anxiety, distress, shame) stemming from the impact that privacy or reputation wrongs may have on our social and professional activities.

There is a clear but complex relationship between privacy and reputation, the key feature being that private information about an individual may shape one's perception of them. However, while the acquisition of private information may lead to a diminution of a person's good name, this may not necessarily be a reputation wrong if the information in question is true. Rather, a reputation wrong is different as it necessarily involves an *unwarranted* lowering of our

reputation. In most cases, this will be because one's reputation is lowered as a result of false (as opposed to private) information or statements. By contrast, one's privacy may be violated because of the disclosure or misuse of true information about them, which they are nevertheless entitled to keep private. Privacy and reputation may accordingly be said to be two sides of the same coin, as explained above. Moreover, privacy will be shown to encompass more than information alone, and includes physical and spatial interests, which further distinguishes privacy from reputation. That is not to say that there is always a clear division between the two interests and this has been illustrated in case law relating to the disclosure of private information that has a direct impact on reputation. Such issues are yet to be fully resolved by courts in other jurisdictions and have not come before the Scottish courts, so it remains to be seen how these may be addressed in practice.

Building on this, there are two questions that will be considered further in thesis. The first concerns the wrongdoing itself: what type of conduct may represent a privacy or reputation wrong? The second concerns the harms: where a victim suffers a privacy or reputation wrong, how can the law's response adequately provide redress? This thesis will seek to provide answers by explaining how these interests should be defined, before turning to the central issue of the thesis, which concerns the legal protection of these interests.

3. Defining Privacy and Reputation

3.1 Introduction

Given that the focus of this thesis is the criminal law's protection of privacy and reputation rights, it is necessary to establish what are meant by the terms "privacy" and "reputation". Despite these terms being frequently used, their meaning and scope remain uncertain. This chapter therefore assesses definitions of these terms. First, the chapter begins by considering different approaches that may be taken in identifying definitions of privacy and reputation rights. Secondly, key theoretical and philosophical literature on privacy and reputation will be discussed to assess the ways in which these rights have been defined.

In identifying the ways in which privacy and reputation are defined, it is important to look not only at definitions in law, but also in the abstract. This initial enquiry will be approached primarily from a philosophical perspective by reference to leading books and journal articles in this field. This will then lay the foundations for a consideration of how privacy and reputation are defined for the purposes of the law through primary legal sources and secondary legal texts later in this thesis.

Given that the literature on privacy considerably outweighs that on reputation, privacy will be the primary focus of the chapter. As will be shown, questions relating to definitions of privacy have provoked far more academic commentary than equivalent discussion regarding reputation, and "reputation remains to this day under-theorised, particularly when compared with the vast scholarship on privacy".[1]

[1] T Aplin and J Bosland, "The uncertain landscape of Article 8 of the ECHR: the protection of reputation as a fundamental human right?" in A T Kenyon (ed), *Comparative Defamation and Privacy Law* (2016) 265 at 267-268.

3.2 Privacy

Trying to find an agreed definition of privacy is a difficult task. Much literature has considered this issue and there exists significant disagreement. This is recognised in the literature itself; it has been observed that privacy is "a concept in disarray",[2] that there is "a continuing struggle to define privacy",[3] and that there is "no consensus in either the legal or the philosophical literature".[4] This may appear surprising given that it is such a significant right and that many people would intuitively have some idea of what constitutes privacy.

This section will firstly explain why a single definition has been so hard to come by, and then proceed to offer an account of the different types of definitions that have been proposed. It will be argued that privacy has value as a concept and that reductionist approaches should consequently be rejected. However, finding a single, unified definition of privacy presents problems in practice. There is consequently merit in a pluralistic approach to defining privacy, with Prosser's fourfold classification and the separation of privacy interests being a basis for the purposes of this thesis. This recognises the value that privacy has while acknowledging that there are distinct elements of privacy that the law distinguishes between in practice.

3.2.1 Difficulties

Why has a singular definition of privacy proved so difficult to arrive at? To begin with, definitions may vary between one culture and another. What may be considered private in one society may differ greatly from that in another. Privacy is therefore dependent on the prevailing social and cultural norms in a

[2] D J Solove, "The meaning and value of privacy", in B Roessler and D Mokrosinska (eds), *Social Dimensions of Privacy: Interdisciplinary Perspectives* (2015) 71 at 73.
[3] J L Mills, *Privacy: The Lost Right* (2008) 4.
[4] A Schaefer, "Privacy: a philosophical overview", in D Gibson (ed), *Aspects of Privacy* (1980) 1 at 4.

particular society.[5] It is also historically dependent.[6] Solove notes that although in ancient Rome and Greece it was common for individuals to publicly bathe or exercise while naked, this would no longer be considered appropriate.[7] As social norms change, so too do the expectations that we have in respect of our privacy.[8] What we may previously have considered to be part of our private domain may now be something which – for any number of reasons – is less obviously "private". Social, technological, and economic advancements may each be responsible for changes in how privacy is regarded.[9]

Even within liberal Western democracies, one of the most notable features of the right to privacy is "that nobody seems to have any very clear idea what it is".[10] This is not for lack of effort; the concept finds itself drowning in a vast sea of rich philosophical literature. The problem is that there is no real consensus among scholars as to its meaning and it remains the case that "its theoretical foundations are uncertain and its practical limits ill-defined".[11]

Prosser partly attributes this definitional shortcoming to the way in which privacy rights have developed in the USA.[12] A number of the initial questions posed to the courts concerned whether a right to privacy existed, with less consideration being given to what such a right would consist of should it be found to exist.[13] In the legal sphere questions relating to the existence or recognition of the right have therefore taken precedence over those concerning the content of the right.

In academic texts, Solove believes there is a foundational problem that has made defining privacy increasingly difficult.[14] This is that there is disagreement

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[5] Solove (n 2) at 74. See also J W DeCew, "The scope of privacy in law and ethics" (1986) 5 Law and Philosophy 145 at 169.
[6] D Lindsay, "An exploration of the conceptual basis of privacy and the implications for the future of Australian privacy law" (2005) 29 Melbourne University Law Review 131 at 137.
[7] Solove (n 2) at 74.
[8] Schaefer (n 4) at 2.
[9] Lindsay (n 6) at 137, citing J W DeCew, *Privacy* (2002, revised 2018) in The Stanford Encyclopaedia of Philosophy, available at http://plato.stanford.edu/entries/privacy.
[10] J J Thomson, "The right to privacy" (1975) 4 Philosophy & Public Affairs 295 at 295.
[11] P Roberts, "Privacy, autonomy and criminal justice rights: philosophical preliminaries", in P Alldridge and C Brants (eds), *Personal Autonomy, the Private Sphere and Criminal Law: A Comparative Study* (2001) 49 at 51.
[12] D W Prosser, "Privacy" (1960) 48 California Law Review 383 at 388.
[13] ibid.
[14] D J Solove, "Conceptualizing privacy" (2002) 90 California Law Review 1087 at 1094.

as to the approaches taken by different authors. While Solove argues that it is necessary to know what privacy *is* before determining its value, it can be conversely argued that we cannot formulate a definition of privacy until we understand the value that it has. Given that there exist varying justifications for a right to privacy, what is clear is that the scope of the right itself is going to vary accordingly.[15] In particular, in terms of the content of the right, difficulties may arise as to the extent or degree to which a specific privacy interest ought to be protected.[16] This can be attributed to the highly subjective nature of privacy.[17] Even if it can be agreed that an individual should be entitled to a right to privacy in a particular situation, it does not follow that there will be agreement as to how far this right should extend. In trying to resolve these difficulties, some commentators believe that we should take a more practical approach to the question and that a definition should "fit the data".[18] This means that we should look to the instances in which privacy is thought to be engaged or where privacy is viewed as being lost and base our definition on these. This is in keeping with Waldron's observation that:

> "it would be a brave moral philosopher who would say that the best way to understand rights (or a concept connected with rights) is to begin with moral ideas and then see what the law does with those. Surely it is better to begin (as Hohfeld did) with rights as a juridical idea and then look to see how that works in a normative environment (like morality) that is structured quite differently from the way in which a legal system is structured".[19]

Such an approach would involve placing greater emphasis on existing legal definitions of privacy and relying on these in the process of formulating a definition.

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[15] J Angelo Corlett, "The nature and value of the moral right to privacy" (2002) 16 Public Affairs Quarterly 329 at 333.
[16] F Davis, "What do we mean by 'right to privacy'?" (1959) 4 South Dakota Law Review 1 at 6.
[17] ibid.
[18] Schaefer (n 4) at 276.
[19] J Waldron, "Dignity and rank" in J Waldron and M Dan-Cohen (eds), *Dignity, Rank, and Rights* (2012) 13 at 14-15.

There is additionally disagreement about whether it is even possible to propose a unified definition of privacy. There are three distinct views on this. The first is that a single definition of privacy may be proposed that encompasses the essential elements of privacy. This may be by reference to a set of necessary and/or sufficient conditions. This is sometimes referred to as a "unitary definition of privacy" or a "coherentist account of privacy".[20] The second is that privacy is a series of related interests that do not necessarily share a single, common defining feature, but that may be grouped together under the broad heading of "privacy". This has been termed "pluralistic privacy".[21] The third is that privacy has little efficacy as a concept and that it is merely a category of interests placed under a single heading that ought to be treated independently or viewed as pertaining to a separate category of rights (e.g. property or liberty). This latter approach is advocated by those who take a reductionist view of privacy rights.

Notwithstanding these difficulties, numerous definitions have been advanced by scholars. This is particularly so in the field of philosophy. While the aspirational goal of finding a single definition of privacy capable of providing sufficient protection may be theoretically admirable, in practice this is challenging, and privacy can be more clearly explained by reference to a pluralistic conceptualisation.

3.2.2 Differences

In terms of the types of definition that may be offered, there are a number of ways of distinguishing between these.[22] Two broad differences are that privacy definitions may be (a) descriptive or normative, and (b) reductionist or non-reductionist.

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[20] S P Lee, "The nature and value of privacy" in A E Cudd and M C Navin (eds), *Core Concepts and Contemporary Issues in Privacy* (2018) 47 at 48.
[21] D E Pozen, "Privacy-privacy tradeoffs" (2016) 83 University of Chicago Law Review 221 at 225.
[22] A Moore, "Defining privacy" (2008) 39 Journal of Social Philosophy 411 at 412.

Before considering these differences, it is worth noting that privacy definitions (irrespective of the types mentioned above) may vary according to their substance. A somewhat crude dividing line can be drawn between broad and narrow definitions of privacy.[23] As will be illustrated below, some definitions of privacy are framed broadly. This may be by reference to an individual's personhood or property. In such definitions there may be overlap with other interests and rights such as liberty, physical integrity, or property. Privacy may therefore come into tension with these rights when defined more broadly.

On the other hand, some definitions are much narrower. This may be because they restrict privacy's application to certain circumstances. For example, these definitions may define privacy as relating solely to personal information or confidential information, without taking account of other situations where privacy may be relevant (such as not being disturbed within one's home).

Care must be taken to ensure that a definition is not so broad as to be of little utility, nor so narrow as to be too limiting.[24] In striking this balance, it is important that a definition captures the various circumstances in which privacy applies, while also being easily understandable and "by and large consistent with ordinary language".[25] A pluralistic account of privacy reduces some of these concerns by avoiding the need to have a single definition of privacy capable of capturing the varying circumstances in which one's privacy may be engaged.

This section will now proceed to explain the difference between descriptive and normative definitions of privacy and argue that it is important to explain privacy in normative terms, given that the focus is on the circumstances in which one's privacy is violated. Following this, the section will outline the flaws of a purely reductionist approach to privacy. Despite accepting part of the reductionist claim that there is difficulty in formulating a single, functional definition of privacy, it will be argued that eliminating the concept of privacy in

[23] Schaefer (n 4) at 5.
[24] Solove (n 2) at 74; R B Parker, "A definition of privacy" (1974) 27 Rutgers Law Review 275 at 276.
[25] W A Parent, "Privacy, morality, and the law" (1983) 12 Philosophy & Public Affairs 269 at 269.

its entirety and subsuming it within other rights is conceptually flawed and fails to recognise its value as a fundamental interest.

(a) Descriptive v normative

A descriptive definition is one that merely describes the condition of privacy. This may include describing circumstances in which privacy is engaged or setting out what a loss of privacy is. A normative definition, on the other hand, refers to ethical or moral considerations within the definition. Schaefer refers to these definitions respectively as being "value-neutral" and "value-loaded".[26]

An example of a descriptive definition would be a definition stating that the condition of privacy is not having information about oneself known to others. This straightforward definition describes a condition of privacy and makes it clear when a person enjoys privacy. It also allows us to know when a person's privacy will be lost (i.e. when another person, B, acquires information relating to person A). However, what it does not tell us is when a person's right to privacy is "violated", nor when a person can be said to have suffered a privacy wrong. An example of a normative definition would be one stating that privacy is the "area of a man's life which, in any given circumstances, a reasonable man with an understanding of the legitimate needs of the community would think it wrong to invade".[27] This definition is "value-loaded" as it refers to normative considerations such as "reasonableness, "legitimacy", "needs" and "thoughts".

Thus, the differences between descriptive and normative definitions can be linked to the earlier distinction between "conditions" and "losses" of privacy on the one hand, and privacy "violations" and "wrongs" on the other.[28] A descriptive definition generally does not seek to identify when a loss of privacy becomes a violation or wrongful. Moore argues not only that a descriptive definition of privacy is not particularly interesting, but that it is also unhelpful.[29]

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[26] Schaefer (n 4) at 6.
[27] Lord Kilbrandon, "The law of privacy in Scotland" (1971) 2 Cambrian Law Review 35 at 36, citing *Privacy and the Law* (1970) 5, quoting Justice Educational and Research Trust, *Report on Privacy and the Law* (1970) 5.
[28] See the earlier explanation in section 2.5.
[29] Moore (n 22) at 416.

Merely stating that there is a condition of privacy does not tell us when privacy *should* be justified. Given that the focus of this thesis is the law's protection of privacy rights, these additional normative considerations are particularly relevant in defining privacy.

(b) Reductionist v non-reductionist

Turning to the second basis for distinguishing between definitions, reductionist definitions are those advancing the idea that the concept of privacy can be derived from other rights (e.g. the right to life, liberty, or property). Non-reductionist definitions treat privacy as an independent right (or set of related rights falling under the heading of privacy).

One of the most influential reductionist arguments is advanced by Judith Jarvis Thomson, who views privacy rights as being primarily derived from two categories of rights: rights over the person and property rights.[30] She therefore argues that privacy is unnecessary as a concept, for "the wrongness of every violation of the right to privacy can be explained without ever once mentioning it".[31] This is supported by Frederick Davis, who argues that privacy invasions are "a complex of more fundamental wrongs",[32] and that property rights can better provide an answer to what Warren and Brandeis described as privacy breaches.[33]

Thomson's argument that every potential privacy violation can be explained by reference to other rights is unconvincing. The argument is constructed by providing various examples where it may be claimed that a privacy right is violated. Rather than relying on privacy rights to deal with the apparent wrongdoing in each of her examples, she instead resorts to such rights as "the right not to be heard", "the right not to be looked at" and "the right not to be touched". These are grouped together under the heading "the right over the

[30] Thomson (n 10) at 306.
[31] ibid at 313.
[32] Davis (n 16) at 20.
[33] ibid at 10.

person". She concedes that it "sounds funny to say we have such rights"[34] and this is one of the central problems with her analysis: these are not rights we would necessarily think of ourselves as having. If so, this would mean that we are "constantly besieged with privacy invasions"[35] and that we must routinely waive these rights.[36] Parent is particularly scathing in his criticism of Thomson's approach, describing it as "unmistakably convoluted" and "torturous".[37] The idea that we waive our right "not to be seen" whenever we leave our home certainly seems to strain logic. This therefore raises questions over conceptual clarity of the very kind that Thomson criticises in respect of privacy rights.

Furthermore, there are two conceptual problems with Thomson's reliance on property rights. To begin with, tying certain privacy issues to property means that ownership becomes a necessary condition of a privacy interest being protected. Inness is critical of this and gives an example of writing and sending love letters to someone.[38] Once these are sent you no longer have ownership of these letters but if they were to be non-consensually shared by the recipient then you could argue that your privacy rights have still been violated. It would seem strange to say in this situation that property rights would protect the sender of the letters against this wrong. What is clear is that in a number of circumstances we would find ourselves resorting to complex discussions about property law in order to respond to wrongs of a very different nature. This does not seem a satisfactory solution to Thomson's criticism that privacy rights lack clarity; it merely seems to replace one problem with another.

Secondly, it is not clear that property law does protect indeed such interests. For example, Thomson refers to a right not to have another person look at a picture you own.[39] Although property rights would protect you from being dispossessed of your picture, or from your picture being damaged or destroyed, it is doubtful that they would extend to preventing someone from merely

[34] Thomson (n 10) at 305.
[35] J C Inness, *Privacy, Intimacy and Isolation* (1996) 46.
[36] Parent (n 25) at 279; ibid Inness 46.
[37] Parent (n 25) at 279.
[38] Inness, *Privacy* (n 35) 33.
[39] Thomson (n 10) at 303.

viewing your picture. Again, Thomson presents a perplexing and "over-expansive"[40] picture of rights.

However, irrespective of whether one accepts that privacy is derivative, there may still be value in marking out privacy wrongs as being distinct from others.[41] Gavison is critical of the reductionist view[42] and argues that privacy is a useful concept. In order to be considered useful, she claims that "the concept must denote something that is distinct and coherent".[43] Indeed the problem that reductionists have is their failure to appreciate the value that privacy has.[44] Privacy is widely used among members of the public[45] and readily understood by people (irrespective of the difficulties that have arisen in producing an agreed, satisfactory definition).

Rachels views Thomson's approach as an overly simplistic characterisation of rights[46] and criticises it on the basis that privacy is a distinct interest that differs from property rights.[47] This is evident in cases where there are multiple harms stemming from one wrongful act. In such cases existing rights may not suitably capture the nature of the harm felt by the individual. For example, while property rights may protect against the wrong in question, they may be inadequate when it comes to redressing the harm caused. Warren and Brandeis note that property rights, for example, are insufficient to protect certain interests (like the infliction of mental suffering).[48]

Finally, one of the issues with the reductionist approach is that an argument that privacy may be reduced from other rights can be countered with the argument that other rights are actually derived from a right to privacy.[49] Given that privacy is such a fundamental right, it seems odd that its status should be so easily diminished. Privacy's value has been outlined at the start of this thesis.

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[40] Lindsay (n 6) at 145.
[41] ibid.
[42] R Gavison, "Privacy and the limits of the law" (1980) 89 Yale Law Journal 421 at 422.
[43] ibid.
[44] J Rachels, "Why is privacy important?" (1975) 4 Philosophy and Public Affairs 323 at 332.
[45] J W DeCew, *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology* (1997) 47.
[46] Rachels (n 44) at 332.
[47] ibid.
[48] S Warren and L Brandeis, "The right to privacy" (1890) 4 Harvard Law Review 193 at 204.
[49] DeCew, *In Pursuit of Privacy* (n 45) 29, 47; Moore (n 22) at 413; T Scanlon, "Thomson on privacy" (1975) 4 Philosophy & Public Affairs 315 at 322.

Compelling reasons were presented as to why privacy is so important.[50] It promotes autonomy, enables us to interact with one another, and safeguards democracy. Inness argues that "it is even plausible to suggest that *privacy* rights are more "basic" than other rights, especially property rights".[51] However, regardless of whether one set of rights is derivative of the other, given that privacy has a distinct and coherent meaning this does not matter. The value of the concept remains. Rights may overlap with one another and liberty rights, rights over the person and property rights will all overlap to an extent. This does not mean that we should seek to reduce multiple rights to one universal right. This would only reduce conceptual clarity.

Although the reductionist approach has been criticised and ultimately rejected in this section, it is recognised that there is some merit in the argument that privacy rights lack a unifying principle. How can this be resolved? Other commentators have sensibly been wary of entirely abandoning privacy as a concept but have not sought to provide a unitary definition. DeCew advocates a broad definition of privacy insofar as she characterises privacy as being "an umbrella term for a wide variety of interests".[52] This is an approach ("pluralistic privacy")[53] that has gained some traction. Mills agrees that part of the difficulty with defining privacy is that it "cannot be understood as a unified concept",[54] but is rather a "bundle of rights".[55] Solove similarly argues that we should avoid the temptation of defining privacy by reference to common denominators and instead recognise privacy as being "not one thing, but a plurality of many distinct yet related things".[56] In advocating this approach, Solove states that the

> "top-down approach of beginning with an overarching definition of privacy designed to apply in all contexts often results in a conception that does not fit well when applied to the multitude of situations and problems involving privacy".[57]

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[50] See section 2.2.1 on the value of privacy and section 2.3.3 on privacy's status as a fundamental right.
[51] Inness, *Privacy* (n 35) 36.
[52] DeCew (n 5) at 145.
[53] Pozen (n 21).
[54] Mills, *Privacy* (n 3) 4.
[55] ibid.
[56] Solove, "The meaning and value of privacy" (n 2) at 74.
[57] Solove, "Conceptualizing privacy" (n 14) at 1099.

Gormley additionally states that "single one-size-fits-all definitions of privacy have proven to be of limited value".[58] Recognition of privacy as encompassing multiple related interests avoids problems encountered with classic definitions.[59] These are that definitions have to be framed broadly in order capture all circumstances where a privacy right may exist but therefore run the risk of being either too broad or imprecise. Conversely, if a definition is framed narrowly, there is the risk that some species of privacy may not be captured by it. This is particularly the case in respect of legal rights. While a unitary definition of privacy may work as an ideal, it has less merit in the legal sphere. The concept has to be workable in practice.

One of the most influential works on privacy law is that of William Prosser, who viewed privacy as comprising four distinct torts. He famously wrote that the law of privacy:

> "comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff 'to be let alone'".[60]

In doing so, Prosser identified four categories of privacy torts in the USA. These are: intrusion, private facts, false light and appropriation. While the substance of these wrongs will be considered further,[61] what is important for present purposes is that Prosser does not view privacy as a unitary right. Rather, Prosser's privacy torts encompass notions of privacy in terms of both access and control. This approach is supported by Solove, who similarly categorises privacy wrongs[62] under four headings: information collection, information processing, information dissemination, and invasion.[63]

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[58] K Gormley, "One hundred years of privacy" (1992) 5 Wisconsin Law Review 1335 at 1339.
[59] Solove, "The meaning and value of privacy" (n 2) at 74.
[60] Prosser (n 12) at 389.
[61] See section 7.3.
[62] Solove, "The meaning and value of privacy" (n 2) at 77.
[63] ibid.

Whether Prosser's account is reductionist or not is questionable.[64] Prosser's characterisation sits somewhere in the middle of reductionist and coherentist theories. While he does not think that the concept of privacy should be discarded completely, he does not advocate a unitary concept of privacy. In respect of the latter, Prosser states that not only are the types of invasions suffered and the interests affected distinct, but they lack common features.[65]

The problem with pluralistic accounts is that there is no central feature, which makes it difficult to determine what is a privacy interest and what is not. While we may be able to identify existing interests (as Solove or Prosser do), how do we then identify new or emerging interests? Do we reason by analogy as to whether it seems similar to an existing one? A shortcoming of this approach is that there is limited connections between the current types; this is a point conceded by the authors advocating a pluralistic approach.[66] This means that there is no obvious means of adding a new interest given that this may not have anything in common with one of the current ones.

3.2.3 Leading definitions

Having identified the different approaches to defining privacy, the leading definitions will now be assessed. This section will explain the differences between privacy as "the right to be let alone", as well as "access" and "control" based definitions of privacy. While the right to be let alone will be shown to be overly broad, it will be argued that control provides a more suitable basis for defining privacy than access. Finally, it will be suggested that distinguishing between informational and physical privacy provides a useful conceptual foundation for evaluating the law's protection of these rights.

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[64] N Witzleb, "Justifying gain-based remedies for invasions of privacy" (2009) 29 Oxford Journal of Legal Studies 325 at 347, n 148.
[65] See Prosser's quote above.
[66] Solove, "Conceptualizing privacy" (n 14) at 1097.

(a) The right to be let alone

Let us take as our starting point the most prominent definition of privacy, that offered by Samuel Warren and Louis Brandeis in their seminal article on the topic from 1890. This represented the first attempt at defining privacy as a standalone right and was written against the backdrop of increased media scrutiny of individuals' private lives and the development of "instantaneous photography".[67] Warren and Brandeis viewed existing rights as being inadequate to deal with what they termed "the evil of the invasion of privacy by the newspapers",[68] which had the potential to cause extreme mental suffering.[69]

What is significant about Warren and Brandeis' article is that in advocating a definition of a separate legal right to privacy, they recognised the harm that could be done by an infringement of this right, as distinct from infringements of other rights (such as property rights). This is in contrast to the reductionist approaches mentioned above that view privacy only as derivative of other fundamental rights.

The definition proposed by Warren and Brandeis was that privacy is the "right to be let alone".[70] This is a descriptive definition of privacy, which has the merit of simplicity but can be criticised for being too broad.[71]

To begin with, this definition is problematic as it may include a number of violations that we would view as going beyond relating to privacy, such as property infringements (e.g. trespass) or violations of one's bodily autonomy (e.g. an assault).[72] In criticising this definition, Parent states:

> "There are innumerable ways of refusing to let a person alone. Most of them have no bearing on privacy. To conceive of privacy as freedom

[67] Warren and Brandeis (n 48) at 195.
[68] ibid.
[69] ibid at 196.
[70] ibid at 195.
[71] Lord Kilbrandon (n 27) at 36.
[72] W A Parent, "Recent work on the concept of privacy" (1983) 20 American Philosophical Quarterly 341 at 342.

from intrusion is open to a similar objection. The definition is so broad that it totally obscures the conceptual core of privacy".[73]

Thomson similarly notes that on this basis almost every violation of a right could be characterised as a violation of the right to privacy,[74] and therefore views this definition as unsatisfactory.[75] Thus, privacy has to be treated as something narrower than merely a right to be let alone.

An objection can also be made that this definition conflates privacy with liberty.[76] Defining privacy in terms of liberty is too broad[77] and this is where the right to be let alone or without interference definition becomes problematic. A number of examples of conduct that would interfere with your right to be let alone would not be characterised as infringing your right to privacy. Schaefer gives the example of a rule prohibiting any public advocacy of communism.[78] In this case one's liberty is restricted but this has no bearing on privacy.

Furthermore, this definition suffers from vagueness. What does it mean to be "let alone"? Let us consider a straightforward example. If a person's communications are accessed without their consent (or even knowledge) we may say that their privacy has been infringed. However, can it be said that the person's "right to be let alone" has been infringed? It does not necessarily follow that they have not been "let alone" in this situation, even though we may characterise this as a breach of their right to privacy.

These criticisms relating both to the breadth and vagueness of the definition are convincing. To define privacy in such a broad way has the effect of diminishing what is distinct about the concept. This is a criticism that has already been made of reductionists, who deny the very need for a concept of privacy at all. That is not to say that the definition has not served a purpose. It has helped privacy become recognised as a concept and kickstarted the long-

[73] ibid.
[74] Although Thomson is critical of privacy rights generally for this very reason: see above.
[75] Thomson (n 10) at 295.
[76] H T Tavani, "Philosophical theories of privacy: implications for an adequate online privacy policy" (2007) 38 Metaphilosophy 1 at 5.
[77] Schaefer (n 4) at 7.
[78] ibid.

running academic debate on the existence and content of the right. Two leading approaches have developed from Warren and Brandeis' initial definition. The first of these can be seen as stemming from "the right to be let alone" by rooting privacy to "access". The second approach goes further than "access" and instead relies on "control" as its guiding principle.

(a) Access

As stated above, a number of privacy definitions are framed around the idea of "access" (otherwise known as "spatial privacy").[79] This can either refer to access to one's self, or access to one's information or property. Such definitions can be viewed as similar – albeit narrower – to the right to be let alone, and Solove describes conceptualisation in terms of access as being a "more sophisticated formulation of that right".[80]

As with the right to be let alone, the focus of access definitions is interference with the individual. Both Garrett and Gavison define privacy in this way.[81] Garrett's definition is that privacy is "a limitation on the access of one or more entities to an entity that possesses experience",[82] while Gavison views privacy as being "limitation on access to the self".[83]

Why is access so important? Some commentators refer to privacy's natural origins and suggest that most sociable animal species nevertheless crave seclusion and solitude.[84] But access is about more than just physical access and it extends beyond seclusion and solitude.[85] This is recognised by Gavison and Garrett, who are more expansive in their definitions. Gavison develops her definition by setting out three irreducible elements of privacy: secrecy,

[79] A Allen, *Unpopular Privacy: What Must We Hide?* (2011) 4.
[80] Solove, "Conceptualizing privacy" (n 14) at 1102.
[81] R Garrett, "The nature of privacy" (1974) 18 Philosophy Today 263
[82] ibid at 264.
[83] Gavison (n 42) at 428.
[84] Garrett (n 81) at 265; A Moore, "Privacy: its meaning and value" (2003) 40 American Philosophical Quarterly 215 at 220.
[85] Solove, "Conceptualizing privacy" (n 14) at 1103.

anonymity, and solitude.[86] These three elements can be described as "the extent to which we are known to others, the extent to which others have physical access to us, and the extent to which we are the subject of others' attention".[87] Thus, it is limitations on access to these interests that are protected by a privacy right. Gavison describes a state of "perfect privacy" as being when an individual is "completely inaccessible to others".[88] However, Gavison views privacy as a spectrum in which neither absolute privacy nor complete lack of privacy are desirable. The value in having privacy lies in there being a balance between these two extremes.

Although Gavison advocates a broader interpretation of "access" than that provided by other authors, this is still a narrow definition of privacy. It deals with two elements of privacy: "withdrawal" (or "seclusion") and "concealment",[89] but fails to capture other potential privacy breaches that go beyond secrecy, anonymity or solitude. Garrett similarly separates access into distinct components and distinguishes between "causal access" and "interpretive access".[90] Causal access refers to contact with or influence over an individual,[91] while interpretive access refers to the acquisition or development of knowledge about an individual.[92] Again, a distinction between physical access and non-physical access to (or wider interference with) an individual is made.

While limited access may accord with our ordinary understanding of privacy (e.g. being in one's home; being in a shower cubicle), this does not mean that privacy must be taken to mean or be equated to limited access.[93] This is too simplistic. Privacy loses its status as a valuable interest or as a goal that is pursued when it is defined in terms of access alone. Privacy ought to be viewed as a goal that is to be attained. We desire privacy, and this is consistent with the earlier argument setting out the positive, valued nature of privacy. This can be

[86] Gavison (n 42) at 433.
[87] ibid.
[88] ibid at 428.
[89] Solove, "Conceptualizing privacy" (n 14) at 1105.
[90] Garrett (n 81) at 271.
[91] ibid at 264.
[92] ibid at 271.
[93] Inness, *Privacy* (n 35) 43.

illustrated by an example. Where a person is shipwrecked on a remote island and is cut-off from civilisation, there is no physical access to them. In accordance with access definitions, this would be described as a state of "privacy". However, it would seem strange in such a case to talk of this stranded individual as having increased privacy (or even enjoying privacy), despite them being in a state of seclusion.[94] That privacy is a desirable good can be shown by a similar example in which an individual journeys to the same island in order to get some much-needed escape from their hectic life. In this example we would be more inclined to say that the individual has attained a state of privacy (or enjoys privacy).

(b) Control

Another way in which privacy has been defined is by reference to "control". Such definitions are referred to as "control definitions of privacy" and will now be considered. What is meant by control in this context and why is control so important? Keller explains that a "privacy right grows out of the idea that each individual should have control over his or her personal sphere of space and identity, determining both access and disclosure".[95] As with access, control can mean control over information,[96] and also control over access to oneself.[97]

As stated in the preceding section, access can only go so far in defining privacy. There may be situations where we allow access to some part of our self or data but expect privacy in respect of how others use that access. For example, in situations where confidentiality is expected we may allow information to be shared with another individual, but may reasonably expect that this information is not misused (e.g. shared with others; used for an improper purpose) by that individual.

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[94] ibid 44-45.
[95] P Keller, *European and International Media Law* (2011) 307.
[96] E.g. Westin, Lee, Norrie and Burchell.
[97] E.g. Moore, Parker.

The most notable control definition of privacy was proposed by Justice Brennan in the US Supreme Court case of *Eisenstadt v Baird*,[98] stating that privacy consists of a form of autonomy or control over significant personal matters. However, control definitions have also found favour with numerous privacy academics. Moore supports such a definition, writing that "privacy should be defined as a right to control access to places, locations, and personal information along with use and control rights to these goods".[99] Westin's influential definition provides that privacy is:

> "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others. Viewed in terms of the relation of the individual to social participation, privacy is the voluntary and temporary withdrawal of a person from the general society through physical or psychological means, either in a state of solitude or small-group intimacy or, when among larger groups, in a condition of anonymity or reserve".[100]

Norrie and Burchell define privacy as "the autonomy right of an individual to control access to, and use of, information concerning him or herself".[101] Parker views it as being "control over when and by whom the various parts of us can be sensed by others".[102] Lee states that it "is a condition (and/or the legal and social institutions that support that condition) under which individuals have a protected degree of control over how they are presented publically [*sic*], in terms of information about themselves available to others".[103]

With control definitions the nature of privacy is different to those discussed above. By characterising privacy as a form of control, privacy is treated as a "power" that individuals have rather than it being a "state" or "condition".[104] Inness credits control definitions for giving a person "a specified realm of

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[98] *Eisenstadt v Baird*, 405 U.S. 438, 453 (1972).
[99] Moore, "Defining privacy" (n 22) at 425.
[100] A Westin, *Privacy and Freedom* (1967) 7.
[101] J Burchell and K McK Norrie, "Impairment of reputation, dignity and privacy", in R Zimmermann, K Reid, and D Visser (eds), *Mixed Legal Systems in Comparative Perspective* (2005) 545 at 571.
[102] Parker (n 24) at 281.
[103] Lee (n 20) at 48.
[104] Parker (n 24).

autonomy".[105] In contrast to access definitions, control definitions support a morally loaded account of privacy. This is because autonomy is a "positively valued condition", which is promoted through its incorporation in the definition of privacy.[106] Thus, defining privacy in terms of control is a much more positive definition of the concept and this relates more closely to autonomy; defining privacy in terms of control allows one to "grow personally while maintaining autonomy over the course and direction of one's life".[107] Such a conception of privacy is therefore firmly rooted in individual autonomy.

Critics of control definitions nevertheless argue that they are illogical.[108] This is because a person who has control over privacy can choose to give that up. Can it then be said that this person has privacy? Parent refers to an example in which a person divulges intimate information to a friend. In this example he claims that the person is clearly exercising control but in doing so is not protecting or preserving their privacy; they are surrendering their right to privacy in this situation.[109] Yet this should not be viewed as problematic. Giving up control over privacy does not mean that a person does not have a claim to privacy, it simply means that they have waived this claim. Moore notes that the same can be said of liberty: "someone may freely limit their own liberty. An exercise of liberty may limit liberty while an exercise of control may limit control".[110] We are free to give up our own interests, just as we are free to harm our own interests. This has no bearing on the definition of that interest.

Defining privacy in terms of control also raises an obvious question: control over what? Tavani gives the example of a person seen by their neighbour in a nearby supermarket.[111] The person shopping does not have control over certain information such as the fact that they shop in that particular supermarket or even the contents of their shopping basket. Clearly there must be a limiting principle that prevents trivial content from being captured by privacy definitions. This is evident where the definition includes reference to access or information. Parker

[105] Inness, *Privacy* (n 35) 47.
[106] ibid.
[107] Moore, "Defining privacy" (n 22) at 414.
[108] Parent, "Privacy, morality, and the law" (n 24) at 273.
[109] ibid.
[110] Moore, "Defining privacy" (n 22) at 415.
[111] Tavani (n 76) at 7.

dismisses "information" as a means of limiting the scope of the definition,[112] and the merits and shortcomings of defining privacy in terms of (access to or control over) information will be considered in the next section. "Control over information" definitions will therefore not be subject to any criticism here. However, for present purposes it is sufficient to note that a control definition cannot apply to all types of information for this would be too broad.

It will be shown that there are two key aspects of privacy that merit recognition. These are control over information about oneself and control over access to oneself.

(c) Categories of privacy

Turning now to substance and content of the definition, there are clearly a number of different species of privacy. While some definitions may be broad enough to encompass various sub-categories of privacy (e.g. Warren and Brandeis), others are formulated in too narrow a way to take account of these.

What do we mean by sub-categories of privacy? These are specific aspects of one's privacy that exist and may be engaged in different circumstances. Examples could include confidentiality and informational privacy,[113] territorial privacy, bodily privacy, and sexual privacy.[114] These categories are not mutually exclusive and there may be overlap between them. For example, confidentiality is a sub-category of informational privacy, for confidential information is just a particularly privileged type of personal information that is generally afforded greater protection by law. Sexual privacy may also be viewed as a sub-category of intrusion, or a species of physical or bodily privacy.

Allen helpfully sets out a threefold categorisation of privacy as comprising "physical, informational, and proprietary privacy".[115] Categorising privacy in this way is largely consistent with Prosser's classification of privacy into

[112] Parker (n 24) at 280.
[113] Parent, "Privacy, morality, and the law" (n 25).
[114] D K Citron, "Sexual privacy" (2019) 128 Yale Law Journal 1870.
[115] A Allen "Coercing privacy" (1999) 40 William Mary Law Rev 723 at 723.

discrete but connected interests and will be used as a basis for assessing privacy rights in the rest of this thesis. This recognises the importance of privacy as a value and as a right, while additionally reflecting the ways in which privacy rights have developed in Western jurisprudence.

(i) Informational privacy

Informational privacy may be viewed as a specific category of privacy.[116] It generally "refers to the ability to control the collection, use, and disclosure of one's personal information".[117] The relationship between privacy and information is clearly significant. However, differences exist in the ways in which this relationship is treated. First, some scholars ensure that a single definition of privacy is broad enough to include private information (as many of those set out above do). Secondly, some prefer to treat informational privacy as a particular category of privacy (or privacy interest). And thirdly, some define privacy only in terms of informational privacy. This thesis favours the second option and will treat informational privacy as a type of privacy right that individuals are entitled to protect.

Where privacy is defined by reference to information, such a definition may be still be categorised as being either an "access" definition or "control" definition. Privacy may entail not permitting access to information or the exercise of control over information.

One of the leading proponents of a definition of privacy in terms of information is Parent, who argues that privacy "is the condition of not having undocumented personal knowledge about one possessed by others".[118] Thus, Parent's definition is descriptive (it describes a condition of privacy) and focuses on merely one aspect of privacy: personal information. In particular, this definition

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[116] J Oster, "Theories of reputation" in A Koltay and P Wragg (eds), *Comparative Privacy and Defamation* (2020) 48 at 59.
[117] R J R Levesque, *Adolescence, Privacy and the Law: A Developmental Science Perspective* (2016) 96.
[118] Parent, "Privacy, morality, and the law" (n 25) at 269.

concerns access to information rather than control over it. The focus is therefore on privacy as a means of ensuring secrecy.[119]

Parent limits his definition to knowledge about another; spreading false information about another does not constitute a breach of one's privacy.[120] This is consistent with the idea that "information privacy concerns the interest of a person about true information that should – or should not – be known about him or her".[121]

This definition can be criticised for being overly narrow. Moore gives the example of a person wandering into another person's home when they are asleep and patting them on the head as being an obvious privacy violation, but one which would not fall within Parent's definition.[122] This is because this act does not relate to personal knowledge. Numerous similar examples could be offered but what this shows is that informational privacy appears to have less regard to the invasion a person may suffer in terms of their dignity and autonomy.

There are further issues with such a definition. While it has been said earlier that there must be some way of restricting the types of information that can be considered "private", Parent's formulation is inadequate. One of these concerns the meaning and scope of the term "personal knowledge". Parent considered "sexual preferences, drinking or drug habits, income, the state of his or her marriage and health" to be personal information.[123] What may be termed "objective" personal information (such as those listed above) was equated with what will be termed "subjective" personal information. The latter category would include information that is particularly sensitive to an individual, despite not having this status among the rest of the population. Clearly there is also likely to be a fine line in some instances between objective and subjective categories of information. While a heterosexual person may not regard their sexual orientation as particularly sensitive, a person of a minority sexuality may do so (especially in territories where such sexualities are illegal or viewed

[119] DeCew, *In Pursuit of Privacy* (n 45) 48.
[120] Parent, "Privacy, morality, and the law" (n 25) at 269. Although this would presumably represent a distinct reputation wrong (i.e. defamation).
[121] Oster (n 116) at 61.
[122] Moore, "Defining privacy" (n 22) at 417.
[123] Parent, "Privacy, morality, and the law" (n 25) at 270.

unfavourably). Difficulties may therefore arise in practice in trying to determine whether information relating to an individual is "personal information", and Solove notes that "no particular kind of information or matter is inherently private".[124] Thus, it falls to a normative, legal test to do much of the work in determining the types of information that should be deemed private for the purposes of protecting informational privacy. The primary method of doing so is by assessing whether the individual has a reasonable expectation of privacy over the information in question, the content of which will be considered further in Chapter 7.

For present purposes, it is sufficient to state that informational privacy is a core privacy interest from which a legal right should be derived. This right should enable individuals to exercise control over who (among other conduct) has access to, can use, and disclose private information.

(ii) Physical privacy

In addition to informational privacy, the second broad category of privacy is physical privacy (or spatial privacy).[125] This relates to an individual themselves and concerns invasions by "unwanted others, objects, and other disruptions".[126] In its widest sense, this may be likened to Warren and Brandeis' "right to be let alone" and the need to protect against unwanted intrusion into one's private sphere.

It is argued that control over who may physically interact or engage with us is a key element of privacy, even if it is one that has less clearly been recognised in Scots law.[127] There is value in having the ability to control these matters. It has been shown that privacy is vital in promoting key individual values such as autonomy and liberty, as well as the ability to form meaningful relationships, whether these be social, professional or intimate. It also offers us protection

[124] Solove, "The meaning and value of privacy" (n 2) at 75.
[125] Levesque, *Adolescence, Privacy and the Law* (n 117) 56.
[126] ibid.
[127] See section 7.3.1.

from unwanted state intrusion (e.g. surveillance). Informational privacy only goes so far here, and it would be stretching the ordinary meaning of private information to claim that this can capture other instances of intrusion.[128] This is explained by Moreham, who suggests that:

> "privacy can also be breached by unwanted watching, listening or recording even if little information is obtained and none is disseminated. Peering through a person's bedroom window, following him or her around, bugging his or her home or telephone calls, or surreptitiously taking for one's own purposes an intimate photograph or video recording are all examples of this kind of intrusion".[129]

Intrusion therefore extends something beyond merely physical intrusion to encompass both physical *and* spatial (or territorial) intrusion. This has been described as "sensory interference".[130] This understanding of privacy is broadly consistent with that adopted by the ECHR in Article 8 (Right to respect for private and family life). However, it should be noted that "private life" is inevitably a broader concept than privacy alone and encompasses elements that would extend beyond what we might typically think of as concerning privacy.[131]

A particular sub-category of physical privacy that has developed is sexual privacy. This has been defined as "the social norms (behaviours, expectations, and decisions) that govern access to, and information about, individuals' intimate lives".[132] This definition is characterised by Citron as being both descriptive and normative.[133]

This clearly relates to privacy's value in terms of promoting autonomy and allowing for individuals to develop and maintain intimate relationships.[134] As outlined in the previous chapter, a number of commentators view privacy's value as being related to intimacy and relationships. Fried argues that privacy's

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[128] DeCew (n 5) at 154.
[129] N A Moreham, "Beyond information: physical privacy in English law" (2014) 73 Cambridge Law Journal 350 at 351.
[130] ibid at 354.
[131] See section 7.2.1 for the meaning of "private life".
[132] Citron (n 114) at 1874.
[133] ibid.
[134] ibid at 1875. See also section 2.2.1(b) on this.

value is in its promotion of "respect, love, friendship, and trust".[135] Similar justifications have been offered by authors such as Gerstein[136] and Inness.[137] Citron notes that sexual privacy is "foundational for the exercise of human agency and sexual autonomy"[138] and "enables individuals to set the boundaries of their intimate lives".[139]

While privacy is firmly rooted in the civil law, sexual privacy can be viewed as having a closer connection to criminal law rules. Sexual offences such as voyeurism[140] and related offences such as the non-consensual distribution of intimate images[141] are examples of offences that have a similar rationale in that they seek to protect "access to, and information about, individuals' intimate lives".[142]

As with definitions of privacy focusing on informational privacy, this is a definition of privacy which turns on substance. As such, it can better be described as a branch of privacy, in the same way as informational privacy is, rather than a definition of privacy. Indeed, Citron argues that sexual privacy is a distinct privacy interest.[143] In doing so, she draws on Pozen's argument that individual privacy interests should be distinguished from one another.[144] Citron argues that while existing definitions of privacy may overlap with sexual privacy, legal responses are inadequate.[145]

By way of summary, this section has sought to characterise privacy by reference to Solove's pluralistic conceptualisation of privacy as comprising multiple distinct (but nevertheless related) interests. Prosser's influential account divides privacy interests in a similar manner, but by reference to four legal wrongs. Two of these wrongs have been identified as relevant to the

[135] C Fried, "Privacy" (1968) 77 Yale Law Journal 475 at 477.
[136] R S Gerstein, "Intimacy and privacy" (1978) 89 Ethics 76.
[137] Inness, *Privacy* (n 35).
[138] Citron (n 114) at 1882.
[139] ibid.
[140] Sexual Offences (Scotland) Act 2009 s 9.
[141] Abusive Behaviour and Sexual Harm (Scotland) Act 2016 s 2.
[142] Citron (n 114) at 1874.
[143] ibid at 1882.
[144] Pozen (n 21).
[145] Citron (n 114).

protection of personal privacy: intrusion and misuse of private information. The Australian Law Commission has gone as far as to say that "these two categories of invasion of privacy are widely considered to be the core of a right to privacy".[146] Intrusion captures privacy violations where an individual is subject to unwarranted physical (or otherwise sensory) intrusion, while the misuse of private information captures violations relating to unwarranted access to or loss of control over such information. The ways in which these wrongs have been interpreted and regulated in practice will be examined further in this thesis, and it will be shown that the level of protection offered to each differs considerably.

3.3 Reputation

Defining reputation is a less difficult challenge than defining privacy. Unlike privacy, "there is generally agreement regarding the concept of reputation and the types of justifications that may support its protection".[147] It has nevertheless been observed that it "still lacks a sound philosophical definition and an appropriate conceptual analysis".[148] Why is this the case? Reputation appears to suffer from the opposite problem to privacy. While literature on privacy is extensive, Milo notes that there is a "scant body of literature on reputation"[149] and that "there is a paucity of detailed analysis on the meaning of reputation and the reason for its legal protection".[150] McNamara agrees and claims that despite defamation attracting much attention, this cannot be viewed as literature on reputation.[151] Such literature does not adequately consider what is meant by reputation, nor its value.[152]

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[146] Report on *Serious Invasions of Privacy in the Digital Era* (Australian Law Reform Commission Report 123, 2014) para 5.4.
[147] Aplin and Bosland (n 1) at 267-268.
[148] G Origgi, "Reputation in moral philosophy and epistemology", in F Giardini and R Wittek (eds), *The Oxford Handbook of Gossip and Reputation* (2019) 69 at 69.
[149] D Milo, *Defamation and Freedom of Speech* (2008) 27, fn 97.
[150] ibid 15.
[151] L McNamara, *Reputation and Defamation* (2007) 19.
[152] See Post's observation that its value is often assumed: R C Post, "The social foundations of defamation law: reputation and the constitution" (1986) 74 California Law Review 691 at 692. See also section 2.2.2.

Notwithstanding this, definitions of reputation typically share one common feature. Central to most definitions of reputation is the significance of others. Reputation can only exist in a world where we are susceptible to the judgments of others. This is different to pride, honour, or esteem, which were qualities or values that we may hold ourselves and that are not dependent on others. While reputation "has been variously described as a person's standing, character, esteem, worth, fame, celebrity, honour, rank or prestige",[153] such descriptions are misleading. Milo distinguishes between reputation and character. Reputation is what we appear to be in the eyes of others, whereas character is what we are.[154] Thus, reputation has been defined as "an external assessment of a person's behaviour and characteristics made by a relevant community, for example, neighbours, colleagues or the public at large".[155] This goes some way in explaining any requirement in defamation law that a defamatory statement be communicated to a third party and not simply to the injured party.[156] It is also for this reason that reputational harm ought not to be conflated with offence.[157]

Reputation has further been said to be "the part of ourselves that depends on the judgments of others",[158] and legal scholars writing on personality rights similarly define it as "the esteem in which we are held by others"[159] and "the esteem in which [a person] is held by society".[160] The relevance of society is clearly key, and we can "contrast reputation with self-esteem, which is the esteem a person has for themselves rather than society for them".[161]

But how do those around us evaluate our reputation? McNamara describes reputation as "a social judgment of the person based upon facts which are considered relevant by a community", [162] and "at its core…reputation is the

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[153] T Gibbons, "Defamation reconsidered" (1996) 16 Oxford Journal of Legal Studies 587 at 589.
[154] Milo, *Defamation* (n 149) 17.
[155] ibid.
[156] ibid 18.
[157] A P Simester and A von Hirsch, *Crimes, Harms and Wrongs* (2011) 37.
[158] Origgi (n 148) at 71.
[159] Burchell and Norrie (n 101) at 546-547.
[160] N R Whitty, "Overview of rights of personality in Scots law", in N R Whitty and R Zimmermann (eds), *Rights of Personality in Scots Law: A Comparative Perspective* (2009) 147 at 170.
[161] E Descheemaeker, "Protecting reputation: defamation and negligence" (2009) 29 Oxford Journal of Legal Studies 603 at 609.
[162] McNamara, *Reputation and Defamation* (n 151) 21.

result of the collective act of judging another and the potential use of that result to direct future engagements".[163]

Reputation can therefore change according to the facts known by those around us. This point is made by Gibbons who notes that:

> "reputation is not a fixed attribute of the individual. Rather, it is an appraisal based on the facts which are known about the person and on the social values which are considered relevant. Essentially, therefore, a reputation is socially contingent. Despite being associated with a particular person, it depends on others' views and assessments".[164]

Thus, "the law of defamation protects the respect and esteem in which a person *is held* because that is the essence of reputation".[165]

To summarise, the central features of reputation are that it involves some judgment or opinion formed by another person; it is an external assessment. As such, it is not something that has any worth in a vacuum; it is only meaningful in relation to others. While an individual's reputation goes to the heart of their esteem, character and self-worth, it is of social significance since it determines how others interact with us. These central features are imperative to understanding how the law ought to regulate reputation wrongs, and how legal responses can adequately provide redress for resulting harms.

3.4 Conclusion

In this chapter, it has been shown that privacy is a complex and multi-faceted interest. Its value has already been established in Chapter 2 and it is therefore important that the concept is recognised in law. While reductionist arguments have been rejected, it is argued that it is not necessary to strive for a "one-size-fits-all" definition of privacy. Rather, it is more helpful to treat privacy as

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[163] L A Heymann, "The law of reputation and the interest of the audience" (2011) 52 Boston College Law Review 1341 at 1342.
[164] Gibbons (n 153) at 592.
[165] U Cheer, "Divining the dignity torts: a possible future for defamation and privacy" in A T Kenyon (ed), *Comparative Defamation and Privacy Law* (2016) 309 at 310.

comprising related interests relating to physical/spatial privacy and informational privacy, over which individuals have legal rights. This supports the views expressed by several commentators that

> "a comprehensive definition of privacy must accommodate both physical and informational privacy interests: in other words, it must protect individuals against unwanted watching, listening, touching, etc., as well as against the unwanted acquisition and dissemination of private information".[166]

Moreover, it was explained that reputation requires far less consideration than privacy, given the relative consensus as to its meaning. As such, this section sought to set out the core elements of reputation, which will help inform the assessment of the legal mechanisms through which reputation may be most appropriately protected.

It will be shown that although privacy and reputation are mentioned in various cases and pieces of legislation, little effort has been made by either judges or legislators to define these terms. As Gormley states:

> "Commentators have stumbled over privacy, and have failed to agree upon an acceptable definition, because they have generally focused on privacy as a philosophical or moral concept…while wholly ignoring privacy as a legal concept".[167]

Hogg echoes this in the context of Scots law, noting that "in a legal system which valued privacy for its own sake, one would expect to find treatment of such a concept. To date, this has been sadly lacking both in Scotland and England".[168]

Elsewhere in the UK, three prominent reports have both found legal definitions of privacy to be inadequate. The first of these was prepared under the auspices of the Justice Educational and Research Trust, which published a report on

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[166] N A Moreham, "Privacy in the common law: a doctrinal and theoretical analysis" (2005) 121 Law Quarterly Review 628 at 651. See also fn 73.
[167] Gormley (n 58) at 1339.
[168] M A Hogg, "The very private life of the right to privacy" in *Privacy and Property*, Hume Papers on Public Policy, vol 2 no 3 (1994) 1 at 3.

Privacy and the Law in 1970.[169] This led the government to appoint a committee to report on the law of privacy.[170] The third was almost two decades later. This was a report by the Calcutt Committee,[171] a committee established by the Home Secretary to make recommendations on the existing law of privacy and related matters. This *Report of the Committee on Privacy and Related Matters*[172] was published in 1990 in response to growing concern over the intrusion into individuals' private lives.

Thus, while much of the thesis has so far focused on the conceptual nature of privacy and reputation, attention will now shift towards the law itself in Parts 2 and 3. The starting point in Chapter 4 is with the historical protection of these interests, in which it will be shown how the current law has been as much influenced by its institutional foundations as it has by the substance of the wrongs.

In determining the suitability of the criminal law in protecting these rights, Chapter 5 will assess the key differences between the criminal and civil systems. It will show that while there was some historical overlap between the two systems, there has been some divergence. There are striking conceptual differences between the aims and features of the systems were dealing with criminal and civil wrongs, and these are now broadly reflected in the ways in which each system operates. These theoretical and practical differences will play an important role in determining the extent to which the criminal law ought to protect these rights, as set out in Chapter 8.

[169] Justice Educational and Research Trust, *Report on Privacy and the Law* (1970). Chaired by Mark Littman QC and Peter Carter-Ruck.
[170] Report of the Committee on Privacy (Cmnd 5012: 1972). Chaired by Kenneth Younger.
[171] Chaired by Sir David Caclutt QC.
[172] Report of the Committee on Privacy and Related Matters (Cmnd 1102: 1990).

PART 2

4. The Historical Development of the Law of Delict and Criminal Law in Scotland in Respect of Privacy and Reputation Rights

4.1 Background

While the law of delict and criminal law in Scotland are now very much distinct,[1] this was not always the case. Having developed as part of Scots common law with roots in Roman law, both areas have a rich and complex history.

This chapter aims to bring together the historical accounts of private law authors, criminal law authors, and Institutional writers in order to answer three key questions. First, how did the law of delict and criminal law develop historically in respect of the protection of privacy and reputation rights? Secondly, what factors led each branch of the law to develop as it did? And thirdly, what is the lasting impact of these developments on the current law? By addressing these questions, this chapter will lay the foundations for a comparison of the features of contemporary criminal and civil law in the next chapter.

As the focus of this work is privacy and reputation interests, literature on personality rights more broadly has proved useful in identifying the ways in which these interests were historically protected. The historical development of personality rights in Scotland has been charted, most notably, by Blackie, and his body of work[2] (particularly his chapter "Unity in Diversity") is a helpful starting point for this chapter. In terms of contemporary Scots law, the leading works on personality rights are Reid's book, *Personality, Confidentiality and Privacy in Scots Law*,[3] and Whitty and Zimmermann's edited book *Rights of*

[1] See Chapter 5 for a comparative analysis of the key differences between the two areas of law in contemporary Scots law.
[2] J Blackie, "Unity in diversity: the history of personality rights in Scotland" in N R Whitty and R Zimmermann (eds), *Rights of Personality in Scots Law* (2009) 31; J Blackie, "Defamation" in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000) 633; J Blackie, "The interaction of crime and delict in Scotland" in M Dyson (ed), *Unravelling Tort and Crime* (2014) 356 at 359.
[3] E C Reid, *Personality, Confidentiality and Privacy in Scots Law* (2010).

Personality in Scots Law.[4] While of great value in examining the law's protection of these rights, Reid explicitly states that her work concerns Scots private law, and therefore only incidentally considers issues of criminal law.[5] This is reflective of other literature in this area; further historical accounts exist in the private law sphere, including tracing the ways in which Roman law has influenced the development of these personality rights,[6] and the impact of Institutional writers. In respect of the latter, the works of Mackenzie,[7] Hume,[8] Alison,[9] and Macdonald[10] are of specific relevance to criminal law. However, more generally, Stair,[11] Bankton,[12] Erskine,[13] and Bell[14] all provide some account of the actions available in respect of privacy and reputation breaches during their respective eras. The significance of these works is twofold. From a practical perspective, they first shed light on the changes the substantive law underwent, as well as evidencing changes in taxonomical approaches to this area of the law.

More recently, of the two leading works from the past century on delict and criminal law in Scotland, Walker includes little discussion of criminal liability for violations of privacy and reputation rights,[15] while Gordon's influential book on Scots criminal law does not engage with equivalent delictual liability in this area.[16] These works nevertheless provide some important historical coverage of the origins and key developments of the law of delict and the criminal law.

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[4] N R Whitty and R Zimmermann (eds), *Rights of Personality in Scots Law* (2009).
[5] Reid, *Personality* 4.
[6] R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996); T McGinn (ed), *Obligations in Roman Law: Past, Present, and Future* (2013).
[7] G Mackenzie, *Laws and Customs of Scotland in Matters Criminal*, 1st edn (1674), 2nd edn (1699).
[8] D Hume, *Commentaries on the Law of Scotland, Respecting Crimes* 1st edn (1797, reprinted 1986).
[9] A Alison, *Principles of the Criminal Law of Scotland* (1832); A Alison, *Practice of the Criminal Law of Scotland* (1833).
[10] J H A Macdonald, *A Practical Treatise on the Criminal Law of Scotland*, 5th edn (1948).
[11] J Dalrymple, 1st Viscount Stair, *The Institutions of the Law of Scotland*, 6th edn by D M Walker (ed) (1981).
[12] A McDouall, Lord Bankton, *An Institute of the Laws of Scotland in Civil Rights,* 1st edn (1751-1753, reprinted 1993-1995).
[13] J Erskine, *An Institute of the Law of Scotland*, 1st edn (1773, reprinted 2014)
[14] G J Bell, *Principles of the Law of Scotland*, 4th edn (1839, reprinted 2010)
[15] D M Walker, *The Law of Delict in Scotland*, 2nd edn (1981).
[16] G H Gordon, *The Criminal Law of Scotland: Vol 1*, 4th edn, by J Chalmers and F Leverick (2023); G H Gordon, *The Criminal Law of Scotland: Vol 2*, 4th edn, by J Chalmers and F Leverick (2017).

Similarly, while not dealing directly with privacy and reputation rights, historical literature on each area provides important context for this research. In particular, some chapters in Reid and Zimmermann's *A History of Private Law in Scotland* touch on personality rights.[17] From a criminal law perspective, several works by Farmer[18] focus on the historical development of Scots criminal law. These works offer an insight into the wider factors fuelling legal change, and primarily the evolution of criminal law institutions.

Drawing on these different sources, the law's protection of privacy and reputation rights will now be charted in order to address those research questions set out above.

4.2 Charting the relationship between crime and delict

This section will assess the ways in which the criminal law and law of delict were historically interconnected, and the reasons why the two branches of law later diverged. A notable contrast will be shown between the development of the law's protection of reputation interests and its protection of privacy interests. While the evolution of reputation as a recognisable interest is ingrained in Scots law, this cannot be said about privacy.

Three broad time periods will be examined in this chapter. The starting point will be the *ius commune* period (from the sixteenth to late-seventeenth century) when Scots law remained heavily influenced by the civilian tradition and Roman law. Following this, the Institutional period (from the late-seventeenth to early nineteenth century) of Scots law will be considered, during which legal rules, principles and structures began to shift away from civilian influences, especially in respect of criminal law.[19] Finally, the focus will be on the modern period of Scots law (from the early nineteenth to late nineteenth century), when criminal

[17] K Reid and R Zimmermann (eds) *A History of Private Law in Scotland* (2000). See also E C Reid and D L Carey Miller (eds) *A Mixed Legal System in Transition: T B Smith and the Progress of Scots Law* (2005).
[18] L Farmer, *Criminal Law, Tradition and Legal Order* (1996); L Farmer, *Making the Modern Criminal Law* (2016).
[19] These can collectively be referred to as being part of the "pre-modern" period.

law and the law of delict became truly distinct and the legal system underwent substantial reform. It was during this time that the protection of privacy and reputation rights found its home in the law of delict rather than in the criminal law, and that English law began to assert greater influence over certain areas of the law in Scotland.

There are challenges in providing a clear picture of the legal landscape from the earlier periods (and even up until the early part of the nineteenth century). The principal reason for this is that there was no uniform system for reporting case law. This, alongside a lack of academic writings, explain why "[a] study of the systematic arrangement of Scots law prior to the seventeenth century is likely to yield only meagre pickings".[20] As will be shown below, the works of the Institutional writers (beginning with Mackenzie and Stair towards the end of the seventeenth century) help to further our understanding of both the structure and substance of the law from this period onwards.

4.3 The Ius Commune and Roman Law Foundations

Given the strong civilian influence on Scots law, at least up until the eighteenth century, "the *ius commune* was regarded as an important source of Scots criminal law".[21] During the *ius commune* period, *delictum* and *crimen*[22] (criminal wrong) were used interchangeably in Scots law, with the result that Blackie refers to a category of actions dealing with wrongs as "crime/delict",[23] this being a single body of law.[24] Although Farmer regards the separation between criminal and civil jurisdiction as a key feature of a modern legal system,[25] he goes on to note that "in early modern Scotland the distinction

[20] D Visser and N R Whitty, "The structure of the law of delict" in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000) 422 at 427.
[21] C Gane, "Civilian and English influences on Scots criminal law" in E C Reid and D L Carey Miller (eds), *A Mixed Legal System in Transition: T B Smith and the Progress of Scots Law* (2005) 218 at 220.
[22] Zimmermann, *Obligations* (n 6) 917.
[23] J Blackie, "The interaction of crime and delict in Scotland" in M Dyson (ed), *Unravelling Tort and Crime* (2014) 356 at 359.
[24] J Blackie and J Chalmers, "Mixing and matching in Scottish delict and crime" in M Dyson (ed), *Comparing Tort and Crime* (2015) 271 at 286.
[25] L Farmer, *Criminal Law, Tradition and Legal Order* (1996) 82.

between private and public wrongs was not clear".[26] Support for this is found in a leading work on the history of Scots private law, the authors of one chapter stating that "Scots law originally had only the sketchiest of distinctions between criminal and delictual liability".[27] This is unsurprising given its Roman law origins. The system for dealing with wrongs under Roman law was mainly focused on deterring private vengeance and this has led commentators to claim that the system was more criminal in character,[28] despite there being provision for compensation.[29] This mixed criminal/delict process meant that "the distinction between crime and delict was much less clear-cut than it is today".[30] In particular, this can be seen with defamation, which is an area where there was historically a significant degree of overlap between criminal and civil liability,[31] despite the action now being firmly rooted in the civil law.

4.3.1 Actions

What is the impact of this on privacy and reputation rights? Reid observes that the "[p]rotection of personality rights has a long history".[32] Their protection can primarily be seen as stemming from the delict of *iniuria* (injury). This broad action (*actio iniuriarum*) had its roots in Roman law, with its rationale being the protection of *corpus* (body), *fama* (reputation) and *dignitas* (dignity).[33] Despite such an action in delict being categorised as a private action, its penal character[34] made it more analogous to a criminal action.[35] In keeping with the *ius commune* tradition, *iniuria* was sub-divided into two separate wrongs in Scots law: real injury (*iniuria realis*) and verbal injury (*iniuria verbalis*).[36] Of most relevance to the present research is the protection of *fama* and *dignitas*, and specifically

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[26] ibid.
[27] Visser and Whitty (n 20) at 432-433.
[28] See also Zimmermann's observation that "the Roman notion of delict had a strongly criminal flavour; and even though the compensatory function came increasingly to the fore, in the course of Roman legal history the penal element was never entirely abandoned": Zimmermann, *Obligations* (n 6) 913.
[29] Referred to as "Aquilian liability". See Visser and Whitty (n 20) at 433.
[30] Zimmermann, *Obligations* (n 6) 913.
[31] Visser and Whitty (n 20) at 433. See also K McK Norrie, "Obligations" in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 15 (1996) para 471.
[32] Reid, *Personality* (n 3) 5.
[33] D 47, 10, 1, 2. Justinian, *Institutes* IV, 4, 1.
[34] The reasons why this action was considered penal will be considered later in this chapter.
[35] Zimmermann, *Obligations* (n 6) 917.
[36] Also referred to as "*convicium*".

the *iniuria verbalis*.[37] Verbal injury was a single action, in contrast to real injury, which had a number of sub-categories.[38] In addition to *iniuria*, actions could be brought under the *lex Aquilia*. This was a distinct, over-arching action through which the victim sought the recovery of patrimonial loss (leading to a finding of "Aquilian liability" against the wrongdoer). The lasting impact of these distinct historic actions can still be seen in the modern law in the form of a civil claim for solatium and patrimonial loss respectively.[39]

There is generally consensus among scholars as to these historical foundations. However, different taxonomical approaches have nevertheless emerged in contemporary literature. These vary according to the treatment of these historical classifications by individual authors. This has had some impact on the approaches that these authors have taken on the protection of privacy and reputation in the civil law. Most notably, differences exist between those who continue to rely on the historical classifications of the civilian system, as opposed to those who have been more amenable to the continued influence of English tort law. Disagreement has primarily centred on the continued relevance of the *actio iniuriarum* in Scots law and the extent to which this may be relied upon as a means of achieving redress for such wrongs. The leading literature on personality rights by Reid has been sceptical of its continued significance, noting that "there is no doubting its importance as a source, it is questionable whether it offers a sustainable model for the modern development of personality right protection".[40] Reid further suggests that the "protection for personality interests in the modern law has been achieved largely through the medium of discrete categories of delictual/tortious liability",[41] thereby highlighting the influence that English law has had.[42] This is in contrast to other

[37] *Corpus* would encompass interests that would now be known as physical integrity or bodily autonomy. These were protected by the *actio iniuria realis* and are not relevant to the present research.
[38] E.g. mutilation, *plagium*, abduction, *raptus*.
[39] J Brown, "The Defamation and Malicious Publications (Scotland) Bill: an undignified approach to law reform?" 2020 Scots Law Times (News) 131 at 131-132, 135.
[40] E C Reid, "Protection of personality rights in the modern Scots law of delict", in R Zimmermann and N R Whitty (eds), *Rights of Personality in Scots Law: A Comparative Perspective* (2009) 248 at 305.
[41] ibid at 308.
[42] See sections 4.4.5 and 4.5 below.

scholars, such as Brown, who has recently argued that the *actio iniuriarum* remains a legal mechanism through which the protection of privacy and reputation may be achieved.[43]

In terms of the content of the actions, although reputation rights were clearly protected through the verbal injury action, that is not to say that real injury is in no way relevant. As of 1700, privacy interests were afforded protection through the latter in respect of revealing secrets, while reputation interests were protected through a residual category of real injury relating to insulting behaviour.[44] Moreover, as a sub-category of real injury, *haimesucken,* had as one of its rationales the protection of privacy.[45] This is because it specifically criminalised the following:

> "beating or assaulting a person within his own house. A man's house is considered as his sanctuary; and for that reason the violence that is committed there is deemed an aggravation of the crime, both by the Jewish law, 2 Sam. iv 11, and by the Romans, *De iniuria*."[46]

Thus, the private element of this offence can be viewed as an aggravated type of assault.[47] Similarly, the *iniuria* action criminalised the entering of a person's house without their permission, even where no further criminal act followed.[48] Notwithstanding these isolated examples of privacy rights being protected during the *ius commune* period, a general concept of privacy – as will be shown below – did not begin to be recognised as an interest meriting legal protection until at least the eighteenth century.[49] This is in contrast to reputation rights, which were historically given greater systematic protection through the verbal

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[43] See Brown's comments in J Brown,"'Revenge porn' and the *actio iniuriarum*: using 'old law' to solve 'new problems'" (2018) 38 Legal Studies 396 at 397. See also fn 227.
[44] J Blackie, "Unity in diversity: the history of personality rights in Scotland" in N R Whitty and R Zimmermann (eds), *Rights of Personality in Scots Law* (2009) 31 at 38.
[45] For a detailed consideration of this historic offence, see J Cairns, "Hamesucken and the major premiss in the libel, 1672–1770: criminal law in the age of enlightenment" in J Cairns, *Enlightenment, Legal Education and Critique: Selected Essays on the History of Scots Law, Vol 2* (2015) 311-340.
[46] Lord Kilbrandon, "The law of privacy in Scotland" (1971) 2 Cambrian Law Review 35 at 43.
[47] G Mackenzie, *Laws and Customs of Scotland in Matters Criminal*, 2nd edn (1699) Part I, Title 21, 2.
[48] ibid.
[49] N R Whitty and R Zimmermann, "Rights of personality in Scots Law: issues and options" in N R Whitty and R Zimmermann (eds), *Rights of Personality in Scots Law* (2009) 1 at 4.

injury action. It would therefore be wrong to think that the protection of privacy and reputation interests developed hand-in-hand. Accordingly, much of the focus of the next section of this chapter will be on actions relating to the latter.

4.3.2 Jurisdiction

As well as being divided according to the nature of the harm (real or verbal), such actions can be distinguished according to jurisdiction. Before assessing the significance of jurisdiction, an outline of the historical court structure in Scotland will now be provided. In doing so, it is necessary to take account of the differences in the court structure between the pre-modern and the modern period. The judicial system underwent large-scale reform in the mid-eighteenth century[50] (and to a lesser extent through the reforms of the early nineteenth century),[51] the impact of which will be assessed below.

For present purposes, it is sufficient to say that the early courts could be characterised as numerous, varied, over-lapping, and lacking meaningful central organisation.[52] It is this pre-modern court structure that will now be set out, with this being the backdrop against which the (early) Institutional writers were operating. While it is necessary to keep this overview brief, it is intended that this will provide appropriate context for the forthcoming examination of the law during the Institutional period.

Criminal jurisdiction was historically split between a number of different courts with there being a focus on local justice.[53] In particular, the Sheriff Courts, Franchise Courts, and Justice of the Peace Courts were spread across the nation and took jurisdiction over certain criminal (and in some cases civil) actions within their respective regions. On the other hand, some courts - such as the High Court of Justiciary and the High Court of Admiralty - exercised criminal jurisdiction across the whole country in respect of certain actions. In

[50] Heritable Jurisdictions (Scotland) Act 1746.
[51] E.g. Commissary Courts (Scotland) Act 1823; Court of Session Act 1830.
[52] S J Davies, "The courts and the Scottish legal system 1600-1747" in V A C Gatrell (ed) *Crime and the Law: The Social History of Crime in Western Europe since 1500* (1980) 120 at 122.
[53] Much in the same way that Sheriffdoms presently ensure a link between the court where criminal proceedings take place and the locus of a criminal wrong.

addition to these criminal courts, it is necessary to include some discussion of the Commissary Courts, as well as the (primarily civil) Court of Session and the Privy Council. As will be shown below, each of these courts played a part in dealing with wrongs relating to privacy and reputation interests.

(a) Central Criminal Courts

(i) High Court of Justiciary

The High Court of Justiciary was established by the Courts Act 1672 – much later than its civil counterpart the Court of Session – and became the first centralised criminal court in Scotland, sitting in Edinburgh. Prior to its formation, the office of Justiciar (which was to later become the office of Justice General) was responsible for administering criminal justice. The Justiciar originally had both criminal and civil jurisdiction, but this changed with the formation of the Court of Session, after which its jurisdiction became solely criminal. The Justice Court was based in Edinburgh and although efforts were made during the sixteenth century for circuits to be held (also known as "justice ayres"), these were largely unsuccessful.[54] Further provision was made for the holding of circuits once the High Court of Justiciary was formed, yet it was not until the 1747 reforms – which provided for circuits to be convened twice a year – that these were held.[55]

In terms of procedure, criminal actions were initiated either by indictment at the instance of the Lord Advocate or by criminal letters at the instance of a private party. In the early seventeenth century before the High Court of Justiciary was established, private prosecution "was still the norm in criminal trials, but public prosecution was becoming more common"[56] as the criminal justice system become more centralised.

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[54] W C Dickinson, "The High Court of Justiciary" in *An Introduction to Scottish Legal History* (Stair Society vol 20, 1958) 408 at 410.
[55] Heritable Jurisdictions (Scotland) Act 1746, s 31.
[56] M Wasser, "Defence counsel in early modern Scotland: a study based on the High Court of Justiciary" (2005) 26 Journal of Legal History 183 at 195, fn 75; M Wasser, "Violence and the central criminal courts in Scotland, 1603-1638" (unpublished thesis, 1995) at 109.

(ii) High Court of Admiralty

The High Court of Admiralty had a limited form of criminal jurisdiction over maritime and admiralty actions.[57] This jurisdiction lasted until 1830 when it was transferred to the Court of Session following the enactment of the Court of Session Act 1830.[58]

(b) Local Criminal Courts

(i) Sheriff Courts

Turning now to the local courts, the Sheriff Courts were transformed as a result of the 1747 reforms, these reforms laying the groundwork for the system seen today. However, prior to this, the Sheriff Courts had a different character. One noticeable feature of the pre-modern system was that the courts were presided over by heritable sheriffs. This meant that they often had no legal training,[59] nor any real interest in the administration of justice aside from the collection of payments made to their Court.[60] This was a feature that was shared with other local courts (e.g. the franchise courts) and as a result, it has been said that these courts "were run with greater regard for profit than for quality of justice".[61]

In terms of jurisdiction, the Sheriff Courts could hear an array of criminal (as well as civil) actions except for the "four pleas of the Crown" (murder, rape, robbery and arson),[62] which in most cases were heard exclusively before the High Court of Justiciary.

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[57] Sheriff N McFadyen, "Courts and competency" in *The Laws of Scotland: Stair Memorial Encyclopaedia*, Reissue (2010) para 102. Davies explains that this jurisdiction was "mostly concerned with smuggling and piracy": Davies (n 48) at 121.
[58] Court of Session Act 1830 s 21.
[59] A depute with legal training would often be appointed to preside over the Court.
[60] A Whetstone, "The reform of the Scottish sheriffdoms in the eighteenth and early nineteenth centuries" (1977) 9 Albion: A Quarterly Journal Concerned with British Studies 61 at 62.
[61] ibid at 63.
[62] Sheriff A V Sheehan, "Criminal procedure" in *The Laws of Scotland: Stair Memorial Encyclopaedia*, 3rd reissue (2020) para 11.

(ii) Franchise Courts

The Barony Courts, Regality Courts, Stewartry Courts and Bailiery Courts were collectively referred to as franchise courts.[63] In respect of the Barony and Regality Courts, these courts were overseen by noblemen and landowners who were granted a franchise from the Crown to administer justice within the boundaries of their land.[64] This is in contrast to the Stewartry and Bailiery Courts, which were chaired by officers of the Crown (Stewarts and Bailies) tasked with holding courts in lands owned directly by the King.[65] While each court had its own jurisdiction and procedure, it is sufficient to say here that the courts operated alongside the Sheriff Courts and could similarly hear both criminal and civil actions. In particular, the courts had wide powers in respect of criminal actions.[66]

(iii) Justice of the Peace Courts

The Justice of the Peace Courts were established in the late-sixteenth century[67] and have been described as "imports based on English practice".[68] Their primary function was to uphold public order by hearing breach of the peace trials. The courts underwent a series of reforms throughout the seventeenth century yet were never seen as being effective. Their failure can mainly be attributed to the already excessive number of courts in operation at the same time, which resulted in much their potential business being heard in other local courts.[69]

[63] ibid at para 4.
[64] P McIntyre, "The Franchise Courts" in *An Introduction to Scottish Legal History* (Stair Society vol 20, 1958) 374 at 374.
[65] Sheehan (n 62) at para 23.
[66] E.g. the Barony Courts could preside over trials concerning capital crimes; the Regality Courts could hear the "four pleas of the Crown".
[67] Criminal Justice Act 1587. For the avoidance of doubt, these historical courts bear no relation to the current Justice of the Peace Courts in Scotland.
[68] Davies (n 52) at 132.
[69] ibid at 134.

(c) Commissary Courts

The Commissary Courts were ecclesiastical courts that filled a gap left by the Courts of the Official (also known as the papal courts) in the aftermath of the Reformation.[70] In succeeding to the jurisdiction previously held by the Courts of the Official, the Commissary Courts applied consistorial law and had jurisdiction over such actions.[71] These were typically family law actions, and particularly those concerning marriage, divorce and legitimacy.[72] However, their jurisdiction additionally extended to verbal injury actions, which will be examined further in the next section. The central Commissary Court was based in Edinburgh and acted as an appellate court, as well as having exclusive jurisdiction over certain actions, while inferior Commissary Courts operated locally.[73] These courts were historically chaired by Commissars, who were officials appointed by archbishops and bishops within their dioceses or districts to apply this law.[74] The Commissary Courts were abolished by the end of the nineteenth century with their jurisdiction transferring over to the Court of Session and Sheriff Courts.[75]

(d) Civil Courts

(i) Court of Session

As is the case at present, the Court of Session was the main court of civil jurisdiction. This had been loosely formed in 1426 before being formally established in 1532 and based in Edinburgh. Wormald observes that "[i]n so far as a distinction can be drawn between criminal and civil law, it was the supreme civil court".[76] Although the Court had no criminal jurisdiction, it could "punish

[70] See S Ollivant, *Court of the Official in Pre-Reformation Scotland: Based on the Surviving Records of the Officials of St Andrews and Edinburgh* (1982) for background on these courts.
[71] McFadyen (n 57) para 194.
[72] T Green, "The sources of early Scots consistorial law" in M Godfrey (ed), *Law and Authority in British Legal History, 1200-1900* (2016) 120 at 120.
[73] McFadyen (n 57) para 194.
[74] J Fergusson, *Treatise on the Present State of the Consistorial Law in Scotland: With Reports of Decided Cases* (1829) 89.
[75] See section 4.5.1.
[76] J Wormald, "Bloodfeud, kindred and government in early modern Scotland" (1980) 87 Past and Present 54 at 77.

injuries committed against any of…[its] own Members, by fining or confining".[77]

(ii) Privy Council

Finally, in addition to being an executive body tasked with advising the Crown, the Privy Council was a court of both criminal and civil jurisdiction. In respect of the former, this was limited to wrongs violating "the publick peace",[78] and Mackenzie writes that the Council's criminal jurisdiction mostly concerned "riots", as constituting a "breach of the peace".[79] Following the Treaty of Union, the Council was abolished in 1708 by the Parliament of Great Britain,[80] with the former Privy Council for England and Wales exercising authority over the whole of Great Britain.

4.3.3 Summary

As will be shown later in this chapter, changes to the judicial structure (particularly at the start of the nineteenth century) had a significant impact on the way in which *iniuria* actions were heard, and consequently on the law's treatment of reputation and privacy-related actions.

With regard to real injury actions, the Justiciary Court and other criminal courts had exclusive jurisdiction (both criminal and civil), while the Commissary Courts had exclusive jurisdiction in verbal injury actions.[81] The latter included "invasions of personal reputation (by defamation) or dignitary interests".[82] Ordinary civil courts, on the other hand, had no jurisdiction over *iniuria* actions, although civil remedies could be claimed in either the Justiciary or Commissary Courts.[83] Despite the judicial structure being well-documented, research into

[77] G Mackenzie, *Criminal*, 2nd edn (1699) Part II, Title 8, 2.
[78] ibid Part II, Title 6, 3.
[79] G Mackenzie, *Institutions of the Law of Scotland* (1684) Book V, Title 2, 188.
[80] Farmer, *Criminal Law* (n 25) 65; J Black, *The Politics of Britain, 1688-1800* (1993) 13.
[81] Blackie, "Unity in diversity" (n 44) at 75.
[82] Blackie, "The interaction of crime and delict in Scotland" (n 23) at 360.
[83] Reid, *Personality* (n 3) 6.

the substantive law in this area is difficult given that very few published records exist from the Commissary Courts, or from the Justiciary Courts during this period.[84] As a result, it is not until the Institutional period that it becomes possible to determine the substance of the actions being brought in such proceedings.

4.4 Institutional Period

The eighteenth century heralded significant political and legal changes. In particular, a contributor to the Stair Memorial Encyclopaedia identifies the Treaty of Union in 1707 as being a catalyst for the reform of criminal procedure.[85] While TB Smith believes that Scottish criminal law "did not reach maturity until the late eighteenth century",[86] a more sophisticated criminal procedure was starting to take shape by the middle of that century. It was by this time that the Heritable Jurisdictions (Scotland) Act 1746 was introduced, a development which Farmer regards as being "the point at which the transition from the pre-modern to the modern criminal justice system is made".[87] It was also during this period that Institutional writings began to emerge, with Mackenzie having published his *Laws and Customs of Scotland in Matters Criminal*[88] and Stair his *Institutions of the Law of Scotland*[89] by the end of the seventeenth century.

These changes had a significant impact on substantive law, legal institutions, and the organisation of the law. In practical terms, the impact can be seen on the actions that were available, how (and in which courts) these actions could be raised, and how these actions were categorised.

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[84] Blackie, "Unity in diversity" (n 44) at 39.
[85] Sheehan (n 62) para 3.
[86] T B Smith, *British Justice: The Scottish Contribution* (1961) 95.
[87] Farmer, *Criminal Law* (n 25) 60.
[88] G Mackenzie, *Laws and Customs of Scotland in Matters Criminal*, 1st edition (1674); 2nd edition (1699).
[89] J Dalrymple, 1st Viscount Stair, *The Institutions of the Law of Scotland*, 6th edn by D M Walker (ed) (1981).

Consistent with the *ius commune* approach, Institutional writers considered delict as part of their treatment of criminal law[90] and were heavily influenced by the *actio iniuria*.[91] This meant that actions would be based on civilian principles rather than developed through case law.[92] However, the ways in which Institutional writers categorised wrongs varied, especially according to the time in which they were writing. The relevant works of each writer will be referred to in the rest of this section in order to examine the different approaches adopted.

4.4.1 Mackenzie

The earliest of the Institutional writers was Sir George Mackenzie, whose notable works included *Institutions of the Law of Scotland*,[93] which featured a title "On Crimes" and drew a distinction between pubic crimes and private crimes (also called *delicta*),[94] as well as his pioneering work *Laws and Customs of Scotland in Matters Criminal*.[95] In the opening of this latter work, Mackenzie sets out the structure of wrongs by reference to the terms "crimes", "*delicta*" (delicts) and *quasi delicta* (quasi-delicts):

> "*quasi delicta* are such faults and transgressions as are not so hainous that they deserve to be punished Criminally; such as small Ryots, *delicta*, are such as deserve a more severe Punishment, but yet because they tend not to wrong the Common-wealth, and publick security immediatly, therefore do not deserve to be punisht by any express Laws as Crimes. Crimes are these Injuries done to the Common-wealth which are so immediat and hainous, as that they are punisht by express Law."[96]

Mackenzie therefore views delicts as being deserving of punishment but notes that they are less serious than crimes as they do not pose the same level of threat to the community or wider public. However, he goes on to state that the "the

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[90] Blackie, "The interaction of crime and delict in Scotland" (n 23) at 359.
[91] Reid, *Personality* (n 3) 5.
[92] K McK Norrie, "The *actio iniuriarum* in Scots Law: romantic Romanism or tool for today?" in E Descheemaeker and H Scott (eds) *Iniuria and the Common Law* (2013) 49 at 49.
[93] G Mackenzie, *Institutions of the Law of Scotland* (1684).
[94] ibid Book IV, Title 4, 375. This division is also stated in his work *Matters Criminal* (2nd edn) Part I, Title 1, 2.
[95] *Laws and Customs of Scotland in Matters Criminal*, 1st edition (1674); 2nd edition (1699).
[96] ibid (2nd edn) Part I, Title 1, 2.

word Crimes, comprehends both Crimes and Delicts" and that the procedure for both is the same (by criminal letters) in the Criminal Court.[97] This adds some degree of confusion to the way in which wrongs were categorised by commentators during this period, with "crime" appearing to have both a general meaning (for the category of wrongs) and a narrower meaning (for a specific – and the most serious – wrong within that wider category).

In terms of the distinction between civil and criminal actions, Mackenzie divides these according to the nature of the harm sustained by the innocent party: "A civil action is defined to be that which concerns Lands or Goods; And a Criminal Action that which concerns Life or Limb".[98] This crude division explains in part why "injury" was treated as a criminal action, given that all injuries (both real and verbal) involved some harm to either life or limb.

In addition to this, a difference between criminal punishment and other types of punishment can be seen in Mackenzie's work:

> "And I find by the general consent of criminalists, nothing is to be accounted a Crime or punisht Criminally; but what is forbid by Law, under an express pain or punishment; for they observe, that as there can be no punishment inflicted, but where a *delict* is committed: so there can be no *delict* but where the Law hath appointed a Punishment".[99]

This shows that where a specific punishment was fixed by law in respect of a wrong, this would be deemed a criminal wrong rather than a delict.

Turning our attention towards substantive law, Mackenzie – being one of the earliest Institutional writers – placed more emphasis on Roman law,[100] and as with other commentators, drew a distinction between real and verbal injuries,[101] characterising verbal injury as a criminal wrong that was limited to spoken words.[102]

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[97] ibid Part I, Title 1, 2.
[98] ibid.
[99] ibid.
[100] Gane (n 21) at 223.
[101] Mackenzie, *Matters Criminal* (2nd edn) Part I, Title 30, I.
[102] ibid.

Alongside the criminal law, the consistorial law continued to play a role in protecting personality rights in the eighteenth century, with this jurisdiction for verbal injury continuing at least up until the nineteenth century.[103] Individuals raised actions not in the civil courts but rather in the Justiciary and Commissary Courts. Consistorial law protected most recognised personality rights with the exception of bodily integrity and physical liberty.[104] Reid explains the continued distinction between real and verbal injuries as an attempt to "delimit the jurisdiction between the Justiciary and Commissary Courts".[105] This shows that legal changes were influenced as much by institutional factors (such as jurisdiction) as they were by any rational reasoning, with Norrie characterising the legal distinction between these two categories as being "jurisdictional rather than substantive".[106] Why is this issue of jurisdiction significant? It means that the historical nature of *iniuria* actions was criminal and Blackie notes that this gave the actions a penal character,[107] for "it was solely within the criminal process that private parties sought remedies for the protection of these rights".[108] This is in contrast to defamation actions, which from the end of the eighteenth century began to be heard in the ordinary civil courts.[109]

Although private parties bore the burden of initiating an action in the Commissary Courts, the action was still characterised as a criminal one. What features of the Commissary Courts therefore gave them a criminal character? Mackenzie sheds some light on this question, describing the jurisdiction in the following terms:

> "The Commissars are the Bishops Officials, and so have least criminal jurisdiction of all other courts; but yet they are judges competent to verbal injuries, which by the law are accounted crimes".[110]

Why is this of interest? First, Mackenzie offers a clear statement that the jurisdiction of the Commissary Courts was viewed as criminal at this time, even

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[103] Blackie, "Unity in diversity" (n 44) at 35.
[104] ibid.
[105] Reid, *Personality* (n 3) 6.
[106] Norrie (n 92) at 54.
[107] Blackie, "Unity in diversity" (n 44) at 36.
[108] ibid.
[109] J Blackie, "Defamation" in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000) 633 at 684.
[110] Mackenzie, *Matters Criminal* (2nd edn) Part II, Title 10, 2.

if having the "least criminal jurisdiction of all other courts". Secondly, verbal injuries are expressed in equally clear terms as being "crimes". Thirdly – and a logical consequence of the first two – discussion of actions for verbal injury is included not in Mackenzie's more *general Institutions of the Law of Scotland*, but rather in his *Laws and Customs of Scotland in Matters Criminal*, which clearly deals only with criminal law.[111] But this still does not assist us in explaining why the jurisdiction was thought of as criminal.

To a modern-day observer, that the wronged party had to pursue the action themselves appears more characteristic of a civil action than a criminal one. Indeed, this is widely considered to be a defining feature of a civil action as opposed to a criminal one,[112] the latter of which is typically raised and conducted by the state (through a system of public prosecution). An exception to this is in the case of a private prosecution, which allows an individual to raise criminal proceedings against another party, but such prosecutions are extremely rare in Scotland.[113] However, as explained above, even in criminal actions during the seventeenth century, customary practice was that the victim raised actions by criminal letters in order to initiate proceedings against the accused. When exactly this practice became less common and a move towards public prosecution at the instance of the Lord Advocate occurred is unclear, although it is thought to be at a similar time to when the High Court of Justiciary was established and a more centralised system of criminal law started to emerge.[114]

Notwithstanding this, the remedies offered by the Commissary Courts are the most likely reason for the action's characterisation as penal. The primary remedy was a penal one, this being the power to impose pecuniary penalties on the party liable for the injury. It should be noted here that while the word "penal" may be used in both the criminal and civil contexts, it does not have any single, fixed meaning.[115] The interpretation of the term "penal" in the law of delict has been wider than its use in the criminal law. As such, it may be

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[111] Norrie, "Obligations" (n 31) para 471.
[112] RA Duff, *The Realm of Criminal Law* (2018) 24-25. See the discussion at section 5.4.2.
[113] Blackie and Chalmers state that private prosecution for criminal offences "is practically unknown in Scotland": Blackie and Chalmers (n 24) at 280.
[114] Farmer, *Criminal Law* (n 25) 82.
[115] For an explanation of the differing language used in the criminal and civil systems, see section 5.4.5.

regarded in the civil law context as more broadly relating to the imposition of some form of penalty,[116] which goes some way in explaining the characterisation of the Commissary Courts as penal."[117]

However, in addition to this, the Commissars could impose "church censures", also referred to as the remedy of palinode. This was an order requiring the wrongdoer to apologise to the individual who had sustained the harm, and to retract their injurious statement. Specifically, this involved public recantation of the injurious statement whereby the wrongdoer would be compelled to "stand at the church doors to expiate a slander".[118] Palinode "required falsity, since a defender could not be ordained by a church court to recant from what could be shown to be the truth".[119]

Writing after Mackenzie, Fergusson concurs that in actions for scandal, defamation or libel (all being verbal injuries) the private party may be entitled to "reparation, by palinode and pecuniary damages, or by such damages only"[120] and that the wrong "may also be censured as a delinquency, at the discretion of the court, by imposing a fine for public uses".[121] Fergusson later summarises this by stating that where an action was deemed to be criminal, "it became the practice to award, by the same sentence, both punishment to satisfy public justice, and pecuniary reparation to the individual who had been injured".[122] Thus, it may be more accurate to view the procedure as being jointly criminal and civil (or penal and compensatory), rather than simply criminal/penal. While the actions

[116] It is interesting that Descheemaeker observes that "penal" has "an etymology which simply refers to an idea of a price to pay as a consequence of one's actions": E Descheemaeker, "Solatium and injury to feelings: Roman law, English law and tort theory" in E Descheemaeker and H Scott (eds), *Iniuria and the Common Law* (2013) 59 at 60, fn 19.
[117] See also Descheemaeker's remark that "the solatium awarded by courts to the successful claimant under *iniuria*, in redress of his wounded feelings, was originally regarded as being entirely penal": ibid at 61.
[118] Mackenzie, *Matters Criminal* (2nd edn) Part I, Title 30, 6; Part II, Title 10, 2.
[119] J Burchell and K McK Norrie, "Impairment of reputation, dignity and privacy", in R Zimmermann, K Reid, and D Visser (eds), *Mixed Legal Systems in Comparative Perspective* (2005) 545 at 556.
[120] J Fergusson, *Treatise on the Present State of the Consistorial Law in Scotland: With Reports of Decided Cases* (1829) 14-15.
[121] ibid.
[122] ibid 229.

> "are exclusively at the instance and for the behoof of the private party pursuing…it is assumed that a penal offence has been committed by making a calumnious accusation, the instance of the procurator-fiscal of the court, as the nominal public prosecutor, is added, together with a separate conclusion for fine to be placed at the disposal of the judges, and for a palinode or public recantation".[123]

It is significant that Fergusson explains the function of the punishment as being "to satisfy public justice", with this reinforcing the link between a "public wrong" and a penal sanction, something that is central to our current understanding of criminal law.[124]

Moreover, Guthrie Smith supports this view and emphasises the seriousness of these wrongs, stating that:

> "the right to one's honour and good name was at one time so anxiously guarded by the law of Scotland, that attacks on the reputation, besides giving rise, as at present [writing in 1864], to a claim for redress in an ordinary civil suit, were dealt with as offences against public law, because likely to lead to breaches of the peace, and punishable accordingly".[125]

Notwithstanding this, verbal injury actions were not limited to the jurisdiction of the Commissary Courts. Mackenzie suggests that only verbal injuries "amounting to scandals" fell exclusively within the jurisdiction of the Commissars and that where there was "nothing in them of scandal, but are rather reflections upon the honour of the party injured, as to call a gentleman a puppy or an ass; it may be the Privy Council, and not the Commissars are judges competent".[126] This was similarly the case where the injury was sustained by a magistrate rather than a private citizen. This shows that the status of the injured party (being a public figure) was relevant to the question of jurisdiction, with Mackenzie explaining that "verbal injuries done to persons of Quality" are

[123] ibid 248-249.
[124] This is examined further in section 8.3.1(b), in supporting the case for the imposition of criminal sanctions for similar wrongful conduct.
[125] J Guthrie Smith, *A Treatise on the Law of Reparation*, 1st edn (1864) 187.
[126] Mackenzie, *Matters Criminal* (2nd edn) Part II, Title 10, 2.

called "*scandala magnatum*"[127] and treated differently by the law. This is significant as it highlights a greater connection between criminal jurisdiction and public wrongs; while reputational harms suffered by private individuals were rooted in the jurisdiction of the Commissary Courts, equivalent harms suffered by public officials appeared to demand a more severe judicial response. Thus, some conceptual division between private and public wrongs can be seen in the context of these actions.

Furthermore, cases of *libelli famosi* were not classified as "verbal injury" on account of them being written representations. However, given that verbal injury began to encompass written as well as oral communications, *libellli famosi* gradually became redundant.[128] Indeed, contemporary Scots law recognises no distinction between libel (written) and slander (verbal) communications, as some common law systems do.[129]

4.4.2 Stair

This idea of there being a division between public and private wrongs, which is so familiar to contemporary scholars of criminal law, is promoted by Viscount Stair in his *Institutions of the Law of Scotland*.[130] Visser and Whitty state that by this time "the conceptual distinction between crime and delict is established".[131] In referring to delicts, Stair uses the term "delinquencies", at least in the sense that they gave rise to reparation. As a result, Stair expressly excludes public crimes from the scope of his work.[132]

Stair lists several interests that were protected through actions for reparation: life; members and health; liberty; fame, reputation and honour; content,

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[127] ibid.
[128] Such a division is akin to that seen in the English law of defamation between slander (where the defamatory statement is communicated orally) and libel (where the defamatory statement is communicated in writing).
[129] R Parkes, G Busuttil, D Rolph et al (eds), *Gatley on Libel and Slander* (13th edn, 2022) para 1-005.
[130] Stair, *Institutions* (n 11).
[131] Visser and Whitty (n 20) at 433.
[132] Stair, I, 9, 4.

delight, satisfaction; and goods and possession.[133] Of relevance to the present work are the interests fame, reputation and honour.[134]

McKechnie, however, observes that "all Stair's instance ["of delinquence"] are primarily intentional injuries amounting to crime"[135] and this was viewed as an accurate statement of the law during the Institutional period.[136] Moreover, Stair continues to refer to the wrongdoer as receiving punishment, in addition to their obligation to compensate the victim.[137]

Following Mackenzie and Stair's seventeenth century works, Bankton, Erskine and Hume each shed greater light on the law's protection of reputation (and to a lesser extent privacy) rights and will now be examined.

4.4.3 Bankton

First, Bankton includes a title on "Crimes or Delinquencies" and within this a section on "Injury" in his *Institutions of the Law of Scotland*. Verbal injury is defined as being words that affected a person's "life, liberty, estate, reputation, trade or profession"[138] and this list bears some resemblance to those interests identified by Stair as meriting protection through a system of reparation. As with earlier Institutional writers, Bankton suggests a dual criminal/civil approach to such wrongs, writing that "the offender must suffer the punishment due to the public, and repair the damage to the party aggrieved".[139] While these remedies may have co-existed in practice, it is at this point that a clearer conceptual division between public and private crimes began to emerge as the Institutional writers displayed a greater awareness of taxonomy. Bankton, like Stair, termed private crimes "delicts" or "delinquencies". What distinguished

[133] ibid
[134] Blackie questions whether this represents a collective group of interests or three individual interests: see Blackie, "Unity in diversity" (n 44) at 97.
[135] Visser and Whitty (n 20) at 433, quoting H McKechnie, "Reparation", in Lord Dunedin (ed), *The Encyclopaedia of the Laws of Scotland*: *Vol 12* (1930) at 1060.
[136] ibid at 433.
[137] E C Reid, *The Law of Delict in Scotland* (2022) para 1.09, citing Stair, I, 2, 16.
[138] Bankton, I, X, 24.
[139] ibid I, X, 1.

these from public crimes? Private crimes were said to have "directly concerned the private party's interest, and were sued only at his instance, as the person injured".[140] As a result, the pursuer was entitled to the whole penalty.[141] This bears close resemblance to "private wrongs", which are now typically a means of distinguishing civil wrongs from public (or criminal) wrongs.[142]

Most notably the broad action of "injury" was characterised in this way. Injury was split into four categories: injury by facts (real injury), injury by words (verbal injury), injury by consent (ordering an injury to be committed), and injury by writing (composing infamous libels).[143] As stated above, for the purpose of this research, verbal injury is most relevant given that it is the action most closely associated with the protection of reputation interests. Bankton adds to the idea proposed earlier that verbal injury was a complex and multi-faceted action: verbal injury was "regularly cognoscible by the commissars…the damage may likewise be sued before the court of session, or other civil judges where the injury is atrocious, or persons of character are defamed".[144] This is consistent with Mackenzie's view that the Commissary Courts were most likely to have jurisdiction over a verbal injury action, but that defamation actions could be brought in the civil courts.

Bankton also concurs with Mackenzie in stating that there could in some instances be criminal jurisdiction in respect of verbal injury:

> "if they are of high consequence, on account of persons in power and dignity, against whom such offence is committed, they must be pursued before the court of justiciary, or other proper criminal court, for a condign punishment; since commissars, in a question of injury, can only inflict a pecuniary fine, and subject the offender to recantation".[145]

Unfortunately, Bankton does not elaborate on what he means by a "condign punishment". Nevertheless, his suggestion that the Commissary Courts cannot

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[140] ibid I, X, 2.
[141] ibid I, X, 2,
[142] See section 8.3.1(b) for a detailed explanation of the differences between public and private wrongs.
[143] Bankton, I, X, 21.
[144] ibid I, X, 24.
[145] ibid IV, VIII, 12.

impose a fitting punishment – despite being able to fine the wrongdoer – shows that the pecuniary fine was not of itself necessarily considered "penal" by commentators writing at the time. It can therefore be concluded that a "condign punishment" must have been a sanction greater than a fine.

Bankton states that in verbal injury actions, an order requiring the recantation of the injurious statement was generally imposed "asking the person aggrieved pardon for the offence",[146] adding that where the injury was made in writing, the pardon should likewise be requested from the aggrieved party in writing.[147] Notwithstanding this, a pecuniary fine could also be imposed. While this was generally payable to the public, part of the fine (or even all of it) could be "given to the party in name of damages".[148]

Bankton includes some discussion of remedies and sanctions, stating that:

> "Real injuries subject the offender to an assythment of the party grieved, (of which formerly), and to an arbitrary punishment, according to the atrociousness of the assault or riot; and, in all cases of injury, full reparation ought to be made to the party aggrieved, and even a consideration given him *in solatium*".[149]

This further shows the extent to which multiple actions and remedies operated alongside one another during this period, with there being the availability of reparation (including for solatium) and penal sanctions.

4.4.4 Erskine

As with those writers before him, Erskine writes of a "crime of injury" and notes a distinction between crimes and delicts, with delicts being minor offences and crimes being more serious wrongs.[150] Erskine followed the *ius commune* tradition (and Mackenzie) by writing that verbal injury could only be constituted

[146] ibid I, X, 34.
[147] ibid.
[148] ibid.
[149] ibid.
[150] Farmer, *Criminal Law* (n 25) 103-104.

by spoken words.[151] This is said to be in contrast to the wrong he refers to as "scandal", where the injurious words were "reduced into writing, and published", but which was considered a real rather than verbal injury.[152]

In terms of the content, Erskine regards verbal injury as a wrong directed at a person's "good name and character",[153] which "consists in the uttering of contumelious words, which tend to vilify his character, or render it little or contemptible".[154] The punishment is said to be payment of a pecuniary fine "to be ascertained according to the different conditions of the injuring and injured, and the circumstances of time and place".[155] Erskine suggests that palinode would only be ordered where the offender did not have the financial means to pay the fine, but that in some cases both a fine and palinode would be imposed, although the circumstances in which this may happen are not explained.[156]

4.4.5 Hume

Hume continues to emphasise the mixed civil/criminal nature of proceedings by stating that every wrong gave rise to two actions: (i) criminal *ad vindictam publicam* and (ii) civil for compensation for patrimonial loss or "trouble and distress".[157] This was similarly the case in English law where the victim was able to choose between a criminal and civil action, the difference between the two being the outcome. While a civil action in tort offered *compensation*, a criminal action offered *vengeance*.[158]

In defining crimes at the outset of his work, Hume states that a crime is an act "for which the law of Scotland has appointed the offender to make satisfaction to the public, beside repairing, where that can be done, the injury which the individual hath sustained".[159]

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[151] Erskine, IV, 4, 45.
[152] ibid IV, 4, 81.
[153] ibid IV, 4, 80.
[154] ibid IV, 4, 80.
[155] ibid IV, 4, 81.
[156] ibid.
[157] Hume, Vol 1, I, 1.
[158] M Dyson, "Overlap, separation and hybridity across crime and tort" in M Dyson and B Vogel (eds), *The Limits of the Criminal Law* (2018) 79 at 80-81.
[159] Hume, Vol 1, I, 1.

While Hume dedicates separate chapters to "Real Injuries" and "Offences Against Reputation", it is notable that within the latter chapter, Hume does not provide a treatment of verbal injury on the basis that this was within the jurisdiction of the Commissary Courts as opposed to the criminal courts.[160] This is despite Hume considering these wrongs to be "in some instances more distressing than violence inflicted on the person, and for the most part far more destitute of excuse on the part of the offender".[161] Hume provides an explanation for why the Commissary Courts had jurisdiction over these actions. This is because this is the court "in which the reparation, ordinarily the most suitable to this sort of injury, and the most acceptable to the party injured, reparation by fine, palinode, and damages, can with less expence and trouble be obtained".[162] Moreover, although not examining verbal injury in any detail, Hume's account does show one key difference from Mackenzie's by defining verbal injury as encompassing both spoken and written communications.[163]

Given that verbal injury is not considered by Hume, to what extent does his work engage with the criminal law's protection of privacy and reputation interests? There are some examples given by Hume, but those wrongs falling within the jurisdiction of the criminal courts are mainly what would now be termed "offences against the course of justice". These include "leasing-making" (or slander against the King), "calumnious information of a crime", "calumnious pursuit of a crime", and "slander mixed with violence". In addition to these wrongs, Hume discusses the offence of slander (or "murmur") of judges.[164] Interestingly, this is characterised more as a public wrong, as it is seen as being more damaging to society as a whole than damaging to the judge in their private capacity.[165] However, aside from discussion of specific offences, there is no consideration of the conceptual nature of wrongs in respect of privacy and reputation interests.

[160] ibid Vol 2, X, 70.
[161] ibid.
[162] ibid.
[163] ibid.
[164] ibid, Vol 2, X, 71.
[165] ibid, Vol 2, X, 72.

By the time Hume was writing, there began to be a move away from civil law/Roman law sources in the criminal sphere, which is illustrated by Hume's own writings. This is in contrast to a number of areas of private law (including obligations), which even today continue to be rooted in the Civilian tradition.[166] English law began to exercise a greater influence on Scots civil law, although not so much on its criminal law. The start of the nineteenth century saw a move away from such a striking distinction between the private law of the two jurisdictions as a result of this English law influence and recognition of an action for breach of confidence. Norrie attributes this to the surrounding social and political context, in which "the Enlightenment Scots, Unionist to a man, exhibited a clear desire to associate themselves with the English".[167]

4.5 Modern Period

One might have thought that by the nineteenth century a clear distinction between criminal and civil wrongs would have been apparent. Yet in reality this was not the case. Farmer suggests that "even as late as the middle of the nineteenth century this distinction was still in the process of being clarified".[168] Walker similarly notes that:

> "Since the mid-nineteenth century the separation of criminal and civil wrongdoing has been increasingly recognised though an absolutely clear line cannot be drawn, the word crime being increasingly appropriate to punishable wrongs, as also is, in modern times, the word delinquency, leaving delict the most appropriate term for a wrong only primarily civilly actionable".[169]

Thus, by the end of the nineteenth century we start to see a system that more closely resembles our current one. As will now be shown, this can be linked to wider institutional and procedural changes that occurred during this period.

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[166] Gane (n 21) at 227.
[167] Norrie (n 92) at 49. See also the discussion above in section 4.3.1 for the lasting impact of these developments on the approaches taken in the recent body of literature on personality rights.
[168] Farmer, *Criminal Law* (n 25) 82.
[169] Walker, *Delict* (n 15) 7.

Norrie identifies "three crucial developments in the law of obligations that substantially changed the focus of *iniuria* and moved Scots law some distance away from its civilian roots".[170] These were the increasing dominance of negligence in the law of delict, a misuse of the *actio iniuriarum*, and a hardening of the rules of defamation.[171]

Regarding the *actio iniuriarum*, it is suggested that

> "the treatment of one of Roman law's most significant contributions to legal thought…which was a central feature of the Scottish law of obligations during the Institutional period, was cavalier and even negligent throughout the nineteenth and for much of the twentieth centuries".[172]

4.5.1 Institutional reform

To begin with, a process of gradual reform saw the emergence of a more sophisticated judiciary. Jurisdiction is one area that experienced a series of sweeping reforms. The driving force behind these changes was the Heritable Jurisdictions (Scotland) Act 1746, which kick-started the process of judicial reform. This reform cannot be divorced from the political backdrop against which it occurred and was primarily in response to the Jacobite uprisings that occurred in 1745. It sought to centralise the system by shifting power from local landowners and the nobility to the government. Aside from the political motivations, reform was much needed by this point, with Whetstone stating that in 1700 "Scotland lacked a uniform system of justice".[173] How did the Act remedy this?

One of the most significant changes was the abolition of the franchise courts (with the exception of the Barony Courts). As a result, the jurisdiction of the Sheriff Court greatly expanded.[174] The right to appoint Sheriffs became vested

[170] Norrie (n 92) at 55.
[171] ibid at 55-57.
[172] ibid at 49.
[173] Whetstone (n 60) at 61.
[174] ibid at 64.

in the Crown,[175] with there being a requirement that the Sheriff be a qualified advocate with three years' experience.[176] The position of Sheriff was no longer a hereditary one and they no longer received the payments made to their court, which therefore meant less scope for bribery and corruption.

Changes to the court structure continued to be made into the nineteenth century. Of particular relevance are the changes made to the Commissary Courts; "by the time the Jury Court was established in 1816 the criminal aspect of defamation had withered with the decline in importance of the commissary courts".[177] From 1824, the Commissary Courts began to be subsumed into the jurisdiction of the Sheriff Court, and this continued until 1836, when the Edinburgh Commissary Court was abolished.[178] These were the consequences of changes made by the Commissary Courts (Scotland) Act 1823 and the Court of Session Act 1830. Any remaining Commissary Courts were fully abolished in 1876, and their jurisdiction transferred to the Sheriff Courts.[179] The result of this was that "[a]ny criminal dimensions to other invasions to dignity, privacy and reputation in the common law disappeared".[180] The jurisdiction of the civil courts therefore expanded as they took on actions that would previously have been heard in the Commissary Courts.

In addition to this, Blackie identifies the publication of law reports as a driving force in the separation of the two areas of law during the course of the nineteenth century.[181] While some cases were published by Maclaurin and Arnot towards the end of the eighteenth century and high profile trials may have been reported in the *Scots Magazine* and newspapers, the lack of systematic reporting made it difficult to identify the precise nature of a particular crime.[182] It was not until 1826 that criminal law reports began to be published and this was responsible for the emergence of legal literature on criminal law. In addition, specific writings began to emerge on criminal law. Most prominent were Hume's

[175] Heritable Jurisdictions (Scotland) Act 1746 s 4, 5.
[176] ibid s 29.
[177] Norrie, "Obligations" (n 31) para 471.
[178] Blackie, "Defamation" (n 109) 679-680.
[179] Sheriff Courts (Scotland) Act 1876 s 35.
[180] Blackie, "The interaction of crime and delict in Scotland" (n 23) at 371.
[181] ibid at 358.
[182] Cairns, *Enlightenment* (n 45) 319.

Commentaries (see above), Alison's *Principles* and *Practice*, and Macdonald's *Treatise*.

Moreover, it was not until 1817 that any decisions of the Commissary Courts were reported, these being published in a work by James Fergusson,[183] one of the last Commissars of the Edinburgh Commissary Court.[184] That it took so long for decisions to be reported can be attributed to two factors: the first of these is that the Commissary Courts did not allow entry to members of the public until much later than the majority of Scottish courts; the second is that because of the scandalous and secretive nature of the actions coming before the Commissary Courts (relating to matters such as legitimacy, adultery and slander), Commissars did not seem to have recorded decisions (e.g. in practicks).[185]

Farmer identifies two further significant developments: the first of these is the establishment of a system of public prosecution.[186] The second relates to an emerging distinction in the remedies offered by each system.[187] In respect of the latter, Blackie suggests that the:

> "divergences and parting of the ways in civil and criminal doctrine that occurred in the nineteenth century become clear once changes in jurisdiction removed the possibility of private parties seeking remedies within the criminal process".[188]

4.5.2 Actions

Changes to jurisdiction inevitably had some impact on the actions available. Blackie sets out the structure of personality rights as protected in 1850 through the delict of *iniuria*.[189] The following interests were protected: bodily integrity;

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[183] Fergusson, *Consistorial Law* (n 120).
[184] T M Green, *Consistorial Decisions of the Commissaries of Edinburgh 1564 to 1576/7* (2014) 20, 21.
[185] ibid 21.
[186] Farmer, *Criminal Law* (n 25) 85.
[187] ibid 86.
[188] Blackie, "The interaction of crime and delict in Scotland" (n 23) at 362.
[189] Blackie, "Unity in diversity" (n 44) at 103.

physical liberty; sexual morality (or family life); dignity and privacy; reputation, honour and dignity. Of greatest relevance to the present research are the categories of "dignity and privacy" and "reputation, honour and dignity".

The former interests were protected through an action for real injury, while the latter were protected through an action for verbal injury. Defamation was (and remains) the primary category of verbal injury, although there also existed a residual category of verbal injury that did not constitute defamation. This is somewhat confusing given that verbal injury therefore referred to a broad category of verbal *injuries* and also a specific action within that category.

Invasions of privacy fell not – as one might expect – under the heading "verbal injury", but rather were part of a category of "real injury", with breach of confidence being another nominate action under this heading that emerged later.[190] Blackie distinguishes between two types of informational privacy breaches. One of these is where a person discloses information they have received that relates to another person. The other is where a person obtains private information about another individual without that individual's consent. The latter seems to have emerged as a wrong much later than the former,[191] being derived from the *ius commune* concept of "secret". The most notable example of the former is an action for breach of confidence, which Walker has no difficulty in recognising as an actionable delict on the basis of the *actio injuirarum*,[192] while also taking the view that unjustifiable infringement of another person's private affairs would equally fall within the scope of this action.[193] A link can be identified between such violations of privacy and an individual's reputational interest, insofar as the revelation of private information lowers the reputation of the person in question, or is in fact false.[194]

Furthermore, malicious prosecution is viewed by Blackie as straddling the two categories of "dignity and privacy" and "reputation, honour and dignity" with it being unclear whether this was a nominate delict that developed under the wider

[190] ibid at 103.
[191] ibid at 71.
[192] Walker, *Delict* (n 15) 709.
[193] ibid 704.
[194] ibid 709.

real injury or verbal injury heading. The nature of this wrong will be examined later in the thesis.[195]

Three different types of actions were available to victims of real injury up until the early nineteenth century.[196] These were: (i) criminal law prosecution *ad vindictum publica*, the function of which was the punishment of the wrongdoer and which was a public action carried out in the name of the Lord Advocate; (ii) a private law claim, which was essentially an action for patrimonial loss (referred to as Aquilian damages) pursued at the instance of the victim personally; and (iii) a private penal claim for solatium stemming from *actio iniuriarum aestimatoria*.[197] This was similarly the case for verbal injury, which was actionable through a mixed criminal and civil process. It is interesting to note that an award of solatium was regarded as penal, given that this would now be considered compensatory.

To summarise, by this period, the remedies available begin to bear some resemblance to those currently available in either criminal actions (some form of punishment) or civil actions (damages for patrimonial loss or solatium). Palinode appears to have faded as a remedy in the mid-nineteenth century,[198] about the same time as the Commissary Courts were subsumed into ordinary civil jurisdiction.

4.5.3 Alison

Alison made a significant contribution to criminal law scholarship in the nineteenth century, despite acknowledging that Hume's *Commentaries* remained the leading work in this field. Alison divided his treatment of the

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[195] See section 7.4.3.

[196] See Guthrie Smith, *Reparation* (n 125) 187: "Verbal injuries might be the foundation of no less than three different kinds of procedure: 1st, A criminal suit at the instance of the Lord Advocate; 2d, an action in the civil court at the instance of the individual injured; 3d, a process before the commissaries, partly civil partly criminal in its nature, instituted by the private pursuer with concourse of the procurator-fiscal".

[197] N R Whitty, "Overview of rights of personality in Scots law", in N R Whitty and R Zimmermann (eds), *Rights of Personality in Scots Law: A Comparative Perspective* (2009) 147at 217.

[198] ibid at 233.

criminal law into two works: one dealing with principles and one with practice. As the titles suggest, the former primarily concerned general principles of the criminal law and substantive offences and defences, while the focus of the latter was jurisdiction, court procedure and sentencing. Taking practice as the starting point, Alison's remarks on the nature of criminal procedure provides some idea of the continued mixed civil/criminal nature of proceedings relating to wrongs. Alison notes that:

> "All criminal actions subject the offending party to a twofold obligation; that of expiating, by a punishment inflicted by the criminal tribunals, the outrage done to the offended law, and that of repairing the damage thereby sustained by the suffering party."[199]

While it is set out that the relevant courts for each claim would be the criminal and civil courts respectively, in "some cases, these different branches of jurisdiction are, to a certain extent, blended together, and one trial made to answer both the ends of criminal justice and civil reparation".[200] Thus, a criminal action raised in the Justiciary Court could be accompanied by a claim for damages resulting from the criminal act. As Alison proceeds to state:

> "It is accordingly competent to bring before the Justiciary Court a libel, which embraces both the public and private interest in its conclusions; that is, which concludes for fine, imprisonment, or other punishment, *nomine poenae*, and for damages and solatium also to the party injured".[201]

However, the criminal libel was required for the Court to hear such an action, and it was not competent for a party to raise a civil action for damages alone in this forum, even where this damage was the result of a criminal act.[202]

In terms of substantive law and the protection of privacy and reputation rights, there is little mention of this in Alison's work, thereby reflecting the lack of engagement with these interests in criminal law literature by the nineteenth century. There is therefore no reference to defamation or verbal injury, which

[199] Alison, *Practice* (n 9) Chapter I, 2, 2.
[200] ibid.
[201] ibid.
[202] ibid.

shows that by this time, these delicts had lost their criminal character and had found themselves rooted in the civil system. This is a comment that is equally applicable to Macdonald, whose work similarly focused on the criminal law of Scotland, but was published some decades after Alison.[203]

4.5.4 Bell

In the early nineteenth century, Bell published *Principles of the Law of Scotland*.[204] This work placed greater focus on civil liability than previous Institutional works. Of relevance here is Book Fourth, which was titled "Rights of Persons". In this book, Bell drew a distinction between "absolute rights" (e.g. personal safety, personal freedom and protection of character) and "relative rights" (rights that exist relative to others). Although this represented a development in the conception of rights and wrongs by legal scholars, Reid notes that this list was not comprehensive, and identifies the protection of private life as a particular omission,[205] with it not being until later in the nineteenth century that this began to be recognised as an independent right.[206] Indeed, Reid observes that:

> "many of the privacy concerns which began to preoccupy commentators in the late nineteenth century, such as intrusive use of photography and invasive press coverage, could not reasonably have been imagined by Bell".[207]

Notwithstanding this omission, Bell's discussion of "protection of character" is of value in illustrating how the law's protection of reputation rights had developed by the modern period. Bell writes that actions stemming from the violation of one's reputation could previously be raised in the Commissary Courts and Court of Session.[208] A number of remedies could be obtained: fine, palinode and imprisonment. These reflected the combined needs of preventing

[203] Macdonald, *Criminal Law* (n 10).
[204] Bell, *Principles* (n 14).
[205] Reid, *Personality* (n 3) 8.
[206] ibid; Reid, *Delict* (n 137) para 1.20.
[207] ibid Reid, *Delict* para 1.20.
[208] Bell, *Principles* Book 4, Chapter 1, Title 2, 2.

breaches of the peace, punishing the offender, and redressing the wrong through the offender's acknowledgement or retraction of the harmful statement.[209] However, by Bell's time such an action was within the civil sphere. This was an action for "damages and reparation" through which injuries or losses suffered by the pursuer could be compensated by damages, while the "insult and offence" could be remedied by an award of solatium.[210] The consequence of an award for solatium being competent is that a pursuer could recover for "wounded feelings" notwithstanding that the injurious communication was made only to them.[211] Following this, Bell then proceeds to set out what are essentially the foundations of the current law of defamation.

That there are remedies available for both solatium (for the insult and offence) and the recovery of patrimonial loss reflects the dual private/public nature of verbal injuries. Where verbal injury is done in private then a claim for solatium is competent, while any public element of the verbal injury may lead to a claim for damages in respect of patrimonial loss.[212]

4.6 Conclusion

It has been shown that a number of developments had a profound impact on the Scottish legal system by the end of the 19th century. In particular, the criminal law had emerged as a distinct body of law through which public wrongs were prosecuted by institutions of the state. Criminal jurisdiction, procedure and sanctions were all more clearly defined as a result. This is in contrast to the position in the 17th century through the Institutional period where it was difficult to easily distinguish between systems for dealing with criminal and civil wrongs. This is important as the civil law's "close link with criminal law reflected broader aims not only of reparation to victims and vindication of wrongs but of deterrence of unlawful activity and preservation of public order".[213]

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[209] ibid.
[210] ibid.
[211] ibid.
[212] Walker, *Delict* (n 15) 730.
[213] Reid, *Delict* (n 137) para 1.06.

It was by the end of the 19th century that the protection of both reputation and privacy rights had been almost entirely subsumed into the civil law; only remnants remained within the criminal law. Smith characterises this change by stating that "cases of verbal injuria are now within the province of private law, real injuries are punishable by the criminal law".[214]

While it may be said that real injuries are generally punishable by the criminal law, this is not true of all sub-categories of real injury. Of relevance here are those that – as mentioned above – could be rationalised as protecting privacy. It is also worth noting that Smith seems in his discussion of criminal law to be referring primarily to *mala in se* offences, rather than *mala prohibita* offences. As will be shown, a number of *mala prohibita* offences have been introduced in recent years (particularly the 21st century) that have as their purpose the protection of privacy.

Furthermore, even in respect of reputation rights, it is not clear that all such wrongs became civil wrongs. Smith specifically mentions the offence of murmuring judges, which continues to be a criminal wrong – and the rationale of which is the protection of reputation – as well as commenting that the "uttering of threats to injure a person, his property or reputation is a crime, giving, as they do, reasonable grounds of alarm both to the individual and to the public".[215]

In addition to these isolated examples, Lord Kilbrandon even cites breach of the peace as a crime which can be rationalised on the basis of protecting one's reputation.[216] While this may be disputed, breach of the peace is an example of an offence that developed to be so broad (at least until its ambit was restricted in a line of 21st century cases)[217] that it could be viewed as protecting a number of different interests. The character of these criminal offences and their relationship with privacy and reputation interests is considered later in this thesis.[218]

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[214] T B Smith, *A Short Commentary on the Law of Scotland* (1963) 191.
[215] ibid 192.
[216] Kilbrandon (n 46) at 44.
[217] See section 6.4.3(c) for an analysis of this offence.
[218] See section 6.4.

In the context of reputation, Walker notes that verbal injury came to be used in a narrower sense than that used by the Institutional writers, becoming a residual category of reputational wrongs other than defamation.[219] Thus, a distinction was drawn between defamation and verbal injury, which continued until verbal injury actions were abolished by the Defamation and Malicious Publication (Scotland) Act 2021.[220] There is no defined category of reputational wrongs under Scots civil law, although references in legislation are made to "proceedings which are wholly or partly concerned with defamation or verbal injury",[221] and "injuries which, though not personal injuries, are – (i) injuries to name or reputation".[222] Moreover, the historical features have had a lasting impact. For example, jury trials may be used for civil defamation actions,[223] although their usage has diminished and there is no longer a presumption that defamation actions are to be tried by jury.[224] Damages remain tethered to the principle of damages being awarded as reparation for violations of protected interests, of which reputation and good name are fundamental. While other outcomes available in the criminal or Commissary courts, such as a fine or palinode are no longer available, those that could historically be obtained through the civil courts inform the remedies that are now available. The two heads of damages that may be awarded in defamation and malicious publication (which has generally replaced verbal injury) actions of solatium and patrimonial loss can be traced back to their historical origins.

Notwithstanding these changes, the apparent fragmented development of the law's protection of privacy and reputation rights is merely an illustration of the lack of academic scholarship in respect of personality rights more broadly. As Reid notes:

> "[a]s well as remaining distanced from the discussion taking place elsewhere by the end of the nineteenth century, British lawyers

[219] Walker, *Delict* (n 15) 732. See also Norrie (n 92) para 557.
[220] Defamation and Malicious Publication (Scotland) Act 2021 s 27.
[221] Legal Aid (Scotland) Act 1986 Schedule 2, Part II, para 1.
[222] Damages (Scotland) Act 2011 s 2(1)(b)(i).
[223] Court of Session Act 1988 s 11(b).
[224] Defamation and Malicious Publication (Scotland) Act 2021 s 20(1).

> showed little inclination to engage in wider-ranging analysis on how personality rights should be protected more generally".[225]

Indeed,

> "the common law long adopted an anomalous and bifurcated treatment of personality interests. Reputation – principally the public self of the plaintiff – was highly protected, while there was no direct protection of privacy".[226]

The implications of this can be seen in contemporary Scots law, with there being a delayed development of civil law mechanisms for protecting individual privacy, in contrast to the much stronger protection afforded to reputation interests.[227]

The next chapter will proceed from this account of the historical framework for protecting privacy and reputation interests to focus on the conceptual and practical differences between protection through the criminal and civil law.

[225] Reid, *Personality* (n 3) 13.
[226] D Rolph, "Vindicating privacy and reputation" in A T Kenyon (ed), *Comparative Defamation and Privacy Law* (2016) 291 at 291.
[227] For example, there has been some revival of academic interest in the relevance and availability of the *actio iniuriarum*: see Norrie (n 92); J Brown, "Dignity, body parts and the *actio iniuriarum*: a novel solution to a common (law) problem?" (2019) 28 Cambridge Quarterly of Healthcare Ethics 522; J Brown, "'Revenge porn' and the *actio iniuriarum*: using 'old law' to solve 'new problems'" (2018) 38 Legal Studies 396. This is in contrast to other authors, such as Reid: see section 4.3.1.

5. The Relationship Between the Law of Delict and Criminal Law

5.1 Introduction

This chapter will focus on the modern-day relationship between the law of delict[1] and the criminal law, with particular attention being paid to the distinction between the two. Walker notes that "historically delict and crime were much interlocked, but today they are substantially separated by the nature of the remedy sought in particular cases".[2] The historical account provided in the previous chapter has shown the degree of interconnection that formerly existed between the two branches of the law in Scotland. However, concerning the second part of Walker's statement, it is suggested that the current differences extend beyond the remedies available in each action. There are further differences in the overarching aims of the two systems, the ways in which cases are heard, the procedures in place, and the nature of the wrongs.

The chapter will begin by identifying the key differences between these two areas of the law, before – more significantly – assessing the impact of these differences on the possible approaches that may be taken in protecting privacy and reputation rights. The purpose of this chapter is consequently to provide a foundation from which to assess the suitability of the criminal law as a means through which privacy and reputation rights may be protected.

5.2 Defining crimes and delicts

This chapter builds on the earlier analysis of the historical protection of privacy and reputation interests. In developing this discussion, the chapter will progress from the question of how the protection of these interests primarily found its

[1] While this term will be used where possible in the chapter, this will sometimes be referred to as tort law in the literature.
[2] D M Walker, *The Law of Delict in Scotland*, 2nd edn (1981) 15.

home in the civil law as opposed to the criminal law, to the question of whether the criminal law ought to play a greater role in their protection. This will be done through an examination of the different features of each system, both conceptually and in practice.

Given that it is "difficult to discern any distinctively Scottish articulation of the purposes of criminal law",[3] the starting point of this inquiry will be with principled differences in the systems. However, some reference will be made to Scots law in order to illustrate the practical significance of these differences. This will additionally provide context for the next chapter, which will focus on the role of substantive Scots law.

In distinguishing between the two systems of rules, a distinction can be made between descriptive or analytical definitions (or outlines) of each system, and normative accounts. At a descriptive level, both criminal law and the law of delict concern wrongful conduct.[4] Some commentators express the view that crimes and delicts are two branches of a single category of law dealing with "wrongs"[5] (particularly non-contractual wrongs). Holmes goes further in stating that "the general principles of criminal and civil liability are the same".[6] However, it will be shown below that there a number of key differences in the principles that govern each set of rules.

In the broadest sense, a crime is simply wrongful conduct that is labelled as such by the state.[7] Yet this is a definition that could equally apply to a delict. More specifically, a crime is conduct for which the state may initiate and administer proceedings against an individual leading to the imposition of criminal or "penal" sanctions. From a Scots law perspective, Gordon defines the criminal law as being "that branch of the law which deals with those acts, attempts and omissions of which the state may take cognisance by prosecution

[3] J Blackie and J Chalmers, "Mixing and matching in Scottish delict and crime" in M Dyson (ed), *Comparing Tort and Crime* (2015) 271 at 277.
[4] E C Reid, *The Law of Delict in Scotland* (2022) para 2.01.
[5] J Hall, "Interrelations of criminal law and torts: I" (1943) 43 Columbia Law Review 753 at 753 citing H T Terry, *Some Leading Principles of Anglo-American Law* (1884) 538.
[6] O W Holmes, *The Common Law* (1881) 44.
[7] See Blackie and Chalmer at 276: "the question of whether a rule is a criminal or civil one should be specified in legislative drafting, and in modern practice is rarely left unclear".

in the criminal courts".[8] Lamond concurs in stating that "a legal prohibition is a criminal prohibition when it is subject to criminal proceedings".[9]

While a delict can also be said to be a legally recognised wrong, leading textbooks on tort law have stated that it is impossible to offer a definition that encompasses the entire area of law.[10] It has been said that "it is not possible plausibly to assign any one aim to the law of tort"[11] and that "no one theory explains the whole of the law".[12] Despite these difficulties, definitions consistently characterise a delict as a civil wrong, in contrast to a criminal wrong.[13] This means that the victim themselves must bring proceedings against the wrongdoer.[14] In addition to the private nature of proceedings, the law of delict may be defined by reference to the availability of a remedy. Giliker suggests that the law of "civil wrongs" is "concerned with behaviour which is legally classified as "wrong" or "tortious", so as to entitle the claimant to a remedy",[15] and Winfield states that "tortious liability arises from the breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressable by an action for unliquidated damages".[16] Thus, liability in delict can be said to give rise to a duty to compensate the victim of the wrongdoing. In terms of the wrongdoing itself, Reid suggests that the law of delict "regulates the conditions under which one person may be held accountable for causing legally relevant damage to another".[17] Although a delict has been said to entail a breach of a duty[18] "primarily fixed by law",[19] this simply explains that a delict is the breach of a duty for which the law attaches delictual liability.

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[8] G H Gordon, *The Criminal Law of Scotland: Vol 1*, 4th edn by J Chalmers and F Leverick (2023) 7.
[9] G Lamond, "What is a crime?" (2007) 27 Oxford Journal of Legal Studies 609 at 609. See also G Williams, "The definition of crime" (1955) 8 Current Legal Problems 107 at 123.
[10] P Giliker, *Tort*, 8th edn (2023) para 1-002.
[11] P H Winfield and J A Jolowicz, *Winfield and Jolowicz on Tort*, 20th edn by J Goudkamp and D Nolan (2020) para 1-002.
[12] ibid.
[13] P Birks, "The concept of a civil wrong" in D G Owen (ed), *The Philosophical Foundations of Tort Law* (1997) 31 at 39-40.
[14] ibid.
[15] Giliker, *Tort* (n 10) para 1.002.
[16] Winfield and Jolowicz, *Tort* (n 11) para 1-003.
[17] Reid, *Delict* (n 4) para 2.01.
[18] Birks (n 13) at 47.
[19] Winfield and Jolowicz, *Tort* (n 11) para 1-003.

We may say that a party obtains "civil recourse"[20] through an action in delict. This refers to the ability of the wronged party to unilaterally bring proceedings against an alleged wrongdoer in order to obtain a remedy.[21] However, civil recourse is not exclusive to the law of delict. This is a core element of private law more generally.[22] Descriptively, one of the differences between delictual wrongs and contractual wrongs is that the former can occur without the parties having a contractual relationship. While both are legal wrongs in the sense that they necessarily involve a breach of a legally recognised right,[23] it is the nature of that right that is relevant. The rights that the law of delict protects are absolute rights. This does not mean that they are unqualified.[24] There are clearly circumstances in which these rights may be lawfully breached. Rather, in contrast to contractual rights, the rights are absolute as they are held equally by individuals and are enforceable against everyone.[25] Consistent with Hohfeld's analysis of rights and duties,[26] for each of these rights there must be a corresponding duty.[27] The law of delict recognises first-order absolute rights and second order personal rights.[28] The first-order right is that which is held against everyone, and the corresponding duty is the duty owed by others to respect that right.[29] The second-order right is a personal right against an individual who has breached the first-order right and this right requires that individual to make reparation in respect of their wrongdoing. This places the wrongdoer under a duty to make reparation to the party whose first-order right has been infringed.[30] Although we may ground the law of delict in rights and duties, and this may help further our understanding of how delictual liability

[20] J C P Goldberg and B C Zipursky, "Torts as wrongs" (2010) 88 Texas Law Review 917.
[21] J Gardner, *Torts and Other Wrongs* (2019) 3.
[22] ibid.
[23] ibid.
[24] Reid, *Delict* (n 4) para 2.03.
[25] ibid.
[26] W N Hohfeld, "Fundamental legal conceptions as applied in judicial reasoning" (1917) 26 Yale Law Journal 710.
[27] See the earlier discussion of this at section 2.3.2.
[28] Reid, *Delict* (n 4) para 2.04.
[29] ibid para 2.03.
[30] ibid para 2.04.

arises, this "tells us little about the substantive nature and function of that body of law".[31]

Indeed, the problem with descriptive definitions such as these is that they only tell us what a crime or delict is in a circular manner.[32] As Wharton states, such definitions are the "equivalent to saying, that an act is a crime because it is forbidden by law, and that it is forbidden by law because it is a crime".[33] They do not enable us to determine whether a wrong is a crime or delict in terms of its substance, nor whether a wrong *ought* to be a crime or delict. This is explained by Gordon, who acknowledges that the definition of a crime provided is simply a formal one that does not tell us *why* a certain type of conduct is criminal, nor *when* it should be criminal.[34]

We must therefore look beyond such definitions in assessing, firstly, whether certain wrongs are criminal or civil wrongs, and secondly, why they are characterised as such. It is important to consider the boundaries of the law of delict and criminal law in determining where liability for each should start and end. Studying this relationship between crime and delict can help shape our understanding of the limits of the criminal law[35] and provide an explanation as to why the criminal law plays a limited role in the protection of privacy and reputation interests, and why civil actions are the primary enforcement mechanisms.

Dyson and Vogel offer five factors that they deem to be relevant in determining whether a wrong is criminal or a tort.[36] These are: (1) the moral or natural description of the wrong; (2) characterisation of the process of remedying the

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[31] J N E Varuhas, "The concept of vindication in the law of torts: rights, interests and damages" (2014) 34 Oxford Journal of Legal Studies 253 at 257.
[32] G Williams, *Textbook of Criminal Law*, 4th edn by D Baker (2015) para 1-052. See Farmer's amusing comment that Gordon's definition is "so circular it makes you dizzy to think about it!": L Farmer, "The obsession with definition: the nature of crime and critical legal theory" (1996) 5 Social and Legal Studies 57 at 58.
[33] F Wharton, *Philosophy of Criminal Law* (1880) 18; see also H M Hart Jr, "The aims of the criminal law" (1958) 23 Law and Contemporary Problems 401 at 404: "a crime is anything which is *called* a crime".
[34] Gordon, *Criminal Law* (n 8) 7.
[35] M Dyson, "Overlap, separation and hybridity across crime and tort" in M Dyson and B Vogel (eds), *The Limits of the Criminal Law* (2018) 79 at 80. See also M Dyson, *Explaining Tort and Crime: Legal Development Across Laws and Legal Systems, 1850-2020* (2022).
[36] ibid at 81.

wrong as being of public concern rather than merely private; (3) a positivist approach of some kind, focusing on the process of creating the legal classifications and thus their resulting form; (4) a procedural statement of which court or other legal actor deals with the issue; (5) the presence of compensation or penalty.[37] Such an approach is supported by Blackie, who states that the "interaction of crime and civil liability is not just a question of the analysis of the substantive rules in cognate areas",[38] but that it is additionally necessary to look at the processes of each system. These factors therefore offer a useful starting point in achieving the aims set out above. These have been arranged into the following headings, each of which will now be discussed: central features and aims, procedure, substance, and outcomes/disposals.

5.3 Central features and aims

One of the most important differences between criminal law and civil law is that they have different aims; they seek to achieve different things. In providing an account of the possible aims of each system, the obvious starting point is to look at what each system *does*. This section will begin by showing that the primary distinction between the two systems is the way in which they respond to wrongs. However, it is important to distinguish between the central features of each system, and their aims. While punishment and compensation will be shown to be central to the criminal law and law of delict respectively, these should properly be viewed as means to an end rather than ends in themselves.[39] Despite the contrasting approaches taken by each system in responding to wrongs, this part of the thesis will demonstrate that some similarities may be discerned in their overarching aims.

[37] ibid.
[38] J Blackie, "The interaction of crime and delict in Scotland" in M Dyson (ed), *Unravelling Tort and Crime* (2014) 356 at 387.
[39] See section 5.3.1 below.

5.3.1 Central features: compensation v punishment

As outlined in the previous section, we may say descriptively that "the law of delict provides redress or "reparation" for wrongdoing".[40] The criminal law, on the other hand, sanctions or punishes wrongdoers. The two systems therefore approach the common issue of wrongdoing from differing perspectives – a central feature of delict is compensation whereas a central feature of criminal law is punishment.

(a) Compensation

In redressing wrongs, the law of delict ordinarily provides that the "wronged party should be put as nearly as possible into the position which they would have been but for the delict".[41] Compensation has been said to be "[p]erhaps the most obvious objective of tort law",[42] "the immediate object of a tort action",[43] and "the primary function of tort".[44] However, Williams suggests that this tells us very little on its own about the law of delict; we must instead ask ourselves why we have a system that imposes a duty on a wrongdoer to compensate another individual who has suffered loss as a result of the wrongful conduct.[45] In other words, what ends are met by redressing wrongs in this way? In order to answer this question, this section will show the ways in which the law of delict is rooted in compensation before later outlining the aims that are advanced as a result of this.

Compensation is usually achieved through an award of damages, which can be viewed as a "backward-looking" remedy.[46] Damages are principally awarded

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[40] Reid, *Delict* (n 4) para 2.01. For a further account of the norms that are (and should be) given effect to in the law of delict, see: R Stevens, *Torts and Rights* (2007) 320-340; A Ripstein, *Private Wrongs* (2016) Chapter 7.
[41] Blackie and Chalmers (n 3) at 277. This is often referred to as *restitutio in integrum*.
[42] Giliker, *Tort* (n 10) para 1-004.
[43] G Williams, "The aims of the law of tort" (1951) 4 Current Legal Problems 137 at 137.
[44] Lord Bingham, "The uses of tort" (2010) 1 Journal of European Tort Law 3 at 4.
[45] Williams (n 9) at 137, 144.
[46] S R Perry, "Tort law" in D Patterson (ed), *A Companion to Philosophy of Law and Legal Theory*, 2nd edn (2010) 64 at 64.

not by reference to the wrongful conduct, but by reference to the loss suffered. This may be for economic loss (damages for patrimonial loss),[47] or in cases where no economic loss is sustained, this may be for "intangible" or "non-pecuniary" loss (damages for solatium).[48] Regardless of whether damages are awarded for patrimonial loss or solatium, they are both compensatory in nature. The damages compensate the injured party for tangible or intangible harm that they have suffered. This is a significant difference from the criminal law, which generally imposes liability irrespective of whether any resulting harm or loss arises.[49]

Does a successful delict action therefore require there to be demonstrable loss? This is not always necessary. To begin with, an action may be raised where a delict is anticipated (or continuing). The appropriate remedy in such cases would usually be an interdict to prevent the wrongful conduct from occurring.[50] This remedy is particularly relevant to wrongs involving privacy and reputation where the pursuer may seek to prevent another individual from releasing private, confidential, or defamatory material. In addition to this, even where the wrong has already occurred, damages may be awarded either without any demonstrable loss, or without reference being made to the harm in question. These may take the form of vindicatory damages, disgorgement damages, or punitive (or exemplary) damages.

First, damages may be awarded in recognition of the vindication of interests.[51] In doing so, it is recognised that violations of interest(s) may occur irrespective of any factual losses. Vindication is closely aligned to a rights-based conception of tort law.[52] This is in contrast to views of tort law as concerning losses and damage. Varuhas refers to categories of torts that are "actionable per se" and do not require proof of damage or loss.[53] This is mainly seen in respect of

[47] E.g. loss of earnings, damage to property.
[48] E.g. pain and suffering, injury to feelings, reputational harm.
[49] That is not to say in some circumstances that harm is irrelevant to the sanction that may be imposed on the wrongdoer. This may be a relevant consideration at the sentencing stage (e.g. through a victim impact statement): see section 5.6.
[50] Reid, *Delict* (2022) para 31.72.
[51] ibid para 31.04.
[52] Varuhas (n 31) at 254.
[53] ibid at 261-262.

intentional delicts against the person.[54] This is in contrast to negligence actions, which ordinarily require the pursuer to demonstrate that they have suffered a loss.[55] Thus, recognition of a pursuer's interest is the central aim of such torts, as opposed to the redressing the harm they have suffered. As Reid explains:

> "the infringement of the pursuer's interest in life, limb, liberty or reputation is recognised as a form of damage for which the pursuer may be compensated over and above any specific financial, physical, psychological or emotional impact suffered".[56]

In such cases the onus can be viewed as being on the defender to explain the lawful basis that they had for interfering with the pursuer's interest.[57] This affirms the fundamental importance of interests such as privacy and reputation.[58]

Secondly, there is limited scope for an award of damages to be made by reference to the gain made by the wrongdoer (disgorgement damages) rather than the loss suffered by the pursuer.[59] These damages require the wrongdoer to make payment to the wronged party of any profits that they have made as a result of their wrongdoing.[60] An example of this would be in cases where the wrongdoer uses information obtained through breach of confidence in order to benefit financially (e.g. by using the protected information to publish a book). However, in Scots law, this remedy is restricted to unjustified enrichment actions and cannot be awarded in a delict action.[61]

Thirdly, consistent with the earlier description of the law of delict in compensating a wronged party, damages are typically not awarded to punish or

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[54] Reid, *Delict* (n 4) para 31.04.
[55] Although Reid notes that there is a growing propensity towards awarding vindicatory damages in response to specific types of negligent wrongdoing (e.g. the failure to properly inform patients prior to medical procedures: see *Chester v Ashfar* [2004] UKHL 41). See Reid, *Delict* (n 4) para 31.04; Varuhas (n 31) at 269.
[56] Reid, *Delict* (n 4) para 31.04.
[57] Varuhas (n 31) at 266.
[58] ibid at 263.
[59] H McGregor, *McGregor on Damages* 21st edn (2021) by J Edelman, S Colt, and J Varuhas (eds) para 15-029.
[60] P Cane, *Tort Law and Economic Interests* (1991) 485.
[61] Reid, *Delict* (n 4) para 19.74; N R Whitty, "Overview of rights of personality in Scots law" in N R Whitty and R Zimmermann (eds), *Rights of Personality in Scots Law: A Comparative Perspective* (2014) 147 at 242.

penalise the wrongdoer.[62] While the practice of awarding exemplary or punitive damages may be common in other jurisdictions (including in the USA),[63] and such damages are exceptionally available in England and Wales,[64] they are not part of Scots law.[65]

> "Tort law and criminal law represent a particular kind of response to the problem of co-ordinating our activities so that we can each enjoy one or more goods. This response involves granting each of us certain basic rights against other people that they act (or do not act) in certain ways towards us. To explain: A has a basic right against B that B do x if the law imposes a duty on B to do x, and it does so for A's benefit, and A does not have to do anything special for B to be subject to that duty. In granting A a range of basic rights against B – and B against A – the law aims to co-ordinate A and B's activities so as to help ensure that both A and B enjoy one or more goods. Tort law determines what basic rights we have against each other, and provides us with remedies when those rights are violated. The criminal law – or, at least, the core of the criminal law – is concerned to punish those who wilfully violate the basic rights that tort law grants us against other people".[66]

It has therefore been shown that the law of delict primarily provides compensatory damages and that punitive or disgorgement damages are not awarded in Scots law. Even in cases where vindicatory damages are awarded, this is done by reference to the violation of an interest that the pursuer sustains. As a result, such awards more closely resemble compensatory damages than punitive or gain-based damages. This affirms the view that the Scots law of delict is primarily compensatory in nature.

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[62] See section 5.6.
[63] McGregor, *Damages* (n 59) para 13-005.
[64] ibid para 13-009. See *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29 and *Rookes v Barnard and Others* [1964] AC 1129.
[65] Blackie and Chalmers (n 3) at 278, citing *Black v North British Railway Co* 1908 SC 444.
[66] N J McBride, "Tort law and criminal law in an age of austerity" in M Dyson (ed), *Unravelling Tort and Crime* (2014) 58 at 61-62.

(b) Punishment

Having focused on the law of delict, attention will now turn to the criminal law. While compensation has been shown to be a central feature of the law of delict, punishment is at the core of the criminal law.[67] This section will examine the role of punishment in supporting the aims of the criminal law. In particular, it will draw on Hart's outline of the key elements of punishment. This will help further illustrate the complex relationship that exists between the criminal law and its reliance on punishment, and the law of delict and its reliance on compensation.

It may be tempting to state that the criminal law primarily aims to punish individuals, but this is misleading. While some writers[68] view punishment as a definitional element of criminal law, Duff is critical of this and argues that "we should not let criminal punishment dominate our discussion of what criminal law is, or ought to be".[69] This is supported by Simester, who states that "state punishment may be a characteristic function of the criminal law, yet its occurrence is neither necessary nor sufficient".[70] As will be explained below, punishment is a tool that the criminal law uses in order to achieve its aims rather than an aim in itself. Thus, a distinction must be made between the purpose of the criminal law itself, and the purpose of punishment. To premise criminal law on punishment would be to leave it devoid of any meaning if punishment were to be removed from the criminal process. This is not the case; criminal law would still exist and function without punishment.[71] It cannot therefore be said that criminal law is premised on punishment as an end goal.[72] Punishment may more appropriately be described as a central feature of criminal law rather than an aim.[73]

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[67] A P Simester, *Fundamentals of Criminal Law: Responsibility, Culpability, and Wrongdoing* (2021) 4.
[68] E.g. Moore, Husak.
[69] R A Duff, *The Realm of Criminal Law* (2018) 15, 39.
[70] Simester, *Fundamentals of Criminal Law* (n 67) 4.
[71] R Stevens, "Private rights and public wrongs" in M Dyson (ed), *Unravelling Tort and Crime* (2014) 111 at 120.
[72] P R Ferguson and C McDiarmid, *Scots Criminal Law: A Critical Analysis*, 2nd edn (2014) 35.
[73] Simester, *Fundamentals of Criminal Law* (n 67) 4.

The aims of delict and criminal law will be considered in the next section. In this section, it is necessary to take a more detailed look at punishment and what is meant by this. To begin with, Farmer explains that criminal law is "uniquely coercive"[74] as a "breach of the criminal law leads to state punishment, and punishment as the imposition of hard treatment requires it to be justified".[75] What then do we mean by punishment? Blackstone defines punishments as being:

> "evils or inconveniences consequent upon crimes and misdemesnors [*sic*]; being devised, denounced, and inflicted by human laws, in consequence of disobedience or misbehaviour in those, to regulate whose conduct such laws were respectively made".[76]

Hart – one of the leading voices on the theory of punishment – sets out five features of the "standard or central case" of punishment. In doing so, Hart offers a fuller account of the nature of punishment in response to criminal wrongs.[77] These features are that punishment must (i) "involve pain or other consequences normally considered unpleasant", (ii) "be for an offence against legal rules", (iii) "be of an actual or supposed offender for his offence", (iv) "be intentionally administered by human beings other than the offender", and (v) "be imposed and administered by an authority constituted by a legal system against which the offence is committed".[78]

The rest of this section will examine each of these features in turn in order. This will be done in order to explain the significance of each feature of punishment, to provide context for the subsequent assessment of the criminal law's aims, and to further emphasise the contrasting approaches adopted by the criminal law and civil law in promoting their aims.

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[74] L Farmer, *Making the Modern Criminal Law* (2016) 13.
[75] ibid.
[76] W Blackstone, *The Oxford Edition of Blackstone's Commentaries on the Laws of England: Book IV: Of Public Wrongs*, by R Paley (2016) 4.
[77] See also Duff, *The Realm of Criminal Law* (n 69) 35-40.
[78] H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd edn (2008) 4-5.

(i) Involve pain or other consequences normally considered unpleasant

The first of Hart's features of punishment concerns the nature of the punishment itself. That the punishment must involve pain or other unpleasant consequences may seem obvious. This accords with the ordinary meaning of punishment as we would generally understand it. In addition to punishment being unpleasant, it is just as significant that the intention of punishment is to inflict this burden on another person ("punitive purpose").[79] There are some instances where the reality of the punishment imposed on an offender may not be considered unpleasant by the offender themselves. Although this would be a rare occurrence, it demonstrates that the criminal law is more concerned with the objective purpose of the punishment. It can therefore be said that punishment should *prima facie* involve pain or unpleasant consequences.[80] Husak summarises this well:

> "a response amounts to punishment when it deliberately imposes a stigmatizing deprivation or hardship. Each of these components is crucial. A treatment is not punitive because it *happens* to deprive or stigmatize. The very *purpose* of a response must be to deprive and to stigmatize before it qualifies as a punishment. That is, punishments *intentionally* impose a stigmatizing deprivation".[81]

Thus, we are not talking about whether or not a sanction stigmatises or inflicts hardship on an individual, but rather whether it is *designed* to do so.[82] For this reason, imprisonment differs from other forms of state detention[83] (such as being detained under the Mental Health (Care and Treatment) (Scotland) Act 2003). It cannot be said that the purpose of detaining mentally ill individuals is to stigmatise them; instead, this is an unwanted consequence of such a measure.[84]

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[79] M S Moore, *Placing Blame: A Theory of the Criminal Law* (2010) 25.
[80] N Hanna, "Facing the consequences" (2014) 8 Criminal Law and Philosophy 589 at 593.
[81] D N Husak, "Does the state have a monopoly to punish crime?" in C Flanders and Z Hoskins (eds), *The New Philosophy of Criminal Law* (2016) 97 at 98.
[82] See also Duff, *The Realm of Criminal Law* (n 69) 27, 37.
[83] Hart Jr (n 33) at 405-406.
[84] And although there may be a stigma attached to detention on the basis of mental illness, this is clearly different from the stigma associated with criminal wrongdoing.

In terms of the nature of punishment, it is further characterised by an element of condemnation or censure; it is "not just hard treatment, but hard treatment motivated by, and expressive of, resentment directed at what we believe to be the person's morally wrongful conduct".[85] It is this that distinguishes punishment from penalties[86] that may be imposed in respect of non-criminal wrongs. Punishment may therefore be said to be the intentional imposition of objective hardship on an offender with the accompanying purpose of stigmatising the offender.

This is distinct from the civil law, which does not seek to impose punishment. While the payment of damages may cause hardship to the wrongdoer in a delict action, the focus of the system is to provide redress for wrongs.[87] As has been explained, compensatory damages are not *intended* to be punitive. Even with the practice of awarding damages for vindication of interests, the focus remains on the wronged party. Such damages are awarded in recognition of the violation of one's interest(s) and not by reference to the wrongdoer's degree of fault.

(ii) An offence against legal rules

Hart's second feature is that criminal punishment must be imposed for an offence against legal rules. This encompasses a number of important considerations, particularly those relating to the legitimacy of criminal laws. It requires that punishment may not be imposed without notice of the wrong in question. This is given practical effect through Article 7 of the ECHR,[88] which provides that there can be "no punishment without law".[89] This prohibits retroactive criminal laws from being applied and ensures wrongs must have been legally recognised as such at the time an alleged offence is committed.

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[85] V Chiao, "What is the criminal law for?" (2016) 35 Law and Philosophy 137 at 137.
[86] Duff, *The Realm of Criminal Law* (n 69) 37; J Feinberg, "The expressive function of punishment" in J Feinberg, *Doing and Deserving: Essays in Theory of Responsibility* (1970) 95.
[87] That is not to say that the victim may not derive some satisfaction from the fact that the wrongdoer is made to make payment to them: see Williams (n 43) at 138, 140.
[88] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), Article 7(1) provides that: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed."
[89] This is sometimes referred by the Latin term "*nulla poena sine lege*".

This is in contrast to the law of delict, where some limited recognition of retrospective laws may be permitted.[90]

The principle of "no punishment without law" additionally requires that systems communicate clearly conduct that is a criminal wrong.[91] It is imperative that an offence is clear in scope and not so vague as to leave citizens in doubt as to the conduct that is unlawful.[92]

In satisfying this principle, Robinson argues that the criminal law serves two communicative functions. One is to "announce to the general public, *ex ante*, the rules of conduct that are to be enforced with criminal penalties", while the other is to "adjudicate, *ex post*, any violation of those rules".[93] It is specifically the former rules (rules of conduct) that Robinson claims require to be readily and easily understandable to the public in order to guide their conduct.[94] The manner in which this ought to be done has been the subject of debate.[95] However, what is clear is that the criminal law must only punish wrongdoers in respect of criminal offences that are legally recognised criminal wrongs.

(iii) Of an actual or supposed offender for his offence

Turning now to Hart's third feature of punishment, that punishment is imposed on an actual or supposed offender is perhaps the least difficult element, at least for present purposes. This ensures that individuals may not be subject to punishment unless they are found criminally liable and therefore "culpable". [96]

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[90] For an example of this, see Damages (Asbestos-related Conditions) (Scotland) Act 2009 s 4(2). Retrospective legislation in a civil context is considered (disapprovingly) by the Scottish Law Commission in respect of personal injury actions: see Discussion Paper on *Personal Injury Actions: Limitation and Prescribed Claims* (Scot Law Com DP No 132, 2006) paras 5.6-5.12.
[91] See P H Robinson, *Structure and Function in Criminal Law* (1997).
[92] An example of an offence falling foul of this principle in Scots law was the offence of shameless indecency: see *Webster v Dominick* 2005 1 JC 65.
[93] Robinson, *Criminal Law* (n 91) 8.
[94] ibid.
[95] P Alldridge, "Making criminal law known" in S Shute and A P Simester (eds), *Criminal Law Theory: Doctrines of the General Part* (2002) 103; R A Duff, "Rule-violations and wrongdoings" in S Shute and A P Simester (eds), *Criminal Law Theory: Doctrines of the General Part* (2002) 47.
[96] Simester *Fundamentals of Criminal Law* (n 67) 11. For an overview of what is meant by being "criminally responsible", see E Melissaris, "Theories of crime and punishment" in M D Dubber and T Hörnle (eds), *The Oxford Handbook of Criminal Law* (2014) 355 at 368-371.

The right to a fair trial and presumption of innocence (enshrined in Article 6 of the ECHR)[97] seek to ensure that only those that are *in fact* guilty of an offence are convicted and punished accordingly. It is because of the penal consequences of criminal liability that such stringent procedural safeguards are put in place to protect the accused from potential abuses of process. These safeguards ultimately seek to prevent miscarriages of justice.

Hart additionally provides that the offender in question must only be punished "for his offence". On this note, the punishment must be proportionate and relational.[98] It should be for a specific offence and in proportion to that offence.

Liability in delict may be imposed against parties other than the "actual or supposed" wrongdoer. By contrast, criminal law imposes liability on those individuals that are morally responsible.[99] This emphasis on moral responsibility is generally less relevant to the question of liability for civil wrongs. This is exemplified by findings of civil liability against parties that are found to be "vicariously" liable (liable for the actions of others).[100] The availability of insurance to cover delictual wrongdoing also means that actions may be raised against insurers rather than the individual responsible.[101] However, it is nevertheless possible to have responsibility over the actions of others,[102] which partly explains why civil liability may be imposed at all on parties other than the individual directly responsible for causing the wrongdoing in question.

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[97] ECHR, Article 6(1) (right to a fair trial); Article 6(2) (presumption of innocence).
[98] Duff, *The Realm of Criminal Law* (n 69) 37-38.
[99] B Ewing, "The structure of tort law, revisited: the problem of corporate responsibility" (2015) 8 Journal of Tort Law 1 at 8.
[100] This is usually in cases where there is a particular relationship between the party that is vicariously liable and the party that directly engaged in the wrongful conduct. The most notable example is where an employer may be held liable for the actions of their employee.
[101] Simester, *Fundamentals of Criminal Law* (n 67) 5.
[102] J L Coleman, "The practice of corrective justice" in D G Owen (ed), *The Philosophical Foundations of Tort Law* (1997) 53 at 67.

(iv) Intentionally administered by human beings other than the offender

(v) Imposed and administered by an authority constituted by a legal system against which the offence is committed

As Hart's final two features concern a similar element (the body responsible for imposing and administering punishment), these will be discussed together. That the state itself must impose and administer punishment formalises and legitimises the punishment. Just as an official authority of the state must declare certain conduct criminal, only the state may respond to criminal wrongs by imposing punishment. This is justified by practical and conceptual considerations.[103] From a practical perspective, the state is best placed to determine an offender's culpability, the seriousness of the wrong, and to impose punishment that is proportionate to the offence.[104] This also significantly reduces the likelihood of vigilante justice and private punishment.[105] Conceptually, ensuring that the state is tasked with punishing offenders (or even has a duty to punish offenders)[106] instils confidence in citizens that their rights are protected and is a way in which citizens may collectively respond to criminal wrongdoing.[107] This reflects the public nature of criminal wrongs,[108] and the punishment is a way in which the public's condemnation of the wrongdoing is communicated to the offender.[109]

[103] The latter is likely to depend on questions of political theory and the relationship between the state, its citizens, and criminal wrongs: see V Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (2011) 299. Such questions are beyond the scope of this thesis and cannot be engaged with here.
[104] Duff, *The Realm of Criminal Law* (n 69) 38; ibid Tadros 309-310.
[105] ibid Tadros 304-305.
[106] ibid 21, 23-24, 299-303.
[107] C Beccaria, *On Crimes and Punishments and Other Writings* (1995) by R Bellamy (ed) and R Davies (translator) 12-13.
[108] This is closely connected to the idea that citizens share in the wrongs. See R A Duff and S E Marshall, "Criminalization and sharing wrongs" (1998) 11 Canadian Journal of Law and Jurisprudence 7.
[109] R A Duff, "Relational reasons and the criminal law" in L Green and B Leiter (eds), *Oxford Studies in Philosophy of Law: Volume 2* (2013) 175.

5.3.2 Aims

While the previous section examined the central features of the law of delict and criminal law, this section will now outline the wider aims of both the criminal law and law of delict. This will explain how these aims are furthered by the criminal law's imposition of punishment and the law of delict's adherence to compensation.

In assessing why criminal wrongs are deserving of punishment, we must consider other features of the criminal law and their relationship with punishment. In summarising these, Chiao states that the criminal law "deters people from engaging in wrongdoing, gives people the punishment they deserve, incapacitates the dangerous, and reforms their characters".[110] These features can be termed deterrence, retribution, public protection, and rehabilitation. This is consistent with Demleitner's reference to retribution or desert, deterrence, rehabilitation, and incapacitation,[111] and Moore's view that "punitive sanctions are justified when they attain a sufficient level of incapacitation, deterrence, reform, and retribution.[112] Moore refers to these as "the traditional big four of punishment theory".[113] Thus, the criminal law has been said to be a "multi-function tool".[114]

As a result, it has been observed that the criminal law's various functions are compatible but "often thought to be in tension".[115] In particular, it may be questioned how the criminal law can meet the competing demands of punishment; how can it, for example, simultaneously punish and rehabilitate offenders?[116] One's response to this issue is likely to depend on how punishment is both characterised and justified, and whether one treats punishment as being intrinsically valuable (of value in itself) or instrumentally

[110] Chiao (n 85) at 138.
[111] N V Demleitner, "Types of punishment" in M D Dubber and T Hörnle (eds), *The Oxford Handbook of Criminal Law* (2014) 941 at 944.
[112] Moore, *Placing Blame* (n 79) 24.
[113] ibid.
[114] Simester, *Fundamentals of Criminal Law* (n 67) 3.
[115] ibid.
[116] Melissaris (n 96) at 371.

valuable (of value because it promote other values or brings about benefits).[117] Those favouring the former view argue that retributivism is the leading aim of the criminal law, while those adopting the latter approach point towards goals such as deterrence and public protection. Although it is beyond the scope of this thesis to even attempt to resolve this conceptual question, it is intended that the rest of this section can offer an overview of the criminal law's competing aims. In addition to this, it will be shown that the aims of the law of delict overlap to an extent with those of the criminal law. Both systems demonstrate some deterrence-based rationale and are underpinned by considerations of justice (corrective and distributive justice in the law of delict, and retributivist justice in the criminal law).[118] This comparison between the aims of the two systems will provide a helpful context in which to later assess whether the protection of privacy and reputation interests may be more appropriately met by the criminal law or civil law.

(a) Deterrence

Beginning with deterrence, this is a "theory of choice in which would-be offenders balance the benefits and costs of crime".[119] It is clear that criminal law aims to deter individuals from engaging in wrongful conduct.[120] Blackstone advances this idea, stating that "punishments are chiefly intended for the prevention of future crimes".[121] Hart similarly states that the criminal law is there to "announce to society that these actions are not to be done and to secure that fewer of them are done".[122]

A distinction may be made between general deterrence and specific deterrence:

[117] Tadros, *The Ends of Harm* (n 103) 21.
[118] T Honoré, *Responsibility and Luck* (1999) 71.
[119] D S Nagin, "Deterrence in the twenty-first century" (2013) 42 Crime and Justice 199 at 205.
[120] See Lord Bingham's comment that "we do not doubt that the purpose of the criminal law is to discourage and punish conduct which crosses the line which society has at anytime chosen to draw": Bingham (n 44) at 3.
[121] Blackstone, *Commentaries* (n 76) 10.
[122] Hart, *Punishment and Responsibility* (n 78) 6.

> "General deterrence refers to the crime prevention effects of the threat of punishment. Specific deterrence concerns the aftermath of the failure of general deterrence—the effect on reoffending, if any, that results from the experience of actually being punished".[123]

The former is promoted through the imposition of rules that may in turn guide conduct. The latter relates more to an individual who has already committed a crime "either by incapacitating the offender altogether or by giving the wrongdoer a strong disincentive not to reoffend".[124] While the threat or experience of incapacitation may deter potential wrongdoers, incapacitation itself should be viewed as a means of preventing crime rather than deterring it. As such, this will be examined separately below.

With general deterrence, it is this threat of punishment and subsequent sanctions that may reduce the likelihood of a person offending. While doubts have been raised as to the efficacy of punishment as a deterrent,[125] Bentham's classic view – developing the work of Beccaria – is that in order for punishment to be an effective deterrent there must be "certainty, severity and celerity".[126] This means that potential wrongdoers must believe that the punishment will be imposed, that it must be of sufficient severity in order to prevent them from engaging in wrongful conduct, and that it must be imposed in a swift manner.[127] The first of these requirements has been said to be the most relevant in effectively deterring people,[128] and Simester observes that "offending rates are more responsive to increases in the probability of being caught and convicted than to increases in the expected sentence".[129]

Unlike retributivists, Bentham views punishment in an instrumental sense: "all punishment in itself is evil. Upon the principle of utility, if it ought at all to be

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[123] Nagin (n 119) at 200.
[124] Melissaris (n 96) at 375; L Fosberg and T Douglas, "What is criminal rehabilitation?" (2022) 16 Criminal Law and Philosophy 103 at 110.
[125] Moore, *Placing Blame* (n 79) 29.
[126] J Bentham, *Theory of Legislation Volume 2: Principles of the Penal Code* (1914) by C M Atkinson (translator) 126-129. See also Beccaria, *Crimes and Punishments* (n 107) 19-21, 48-49.
[127] Nagin (n 119) at 205.
[128] ibid.
[129] Simester, *Fundamentals of Criminal Law* (n 67) 5.

admitted, it ought only to be admitted in as far as it promises to exclude some greater evil".[130] Thus, on a forward-looking, utilitarian conception of criminal law, a leading aim may be said to be the prevention of future wrongful conduct.

While civil law may have some deterrence-based rationale, the absence of punishment from this area of the law means that this cannot act as the basis of any form of deterrence. The deterrence must therefore be grounded in something other than punishment.

This is likely to depend on the nature of the civil wrong. In contract law, the rules relating to breach not only compensate the innocent party, but also deter parties from reneging on their obligations. However, in respect of delicts, the position is more complicated. At a basic level, it may be said that "the risk of tort liability creates an incentive to take steps to avoid injuring others".[131] But can this said to be an *aim* of tort law?

Deterrence is typically viewed as an economic rationale for the law of delict.[132] This is an instrumentalist view of the law of delict, which views this area of the law as being a means of achieving a collective goal (in this case economic efficiency).[133] While much has been written on this subject, the leading proponent of this theory is Posner.[134]

In respect of negligence, the threat of civil liability may help ensure greater compliance with rules and regulations, as well as reducing risk-taking. At least in this context, it is intended that the threat of liability "will ensure the optimum level of safety precautions".[135]

On the other hand, there are concerns that the threat of liability can result in "over-deterrence" and encourage defensive practices that inhibit efficiency.[136] There are also doubts as to whether this has any impact on conduct in practice,

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[130] J Bentham, *An Introduction to the Principles of Morals and Legislation* (1780) 166.
[131] Ewing (n 99) at 4.
[132] G Schwart, "Mixed theories of tort law: affirming both deterrence and corrective justice" (1997) 75 Texas Law Review 1801 at 1828.
[133] Perry (n 46) at 67.
[134] R A Posner, "A theory of negligence" (1972) 1 Journal of Legal Studies 29.
[135] Stevens, *Torts and Rights* (n 40) 321.
[136] Cane, *Tort Law* (n 60) 488.

and "the extent to which tort law deters is controversial, especially in the context of negligently caused accidents".[137] Reid goes further than this in claiming that "there is little direct evidence to show that, as a general rule, the fear of a civil claim influences potential wrongdoers in their behaviour".[138] There are a number of reasons why this may be the case. These include the presence of insurance coverage,[139] the apparent disconnect between the degree of risk-taking and the quantum of damages,[140] the possibility of liability being imposed for inadvertent conduct for which no precautions could be taken,[141] and general lack of knowledge about what constitutes a delict (or lack of clarity as to what the law is).[142]

That does not mean that the law of delict has no deterrent effect. Clearly it has some influence on behaviour in a way that is likely to reduce the chance of harm. What is less clear is whether it is the best system for doing so. Stevens suggests that the system is better than nothing, but that there may be more effective ways of regulating behaviour and deterring wrongful conduct.[143] This is supported by Reid who questions whether the threat of civil liability is the "optimum means of promoting efficiency".[144]

It is additionally interesting that Reid is more convinced by the idea of deterrence in respect of specific (mainly intentional) wrongs such as defamation or misuse of private information.[145] Cane likewise refers to defamation in stating that "newspaper editors no doubt sometimes think about the law of defamation before they decide to publish".[146] Thus, a distinction may be made between intentional and non-intentional torts. In particular, there are different considerations in play depending on whether the delict is intentional or not.

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[137] Winfield and Jolowicz, *Tort* (n 11) para 1-034.
[138] Reid, *Delict* (n 4) para 2.17; Stevens, *Torts and Rights* (n 40) 323.
[139] ibid Stevens 322; Giliker, *Tort* (n 10) para 1-007; Winfield and Jolowicz, *Tort* (n 11) para 1-035.
[140] ibid Stevens.
[141] Cane, *Tort Law* (n 60) 488; ibid Stevens; Giliker, *Tort* para 1-007.
[142] ibid Cane; Winfield and Jolowicz, *Tort* para 1-034.
[143] Stevens, *Torts and Rights* (n 40) 321-322.
[144] Reid, *Delict* (n 4) para 2.17. Reid notes, however, that "the converse argument – that this prospect would encourage defensive practices which would be damaging to the wider community – similarly lacks a convincing empirical basis".
[145] ibid.
[146] Cane, *Tort Law* (n 60) 488.

Some of the criticisms of the deterrent-effect of delicts are less readily applicable to intentional delicts (e.g. the possibility of liability being imposed for inadvertent conduct for which no precautions could be taken or the lack of knowledge that the conduct was a delictual wrong).

(b) Retribution

Retribution at first glance appears most closely related to the penal nature of the criminal law. As has already been explained, the imposition of punishment is the most obvious means of distinguishing between criminal law and civil law. However, while it is accepted that one feature of punishment is to impose suffering on wrongdoers, this is distinct from claiming that the criminal law exists *in order to make wrongdoers suffer*.

Two forms of retributivism have found favour among scholars: positive retributivism and negative retributivism.[147] The former is the more extreme view that the state *ought* to punish criminals, while the latter merely *permits* the punishment of criminals.[148]

Those proponents of a positive retributivist theory (such as Moore)[149] argue that such suffering is intrinsically valuable.[150] This is a non-consequentialist view that does not take account of the benefits of punishment, but rather views punishment as a just response to criminal wrongdoing.[151] In addition to this, advocates of this theory argue that the state has more than simply a right to punish offenders, and that they are under a duty to ensure that the offender is punished in order to achieve retribution.[152]

On the other hand, one may adopt a negative retributivist view without exclusively endorsing retribution as an aim of the criminal law. For example,

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[147] M N Berman, "Two kinds of retributivism" in R A Duff and S P Green (eds), *Philosophical Foundations of Criminal Law* (2011) 433 at 447-449.
[148] R A Duff, *Punishment, Communication and Community* (2000) 19.
[149] Moore, *Placing Blame* (n 79).
[150] Tadros, *The Ends of Harm* (n 103) 35.
[151] Duff, *Punishment, Communication and Community* (n 148) 19.
[152] Berman (n 147) at 449, citing M S Moore, "The moral worth of retribution" in F D Schoeman (ed), *Responsibility, Character, and the Emotions* (1987) 179 at 179, 182.

Hart distinguishes between the "primary objective of the law in encouraging or discouraging certain kinds of behaviour" and "merely ancillary sanction or remedial steps".[153] In doing so, Hart proposes a mixed theory of criminal law, in which deterrence is the "justifying aim", but punishment is inflicted on individuals in accordance with the principle of retributivist justice.[154]

Thus, even among those scholars who premise the criminal law on retributivist principles, there clearly remains disagreement over the extent to which the law should be guided by these. The above accounts may accordingly be characterised as weaker, moderate or severe, illustrating a range of theories on the role retributivism ought to play.[155] While weaker accounts may support the imposition of punishment on the basis that it may further some consequentialist goal(s), more severe accounts regard punishment as being necessary to ensure that morally wrongful actors receive their just deserts. With the latter accounts, punishment may be justified even where it brings no wider benefits.[156]

Such emphasis on retributive principles (notably stronger accounts) has been the subject of criticism in recent years and there has been a shift away from these theories in explaining the criminal law. This is illustrated by the works of several leading criminal law scholars, most notably Kelly.[157] This trend has seen the development of other principles as a means of explaining and justifying the imposition of criminal liability and sanctions, such as those grounded in rehabilitation and restorative justice, which are outlined below.[158]

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[153] Hart, *Punishment and Responsibility* (n 78) 7.
[154] ibid 1-12.
[155] A Walen, "Retributive justice" in E Zalta and U Nodelman (eds), *The Stanford Encyclopedia of Philosophy* (Winter 2023 edn) at para 3.2. Available at: https://plato.stanford.edu/archives/win2023/entries/justice-retributive/.
[156] E.g. the position adopted by Moore (n 79).
[157] E I Kelly, *The Limits of Blame: Rethinking Punishment and Responsibility* (2018). See also G D Caruso, *Rejecting Retributivism* (2021).
[158] See also the works of Lacey and Pickard, in which they have developed a theoretical model premised more on the responsibility of the wrongdoer, rather than the attribution of affective blame: see N Lacey and H Pickard, "The chimera of proportionality: institutionalising limits on punishment in contemporary social and political systems" (2015) 78 Modern Law Review 216; N Lacey and H Pickard, "To blame or to forgive? Reconciling punishment and forgiveness in criminal justice" (2015) 35 Oxford Journal of Legal Studies 665.

These can generally be characterised by a greater reliance on instrumentalist ideals and therefore resonate more closely with corrective justice principles discussed above, which inform the operation of the civil law.

By contrast with the criminal law, the law of delict does not ordinarily concern the punishment wrongdoers.[159] There is therefore limited scope for the application of principles of retributive justice. This absence can be further explained by several factors. The first of these is that wrongdoers in delict cases are generally viewed as being less culpable as a result of a lesser fault requirement (i.e. negligence), and in some cases third parties may be liable.[160] From a more practical perspective, there is additionally the risk of "double-punishment" (given the possibility of concurrent civil and criminal liability), and the reduced evidential and procedural safeguards in civil proceedings.[161]

The law of delict, on the other hand, does seek to provide justice, even if this is not grounded in retributive ideals.[162] Justice may be achieved either through the principle of corrective justice or distributive justice. The difference in these principles illustrates an ideological tension between whether tort law seeks to serve the parties or the community as a whole.[163]

MacCormick states that the "underlying policy of the law of tort or delict is the provision of *just* [emphasis added] compensation for injuries to person or property".[164] This is an endorsement of the principle of corrective justice, which is often cited as a leading aim of the law of delict. This "is the idea that liability rectifies the injustice inflicted by one person on another".[165] This is very much linked to the nature of the remedy (compensation) and restoring the parties to their previous positions. Correlativity is a key feature of corrective justice. Justice is "achieved for both parties through a single operation in which the

[159] Simester, *Fundamentals of Criminal Law* (n 67) 5.
[160] E.g. in cases of vicarious liability.
[161] Giliker, *Tort* (n 10) para 1-006.
[162] Except in jurisdictions where punitive damages may be awarded (e.g. the USA).
[163] G P Fletcher, "Fairness and utility in tort theory" (1972) 85 Harvard Law Review 540.
[164] Reid, *Delict* (n 4) para 2.15, quoting N MacCormick, *Legal Reasoning and Legal Theory* (1978) 166.
[165] E J Weinrib, "Corrective justice in a nutshell" (2002) 52 University of Toronto Law Journal 349 at 349.

plaintiff recovers precisely what the defendant is made to surrender".[166] This is consistent with the rights-based[167] conception of the law of delict set out above. Corrective justice approaches do not therefore involve an assessment of what is best in the future interests of the parties,[168] nor do they have regard to the respective financial positions of the parties.

Distributive justice, by contrast, concerns "the just distribution of material resources, and perhaps other goods, throughout society as a whole".[169] This allows for external considerations (beyond the parties' relationship) to be considered in determining the compensation that should be awarded in a given case. Despite this, there may be a stronger justification for retribution in the case of intentional delicts, particularly where no criminal liability arises. One example would be defamation, where the injured party may wish to be vindicated through a finding of civil liability against the wrongdoer. This is consistent with the practice of awarding vindicatory damages in respect of such delicts. Thus, regardless of whether any loss is experienced by the victim in cases of reputational harm or infringement of privacy, there may be recognition of the violation that the victim has suffered. However, as stated above, any damages to reflect the vindication of one's right should not be conflated with punishing the wrongdoer for violating the right in question.

(c) Public protection and incapacitation

While the criminal law may be viewed as protecting the public by announcing to citizens conduct that is prohibited (and for which punishment may consequently be imposed), this may similarly be viewed as a feature of the civil law. What is perhaps more significant is the manner in which the criminal law seeks to protect the public. In doing so in such a coercive manner, it represents an altogether different set of rules. Simester states that both the civil law and

[166] ibid at 350.
[167] Perry (n 46) at 81.
[168] Weinrib at 350.
[169] Perry (n 46) at 79.

criminal law regulate conduct and protect the public, but "as regulatory tools go, the criminal law is a sledgehammer. It makes habitually loaded utterances that the civil law does not, and its judgments of the accused have a symbolic significance that civil judgments lack".[170] One of the most notable ways in which the criminal law may protect the public is by incapacitating offenders. This is a key difference from the civil law, which does not incapacitate wrongdoers,[171] and a finding of civil liability does not offer the court an array of protective sanctions that it has available in criminal cases.[172]

(d) Rehabilitation

The final aim to consider is rehabilitation. This "targets the structural and personal factors that may have contributed to the offense".[173] Rehabilitation may be characterised by two principal functions.[174] The first of these is to disincentivise (and thereby reduce) offending. The second is to reintegrate offenders into society.[175] Rehabilitation may be achieved in three ways: either as an alternative to punishment, as shaping the punishment itself,[176] or as following punishment.[177] There is some overlap between rehabilitation, deterrence, and public protection[178] and rehabilitation can be seen as furthering deterrence-based ends[179] (at least in respect of specific deterrence), while also helping to protect the public.

There was an increased reliance on rehabilitation as an aim of the criminal law from the middle of the 20th century onwards.[180] This was a result of changing

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[170] Simester, *Fundamentals of Criminal Law* (n 67) 6.
[171] Schwart (n 132) at 1813, fn 98.
[172] E.g. notification requirements in sexual offence cases, restriction of liberty orders, supervised release orders, orders requiring the offender to undergo some form of treatment.
[173] Melissaris (n 96) at 375.
[174] F McNeill, "Punishment as rehabilitation" in G Bruinsma and D Weisburd (eds), *Encyclopaedia of Criminology and Criminal Justice* (2014) 4195 at 4196.
[175] ibid.
[176] Duff, for example, uses the term "corrective punishment" to advance the idea of punishment as including correction or persuasion: Duff, *Punishment, Communication and Community* (n 148) 91-92.
[177] McNeill (n 174) at 4196.
[178] Fosberg and Douglas (n 124) at 110.
[179] Tadros, *The Ends of Harm* (n 103) 75.
[180] Schwart (n 132) at 1811.

attitudes towards criminal behaviour and a better understanding of the causes of crime.[181] While there is limited support for "pure rehabilitative theories" (which view rehabilitation as being the sole function of the criminal law), rehabilitation nevertheless remains relevant as an ancillary aim.[182] Indeed, rehabilitative practices have become widespread in the criminal justice system,[183] particularly so in the later stages of the criminal process.[184]

Unlike those aims premised on ideas of justice and deterrence, rehabilitation is less obviously relevant to the law of delict,[185] particularly in the context of privacy and reputation wrongs. As is the case with incapacitation, the state has few tools following a delictual action through which it can impose rehabilitative measures on a wrongdoer.

(e) Restorative justice

Finally, alongside a recent focus on rehabilitation, restorative justice has garnered increased attention among scholars as a guiding aim of the criminal law. What do we mean by restorative justice? This has been defined as

> "a process to involve, to the extent possible, those who have a stake in a specific offense and to carefully and to collectively identify and address harms, needs, and obligations, in order that one put things as right as possible".[186]

The focus is therefore more on the relationship between the individuals involved (offender and victim); "restorative justice offers willing participants the possibility of engaging in accountability practices, with the aim of repairing and restoring relationships".[187]

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[181] ibid at 1811.
[182] ibid at 105-106.
[183] ibid at 106.
[184] A detailed account of these practices is provided in Gilchrist, L and Johnson, A, "Rehabilitation of offenders in the Scottish criminal justice system" in M Vanstone and P Priestley (eds), *The Palgrave Handbook of Global Rehabilitation in Criminal Justice* (2022) 505.
[185] Schwart (n 132) at 1813, fn 98.
[186] H Zehr, *The Little Book of Restorative Justice* (2002) 37.
[187] E I Kelly, "From retributive to restorative justice" (2021) 15 Criminal Law and Philosophy 237 at 245.

Similarities can be discerned between restorative justice and the corrective justice principles underpinning the law of civil wrongs. Both are grounded in forward-looking, instrumentalist conceptualisations of the systems for dealing with wrongs. Some illustrations of the ways in which the criminal justice system accommodates restorative justice are given later in this chapter when explaining the differences between the criminal and civil systems in relation to the procedural rules and outcomes.[188]

5.3.3 Summary

The preceding analysis has sought to outline the conceptual differences between the criminal law and the law of delict as two systems for responding to wrongs. This is important groundwork that paves the way for an examination of the role that each system ought to play in protecting privacy and reputation rights. It has been shown that at the heart of delict is the principle of compensation, whereas the criminal law is much more punitive in nature. This division is further evidenced through the application of Hart's standard features of punishment to each system. In each case, it is difficult to readily apply these features to the law of delict. However, there is a degree of overlap between the aims of the two systems. In the broadest sense, both seek to achieve justice, yet the criminal law is grounded in ideas of retribution, while the civil law concerns corrective or distributive justice. It is similarly the case that deterrence may be an object of each system, but again, this is linked to the notion of punishment with the criminal law and to economic outcomes with the civil law. Rehabilitation and incapacitation appear less obviously connected to the civil law, although the former may be regarded as encompassing principles of corrective justice. This raises questions about which system may be best structured to respond to privacy and reputation wrongs. In particular, in the context of intentional wrongdoing, it will be questioned later in this thesis whether principles of corrective or distributive justice may provide the most appropriate basis for dealing with these wrongs, and whether a case may be

[188] E.g. victim impact statements; relevant court orders.

made based on principles of retributivist justice rather than simply compensatory, economic principles. Having undertaken a detailed analysis of the conceptual differences between criminal law and the law of delict, the rest of this chapter will focus on the practical differences between the two systems. This will demonstrate how the differing aims of the two systems are reflected in practice.

5.4 Procedure

The nature of the response to a wrong may be viewed as a defining feature in determining whether a wrong is criminal or civil. This is because of the difficulties that exist in defining a criminal or civil wrong. While the substance of the wrong is clearly relevant,[189] Duff suggests that "we cannot provide a substantive definition of crime, in terms of the kinds of conduct that do or could count as criminal"[190] and Lamond claims that "the scope of the criminal law can only be set in adjectival terms because there is simply too much variety in the content of those things subject to criminal prohibition".[191] As a result, it is helpful to look more closely at procedure. Procedure varies greatly between criminal and civil law actions, and even within each of these divisions of the law there exist a number of differences. These illustrate the practical mechanisms through which the two systems seek to meet their differing aims. In particular, differences can be seen in jurisdiction, the parties to an action, the rules relating to proof and evidence, and – in a more general sense – the terminology used. These differences will now be examined.

5.4.1 Jurisdiction

Jurisdiction – at least in terms of the subject matter of proceedings – differs between the two areas of law. In Scotland, the Sheriff Court has jurisdiction

[189] See section 5.5 below.
[190] Duff, *The Realm of Criminal Law* (n 69) 16.
[191] Lamond (n 9) at 610.

over both criminal and civil matters. The High Court of Justiciary has exclusive jurisdiction over criminal matters, whereas the Court of Session has exclusive jurisdiction over civil matters. The appellate jurisdiction of the High Court is the highest criminal court in the country,[192] while the Supreme Court of the United Kingdom is the final appeal court in civil actions.[193] Justice of the Peace courts also have jurisdiction over minor criminal offences.[194]

Although jurisdictional differences are typically rooted in historical practice,[195] they additionally serve valuable practical functions by dividing criminal and civil business between the various courts, recognising and respecting the expertise of individual members of the judiciary,[196] and allowing for more convenient implementation of procedural rules. As will now be shown, what is more important is not the difference in the courts in which proceedings are heard, but rather the distinct procedural rules that stem from this.

5.4.2 Parties

Perhaps the most striking difference between the two systems is that a criminal action is generally raised by the state. In Scotland, this is usually done through the Crown Office and Prosecutor Fiscal Service (COPFS). While private prosecutions by individuals are possible under Scots law, such actions are rare.[197] Civil actions, on the other hand, are raised by private individuals. The focus of the proceedings varies, and this reflects the different aims of criminal

[192] Criminal Procedure (Scotland) Act 1995 s 124(2).
[193] Court of Session Act 1988 s 40.
[194] 1995 Act s 7.
[195] See generally the account provided in the previous chapter.
[196] In respect of the Sheriff Court, this is expressly provided for in sections 34 to 37 of the Courts Reform (Scotland) Act 2014.
[197] Blackie and Chalmers (n 3) at 280. That is not to say that this is the case in all jurisdictions. English law allows for other public authorities to investigate criminal wrongdoing and initiate prosecutions, and for private individuals to bring prosecutions: see G Lamond, "Core principles of English criminal law" in M Dyson and B Vogel (eds), *The Limits of the Criminal Law* (2018) 9 at 32. A somewhat notorious recent example of this was a series of private prosecutions brought by the Post Office against a number of sub-postmasters between 2000 and 2014 for financial wrongdoing (including theft and false accounting) that resulted in wrongful convictions.

law and civil law. In criminal law the focus is on the conduct of the accused and the potential culpability of the accused, whereas in civil law the focus is more on the loss and harm caused to the pursuer.

In addition to having clear practical implications, this is symbolic. Victims lose control over a wrong when it becomes part of the criminal process.[198] That is not to say they become irrelevant. Their evidence is still likely to be imperative in securing a conviction for the prosecution, and victim impact statements may be relevant to the question of sentencing if the accused is convicted.[199] Indeed there is growing recognition of the role the victim ought to play in the criminal process and this can be seen in the development of a more "victim-centred" approach in a number of systems (including the UK).[200] However, victims are not responsible for deciding whether to begin proceedings in the first instance, nor how the case against the accused is to be presented. As will be shown below, this is a consequence of the characterisation of criminal wrongs as "public wrongs".[201]

5.4.3 Burden and standard of proof

Once an action is raised, there are differences in the rules of procedure applicable to the action.[202] The first of these relates to the burdens of proof in question. In a criminal case the burden of proof is on the party bringing the action (the prosecution).[203] They must prove that the accused committed the

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[198] R A Duff and S E Marshall, "Public and private wrongs" in J Chalmers, F Leverick, and L Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (2010) 70 at 80. See also N Christie, "Conflicts as property" (1977) 17 British Journal of Criminology 1.
[199] Criminal Justice (Scotland) Act 2003 s 14. For an evaluation of the use of victim impact statements in Scotland, see J Chalmers, P Duff and F Leverick, "Victim impact statements: can work, do work (for those who bother to make them)" [2007] Criminal Law Review 360.
[200] S E Marshall, "Victims of crime: their rights and duties" in C Flanders and Z Hoskins (eds), *The New Philosophy of Criminal Law* (2016) 153 at 153, referring to D Garland, *The Culture of Control* (2002) 196. See also Marshall at 154. Marshall argues in this article that we should view victims' rights to participate in the criminal process as being derived from civic duties.
[201] See section 8.3.1(b) for further discussion of this.
[202] D M Walker, "The interactions of obligations and crime" in R F Hunter (ed), *Justice and Crime: Essays in Honour of The Right Honourable The Lord Emslie* (1993) 15 at 17.
[203] *Lambie v HM Advocate* 1973 JC 53.

offence with which they have been charged. This is consistent with the presumption of innocence.[204] In doing this, the prosecution must prove guilt to a high standard: beyond reasonable doubt.[205] The burden of proof in civil actions similarly rests on the party raising the action: the pursuer. However, they do not have to prove their case to as high a standard as in criminal cases. They simply need to prove on the balance of probabilities that the defender committed the civil wrong in question.[206] In terms of proving one's case, it is therefore significantly easier to succeed with a civil action than with a criminal prosecution.[207]

5.4.4 Evidence

In addition to differences in the burden and standard of proof in criminal and civil cases, further differences exist in respect of the evidence that must be led in discharging the required burden. The primary difference, at least in Scotland, relates to the sufficiency of evidence. Criminal cases generally require "evidence of at least two witnesses implicating the person accused with the commission of the crime or offence with which he is charged".[208] In contrast, corroboration is no longer required in civil cases.[209] As a result, the evidence of one witness may be sufficient to prove a crucial fact[210] and whether the fact is indeed found to be proved would be a "matter of weight rather than sufficiency".[211]

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[204] ECHR, Article 6(2).
[205] *Lambie v HM Advocate* 1973 JC 53; *McKenzie v HM Advocate* 1959 JC 32.
[206] *Hendry v Clan Line Steamers, Ltd* 1949 SC 320.
[207] For examples of successful civil actions following criminal acquittals or decisions not to prosecute, see section 5.4.6 below.
[208] *Morton v HM Advocate* 1938 JC 50 per Lord Justice-Clerk Aitchison at 55. This rule has been somewhat relaxed in respect of real evidence; as long as the provenance is established by corroborated evidence then the fact-finder is entitled to treat the evidence as sufficient. See *Shuttleton v Orr* 2019 JC 98.
[209] Civil Evidence (Scotland) Act 1981 s 1.
[210] M L Ross, J Chalmers and I Callander (eds), *Walker and Walker: The Law of Evidence in Scotland*, 5th edn (2020) para 5.6.2.
[211] ibid.

5.4.5 Terminology

Finally, the terminology used in respect of criminal and civil cases differs greatly. In Scottish criminal cases we talk about the prosecution, the accused (and the defence), and the complainer. The prosecution comprises a prosecutor, and in High Court cases will be led by an Advocate Depute. The accused may represent themselves at trial,[212] or may be represented by a defence agent (either a solicitor, solicitor advocate, or an advocate). The complainer is, in most cases, the party complaining of the crime with which the accused has been charged. A complainer is not essential as some crimes may not have a complainer (e.g. public order offences where there may be no "victim"; homicide cases where the victim is deceased and therefore unable to participate in judicial proceedings). In civil cases, the pursuer is the party raising the action and the defender is the party against whom the action is brought. Each party will likely be represented by solicitor(s) and/or counsel. There are no complainers or victims in civil actions (although the pursuer may view themselves as the "victim" of a civil wrong).

In criminal cases we tend to refer to the proceedings as a "trial", whereas civil proceedings may be referred to – depending on the nature of the proceedings - as an "action", "litigation", "lawsuit", or "petition".

In respect of the outcome of proceedings, a criminal case usually results in punishment in the form of a "sentence", or this may be referred to more broadly as a "disposal". In civil proceedings an outcome tends to be the "remedy", which encompasses any number of available court orders. However, what each of these orders have in common is that they seek to *compensate* the victim, hence the term "remedy".

By way of summary:

[212] Except where they are charged with certain sexual offences, and in domestic abuse cases: Criminal Procedure (Scotland) Act 1995 ss 288C and 288DC.

> "The thin descriptors used in tort law underscore the preoccupation with the post-tort condition of the claimant by contrast with the emphasis on the offender in criminal law. In tort, once C [the claimant] has established a tortious wrong or invasion of his rights by D [the defender], save for rare exceptions, what matters is the extent of the harm suffered by C and what is required by way of reparation".[213]

5.4.6 Why do these differences matter?

What is the significance of these procedural differences? An important difference is in how, and by whom, proceedings are initiated. The state has far greater resources at its disposal than the average individual. Such resources include the police force to investigate wrongdoing, the prosecution service to prepare prosecutions, experts (whether in the fields of pathology, forensic science or others) and the financial support of an (in theory) adequately funded criminal justice system. An individual pursuer, on the other hand, is unlikely to have the financial resources or the impetus to bring an action, especially given limitations on the awarding of legal aid in civil actions.[214] The impact of this is clear: individuals will either be unable for financial reasons to bring civil proceedings against an alleged wrongdoer, will be able to bring civil proceedings but subject to financial or budgetary constraints, or will only be able to bring civil proceedings if they are wealthy.[215] This problem is clearly not exclusive to actions relating to privacy and reputation, but it will be argued that there are particular concerns in respect of these interests.

What if criminal and civil proceedings are both raised?[216] To begin with, there is no requirement that a pursuer must wait for criminal proceedings to be raised

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[213] G R Sullivan, "Wrongs and responsibility for wrongs in crime and tort" in M Dyson (ed), *Unravelling Crime and Tort* (2014) 82 at 85.
[214] B Christman and M Combe, "Funding civil justice in Scotland: full cost recover, at what cost to justice?" (2020) 24 Edinburgh Law Review 49 at 57, 59-60.
[215] Duff and Marshall, "Public and private wrongs" (n 198) at 81.
[216] See M Dyson, "Challenging the orthodoxy of crime's precedence over tort: suspending a tort claim where a crime may exist" in S G A Pitel, J W Neyers and E Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (2013) 119.

or completed before bringing a civil action (nor *vice versa*).[217] While the state may prosecute a wrongdoer in a criminal court, in order to obtain a civil remedy, an action would still have to be raised by the victim themselves. As a general rule, "civil and criminal remedies are concurrent and independent",[218] although it has been suggested that a criminal prosecution should precede a civil action.[219] A civil case can proceed (and indeed succeed) not only where the state has declined to prosecute, but also where a criminal case has resulted in an acquittal. Examples of this can be seen in a series of civil rape actions brought in Scotland.[220] Nevertheless, in cases where a criminal case has been concluded, there is a rebuttable presumption in a subsequent civil case that the findings in the criminal proceedings are true.[221]

An additional complication in engaging in criminal and civil proceedings is that concepts and principles that are common to both criminal and civil law do not necessarily have the same definitions in each system.[222] While the two systems may appear to say the same thing, they are not necessarily speaking in the same language. This is illustrated through the wrong of assault. Although proof of intention is required under both criminal and civil law, there is a much broader interpretation of intention under the latter, which may encompass "conscious recklessness".[223] This can make it difficult to establish liability in one system on the basis of a finding in the other. Different rules relating to evidential rules and the standard of proof mean that in extreme cases the defendant may be acquitted of a crime yet still found to be liable in civil proceedings.[224] The differences between the substantive rules can also lead to

[217] Blackie (n 38) at 377. Cf English law: Walker, *Delict* (n 2) 16, citing *Smith v Selwyn* [1914] 3 KB 98.
[218] ibid Walker 16.
[219] *J & P Coats Ltd v Brown* (1909) 6 Adam 19 at 41-42 per Lord Justice-Clerk (Kingsburgh).
[220] *DC v DG and DR* 2018 SC 47 (followed decision not to prosecute); *AR v Coxen* 2018 SLT (Sh Ct) 335 (followed not proven verdict); *B v Diamond* 2022 Rep. LR 47 (followed not proven verdict).
[221] Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 s 10.
[222] Walker, *Delict* (n 2) 15.
[223] Reid, *Delict* (n 4) paras 15.04-15.05, defining this as "where D [the defender] is indifferent to a risk of harm that could be foreseen with substantial certainty, and proceeds without concern for the possible consequences of D's conduct". See *Reid v Mitchell* (1885) 12 R 1129 as an example of this.
[224] G Virgo, "We do this in the criminal law and that in the law of tort" in S G A Pitel, J W Neyers and E Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (2013) 95 at 104.

outcomes that may appear inconsistent. This may be the result of different substantive rules, as discussed below. An extreme example would be in the House of Lords case of *Ashley v Chief Constable of Sussex Police*.[225] In this case, the defendant was charged with murder and pleaded self-defence. The decision turned on the requirements of self-defence. In the criminal proceedings, the defendant was acquitted on the basis that they had held an honest but mistaken belief as to the level of force required to defend themselves. Despite their acquittal, they were nevertheless found liable in civil proceedings, as English tort law required that the mistake must not only be an honest one, but that it must also be reasonable for the plea of self-defence to succeed.[226] This may be interpreted as operating to the defendant's benefit and the "difference is justified by virtue of the divergent aims of punishment and compensation, but with the result that criminal liability is more restrictive than liability in tort".[227] While rare in practice, this example shows the extent to which proceedings and outcomes arising from the same factual nexus may differ across the two systems. It is therefore important not to lose sight of these differences when determining the appropriate legal response to wrongful conduct.

Finally, in terms of the language used, that the criminal law employs language that is exclusive to this field is significant. In addition to marking out the criminal processes as being distinctive, this serves an important symbolic function. It employs "socially expressive terms",[228] such as "charge, "conviction", and "guilt", which in turn identifies behaviour as "specially reprehensible, so that the machinery of the state needs to be mobilized against it".[229] This language is consistent with the condemnatory function of punishment[230] that has been identified as a central feature of the criminal process earlier in this chapter. While the law of delict attaches liability to the wrongdoer, it does not do so in a morally significant manner; it "pins a breach of duty upon

[225] [2008] UKHL 25, [2008] AC 962.
[226] See the discussion of this in Virgo at 103-104.
[227] ibid at 104.
[228] Lamond, "What is a crime?" (n 9) at 610.
[229] ibid.
[230] Duff, *The Realm of Criminal Law* (n 69) 37; Chiao (n 85) at 137.

the defendant, without reflecting officially upon her moral condition".[231] This is evidenced by the fact that no record of wrongdoing is retained in respect of delictual liability and that wrongdoers are not burdened by the types of collateral consequences that attach themselves to criminal wrongdoers.[232] Thus, although the language is relevant for procedural purposes, it plays an additional role in emphasising the social differences between the two systems.[233]

5.5 Substantive law

Moving on from procedural differences, it is clear that substantive criminal law differs from substantive civil law. But this tells us very little; it amounts to no more than claiming that offences against the person differ from property offences, or that environmental law differs from family law. What is more important here is not the different individual offences that comprise criminal and civil law, but the underlying reasons justifying why a category of wrongs is classified as civil rather than criminal (and *vice versa*), and the legal content of these wrongs.

It has already been said that criminal law and the law of delict are both two systems that regulate non-contractual wrongs. The differences between them primarily lie in the ways in which they do this and the wrongs that they address. Given what has been said about the aims of criminal law in contrast to those of civil law, at a general level it may be said that criminal wrongs are more serious wrongs than civil wrongs. This is because criminal law contains more coercive rules, and only more serious wrongs justify the imposition of punishment and everything else that accompanies criminal liability ("collateral consequences").

Criminal law can be viewed as more closely related to moral wrongs: "that immorality is the essence of criminal behavior is a tenet of ancient and

[231] Simester, *Fundamentals of Criminal Law* (n 67) 5.
[232] ibid.
[233] ibid 6.

traditional philosophy".[234] While this may historically have been the case, a number of criminal wrongs are not concerned with immoral conduct. Although traditional *mala in se* offences such as assault, rape, and theft continue to safeguard against moral wrongs, the increased introduction of *mala prohibita* offences illustrates the criminal law's shift towards regulating conduct on an altogether different basis. Chalmers and Leverick have observed that the Scottish Parliament "appears to have great difficulty regulating without criminalising",[235] while it has been suggested that regulating conduct through statutory offences may be a result of a "lack of enough imagination to think of a more appropriate sanction".[236]

On the other hand, delicts may also be moral or social wrongs, despite this not being a necessary condition.[237] A number of delicts overlap with traditional criminal offences[238] (such as the aforementioned assault, rape, and theft) and "on the surface, at least, there appears to be a close correspondence between the entire law of crimes and that of torts by reference to a common set of principles of culpability".[239] Indeed, as Husak observes:

> "some wrongs that are and ought to be civil involve as much culpability and cause as much harm as many wrongs that are and ought to be criminal. Why, then, do many of those who commit civil wrongs not deserve state punishment?"[240]

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[234] J Hall, "Interrelations of criminal law and torts: I" (1943) 43 Columbia Law Review 753 at 756.
[235] J Chalmers and F Leverick, "Scotland: twice as much criminal law as England?" (2013) 17 Edinburgh Law Review 376 at 380.
[236] Hart Jr (n 33) at 417.
[237] Walker, *Delict* (n 2) 17.
[238] Particularly intentional delicts: see Blackie and Chalmers (n 3) at 286.
[239] Hall (n 234) at 779.
[240] D N Husak, *Overcriminalization: The Limits of the Criminal Law* (2007) 137. See also Duff and Marshall's comment that "it is certainly not in general the case that the wrongs which our existing law counts as crimes are typically more serious than those which count as torts": R A Duff and S E Marshall, "Criminalization and sharing wrongs" (1998) 11 Canadian Journal of Law and Jurisprudence 7 at 8.

Thus, the distinction between the two species of wrongs cannot *solely* be explained by the gravity of the wrong.[241] Where differences may be encountered are not so much in the types of interests that each body of law protects, but in the legal rules themselves. Even where conduct is both a crime and a delict, the legal requirements and the substance of the wrongs are likely to differ. This is particularly so in respect of the mental elements required. A criminal wrong generally requires intention or recklessness. As Feinberg states:

> "the criminal law system is the primary instrumentality for preventing people from intentionally or recklessly harming one another. Acts of harming then are the direct objects of the criminal law, not simply states of harm as such".[242]

Intentional conduct may be viewed as more culpable as the wrongdoer has set out to cause harm to another's interest(s); in general terms, that is their purpose. Recklessness is different insofar as the wrongdoer has not purposefully sought to cause harm, but can be explained by the degree of disregard shown to others: "if an individual knowingly takes a risk of a kind which the community condemns as plainly unjustifiable, then he is morally blameworthy and can properly be adjudged a criminal".[243]

It may therefore be said that criminal wrongdoers are of greater culpability than civil wrongdoers (albeit this is a sweeping generalisation). However, in some cases – mainly in respect of statutory wrongs – negligence or even strict liability may be sufficient to attract criminal liability.[244] Why is this the case? This is usually because the rationale for the criminal offence in question is to guide or regulate behaviour. Aside from the debate as to whether such criminal offences are "true" crimes or merely technical offences,[245] it is unclear in such instances

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[241] See Stevens' comment that any distinction between these wrongs "is not based upon their differing degrees of seriousness or gravity as is sometimes assumed…[a]ll the most serious crimes are simultaneously torts, whilst minor offences are not necessarily so". R Stevens, "Private rights and public wrongs" in M Dyson (ed), *Unravelling Tort and Crime* (2014) 111 at 114.
[242] J Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others* (1987) 31.
[243] Hart Jr (n 33) at 416.
[244] Walker, *Delict* (n 2) 16.
[245] See Gordon, *Criminal Law* (n 8) 11, 12.

whether the criminal law is the appropriate tool for regulating such conduct.[246] It is arguable that such actors – by virtue of their reduced culpability – ought not to be the subject of punishment and condemnation by the state and wider community. However, Hart Jr explains the rationale for the criminalisation of negligent conduct as being justified "not on the ground that violators can be said to be individually blameworthy, but on the ground that the threat of such punishment will help to teach people generally to be more careful".[247] Thus, there is a strong deterrence-based rationale for such regulation.[248] Moreover, the majority of these offences are aimed at individuals acting in a particular capacity (e.g. in the course of a business) rather than the public at large. In this context, regulatory offences have been described as those "dealing with some kind of specialised activity (such as driving, manufacturing, etc) rather than governing interpersonal relations more generally".[249]

Finally, as explained above, the terminology used in criminal and civil procedure differs. The social impact of this has already been considered. However, in a legal context, the problem in relation to wrongs is that different terminology may be used, but that the same terms may be capable of conflicting meanings. Using assault as an example, Horder states that notwithstanding that this is a civil wrong as well as a criminal one, special meaning may be given to the term in a criminal context that may not be appropriate in a civil one.[250] This is in contrast to wider issues of classification, which he argues are unlikely to differ from criminal wrongs to civil wrongs.[251] Walker – similarly referring to assault[252] – states that "the one term does not in such a case necessarily have

[246] Consultation Paper on *Criminal Law in Regulatory Contexts* (Law Com No 195, 2010).
[247] Hart Jr (n 33) at 417.
[248] R Williams, "Criminal law in England and Wales: just another form of regulatory tool" in M Dyson and B Vogel (eds), *The Limits of the Criminal Law* (2018) 207 at 210.
[249] ibid at 209.
[250] J Horder, "The classification of crimes and the special part of the criminal law" in R A Duff and S P Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (2005) 21 at 24.
[251] ibid.
[252] Blackie (n 38) at 368 for an overview of the differences between the crime and delict of assault.

exactly the same connotation in the two spheres of law".[253] He goes on to explain in a separate work that:

> "The legal concept involved, such as conspiracy or fraud, may bear the same meaning in both the sets of principles involved, or it may bear quite materially different meanings in those sets of principles. It is dangerous to think of such concepts as having a single connotation, or to cite civil precedents in a criminal case or conversely".[254]

It is perhaps unsurprising in the context of Scots law that "conscious contrast with concepts of conduct in civil law is rare in criminal cases, and absent in civil cases".[255] Thus, while it has been shown that there is clearly some overlap in terms of the wrongs (particularly intentional wrongs) that criminal law and delict respond to, significant separation remains between the substance of these wrongs in each system, and consequently to the given law's response.

5.6 Outcomes/Disposals

Nowhere are the differences between criminal and civil actions more prominent than in the respective outcomes of judicial proceedings. While criminal cases result in the accused being either acquitted or convicted, in civil cases an action is either won by the pursuer or is dismissed. Where the accused is convicted in a criminal trial, the case will be disposed of by way of sentencing. By contrast, in a civil action, the court will make an order after finding in favour of a pursuer. These respective outcomes reflect the differing aims of the two systems. Criminal sanctions (sentences) are typically more punitive (e.g. imprisonment, community sanctions, fines), whereas civil remedies seek to compensate the pursuer for the loss they have suffered (usually by way of damages).

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[253] Walker, *Delict* (n 2) 15.
[254] Walker, "The interactions of obligations and crime" (n 202) at 32.
[255] Blackie (n 38) at 364.

While punishment is a key feature of the criminal law,[256] that is not to say in practice that criminal law is only concerned with punishment and the civil law is only concerned with compensation. Indeed, punishment "is not uniquely distinctive of the criminal law".[257] In the civil law there may be punishment through the imposition of punitive damages. However, such a practice is not part of Scots law.[258] Nor in the reverse is punishment a necessary consequence of criminal conviction. An absolute discharge,[259] conditional discharge, and admonition[260] are examples of sanctions under Scots law that do not entail punishment. These are orders made by a criminal court that recognise the wrongdoing of the accused, but for which punishment is not warranted. In the case of an absolute discharge, this is not treated as a "sentence", but is rather viewed as a disposal of a case in which the accused has pleaded guilty or been found guilty and where no further action is taken against the accused. The court may make such an order where "having regard to the circumstances including the nature of the offence and the character of the offender…it is inexpedient to inflict punishment".[261] This indicates that an absolute discharge is not intended to be a punishment. Furthermore, where an absolute discharge is made in summary proceedings, no conviction is recorded.[262] Even in cases where the accused is charged on indictment, this conviction "shall be deemed not to be a conviction for any purpose other than the purposes of the proceedings in which the order is made and of laying it before a court as a previous conviction in subsequent proceedings for another offence".[263] It therefore has neither the element of hardship or deprivation in terms of its consequences, nor the stigmatising effects,[264] that are viewed as being defining features of punishment. A conditional discharge is similar to an absolute discharge but provides that an accused will face no punishment on condition that they do not commit another

[256] See section 5.3.1(b).
[257] A P Simester and A T H Smith (eds), *Harm and Culpability* (1996) 4.
[258] Blackie and Chalmers (n 3) at 278, citing *Black v North British Railway Co* 1908 SC 444.
[259] Criminal Procedure (Scotland) Act 1995 s 246.
[260] ibid s 246(1).
[261] ibid s 246(2), (3). One important qualification is that an absolute discharge may only be made in respect of offences that do not have sentences fixed by law.
[262] ibid s 246(3).
[263] ibid s 247(1).
[264] As it is not recorded as a conviction in summary proceedings, and not treated as a conviction in solemn proceedings. As a result, there is no requirement to disclose an absolute discharge: see Rehabilitation of Offenders Act 1974 s5J(1)(a).

criminal offence within a specified time period. Consistent with its ordinary meaning, an admonition is essentially a warning given to the accused by the court "if it appears to meet the justice of the case".[265] In this case an accused is still said to be convicted and will have a criminal record.

Moreover, the criminal process allows for a compensation order to be made against a convicted person.[266] In practice, this may have little impact as it relies on the perpetrator having sufficient assets to provide meaningful compensation. It has also been suggested that there has been an unwillingness on the part of the courts to make a compensation order in cases where a custodial sentence is imposed.[267] This is despite section 24 of the Victims and Witnesses (Scotland) 2014 Act introducing a duty on the court to make a compensation order where it is competent to do so.[268]

At a macro level, the introduction of restitution orders[269] and victim surcharge orders[270] show some political willingness to provide more effective compensation through the criminal justice system. Unlike compensation orders, these orders are not intended to directly compensate individual victims of crimes.[271] They rather seek to provide funds to victim support organisations, who may in turn distribute these to victims and/or their families. These funds may then be used in order for the recipients to access support services. These exceptions, however, do not alter the fact that the criminal law primarily punishes wrongdoers, while the civil law primarily compensates the party that has suffered a loss.[272] By way of summary, "in crime, the award of

[265] 1995 Act s 246(1).
[266] ibid s 249, 250.
[267] Blackie and Chalmers (n 3) at 281, fn 92, citing C G B Nicholson, *Sentencing Law and Practice in Scotland* (1992, 2nd edn) para 10-54.
[268] Victims and Witnesses (Scotland) Act 2014 s 24 (amending the Criminal Procedure (Scotland) Act 1995 s 249).
[269] 1995 Act s 253A-253E. Restitution orders are only applicable where the offence is one under section 90 of the Police and Fire Reform (Scotland) Act 2012 ("assaulting or impeding police").
[270] 1995 Act s 253F-253J.
[271] In the case of victim surcharge orders, the court may not make an order if they additionally make a compensation order: 1995 Act s 253F(1)(b).
[272] A Y K Lee, "Public wrongs and the criminal law" (2015) 9 Criminal Law and Philosophy 155 at 163.

compensation is ancillary to the criminal process, whereas in tort it is normally its very object".[273]

Finally, there may be instances where the potential outcomes for one type of wrong do not match what the victim in the case is looking for. For example, even if successful following an action in delict after the death of a relative, the likely outcomes will still be financial. This may do little to help with the suffering caused to the family and may diminish the value of human life (in terms of how one quantifies what a human life is worth in monetary terms).[274] Instead, the victim's family may be looking for justice, for some form of punishment, or even an apology. On the other hand, a criminal trial may result in punishment of the offender, but this may do little in terms of compensating the victim in a case where they have suffered extensive financial loss.

5.7 Conclusion

This chapter has engaged with a number of areas relating to the conceptual and practical frameworks of both the criminal law and civil law. It has principally sought to identify and examine the fundamental differences between the two systems. Although greater attention has been paid to those features of the criminal law, this approach has been taken in order to frame the argument regarding the criminal law's role in responding to wrongs violating privacy and reputation interests.

Taking the conceptual differences as the starting point, the chapter has illustrated the contrasting aims of criminal law and civil law. At a basic level, the aims of the criminal law have been shown to be largely influenced by punishment, whereas the civil law's primary aim is indisputably to compensate individuals that have suffered wrongdoing. The ways in which these differing aims are reflected in criminal and civil procedure have been detailed.

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[273] Winfield and Jolowicz, *Tort* (n 11) para 1-003.
[274] Duff and Marshall, "Public and private wrongs" (n 198) at 80.

Building on the groundwork done here, the next chapter will turn towards substantive criminal law. It will outline the specific relationship between the criminal law and privacy and reputation interests before demonstrating the ways in which the criminal law currently protects these interests. It will be argued that it does so in a piecemeal and unsystematic manner. Part of the reason for this is that it is unclear whether certain offences may properly be rationalised as protecting privacy or reputation interests, or whether their protection is merely an unintended side-effect of a separate rationale.

Following this, it will be argued that privacy and reputation wrongs are indeed appropriate subjects for criminalisation, but that the current protection is incomplete and unprincipled. This argument will build on the foundations provided in this chapter setting out the key conceptual and practical differences between the two systems, and on the earlier discussion setting out the underlying value that these interests have.

PART 3

6. The Criminal Law's Protection of Privacy and Reputation Rights

6.1 Introduction

This chapter will consider the ways in which the criminal law currently protects privacy and reputation rights. This will be done by reference to offences that have historically been rationalised as protecting these interests and offences that traditionally have not been characterised in this way, but that it is argued involve *some* protection (even incidentally) of these interests.

It will be shown that there has been little by way of formal or academic organisation of offences according to these interests. The corollary of this is that there has been limited principled discussion of privacy and reputation as interests protected by the criminal law, nor of these interests forming the basis for the criminalisation of wrongful conduct.

In filling this gap in the literature, this chapter first aims to explain why it is important to offer an account of these offences. It will then identify the varying ways in which the criminal law interacts with privacy and reputation interests. This will be done at both a general level by analysing the respective treatment of privacy and reputation interests by the criminal law before assessing the ways in which individual criminal offences uphold these interests. This account is divided into three parts: offences protecting privacy, offences protecting reputation, and offences protecting both interests.

It will be argued that the criminal law's protection focuses primarily on violations of physical and informational privacy that occur in particular circumstances. It is these circumstances that appear to justify a criminal law response. Examples of this are where a physical privacy violation is of a sexual nature, involves threatening conduct, or where the information concerned is considered sufficiently sensitive to engage the criminal law. Offences such as voyeurism, the non-consensual distribution of intimate images, breach of the peace, stalking, extortion, as well as offences regulating electoral conduct, state secrets, data protection and investigatory powers illustrate this. As many of

these offences are statutory, they may be viewed as legislative responses to specific problems. There has consequently been little discussion of the ways in which the criminal law as a whole protects core privacy and reputation interests, something which this thesis seeks to address in Chapter 8.

6.2 Categorising offences

Offences may be categorised according to their nature or content. This may involve looking at the substantive conduct of the offence or the interest(s) that the offence protects. In terms of the latter,

> "legally protected interests, or virtues, are socially approved values and objects that are safeguarded by criminal law. Interests can be private or public and range from life, body and limb, sexual integrity and identity, privacy, personal data, property, national security, a country's monetary system, or health system, etc."[1]

While one is not likely to encounter much disagreement as to the typical offences against the person or dishonesty offences, there is also no statement in law of the offences that comprise each of these categories. Why is this the case? There are no formal offence categories in Scots law. Criminal offences may be common law or statutory, but beyond this there is no further formal categorisation. Despite this, offence categories are usually adopted by criminal law writers as a means of organising offences. This may be done in order to give structure to textbooks or for the purposes of analysing specific groups of offences.[2]

An exception to the lack of formal categorisation is in the case of unified statutory schemes, in which related offences may be contained in a single statute or set of statutes. Two notable examples of such schemes are sexual offences and road traffic offences. The former offences are primarily contained in the

[1] M Šepec, "Revenge pornography or non-consensual dissemination of sexually explicit material as a sexual offence or as a privacy violation offence" (2019) 13 International Journal of Cyber Criminology 418 at 422.
[2] P R Ferguson and C McDiarmid, *Scots Criminal Law: A Critical Analysis*, 2nd edn (2014) 37.

Sexual Offences (Scotland) Act 2009. Road traffic offences are contained in the Road Traffic Act 1988, with the Road Traffic Offenders Act 1988 providing rules relating to the prosecution and punishment of such offences.

Formal offence categories are more often found in systems with criminal codes. This may be regarded as the orthodox means through which the criminal law can be structured; this is typical not only in civil law systems, but also in common law ones. One such example is New Zealand, a common law system, which has an entirely codified system of criminal law. Criminal offences are set out in the Crimes Act 1961 and this statute is arranged into various parts according to the nature of the crime. In addition to there being conventional categories such as "crimes against the person",[3] "crimes against public order"[4] and "crimes against morality and decency, sexual crimes and crimes against public welfare" ,[5] there are also "crimes against personal privacy",[6] and previously "crimes against reputation".[7] That is not to say that there are no offences outside of these two specific categories that could be rationalised as protecting privacy and reputation interests. Rather, these are the offences that primarily do so, and which may be grouped together as a result of this common feature.

Similarly, the Criminal Code of Canada contains a distinct part called "invasion of privacy"[8] and includes express reference to reputation in its part called "offences against the person and reputation".[9] While this demonstrates a willingness to conceptualise offences according to these interests, in terms of substance, the "invasion of privacy" part only contains one offence of "interception of communications",[10] and the "offences against the person and reputation" part includes offences grouped under the single heading of "defamatory libel".[11]

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[3] Crimes Act 1961 (New Zealand) Part 5.
[4] ibid Part 8.
[5] ibid Part 7.
[6] ibid Part 9A.
[7] ibid Part 9. Repealed in 1993 by Defamation Act 1992 s 56(2).
[8] Criminal Code 1985 (Canada) Part VI.
[9] ibid Part VIII.
[10] ibid 1985 s 184.
[11] ibid s 297-316.

The Model Penal Code[12] has no specific part dealing with privacy or reputation offences, nor does the Draft Criminal Code for Scotland.[13] Moreover, even at an academic level there is limited recognition of a discrete category of offences protecting privacy or reputation.[14] Robinson does include a specific offence of "violation of privacy" in his draft code of the criminal law,[15] and Alldridge acknowledges that "there are offences that might be grouped together as 'offences against privacy'"[16] but does not elaborate on this.

Other categories of offence exist and are recognised academically, despite not being formally recognised or contained in a single statutory scheme. Ferguson and McDiarmid comment on the "common practice of textbook writers to divide crimes into those which are "against the interests of the person" and "against property interests".[17] Further specific examples include non-fatal, non-sexual offences against the person;[18] homicide offences; sexual offences; dishonesty offences; and offences against the state.[19] In terms of academic organisation, this practice is commonplace, particularly in works dealing with the "special part" of the criminal law.[20] The special part can be defined as covering doctrines applicable to individual crimes,[21] and Gardner states that it "supplies the details of particular criminal offences and arranges them into families".[22] What is meant by "families"? These are "offences gathered together according to the harm that was done, or more broadly the interest that was affected, by the crime".[23] There may be particular difficulties in effectively categorising

[12] American Law Institute, *Model Penal Code and Commentaries* (1985).
[13] E Clive, P Ferguson, C Gane and A McCall Smith, *A Draft Criminal Code for Scotland with Commentary* (published under the auspices of the Scottish Law Commission, 2003).
[14] A Roberts and M Richardson, "Privacy, punishment and private law" in E Bant, W Courtney, J Goudkamp and J M Paterson (eds), *Punishment and Private Law* (2021) 83 at 83.
[15] P H Robinson, *Structure and Function in Criminal Law* (1997), "Appendix A: Draft Code of Conduct, Section 8 (Violation of Privacy)".
[16] P Alldridge, "The public, the private and the significance of payments" in P Alldridge and C Brants (eds), *Personal Autonomy, the Private Sphere and Criminal Law: A Comparative Study* (2001) 79 at 83.
[17] Ferguson and McDiarmid, *Scots Criminal Law* (n 2) 37.
[18] J Horder, "Rethinking non-fatal offences against the person" (1994) 14 Oxford Journal of Legal Studies 355.
[19] G H Gordon, *The Criminal Law of Scotland: Vol 2*, 4th edn, by J Chalmers and F Leverick (2017); M D Dubber and T Hörnle (eds), *The Oxford Handbook of Criminal Law* (2014).
[20] G Williams, *Criminal Law: The General Part* (1953).
[21] A P Simester, *Fundamentals of Criminal Law: Responsibility, Culpability, and Wrongdoing* (2021) 13.
[22] J Gardner, "On the general part of the criminal law" in R A Duff (ed), *Philosophy and the Criminal Law: Principle and Critique* (1998) 205 at 205.
[23] ibid at 247.

offences in uncodified systems as a result of some offences protecting multiple interests and spanning a number of possible categories; such categorisation is generally "unsystematic, overlapping and non-exhaustive".[24]

Notwithstanding these potential issues, why does categorisation matter? Alldridge explains that:

> "Grouping offences in this manner is important because unless crimes are classified appropriately – that is, unless the exact wrong can be identified, which crimes it is like and which it is unlike – then, on a standard liberal account, it will be impossible to label, to compare or to sentence justifiably"[25]

Horder agrees that classifying crimes in different ways is important for the purposes of labelling and as a means of giving "salience to different kinds of moral distinction between them".[26] In addition, there may be practical reasons for classifying crimes in a certain way. This may be for "efficient drafting"[27] in order to group similar offences under the same statute,[28] for the purposes of organising and presenting crime statistics,[29] or because particular types of offences trigger specific requirements[30] or sentences.[31]

Why then is it important that we categorise offences by reference to privacy and reputation interests? First, because these offences – at least as a discrete category – appear to have been neglected by traditional criminal law scholarship. Secondly, in terms of publicity, categorisation better enables the public to determine whether conduct is criminal or not; when offences are

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[24] J Chalmers and F Leverick, "Fair labelling in criminal law" (2008) 71 Modern Law Review 217 at 222.
[25] Alldridge (n 16) at 80.
[26] J Horder, "The classification of crimes and the special part of the criminal law" in R A Duff and S P Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (2005) 21 at 21.
[27] Chalmers and Leverick (n 24) at 222.
[28] Horder (n 26) at 21.
[29] J Horder, *Ashworth's Principles of Criminal Law* 8th edn (2016) 43.
[30] E.g. where the accused is convicted of conduct that is deemed to be a sexual offence or where there is a "significant sexual aspect" to the conduct, they will be subject to the notification requirements contained in section 80 of the Sexual Offences Act 2003. See also Sexual Offences Act 2003, Schedule 3, para 60. This mechanism reflects the reality that it has not been possible to create an exhaustive list of sexual offences.
[31] Chalmers and Leverick (n 24) at 222.

grouped together it is easier to identify criminal conduct. Thirdly, doing so will allow for common themes and principles to be identified across the offences. In particular, it will enable us to assess whether the meanings and parameters of privacy and reputation interests in the criminal law are consistent with those in other areas of the law. Fourthly, this will provide a foundation from which we can question *why* certain types of privacy and reputation interests are protected by the criminal law (i.e. is the criminal law showing a propensity towards capturing specific types of privacy or reputation harms and wrongs?)

6.3 The relationship between crime and privacy

In order to address the questions posed above, the relationship between the criminal law and privacy will now be considered. The relationship is a complex one, not least because references to the term "private" or "privacy" may be encountered in varying contexts in criminal law texts.

In assessing the extent to which crime and privacy interact, the different ways in which privacy and crime come into contact with each other will be outlined. These may be referred to as different layers of privacy:

(a) Private v public wrongs (and the distinction between "private" and "privacy")
(b) Private sphere
(c) Protection of privacy rights

Let us begin by tackling the terminology. What is problematic here is that the terms "private" and "privacy" are being referred to in different contexts and do not necessarily have a shared meaning. In distinguishing between these relationships, it is important to remember that "private" is not the same as "privacy".[32] In examining this difference, each layer of privacy will now be considered in turn.

[32] As Hudson observes in stating that the ECHR does not provide a right to privacy as such, but rather that Article 8 guarantees a right to private and family life: see B Hudson, "Secrets of the

6.3.1 Private v public wrongs

As will be explained later in this thesis, at a broad level, the criminal law is generally only concerned with "public wrongs".[33] For present purposes, a criminal wrong may be said to be a public wrong that causes harm to the interest of another. It is a public wrong if it extends beyond merely the interest of the individual victim. In addition to causing harm to their interest, it must concern the community as a whole, so that we can be said to "share" in the wrong suffered by the individual. This not only enables the state to hold the wrongdoer to account, but it ensures that the wrongdoer answers publicly for their wrongdoing. "Private wrongs" are therefore either part of the civil law sphere,[34] or not legally recognised wrongs at all.[35] Thus, the criminal law is conveying a message that it is not concerned with those wrongs that *only* harm us as individuals.

The difficulty with this conception of wrongs is that a private wrong has little to do with privacy itself, nor with one's private life or sphere. In particular, it should be emphasised here that a *private* wrong is a term used in a normative sense to describe a non-criminal wrong, whereas a *privacy* wrong is a specific wrong in which an individual's privacy interest is violated. A privacy wrong may be either a public or private wrong. If a public wrong, then it is possible that it may be a criminal wrong, given that this public element is traditionally viewed as a minimum condition of criminalisation.[36]

6.3.2 Private sphere

Building on the treatment of privacy definitions earlier in the thesis, individuals may be said to have a "private sphere", which encompasses a number of privacy

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self: punishment and the right to privacy" in E Claes, R A Duff and S Gutwirth (eds), *Privacy and the Criminal Law* (2006) 137 at 139.

[33] See section 8.3.1(b).

[34] E.g. breach of a contract.

[35] E.g. infidelity. Although this conduct may have some legal consequences (e.g. as a ground for divorce: see Divorce (Scotland) Act 1976 s 1(2)(a)).

[36] It is acknowledged that this leads to the somewhat oxymoronic sounding statement that a privacy wrong may be a public wrong.

interests.[37] An analysis of the criminal law's interaction with this sphere will now be provided.

To begin with, privacy is at the heart of Mill's harm principle;[38] conduct between consenting parties in private is generally not within the scope of the criminal law, so long as no harm is caused (or no risk of harm is posed) to others.[39] This is a central feature of a liberal approach towards the criminal law.[40] Such an approach seeks to provide individuals with their own private sphere in which they can do what they want, provided of course that they do not cause harm to others. Privacy is protected under this model of criminal law as individuals are generally free to do as they please in private.

This principle was notably supported by the Wolfenden report,[41] which made recommendations in favour of decriminalising private, consensual homosexual conduct.[42] The report famously stated that "there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business".[43] What is meant by a "realm" of privacy morality or immorality? This appears to refer to the interests affected by certain conduct rather than the setting of the conduct. Thus, it has been suggested that this "does not refer to acts committed in a private setting (e.g. a bedroom), but rather to acts that despite their immorality do not imperil substantial legitimate public interests".[44] It is therefore possible that the private realm mentioned in the Wolfenden report is more closely aligned to the concept of public and private wrongs.

Relying on the harm principle, a number of writers believe that the criminal law has no place in regulating non-harmful conduct that occurs in an individual's private realm. Husak argues that "it is especially important to protect this realm [the private sphere] from interference through the criminal law".[45] McDiarmid and Ferguson refer to "private offences", which they

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[37] See the discussion of this in the context of Article 8 of the ECHR at section 7.2.1.
[38] See section 8.3.1(a).
[39] J S Mill, *On Liberty* (Cambridge University Press, 2012) 134, 135.
[40] Alldridge (n 16) at 81.
[41] Report of the Committee on Homosexual Offences and Prostitution (Cmnd 247: 1957).
[42] ibid para 62.
[43] ibid para 61.
[44] R P George, *Making Men Moral: Civil Liberties and Public Morality* (1995) 49, fn 4.
[45] D N Husak, "Does the state have a monopoly to punish crime?" in C Flanders and Z Hoskins (eds), *The New Philosophy of Criminal Law* (2016) 97 at 105.

suggest are synonymous with "victimless crimes". The latter is "so called because they (arguably) do not involve harm to anyone other than the actor (and some do not involve harm to the actor, either)".[46] Moreover, Duff and Marshall suggest that this is characteristic of a private wrong:

> "Some kinds of conduct belong in the private sphere, as matters of private life or private conscience on which I might accept advice or criticism from my friends or family, but in which the larger community to which I belong does not have the right to tell me what I ought to do".[47]

In contrast, legal moralism is less concerned with whether the conduct in question occurs in public or private, but rather whether it is morally wrong. Notwithstanding this, "most moralists would espouse the liberal view that for an act to be criminal it must have some external impact on the world".[48]

What else may be discerned from the criminal law's relationship with the private sphere? A distinction must be made between offences against privacy on the one hand, and offences that are only such because they take place in public (e.g. urinating or engaging in sexual activity in a public place).[49] Such acts are unproblematic in private, but otherwise criminal in public. While we may view these examples as being situations in which privacy is given weight by allowing individuals to carry out certain conduct in private (an entitlement to exercise privacy in a positive sense), it seems wrong to say that by being permitted to urinate or engage in consensual sexual conduct in our own homes we are being afforded privacy. The more logical way of rationalising these offences is by saying that it is the fact of these acts taking place in public that makes them wrongful. This is what transforms otherwise lawful private acts (e.g. urinating) into a criminal act. Thus, by engaging in certain activities in

[46] Ferguson and McDiarmid, *Scots Criminal Law* (n 2) 40.
[47] R A Duff and S E Marshall, "Criminalization and sharing wrongs" (1998) 11 Canadian Journal of Law and Jurisprudence 7 at 13-14.
[48] E Melissaris, "Theories of crime and punishment" in M D Dubber and T Hörnle (eds), *The Oxford Handbook of Criminal Law* (2014) 355 at 368.
[49] Alldridge (n 16) at 83.

public, there is the potential for public order to be disturbed or for offence to be caused to the wider public.[50]

Finally, the right to private and family life under Article 8 of the ECHR may place limitations on the reach of the criminal law. However, this clearly does not extend to committing criminal offences.[51] In such instances there is no reasonable expectation of privacy and criminal law trumps privacy law.[52] This has recently been affirmed by the Supreme Court in *Sutherland v HM Advocate*,[53] in which Lord Sales stated:

> "for the purposes of considering whether there is an interference with the rights of an individual to respect for his private life (and, in the present case, for his correspondence) under article 8(1), it is necessary that the activity of the individual should be capable of respect within the scheme of values which the ECHR exists to protect and promote".[54]

Lord Sales thereafter relied on the statement by Lord Clarke in *Re JR38* that "the criminal nature of what the appellant was doing was not an aspect of his private life that he was entitled to keep private".[55] This is because the conduct in question (sending sexually explicit message to children on an online dating application with the intention of arranging meetings with the children) was contrary to the guiding principles of Article 8.[56] In any event, even if the communications were capable of falling within the scope of Article 8, it could not be said that the appellant would have any reasonable expectation of privacy in respect of the communications.[57]

This discussion illustrates the interaction between the criminal law and an individual's private sphere. While individuals are evidently not at liberty to do completely as they please in their private sphere, they are nevertheless afforded

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[50] Home Office, *Setting the Boundaries: Reforming the Law on Sexual Offences* (2000) para 8.4.3.
[51] See *R v Brown* [1993] UKHL 19, [1994] 1 AC 212.
[52] W Lee, "Criminal acts, reasonable expectation of privacy, and the private/public split" in A E Cudd and M C Navin (eds), *Core Concepts and Contemporary Issues in Privacy* (2018) 251.
[53] *Sutherland v HM Advocate* [2020] UKSC 32.
[54] ibid per Lord Sales JSC at para 46.
[55] *Re JR38* [2016] AC 1131 per Lord Clarke JSC at para 112.
[56] R McPherson, "*Sutherland v HM Advocate*: the right to privacy, evidence gathering and the integrity of justice in a digital age" 2020 Juridical Review 104 at 106.
[57] *Sutherland* per Lord Sales JSC at para 31.

space to engage in activities. This is not a space in which the criminal law has no place, but rather, a higher threshold must be satisfied before the criminal law will interfere with an individual's private sphere. Such intervention is only justified where harm may be caused to others or where the private activities in question pose a threat to legitimate and substantial state interests.

To summarise, "there are crimes to defend a notion of privacy, to differentiate the circumstances in which behaviour is impermissible (public) and permissible (private), to prevent invasions of privacy".[58]

6.3.3 Protection of privacy rights

Having considered the relationship between the criminal law, "private wrongs" and "the private sphere", how then does the criminal law treat privacy *rights*? We may think of the relationship between privacy and the criminal law in two senses. The first of these is as a "right to be protected by the criminal law", and the second as a "constraint on the scope of the criminal law".[59] The former concerns the ways in which specific substantive offences protect privacy interests, while the latter acts as a constraint on state power and regulates the relationship between the state and its citizens.[60] Alldridge explains this distinction in terms of "invasion by prohibition" and "invasion by enforcement mechanism".[61] From this, it is further explained that:

> "the protection of privacy is just the sort of principle which might be regarded as of significance in the whole range of issues which fall for decision in the field of substantive and procedural criminal law. It might inform the development of the range of activities with which the criminal law can legitimately interfere, the ways in which those responsible for its enforcement may seek evidence, and the range of interests that substantive law should protect".[62]

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[58] P Alldridge, *Relocating Criminal Law* (2000) 130.
[59] S Marshall, "Private lives and public rules" in E Claes, R A Duff and S Gutwirth (eds), *Privacy and the Criminal Law* (2006) 33 at 33.
[60] ibid at 33-34.
[61] Alldridge, *Relocating Criminal Law* (n 58) 119.
[62] ibid 108.

Consistent with this, Roberts suggests that the criminal law's protection of privacy can be separated into three distinct categories: (i) "substantive criminal law", (ii) "criminal investigations, procedure and evidence", and (iii) "sentencing and the penal system".[63] This corresponds with Duff's division of the criminal law into (i) substantive criminal law", (ii) procedural criminal law, and (iii) penal criminal law.[64] The first of these principally concerns the protection of individual privacy rights, while the second and third concern the regulation of individuals by the state.

For the most part, these are examples of privacy being protected in a negative sense. The criminal law is protecting individuals from having their privacy rights violated, and this is significant as "privacy rights are a core principle of justice".[65] Indeed, in some cases, there may even be a positive obligation on the state to protect privacy rights under Article 8 of the ECHR.[66]

It has been said that "privacy language and arguments are rampant in criminal procedure".[67] As a result, "scholarly debate and legal development has focused primarily upon the protection of the privacy rights afforded to criminal defendants, rather than upon the privacy rights of victims of criminal activity".[68] This chapter is nevertheless concerned with the latter: in what ways does the substantive criminal law protect individual privacy rights?

6.4 Identifying privacy and reputation offences

This section will now show the extent to which privacy and reputation interests are protected through the substantive criminal law. Given that there is no

[63] P Roberts, "Privacy, autonomy and criminal justice rights: philosophical preliminaries", in P Alldridge and C Brants (eds), *Personal Autonomy, the Private Sphere and Criminal Law: A Comparative Study* (2001) 49 at 75.
[64] R A Duff, *The Realm of Criminal Law* (2018) 14.
[65] F E Raitt, "Disclosure of records and privacy rights in rape cases" (2011) 15 Edinburgh Law Review 33 at 43.
[66] A Ashworth, *Positive Obligations in Criminal Law* (2015) 198-200.
[67] W J Stuntz, "Privacy's problem and the law of criminal procedure" (1995) 93 Michigan Law Review 1016 at 1016.
[68] L E Rothenberg, "Re-thinking privacy: Peeping Toms, video voyeurs, and failure of the criminal law to recognize a reasonable expectation of privacy in the public space" (2000) 49 American University Law Review 1127 at 1139.

academic categorisation of these offences, this makes the task of identifying "privacy offences" and "reputation offences" a tricky one. Despite this, an attempt is made here to provide an account of offences protecting privacy and reputation in Scots law. This account comprises offences that in other academic works would be included within a different offence category.[69] Within commonly used offence categories, examples of offences protecting privacy or reputation may be found. Although this account seeks to be comprehensive, it is by no means intended to be an exhaustive account of criminal offences that in some way protect privacy and reputation interests. Such a task would be beyond the scope of this thesis, particularly as it would be insurmountable to even identify every single criminal offence in force.[70] This challenge is made more difficult by the sheer number of statutory offences[71] and, in particular, the wide array of offences created by secondary legislation.[72]

The selected offences will be arranged according to whether they protect privacy, reputation, or both. In some cases, the protection is more obvious than in others. In determining whether each offence can be rationalised as protecting privacy, reputation, or both, it will be questioned whether the underlying interest protected falls within the scope of privacy or reputation as set out earlier in this thesis: what are the harms of the offence and what is the nature of the interest being protected?

6.4.1 Offences protecting privacy

As has been stated earlier in this thesis, privacy may include informational privacy (including access to and control over this information) and physical or spatial privacy (including bodily and sexual privacy). The civil law has been

[69] See Gardner's comment that there is inevitably overlap among "families of offences": Gardner (n 22) at 205.
[70] J Chalmers and F Leverick, "Scotland: twice as much criminal law as England?" (2013) 17 Edinburgh Law Review 376 at 377.
[71] A number of which would be characterised as "*mala prohibita*" or regulatory offences.
[72] See also the observation by Chalmers and Leverick that "it is surprisingly difficult to identify accurately the number of offences created by a piece of legislation": J Chalmers and F Leverick, "Tracking the creation of criminal offences" [2013] Criminal Law Review 543 at 546. The analysis provided in this chapter will be limited to offences found in primary legislation.

shown to primarily protect informational privacy in Scots law through actions for breach of confidence and misuse of private information.[73] By contrast:

> "Traditionally, it [criminal law] has tended not to use the concept of privacy to articulate the harm it addresses. This is not to say that the criminal law is unconcerned with privacy. But in common law jurisdictions the protection it affords privacy is often implicit, and one of the consequences of this tendency is that interference with privacy that will have a significant effect on the autonomy of those who suffer it might fall outside the scope of the criminal law".[74]

Moreover, in the context of Scots law, it has been suggested that "existing avenues for privacy protection via the criminal law are limited".[75] This section will seek to map onto the relevant offences the specific type of private interest protected. Irrespective of whether commentators talk of "privacy offences", it is clear that – at least to some extent – "criminal law serves as a vehicle for the substantive protection of individual privacy".[76] What is perhaps less clear are the ways in which the criminal law does so and the types of interests it protects. To begin with, offences protecting privacy may be found to straddle different offence categories, such as "crimes that infringe generally upon person and property, or upon the public order",[77] or sexual offences. In addition to this, a distinction may be drawn between offences that directly protect privacy and those that indirectly (or even incidentally) protect it.[78] In drawing this distinction, it is necessary to question the rationale and primary purpose of the offence in question, both in terms of the wrongdoing it seeks to capture, and the harm(s) it seeks to prevent. From this, it will be questioned what aspects of privacy and reputation are protected through the relevant offence.

While the term "privacy offence" is rarely used, some indication of the legal mechanisms for protecting privacy in the UK is set out in the Investigatory

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[73] See the discussion in section 7.3.2.
[74] Roberts and Richardson (n 14) at 94.
[75] M A Hogg, "The very private life of the right to privacy" in *Privacy and Property*, Hume Papers on Public Policy, vol 2 no 3 (1994) 1 at 21.
[76] Rothenberg (n 68) at 1144.
[77] ibid at 1140.
[78] ibid.

Powers Act 2016. While this statute establishes a legal scheme applicable to a limited context (which will be considered further later in this chapter), it nevertheless acknowledges that:

> "Further protections for privacy…also exist –
>
> (i) by virtue of the Human Rights Act 1998,
>
> (ii) in section 170 of the Data Protection Act 2018 (unlawful obtaining etc of personal data),
>
> (iii) in section 48 of the Wireless Telegraphy Act 2006 (offence of interception or disclosure of messages),
>
> (iv) in sections 1 to 3A of the Computer Misuse Act 1990 (computer misuse offences),
>
> (v) in the common law offence of misconduct in public office, and
>
> (vi) elsewhere in the law".[79]

While this is helpful, point (vi) above clearly shows this to be a non-exhaustive list that focuses primarily on criminal offences concerning informational privacy and the use of communications networks. Thus, the below analysis goes further than this and for the purposes of this thesis, those offences identified as protecting privacy are voyeurism, contempt of court, stalking/harassment, and trespass; as well as statutory offences under the Official Secrets Act 1989, the Computer Misuse Act 1990, the Regulation of Investigatory Powers Act 2000, the Investigatory Powers Act 2016, the Communications Act 2003, the Wireless Telegraphy Act 2006, the Data Protection Act 2018, and the General Data Protection Regulation.

(a) Voyeurism

A voyeurism offence was introduced as part of wholesale reform of sexual offence laws in Scotland.[80] There had been previous support for the introduction

[79] Investigatory Powers Act 2016 s 1(5).
[80] Sexual Offences (Scotland) Act 2009.

of a voyeurism (or similar) offence. The Younger Committee Report previously proposed a criminal offence of "surreptitious surveillance".[81] Although surveillance may give connotations of intrusion by public bodies, the Younger Committee was limited to privacy intrusions by private individuals.[82] Similarly, the Calcutt Report recommended the introduction of three criminal offences related to physical intrusion (entering private property, placing a surveillance device on private property, and taking a photograph or recording the voice of an individual on private property) but only where this conduct was done in order to obtain private information with a view to publishing this.[83]

In the Home Office's report on reforms to sexual offences in England and Wales, they noted that voyeurism

> "is not an offence which would be intended to create any kind of right to privacy but to protect people going about their ordinary lives from unwanted and unacceptable intrusion. However we also recognised the risk that a broader offence, without a requirement for the observation to be done for sexual purposes, could intrude into the work of a free press, which was not our intent".[84]

Technological advancements have allowed for voyeuristic conduct to grow in scale and become more pervasive as new methods of perpetration emerge,[85] and the need for a discrete offence became increasingly pressing. As well as "real-time" voyeurism, there is the opportunity to secretly record individuals through remotely accessed devices and hidden cameras.[86]

At a general level, Scots law voyeurism offence criminalises the viewing or recording of another person doing a "private act" without that person's

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[81] Report of the Committee on Privacy (Cmnd 5012: 1972)
[82] R J Krotoszynski Jr, *Privacy Revisited: A Global Perspective on the Right to be Left Alone* (2016) 121.
[83] Report of the Committee on Privacy and Related Matters (Cmnd 1102: 1990) para 6.33.
[84] Home Office, *Setting the Boundaries: Reforming the Law on Sexual Offences* (2000) para 8.3.10.
[85] A A Gillespie, 'Up-skirts' and 'down-blouses': voyeurism and the law" [2008] Criminal Law Review 370 at 370.
[86] P M Garry, "The erosion of common law privacy and defamation: reconsidering the law's balancing of speech, privacy, and reputation" (2020) 65 Wayne Law Review 279 at 282.

consent.[87] What do we mean by a "private act"? First, the complainer must be in a place "which in the circumstances would reasonably be expected to provide privacy".[88] Secondly, either (i) the complainer's genitals, buttocks or breasts must be exposed or covered solely with underwear, (ii) the complainer must be using a lavatory, or (iii) must be engaging in a sexual act not ordinarily done in public.[89] In the equivalent offence under English law, "breasts" have been interpreted by the court as referring only to a female's chest.[90] This has been described by Ferguson and McDiarmid as a "regrettable interpretation".[91] To illustrate this, they provide the example of a clandestine recording being made in a swimming pool shower of a 10 year old boy who is naked from the waist up.[92] In terms of privacy, this wrongdoing goes to the heart of intrusion and unwanted access. It is nevertheless narrower than what one might intuitively think of as "private", and the definition is much more closely aligned with intimacy and sexual autonomy.

In addition to this requirement, the mens rea of the offence requires the accused to have acted with the intention of obtaining sexual gratification or to humiliate, distress or alarm the complainer,[93] which will be considered further below.

What then is the basis for this offence? The editors of the most recent edition of *Gordon* suggest that irs rationale "has never been properly discussed or articulated"[94] and question whether it is "designed to protect certain limited aspects of B's privacy from intentional intrusion (in which case A's motive may be irrelevant) or…encompass only those persons who act with certain lewd motives (and may perhaps be liable to commit more serious sexual offences)".[95]

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[87] 2009 Act s 9.
[88] ibid s 10(1).
[89] ibid.
[90] *R v Bassett* [2009] 1 WLR 1032.
[91] Ferguson and McDiarmid, *Scots Criminal Law* (n 2) 333.
[92] ibid.
[93] 2009 Act s 9(6), (7).
[94] G H Gordon, *The Criminal Law of Scotland: Vol 2*, 4th edn, by J Chalmers and F Leverick (2017) para 39.38.
[95] ibid.

A distinction may therefore be drawn between voyeurism as an offence premised on the invasion of one's privacy, or in a narrower sense about violating one's sexual autonomy.[96]

> "It might be that an offence of voyeurism should aim to catch only those who act with certain lewd motives, partly because behaving in such a fashion is believed to be associated with more serious sexual offending. Alternatively, perhaps individuals are entitled to a high degree of privacy in respect of certain parts of their anatomy, bodily functions or sexual activities, and invasion of that privacy, regardless of motive, is something which should be criminalised".[97]

This shows that the offence is not simply concerned with privacy. While the non-consensual viewing or recording may be viewed as a violation of one's privacy, the offence is framed more narrowly than this and may be characterised as a sexual offence. However, unlike other sexual offences, the key differentiating feature is that the act being viewed is a private one. Despite the requirement of the victim doing a private act, the offence itself can be committed outside a private setting. As such, voyeurism may be committed in a public place, such as a changing room or a beach. What is key is that the victim has a "reasonable expectation of privacy".[98] This mirrors the language of the test for the civil wrong of misuse of private information.[99] Thus, notwithstanding that this may be regarded as a "sexual offence",[100] the violation of an individual's right to privacy is evident.

What then is the nature of the privacy interest protected? This falls within the category of privacy wrongs of "seclusion from intrusion". More specifically, it also concerns sexual privacy, although it is important to distinguish between a *sexual* act and a *private* act.

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[96] S P Green, "To see and be seen: reconstructing the law of voyeurism and exhibitionism" (2018) 55 American Criminal Law Review 203.
[97] J Chalmers, "Two problems in the Sexual Offences (Scotland) Bill" 2009 Scottish Criminal Law 553 at 555.
[98] 2009 Act s 10(1).
[99] See section 7.3.2.
[100] Cf the offence in English law, which requires that the perpetrator acts "for the purpose of obtaining sexual gratification": Sexual Offences Act 2003 s 67(1)(a).

Green asks the key questions here: "why do we punish voyeurism but not most other kinds of privacy violations?"[101] Clearly the nature of the privacy invasion is key here. One group of authors has sought to characterise voyeurism as "non-consensual visual observation".[102] In the criminal context, the authors draw a distinction between "voyeurism-related crimes" and "intrusion-related crimes".[103] The former are (rather crudely) described as being "largely sexual in character and often containing an element of nudity", while the latter are "where observation occurs in circumstances that imply a privacy intrusion, e.g., inside dwellings, and that do not necessarily include elements related to nudity or sex".[104] The Scots law offence more readily falls into the former category and cannot be viewed as a general offence against intrusive observation. This is not necessarily a shortcoming of the voyeurism offence itself, but is something that would benefit from legal regulation.

Furthermore, there is no requirement that the victim had knowledge of the voyeuristic conduct.[105] This furthers supports the idea that the offence may be premised on the need to protect the victim's physical privacy. It is the violation of privacy per se that is significant, not the impact on the victim. There is no need for the prosecution to demonstrate any type of harm to the complainer: the harm is the infringement of their privacy.

It has been shown that voyeurism is an offence that can be rationalised on the basis of protecting personal privacy. It falls into the category of "intrusion" as a violation of the victim's physical privacy. This is because it criminalises the non-consensual viewing of an individual doing a "private act", albeit that the

[101] Green (n 96) at 214.
[102] B-J Koops, B C Newell, A Roberts, I Skorvainek, and M Galič, "The reasonableness of remaining unobserved: a comparative analysis of visual surveillance and voyeurism in criminal law" (2018) 43 Law & Social Inquiry 1210 at 1211-1212.
[103] ibid at 1213.
[104] ibid.
[105] For example, it would still be an offence where the perpetrator installs a hidden camera in a changing room and records people getting changed, even if the individuals recorded are unaware of this.

scope of this is somewhat prescribed by the legislation. This limited interpretation of "private act" therefore restricts the ambit of the privacy protection to sexual privacy or (intimate) bodily privacy and does not extend to unwanted surveillance of itself.

(b) Contempt of court

The offence of contempt of court covers a variety of conduct and, to an extent, demonstrates some overlap between the protection of privacy rights by substantive criminal law and in the criminal process. It is described in *Gordon* as *sui generis* and not in itself a crime.[106] However, it is punishable by the court through imprisonment or a fine.[107]

Contempt of court can be viewed as playing a role in safeguarding informational privacy. This is the case at both common law and in the Contempt of Court Act 1981. Under the 1981 Act, it is contempt of court to "obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings".[108]

The Judicial Proceedings (Regulation of Reports) Act 1926 further provides that:

> "It shall not be lawful to print or publish, or cause or procure to be printed or published – (a) in relation to any judicial proceedings any indecent matter or indecent medical, surgical or physiological details being matters or details the publication of which would be calculated to injure public morals".[109]

Despite references to highly private and sensitive material, it is suggested in *Gordon* that this provision seeks "to prevent injury to public morals, rather than

[106] Gordon, *Criminal Law: Vol 2* (n 19) para 58.01.
[107] ibid.
[108] Contempt of Court Act 1981 s 8(1).
[109] Judicial Proceedings (Regulation of Reports) Act 1926 s 1(a).

to protect the privacy of the parties to a case".[110] In particular, this is supported by the requirement that the information disclosed "would be calculated to injure public morals", rather than there being any reference to the harm posed to the individual whose privacy is infringed.

The offence nevertheless highlights the relationship between privacy and democracy, the value of which was explained earlier.[111] Privacy in court proceedings is upheld and protected through the coercive muscle of the criminal law because of what is at stake: the efficient and legitimate functioning of judicial institutions. Parallels may be seen between this, electoral offences, offences relating to the Official Secrets Act 1989, and offences under the Investigatory Powers regime, all of which similarly concern the secrecy of private information as a means of maintaining integrity in fundamental democratic practices.

(c) Stalking and harassment

A statutory offence of stalking was introduced[112] in response to growing concerns that such conduct was not suitably captured by existing offences (e.g. breach of the peace),[113] both from a labelling perspective and in terms of sentencing.[114]

For liability to arise, the perpetrator must engage in a course of conduct that causes the victim to suffer fear or alarm,[115] and the conduct must be carried out either with the intention of causing this harm,[116] or where in all the circumstances the perpetrator ought to have known that this would have this effect (essentially recklessness).[117] This is therefore a subjective test. This is in

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[110] Gordon, *Criminal Law: Vol 2* (n 19) para 58.25, citing *Re Guardian News and Media Ltd* [2010] 2 AC 697 at para 24.
[111] See section 2.2.1.
[112] Criminal Justice and Licensing (Scotland) Act 2010 s 39.
[113] S Middlemiss, "The new law of stalking in Scotland, too little too late?" (2010) 4 Juridical Review 297 at 297. See also section 6.4.3(c) below on the offences of breach of the peace and causing fear and alarm.
[114] Gordon, *Criminal Law: Vol 2* (n 19) para 48.16.
[115] 2010 Act s 39(2)
[116] ibid s 39(3).
[117] ibid s 39(4).

contrast to the objective test found in section 38 of the 2010 Act,[118] which provides that liability may arise so long as the conduct would have been likely to cause a reasonable person to suffer fear and alarm.

What types of acts might be captured by the stalking offence? A non-exhaustive list is provided in the legislation.[119] Much of the wrong of stalking can be derived from the "intrusion of privacy and personal autonomy"[120] and the offence constitutes an interference with an individual's personal, territorial, and informational privacy. This is reflected in the types of conduct listed in the offence provisions.[121] There is clearly a great deal of overlap between these. Stalking may pose a threat to an individual's physical and spatial privacy. Examples of the former include following B, contacting or attempting to contact B, loitering in any place (public or private), leaving something for B, while examples of the latter include entering premises, spying or monitoring communications/devices, interfering with property belonging to B, watching or spying on B. In addition to these, publishing a statement or information about B represents a violation of informational privacy. In such cases, concurrent liability may arise under the law of delict for the misuse of private information.[122]

Finally, harassment may seem similar to stalking yet is part of the civil law.[123] As with other civil wrongs, victims are required to take action against the wrongdoer themselves. Liability arises where "(a) the court is satisfied that the conduct is intended to amount to harassment of that person; or (b) occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person".[124] It is expressly provided in the legislation that "harassment" includes causing the person fear or alarm.[125] The rationale similarly appears to be the protection of personal and territorial

[118] ibid s 38.
[119] ibid s 39(6).
[120] Gordon, *Criminal Law: Vol 2* (n 19) para 48.16.
[121] 2010 Act s 39(6).
[122] See section 7.3.2.
[123] Protection from Harassment Act 1997 s 8(2). Cf. s 2, which creates a criminal offence in English law for broadly similar conduct.
[124] ibid s 8(1).
[125] ibid s 8(3).

privacy, as well as safeguarding the victim from mental trauma (e.g. fear and alarm, distress, concern for their personal safety). However, as with stalking, securing a non-harassment order is dependent on proof of a course of wrongful conduct so does not concern individual privacy violations, regardless of how serious this is.[126] It has nevertheless been acknowledged that this "provides some legislative protection against invasions of privacy by intrusion into seclusion".[127]

The pursuer may seek damages, interdict (or interim interdict), or a non-harassment order.[128] Damages may be awarded for both financial loss and anxiety suffered by the victim.[129] While damages and interdict are conventional civil law remedies, it is important to note that criminal liability for may arise where there is a breach of a non-harassment order.[130] Although this mixed civil and criminal response places an initial burden on the victim by having to pursue a civil remedy, securing a non-harassment order is a powerful shield, which is intended to have a strong deterrent effect on the harasser. Where this fails to have the desired impact, then the wrongdoer will face criminal sanctions. Moreover, the availability of this remedy does not preclude the pursuer from obtaining damages.[131]

This shows that there are offences that may capture various types of physical and informational privacy violations. However, these are specifically targeted towards (i) multiple instances of conduct, (ii) the impact of this on the victim (suffering from fear or alarm), and (iii) the intentions of the wrongdoer. The focus is not so much on privacy as it is on the persistent targeting of the victim as the subject of unwanted attention. There are many examples of privacy violations where stalking or harassment would not recognise the victims' experiences nor reflect the actions of the wrongdoer, most notably where the

[126] ibid s 8(1). The position is different in respect of harassment amounting to domestic abuse: s 8A.
[127] Report on *Serious Invasions of Privacy in the Digital Era* (Australian Law Reform Commission Report 123, 2014) para 5.32.
[128] 1997 Act s 8(5).
[129] ibid s 8(6).
[130] ibid s 9(1).
[131] Although the court cannot grant an interdict or interim interdict alongside a non-harassment order: see ibid s 5(b)(ii).

conduct is isolated (or targets multiple individuals) and where the victims do not suffer from fear or alarm.

(d) Trespass

Offences relating to trespass are somewhat piecemeal in Scots law. Although several offences exist, there is no single common law offence of trespass.[132] The different offences will firstly be set out, before considering the extent to which each offence may be rationalised on the basis of protecting the privacy interest of another.

(i) Trespass on heritage

The primary trespass offence is a statutory one and is found in section 3 of the Trespass (Scotland) Act 1865. This provides that:

> "Every person who lodges in any premises, or occupies or encamps on any land, being private property, without the consent and permission of the owner or legal occupier of such premises or land, and every person who encamps or lights a fire on or near any road or enclosed or cultivated land, or in or near any plantation, without the consent and permission of the owner or legal occupier of such road, land, or plantation, shall be guilty of an offence."[133]

Section 2 defines premises as "any house, barn, stable, shed, loft, granary, outhouse, garden, stackyard, court, close, or inclosed [sic] space".[134]

While this wrongdoing primarily represents an interference with an individual's property rights, there is a privacy dimension here. This offence may be premised on the idea that an individual is entitled to respect for their

[132] Gordon, *Criminal Law: Vol 2* (n 19) para 22.39.
[133] Trespass (Scotland) Act 1865 s 3(1). This does not cover any "exercise of access rights" by a person under the Land Reform (Scotland) Act 2003: see 1865 Act s 3(2).
[134] 1865 Act s 2.

territorial privacy (or what may be termed a right to "seclusion from intrusion") by not having others enter their land or premises. However, the language of "lodge", "occupy" and "encamp" suggests a degree of permanent intrusion that limits the scope of the offence to such cases.[135]

Moreover, privacy is by no means absolute in this context and a property owner does not have an unlimited right to seclusion. Any right to seclusion is weighted against rights afforded to others under property law, such as servitudes granting rights of access over land and public access "roaming" rights under the Land Reform (Scotland) Act 2003.

(ii) Aggravated trespass

A second trespass offence is aggravated trespass under section 68 of the Criminal Justice and Public Order Act 1994. As is clear from the offence name, this offence criminalises conduct that goes beyond simply being on another person's land. It provides that an offence is committed where a person:

> "trespasses on land and, in relation to any lawful activity which persons are engaging in or are about to engage in on that or adjoining land, does there anything which is intended by him to have the effect—(a) of intimidating those persons or any of them so as to deter them or any of them from engaging in that activity, (b) of obstructing that activity, or (c) of disrupting that activity."[136]

If the previous trespass offence can be justified by reference to the landowner's property rights, this offence can be more obviously justified on this basis, given that the wrong does not simply involve occupying the land, but involves obstruction or disruption of the use of the property. This offence is accordingly less about privacy and more about one's right to uninterrupted use of their

[135] M A Hogg, "The very private life of the right to privacy" in Privacy and Property, Hume Papers on Public Policy, vol 2 no 3 (1994) 1 at 21.
[136] Criminal Justice and Public Order Act 1994 s 68(1).

property. Rather than protecting privacy, the offence protects the landowner's liberty by ensuring that they are free to use their property in a lawful manner.

Moreover, unlike the ordinary offence of trespass, this aggravated offence may be committed irrespective of whether the perpetrator is exercising access rights under the Land Reform (Scotland) Act 2003.[137]

(iii) Nominate trespass offences

Aside from these two offences, a range of statutory offences criminalise trespass in specific contexts.[138] These contexts include:[139] trespass on a railways,[140] ships,[141] aerodromes[142] and "protected Scottish sites".[143] These offences are less convincingly explained by reference to the protection of privacy interests. Given the different contexts in which trespass is criminalised, these offences appear more regulatory in nature. The rationale seems to be the twofold: the protection of (i) public welfare and (ii) state interests.

(e) Official Secrets Act 1989

As with some of the specific trespass offences outlined above, the rationales for offences under the Official Secrets Act 1989 seem to be the protection of state interests and privacy. Gordon's work positions discussion of these offences alongside treason, thereby highlighting the connection between these offences against the state.[144]

The offences in this Act cover the disclosure (or damaging disclosure)[145] of certain information, documents, or other articles by a set class of persons. To

[137] ibid s 68(1A).
[138] Gordon, *Criminal Law: Vol 2* (n 19) para 22.39.
[139] ibid.
[140] Railway Regulation Act 1840 s.16; Regulation of Railways Act 1868 s 23.
[141] Merchant Shipping Act 1995 s 103.
[142] Civil Aviation Act 1982 s 39.
[143] Serious Organised Crime and Police Act 2005 s 129.
[144] Gordon, *Criminal Law: Vol 2* (n 19) para 43.35.
[145] Official Secrets Act 1989 s 1(3), (4).

summarise, there are separate offences for the disclosure of information relating to security and intelligence,[146] matters of defence,[147] international relations,[148] or the furtherance of criminal offences.[149] While there are ancillary offences,[150] the ones referred to here are the most relevant to the present research.

There will inevitably be incidental violations of an individual's personal privacy where classified information is disclosed and at first glance the substance of these offences bears some resemblance to the delictual wrong of breach of confidence. Yet despite the non-consensual disclosure of private or confidential information, criminal liability arises here. As such, it is not that the information is private (or even confidential) that is key, but rather that the information may be deemed "classified" and may jeopardise national interests.

Liability turns on the status of the accused, whether or not the disclosure was "lawfully authorised", and the knowledge of the accused. The legislation distinguishes between members (or former member) of the security and intelligence service and Crown servants and government contractors. The former are held to a higher standard and are liable for unauthorised disclosures unless they can show that "at the time of the alleged offence, the defendant did not know, and had no reasonable cause to believe, that the information, article or document in question related to security or intelligence".[151] Crown servants and government contractors may be criminally liable for the same conduct but only where the disclosure is "damaging".[152] A damaging disclosure is defined as one which "causes damage to the work of, or of any part of, the security and intelligence services"[153] or would be likely to cause such damage.[154] It is a defence for the accused to show that they had no reasonable belief that the disclosure would be damaging.[155]

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[146] ibid s 1.
[147] ibid s 2.
[148] ibid s 3.
[149] ibid s 4.
[150] E.g. involving third party disclosure (s 5).
[151] 1989 Act s 1(5).
[152] ibid s 1(3).
[153] ibid s 1(4)(a).
[154] ibid s 1(4)(b).
[155] ibid s 1(5).

The offences in section 1 are largely mirrored in sections 2 and 3 in respect of information concerning matters of defence and international relations. However, there is no distinction drawn between the status of the discloser in these sections. The offences apply only to Crown servants and government contractors. As with section 1, it must be shown that the disclosure was made without lawful authority and was damaging.[156] This requirement further emphasises the primary purpose of the offences as being to protect state secrets and interests. The focus here is not simply on the wrongful act of the person disclosing the material, but on the impact that the disclosure may have and the discloser's knowledge of this.

(f) Computer Misuse Act 1990

The Computer Misuse Act 1990 introduced a number of criminal offences with "the intention of protecting the integrity and security of computer systems and data through criminalising access to them which has not been authorised by the owner of the system or data".[157]

The offence most relevant to the protection of privacy interests is that of "unauthorised access to computer material".[158] Other offences either relate to the physical damage or operation of the computer,[159] or to the commission of further offences.[160] Of these, the former offences seem more targeted at the damage caused to the computer itself and make no reference to the information stored on the computer. Thus, they appear to be more akin to property offences. The latter may more appropriately be characterised as preparatory offences, which are aimed at capturing conduct perpetrated with a view to committing a further offence.

The offence of unauthorised access to computer material is, however, a clear example of informational privacy being protected. The offence is primarily

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[156] ibid s 2(1), s 3(1).
[157] Home Office, *Review of the Computer Misuse Act 1990: Consultation and Response to the Call for Information* (2023) at 6.
[158] Computer Misuse Act 1990 s 1.
[159] ibid s 3, 3ZA.
[160] ibid s 2, 3A.

aimed at preventing information from being accessed, obtained and misused. The central wrong here is "hacking" and although the offence was introduced over 30 years ago, it has nevertheless become increasingly relevant as the threats posed to technological devices and data contained thereon have intensified.

(g) Communications offences

As with the previous offence, the offence under section 127 of the Communications Act 2003 relates to the use of technological devices. This offence criminalises the "improper use of public electronic communications network".[161] This is generally considered a "catch-all offence" that has attracted considerable commentary. As with breach of the peace, this offence has been used in various contexts, not all of which concern privacy or reputation interests. However, the wrongful conduct may pose a threat to privacy and reputation.

Section 127(1) provides that an offence is committed if a person "(a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or (b) causes any such message or matter to be so sent".[162]

The harm caused by offensive conduct is generally different to that caused by defamation as

> "a person may be defamed behind his back and thus harmed, because his interest in good reputation remains an important resource; this holds even if he is unaware that his good name is being denigrated. But he cannot be offended unawares".[163]

Secondly, under section 127(2), it is an offence if a person "for the purpose of causing annoyance, inconvenience or needless anxiety to another" does one of the following: "(a) sends by means of a public electronic communications network, a message that he knows to be false, (b) causes such a message to be

[161] Communications Act 2003 s 127.
[162] ibid s 127(1).
[163] A P Simester and A von Hirsch, *Crimes, Harms and Wrongs* (2011) 37.

sent; or (c) persistently makes use of a public electronic communications network".[164]

In addition to the offences under the 2003 Act, there is an offence of interception and disclosure of messages under section 48 of the Wireless Telegraphy Act 2006. This is a narrower offence than that under the 2003 Act in two senses. First, it specifically concerns the interception and disclosure of messages rather than the much broader "improper use" under the 2003 Act. Secondly, the messages must be intercepted via "wireless telegraphy apparatus". This offence clearly concerns informational privacy in terms of criminalising unjustified access to information that is intended to be kept private, as well as the disclosure of this unlawfully obtained information.

6.4.2 Offences protecting reputation

Unlike English law, Scots law has no real history of criminal libel (or defamatory libel).[165] The primary wrong against reputation is defamation, but this is a civil wrong. There are nevertheless some miscellaneous offences that may be viewed as protecting reputation. These are murmuring judges, threats (including hate speech), and offences relating to intellectual property.

(a) Murmuring judges

Murmuring (or slandering) judges is a historic, common law offence. References to this offence can be charted back as far as the institutional writers.[166] That this is an archaic offence is evidenced by the last reported prosecution being over 150 years ago.[167] The offence captures conduct beyond simply criticising the decision of a judicial official. Rather, it is stated in *Gordon* that comments will not be treated as criminal unless they "are clearly

[164] Communications Act 2003 s 127(2).
[165] This was abolished in England and Wales by the Coroners and Justice Act 2009 s 73.
[166] Hume, Vol 2, X, 71.
[167] *Alex Robertson* (1870) 1 Couper 404. See Gordon, *Criminal Law: Vol 2* (n 19) para 58.03.

disrespectful in their terms or are likely to interfere with the proper administration of justice".[168] Moreover, it seems to be the case that the slanderous statement must be somewhat related to the judge's decision in respect of the offender.[169] That is not to say that other slanderous or threatening communications would not be a criminal offence, for they may be treated as contempt of court or a criminal threat.[170]

To what extent can this offence be categorised as an offence against reputation? First, it is clear that the *actus reus* element (the making of the slanderous statement) has the potential to cause damage to the reputation of a judicial official. If malicious and unwarranted statements are permitted, this has the potential to lower the standing of judicial officials in the eyes of the community. But how does this differ from defamation? The additional harm here relates to public administration and the integrity of the justice system. The state has an interest in protecting its institutions from being destabilised as a result of such comments. This is what justifies the elevation of the defamatory statement from a civil wrong to a criminal wrong.[171] Not only is an individual harmed, but there is a wider harm to the state.

In addition, the focus here is not so much what is specifically said about the judge as a person. Rather, it is about the decision reached. It is as much a criticism of the judiciary as an institution as it is of the judge themselves.

How does this fit with the account of reputation provided earlier in this thesis? It is unlikely that there will be economic harm to the judge as a result of this conduct, yet it nevertheless has the potential to lower the standing of the judge and dishonour them. However, to summarise, the offence may be better characterised as an offence against public order or against the course of justice than as an offence concerned with reputation.

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[168] ibid Gordon para 58.03.
[169] ibid para 58.03, citing *Lord Advocate v John Hay* (1822) 1 S 288; *Lord Advocate v Jamieson* (1822) 1 S 285.
[170] ibid para 58.03.
[171] That is not to say that the two are mutually exclusive; a civil action for defamation could still be raised by an aggrieved judicial official.

(b) Threats (including hate speech)

Threats may have the potential to cause fear and alarm and accordingly may fall within the scope of breach of the peace or section 38 of the 2010 Act.[172] However, threats are also a criminal offence at common law. One such offence is a threat of a false accusation, which may have some impact on the standing of the victim. Smith suggests that "to be criminal a false accusation must impute crime or gross immorality to the victim".[173]

Moreover, there is a specific offence of stirring up hatred in Scotland.[174] This criminalises conduct that "a reasonable person would consider to be threatening, abusive or insulting"[175] or "communicates to another person material that a reasonable person would consider to be threatening, abusive or insulting"[176] where the actor intends to stir up hatred against a group of persons defined by reference to a protected characteristic[177] or (in respect of race only) a reasonable person would consider hatred likely to be stirred up by the communication.[178] These offences undoubtedly have the potential to cause harm to one's reputation. However, these can best be viewed as offences relating to public order and protecting an individual from threatening and abusive conduct.

(c) Intellectual property offences

There are a number of offences relating to intellectual property that could be viewed through the lens of reputation interests.[179] However, as explained in the previous chapter,[180] these specifically concern image rights. Given that image

[172] See section 6.4.3(c) below.
[173] T B Smith, *A Short Commentary on the Law of Scotland* (1962) 192.
[174] Hate Crime and Public Order (Scotland) Act 2021 s 4.
[175] ibid s 4(1)(a)(i).
[176] ibid s 4(1)(a)(ii).
[177] ibid s 4(1)(b)(i) and 4(2)(b).
[178] ibid s 4(1)(b)(ii).
[179] Copyright, Designs and Patents Act 1988; Trade Marks Act 1994; Registered Designs Act 1949
[180] See sections 7.3.3 and 7.3.4.

rights extend beyond the scope of privacy interests for the purposes of this thesis, these offences will not be considered in this chapter.

6.4.3 Offences protecting privacy and reputation

Those offences that may be viewed as protecting both privacy and reputation are extortion, the non-consensual distribution of intimate images, breach of the peace, causing fear and alarm, and electoral offences. These will now be considered.

(a) Extortion

Extortion has been described in Scots law as "the crime of obtaining money or any other advantage by threats, often known in non-technical language as blackmail".[181] This definition stems from the writings of Hume, who wrote that extortion may occur where there is a threat against an individual "unless something shall be done, or shall be desisted from".[182] As Scots law does not limit the nature of the demand issued by the perpetrator to the payment of money, extortion is far broader than its English counterpart blackmail, which requires a demand relating to a gain of money or other property, or for there to be a loss to the victim of money or other property.[183]

Given the breadth of the offence, it is helpful to set out the different forms that extortion may take. Feinberg outlines five categories of blackmail.[184] Although Feinberg refers to blackmail rather than extortion, his categorisation is premised on the nature of the threat, not the demand. This makes it equally applicable to the Scots law offence of extortion. The extent to which the offence harms an

[181] Gordon, *Criminal Law: Vol 2* (n 19) para 28.01.
[182] D Hume, *Commentaries on the Law of Scotland, Respecting Crimes*, 1st edn (1797, reprinted 1986) i, 439.
[183] Theft Act 1968 s 34(2): "'gain' or 'loss' are to be construed as extending only to gain or loss in money or other property but as extending to any such gain or loss whether temporary or permanent".
[184] J Feinberg, "The paradox of blackmail" (1998) 1 Ratio Juris 83.

individual's privacy or reputation interests is likely to differ depending on the type of extortion. Each will now be considered. The categories are:

(i) Threat to reveal criminal activity

A threat to reveal criminal information may involve the misuse of private information (that the victim has committed a crime). However, as explained earlier, this is not information that is legally protected as "private". While it may be "private" as a matter of fact, it is unlikely to attract legal protection.[185] Similar to this, an individual's reputation may be damaged as a result of the disclosure of this information, but this is not an unwarranted lowering in the individual's standing. This may be distinguished from situations where the threat is one to reveal false information.[186]

(ii) Threat to reveal immoral/unscrupulous activity

This category is similar to the first, but rather than the specific type of privacy in the first, this is much broader and encompasses unsavoury activity short of a criminal offence. There may also be a degree of overlap between this category and the third, insofar as it may be difficult to draw a clear distinction between immoral activity and embarrassing material.

(iii) Threat to reveal potentially (or subjectively) embarrassing material

Feinberg's third category is perhaps the broadest. This could encompass the threatened disclosure of an array of personal information. This may include – among others – information relating to the victim's medical records or sexual activities. Feinberg states that "threats in large part are threats to invade privacy and therefore to do something prohibited by law".[187] In some circumstances,

[185] See section 6.3.2.
[186] See category (v) below and section 6.4.2(b) on threats.
[187] Feinberg (n 184) at 91.

the threat itself may represent an independent criminal wrong. For example, a threat to disclose intimate images would be unlawful under section 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.[188]

(iv) Threat to reveal past mistakes of a currently reformed person

This type of extortion is closely connected to privacy. It goes to the heart of the issue about whether historic private information ought to be afforded distinct protection. The difficulty here is that the information that the blackmailer seeks to reveal is information that may be publicly available. Yet even this true information may be treated as a privacy violation or cause reputational harm. Thus, the question is whether the threatened disclosure of this information is wrongful or not.

Indeed, there are substantive offences that safeguard against unwarranted disclosure of an individual's criminal convictions, thereby showing the importance of the need to protect individual rights in such cases.[189] This recognises the need to protect the public and maintain the transparency of the justice system while "balancing the need for people to move on from offending".[190] If offenders who have served their sentences are continually associated with their historic offending, then how can they be expected to reintegrate in society and repair the damage done to their reputation? Limitations on what previous convictions must be disclosed, and after how long, are ways in which these concerns seek to be mitigated.[191]

[188] See section 6.4.3(b).
[189] Disclosure (Scotland) Act 2020 ss 41-45.
[190] Disclosure Scotland, *Implementing the Disclosure (Scotland) Act 2020*. Available at: https://www.disclosure.gov.scot/disclosure-act-summary.
[191] See the Rehabilitation of Offenders Act 1974 for an overview of these rules.

(v) Threats in any of the other categories to make accusations that are known to be false

This type of extortion is less likely to involve a breach of privacy, given that privacy principally concerns true information.[192] However, it may pose a serious threat to an individual's reputation. This is essentially a threat of making a defamatory statement as a means of coercing an individual but with the wrongdoer demonstrating a greater degree of culpability through their knowledge that the accusation is false.

The potential harms of extortion are summarised by Feinberg, who states that:

> "Extortionists (other types of extortionists) threaten bodily harm in the future, or harm to other parties, harm to property, or even harm to reputation through false accusations, all of which are independently prohibited by the criminal or civil law."[193]

This multifaceted nature is reflected in the varied positioning of extortion in various criminal law textbooks and codes,[194] with Chalmers stating that "the proper characterization of the offense is contested and it may not be possible to regard it as definitively falling within any particular grouping of offenses".[195] For present purposes, one rationale for an offence of extortion may be the protection of privacy.[196] Alldridge points to the absence of a general right to privacy or civil remedy (i.e. injunction) as explaining blackmail's importance.[197] Horder supports this by commenting that "many prosecutions concern the betrayal of threatened revelation of sexual secrets, so the rationale of the offence may also include the protection of certain forms of privacy".[198] Given that there are no limitations on the threat or demand, the case for this is

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[192] This is typically a key distinction between privacy and reputation wrongs: see section 2.6 and chapter 7 generally.
[193] Feinberg (n 184) at 84.
[194] J Chalmers, "Offences against the person" in M D Dubber and T Hörnle (eds), *The Oxford Handbook of Criminal Law* (2014) 727 at 742.
[195] ibid at 742-743.
[196] P Alldridge, "Attempted murder of the soul: blackmail, privacy and secrets" (1993) 13 Oxford Journal of Legal Studies 368 at 384.
[197] ibid.
[198] J Horder, *Ashworth's Principles of Criminal Law*, 8th edn (2016) 411.

even more compelling in Scots law; the victim may not only be threatened with violence, but instead may be threatened with the disclosure of their private information. It is this use of "coercive threats that constitutes the gravamen of the offence".[199] Lindgren suggests that "the most commonly prohibited threats are to injure person or property, to accuse another of a crime or to expose damaging information".[200] The latter two clearly have implications in terms of the victim's reputation and privacy respectively.

Moreover, the ways in which extortion may be perpetrated have evolved as a result of technological advancements:

> "Modern technology has created greater opportunities for blackmail…it may now be possible, whether or not legally, remotely to access sensitive information about someone that only personal knowledge of the individual would have revealed in the past".[201]

This has made it much easier for perpetrators to target individuals, communicate threats and demands, and to coerce and control victims. In addition to the evident informational privacy violations that a victim may suffer, the power that extortion gives wrongdoers over their victims represents a further privacy violation. Persistent and intrusive communications comprising threats and demands may entail unwanted access to the victim, whether this be online, at home or another location.

Thus, in addition to the harm caused as a result of being subject to threats, extortion may result in a violation of the victim's privacy and reputation where the perpetrator follows through with this threat. There are consequently two privacy elements to extortion: (i) the threat of disclosure of something private, and the (ii) actual disclosure of something private.[202] While the former may be

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[199] ibid 410.
[200] J Lindgren, "Unravelling the paradox of blackmail" (1984) 84 Columbia Law Review 670 at 673.
[201] Horder, *Ashworth's Principles* (n 198) 410.
[202] There may also be a preliminary wrong in acquiring private information to use for this purpose: see M Hepworth, *Blackmail* (1975) 73-77. Hepworth suggests that there are four types of blackmail based on the way in which the information is acquired: participant blackmail, opportunistic blackmail, commercial research blackmail, and entrepreneurial blackmail. Lindgren suggests that "fabricated blackmail" be added to this list: Lindgren (n 200) at 689, fn 102.

remedied through a civil law application for an interdict, the difference in an extortion context is that this threatened privacy violation is being used to coerce the victim into complying with the perpetrator's demand(s). In such cases, private information is being weaponised against the victim.

Even where the threatened disclosure or disclosure itself may not be a legal wrong, nor the demand (financial or otherwise), liability may still arise for extortion. It is for this reason that some authors refer to blackmail/extortion as a legal "paradox",[203] although Macdonald suggests that there is "a duty to prevent knaves from practising upon the fears of others, for gain to themselves".[204] It is less contentious to claim that this conduct should be criminal where there is no legal right in respect of the threat. Thus, cases where the extorter threatens to reveal something which they have no right to reveal should be treated as a criminal wrong. This is particularly so where the threat itself would represent an independent wrong, whether criminal (e.g. threatening to disclose intimate images of the victim) or civil (e.g. threatening to make a defamatory statement about the victim). However, and somewhat paradoxically, the fact that the wrongdoer approaches the victim gives the opportunity for the victim to preserve their privacy.[205]

> "It would be wrong to suggest that successful bargaining with a blackmail victim necessarily invades his privacy more than the release of secret information. Bargaining by itself would tend to increase, not decrease, the victim's ability to preserve his privacy.'"

It may therefore be argued that "if the protection of the victim's privacy is the key to blackmail, the concern of the law would be on the release of the information or, possibly, on the acquisition of the information, but not on bargaining with the blackmail victim to suppress the information".[206] But this does not mean that this is a lesser wrong than simply releasing the information, it rather signifies the extent to which the offence is justified by the coercive power that the wrongdoer exerts over the victim.

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[203] Horder, *Ashworth's Principles* (n 198) 410. See also Feinberg (n 184); Lindgren (n 200).
[204] J H A Macdonald, *A Practical Treatise on the Criminal Law of Scotland*, 2nd edn (1877) 177.
[205] Lindgren (n 200) at 691.
[206] ibid.

In any event, conceptualising privacy as a means of controlling information and access to oneself offers a more convincing justification for extortion being characterised as a privacy offence. Aside from whether the conduct criminalised by extortion is normatively justified or not, there seems little doubt that the existence of criminal liability involves at least some protection of privacy and reputation.

(b) Non-consensual distribution of intimate images

The offence of non-consensual distribution of intimate images[207] was introduced in Scotland in response to the growing problem of conduct colloquially (and misleadingly) known as "revenge porn."[208] It criminalises the disclosure (or threatened disclosure) of an intimate photograph or film.[209] This followed on from legislation introduced in England and Wales, which had already criminalised the non-consensual disclosure of intimate sexual images.[210]

The Scots law offence provisions refer to an intimate image as one which shows a person in an "intimate situation".[211] An intimate situation is defined as one in which:

> "(a) the person is engaging or participating in, or present during, an act which –
>
> (i) a reasonable person would consider to be a sexual act, and
>
> (ii) is not of a kind ordinarily done in public, or
>
> (b) the person's genitals, buttocks or breasts are exposed or covered only with underwear".[212]

[207] Abusive Behaviour and Sexual Harm (Scotland) Act 2016 s 2, 3, 4.
[208] This term has been heavily criticised by commentators: e.g. see C McGlynn and E Rackley, "Image-based sexual abuse" (2017) 37 Oxford Journal of Legal Studies 534 at 536. The term is too narrow and places undue emphasis on the motive of the wrongdoer (revenge) and the nature of the material (pornography).
[209] 2016 Act s 2(1)(a).
[210] Criminal Justice and Courts Act 2015 s 33.
[211] 2016 Act s 2(1)(a), s 3(1).
[212] ibid.

This language differs slightly from that used in the voyeurism offence, which refers to a "private act". The former seems to be narrower in scope, with "intimate" being more limited than "private". For example, "private images can have absolutely nothing to do with sexual exploitation or sexual abuse, and only affect the personal integrity, good name and honour of an individual".[213] Despite this, the very fact that the images must be of an intimate situation reinforce the idea that this goes to the heart of one's privacy rights, and particularly one's physical (including both bodily and sexual) privacy. In addition to this, the offence requires that the image or recording has "not previously been disclosed to the public at large",[214] which further supports the idea that there is clearly some protection of private material in this offence. The wrong is in disclosing material that one is entitled to keep private.

While this may result in a violation of one's privacy and feelings of shame or embarrassment, there is also the potential for reputational harm. Šepec refers to "the privacy and good name of the individual"[215] as possible rationales for the offence. Reputational harm may be particularly prominent where the intimate images/recordings are shared with those known to the victim, such as relatives, friends, neighbours or colleagues. As explained earlier in this work, the challenges victims face in either removing or stopping the spread of this material are considerable. Not only may it be difficult to know who the material has been shared with or where it has been posted, but in many cases the victims may feel like the damage has already been done. The material cannot be unseen by those who have viewed it, nor can the victim easily prevent subsequent dissemination of it. These harms underscore reputation's value in promoting one's dignity and honour, even if one does not necessarily suffer economic loss as a result of the conduct.

The offence requires that there be intention or recklessness on the part of the perpetrator as to whether the disclosure is likely to cause fear, distress or alarm.[216] This shows that in addition to the disclosure of intimate material, there

[213] Šepec (n 1) at 420.
[214] 2016 Act s 2(1)(c).
[215] Šepec (n 1) at 423.
[216] 2016 Act s 2(1)(b).

must be some element of fault on the part of the accused (i.e. this is not a strict liability offence).

(c) Breach of the peace and causing fear and alarm

The scope of breach of the peace in Scots law was historically broad[217] and until recently it "functioned more or less as a catch-all for every kind of disreputable conduct not covered by some other discrete offence".[218] It should therefore come as little surprise that this offence may play some role in protecting privacy and reputation interests.[219]

Notwithstanding its breadth, the parameters of the offence have gradually been limited to conduct that occurs in public,[220] or that has a realistic risk of being observed by a member of the public.[221] The test that was formulated in the leading case of *Smith v Donnelly*[222] is that the accused's conduct must be "severe enough to cause alarm to ordinary people and threaten serious disturbance to the community".[223] Following this, it was confirmed in *Paterson v HM Advocate*[224] (and later approved by a Full Bench in *Harris v HM Advocate*)[225] that *both* elements must be satisfied in order for liability to arise.[226] The former requirement ensures that only conduct that meets a sufficient level of seriousness attracts liability; the conduct must be genuinely alarming and not merely upsetting, annoying or disgusting.[227] The latter requirement of "threatening serious to the community" has presented problems in cases where conduct occurred in private and subsequent case law has struggled to consistently apply this test.[228]

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[217] *Smith v Donnelly* 2002 JC 65 at para 17.
[218] M Plaxton, "*Macdonald v HM Advocate*: privately breaching the peace" (2008) 12 Edinburgh Law Review 476 at 481.
[219] E C Reid, *The Law of Delict in Scotland* (2022) para 20.12; Hogg (n 135) at 22.
[220] *Harris v HM Advocate (No 1)* 2010 JC 245.
[221] *Smith v Donnelly* at para 20; *Jones v Carnegie* 2004 JC 136 at para 12.
[222] 2002 JC 65
[223] *Smith v Donnelly* per Lord Coulsfield at para 17.
[224] [2008] HCJAC 18.
[225] 2010 JC 245.
[226] *Paterson* at para 23.
[227] F Leverick, "Breach of the peace after *Smith v Donnelly*" 2011 Scots Law Times (News) 257 at 261.
[228] ibid at 258-259, 261.

To overcome this difficulty, a statutory alternative to breach of the peace was introduced. This is the offence of causing fear and alarm under section 38 of the Criminal Justice and Licensing (Scotland) Act 2010. It was intended that this offence would apply where the relevant conduct occurred in a private setting and there was no realistic risk that the conduct would be discovered by another individual. As with breach of the peace, there is no requirement of a course of conduct for liability to arise.[229] This consequently addresses isolated instances of conduct causing fear and alarm in a public or private setting.

Three elements must each be satisfied for liability to arise under section 38: the accused must behave in a threatening or abusive manner, be likely to cause a reasonable person to suffer fear or alarm, and intend or be reckless as to whether the conduct would cause fear or alarm.[230]

It should be noted that some conduct that was previously charged as breach of the peace may now be captured not only by this statutory offence, but also by others such as stalking or voyeurism.[231] An example of this is the case of *McDougall v Dochree*,[232] which concerned voyeuristic conduct.

Thus, the result of changes to the legal test for the offence and the introduction of other more targeted, statutory offences (e.g. causing fear and alarm; voyeurism) is that "breach of the peace can be reserved for clear cases of actual or threatened public disturbance, reverting to its origins as a public order offence".[233]

(d) Election offences

Finally, electoral offences may be viewed as having some bearing on privacy and reputation interests. The principle of a secret ballot is fundamental[234] and

[229] Criminal Justice and Licensing (Scotland) Act 2010 38(3).
[230] ibid 38(1).
[231] Sexual Offences (Scotland) Act 2009 s 9. See section 6.4.1(a) above.
[232] 1992 JC 154
[233] Leverick (n 227) at 262.
[234] See ECHR, Article 3 of Protocol No 1: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".

has been described as "the cornerstone of voting in the UK since 1872".[235] This principle is enshrined in section 66 of the Representation of the People Act 1983, which sets out a number of criminal offences related to elections. These offences may be divided into two categories: those that apply to a specified class of individuals (e.g. returning officers, presiding officers, clerks, candidates, election agents, polling agents),[236] and those that apply to the public at large.[237]

In terms of the former, there is a duty to "maintain and aid in maintaining the secrecy of voting"[238] and they are prohibited from communicating certain information before the poll closes (except where lawfully authorised to do so). The relevant information is "the name of any elector or proxy for an elector who has or has not applied for a ballot paper or voted at a polling station",[239] "the number on the register of electors of any elector who, or whose proxy, has or has not applied for a ballot paper or voted at a polling station",[240] or "the official mark".[241]

There is similarly a duty of maintaining secrecy in respect of persons present at the counting of votes.[242] It is an offence to "ascertain or attempt to ascertain at the counting of the votes the number or other unique identifying mark on the back of any ballot paper"[243] or to "communicate any information obtained at the counting of the votes as to the candidate for whom any vote is given on any particular ballot paper".[244]

There are offences that apply to everyone and these prohibit a person from interfering with a voter when they are casting their vote,[245] obtaining information about a candidate that a voter is voting for,[246] communicating this information to others,[247] or inducing a voter to display their ballot paper after it

[235] Report on *Electoral Law* (Law Com No 389; Scot Law Com No 256, 2020) para 5.2.
[236] Representation of the People Act 1983 s 66(1).
[237] ibid s 66(3).
[238] ibid s 66(1).
[239] ibid s 66(1)(d)(i).
[240] ibid s 66(1)(d)(ii).
[241] ibid s 66(1)(d)(iii).
[242] ibid s 66(2).
[243] ibid s 66(2)(a).
[244] ibid s 66(2)(b).
[245] ibid s 66(3)(a).
[246] ibid s 66(3)(b).
[247] ibid s 66(3)(c).

has been marked.[248] Moreover, there are specific rules relating to postal votes[249] and voting by proxy,[250] which prohibit the disclosure of who a voter has voted for.

These offences appear to be rooted in maintaining secrecy[251] and operate in addition to positive obligations requiring certain persons to "maintain and aid in maintaining the secrecy of voting".[252] As with other offences examined above (such as contempt of court or offences relating to official secrets), the rationales for these offences appear to be the promotion of democratic practices rather than the protection of individual privacy rights. Thus, these offences may be viewed as fulfilling a co-ordinating and regulatory function as a means of upholding democratic ideals (such as free elections).

Finally, criminal liability is also imposed for "making or publishing a false statement relating to the personal character or conduct of a candidate".[253] The relevant interest protected here is reputation rather than privacy. This evidently seeks to protect the reputation of candidates from coming under attack. As with defamation, this only applies where a reputation is *falsely* lowered.[254] Evidently in this context, freedom of expression is of the utmost importance, given that individuals running for public offence should be subject to legitimate scrutiny. Given what is at stake and the public interest that political candidates should not come under unjustified attacks on their character, this constitutes a criminal wrong, despite this essentially being a species of defamation.

The Law Commissions note that this offence is most clearly directed towards political opponents and rival candidates.[255] However, the offence is not limited to such persons and liability may arise in respect of statements by any individual who makes a relevant false statement. Opportunities for such statements to be

[248] ibid s 66(3)(d).
[249] ibid s 66(3A).
[250] ibid s 66(3F).
[251] Report on *Electoral Law* (n 235) para 5.3.
[252] 1983 Act ss 1(b), 2, 4.
[253] ibid s 106.
[254] See section 7.4.1 on defamation.
[255] Report on *Electoral Law* (n 235) para 11.66.

made have clearly grown as a result of the routine use of social media platforms, forums, blogs and other communications mediums. There is accordingly a difficult balancing act that the criminal law must achieve here between permitting political debate and scrutiny, while nevertheless ensuring that this is reasonable. The line has been drawn at false statements.

6.5.4 Quasi-criminal regulation

Finally, in addition to substantive criminal law offences, there are also what may be termed "quasi-criminal" offences that protect privacy rights. Roberts and Richardson refer to this as a "third body of law"[256], which is neither criminal nor civil. While not technically criminal offences, these rules nevertheless impose punitive sanctions on wrongdoers. Such rules are found in data protection regulations and schemes. These include offences under the Data Protection Act 2018, the General Data Protection Regulation (GDPR), and the Regulation of Investigatory Powers regime.[257] The rationales for these sets of rules lie in the protection of informational privacy and they establish standards for how this information is obtained, handled, retained, and disclosed.

(a) Data protection

To begin with, "it would be false…to proceed on the basis that data protection is a statutory privacy right in all but name, since the two rights are different in important respects".[258] Data protection is broader in scope than the law relating to privacy; there is no requirement that the data be private.[259] The concept is one of "informational self-determination",[260] which "empowers the individuals

[256] Roberts and Richardson (n 14) at 92.
[257] Investigatory Powers Act 2016; Regulation of Investigatory Powers Act 2000; Regulation of Investigatory Powers (Scotland) Act 2000.
[258] G Black, "Data protection" in *The Laws of Scotland: Stair Memorial Encyclopaedia*, Reissue (2010) para 5.
[259] EU Regulation 2016/679, Article 4(1).
[260] C Heinze and D Ebel, "Data protection in private relations and the European Convention on Human Rights" in M Fornasier and M G Stanzione (eds), *The European Convention on Human Rights and its Impact on National Private Law: A Comparative Perspective* (2024) 137 at 141.

to determine for themselves the disclosure and use of their personal data".[261] This goes beyond the protection of private information found in Article 8 of the European Convention on Human Rights, which generally requires an individual to demonstrate that they had a reasonable expectation of privacy in respect of the information.[262] Indeed, "the right to the protection of personal data is somewhat different in nature: individuals are entitled to lawful processing of their personal data to avoid suffering detrimental consequences".[263] The focus of data protection is therefore less about the information itself but more about the way in which that information is used.

Evidence heard by the Joint Committee on Human Rights found that "people's data is routinely being shared and used without their consent, which clearly infringes on their right to privacy".[264] As a result, data protection law has recently been the subject of significant reform. This was brought about by the introduction of the European Union's General Data Protection Regulation in 2016, and the Data Protection Act 2018. This legislation sought to "empower individuals and give them control over their personal data".[265] The introduction of the General Data Protection Regulation[266] had a wide-ranging impact as it sought to increase harmonisation of data protection law across the EU as a whole. Although an EU regulation, this was retained following the UK's withdrawal from the EU as the United Kingdom General Data Protection Regulation, so continues to apply in this form.

The GDPR paved the way for further reform of data protection law in the UK through the introduction of the Data Protection Act 2018, which repealed the earlier Data Protection Act 1998. The 2018 Act introduced a number of criminal offences, the most relevant being the offences of unlawfully obtaining personal data[267] and the re-identification of de-identified personal data.[268] There is an

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[261] ibid at 142.
[262] See section 7.3.2.
[263] F van der Jagt, "The right to the protection of personal data" in J Gerards (ed), *Fundamental Rights: The European and International dimension* (2023) 202 at 202.
[264] Joint Committee on Human Rights, *The Right to Privacy (Article 8) and the Digital Revolution* (HC 122 HL Paper 14, 2019) 18.
[265] ibid 7.
[266] EU Regulation 2016/679.
[267] Data Protection Act 2018 s 170. This is an updated version of the offence in s 55 of the Data Protection Act 1998.
[268] ibid 2018 Act s 171.

also offence of altering personal data to prevent disclosure to a data subject,[269] and an analogous offence under the Freedom of Information Act 2000.[270] These offences apply across the UK as a whole.

Unlike other wrongs relating to the misuse of personal information, criminal liability is imposed here. Why is this the case? One answer is that civil liability is insufficient:

> "civil actions are often irrelevant to the problems of how to prevent misuses of personal data and provide effective remedies for breaches of privacy that may cause limited harm to each individual concerned, but those individuals may count in the millions".[271]

This legislation therefore provides a stronger response, which can be justified on the basis that there may be an aggregation of harms that can less efficiently be remedied by individual victims.

The other answer relates to the wider, public element. Data protection legislation protects "individuals from abuse resulting from the processing (i.e. the collection, storage, handling etc.) of personal data by public administrations and public actors".[272] Thus, the purpose is "to protect the citizen…to ensure that personal data processed in ways that make it unlikely that personal integrity and privacy will be infringed or invaded".[273] It is this public element that explains why the state enforces these rules. Keller characterises this is part of public law, stating that "the solutions to data protection tend to be regulatory and the debates are over the proper roles of the state and the market in providing those solutions".[274]

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[269] ibid s 173.
[270] Freedom of Information Act 2000 s 77. This offence imposes liability where a person "alters, defaces, blocks, erases, destroys or conceals any record held by the public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information to the communication of which the applicant would have been entitled" (s 1(b)).
[271] P Keller, *European and International Media Law* (2011) 308.
[272] P De Hert and S Gutwirth, "Privacy, data protection and law enforcement. Opacity of the individual and transparency of the power" in E Claes, R A Duff and S Gutwirth (eds), *Privacy and the Criminal Law* (2006) 61 at 76.
[273] ibid at 77.
[274] Keller, *Media Law* (n 271) 308.

Finally, there is a need

> "to secure compliance with principles intended to ensure that those who possess our personal data do not deal with it in ways that cause or expose people to harm. The primary means of deterrence is enforcement notices backed by powers to impose civil penalties".[275]

The data protection regime is striking for the severity of its sanctions. The Information Commissioner and Office (ICO) may impose financial penalties of up to £500,000 for serious breaches.[276] Such penalties are clearly intended to have a strong deterrent effect and may also be viewed as a means of punishing the wrongdoer (by contrast, the financial penalties are not compensatory). It is certainly true that "the maximum fines are of a magnitude that most would consider 'punitive' in the ordinary sense of the word".[277] This is accordingly consistent with a criminal law response. Data protection law places greater emphasis on the wrongful conduct of the party that has mishandled the data in question. This is a marked difference to the ordinary misuse of private information under the civil law, for which delictual liability may arise and for which an individual must raise a court action to obtain damages (or an interdict). It additionally means that there is no requirement to show harm or loss, which can be difficult to evidence in cases of privacy violations.[278]

While any detailed assessment of the GDPR and Data Protection Act 2018 is beyond the scope of this thesis, it is important to stress that data protection law should not be conflated with personal privacy. Van der Sloot notes a growing disconnect between data protection and the right to privacy.[279] This is exemplified by the GDPR's failure to refer to a "right to privacy", with the result

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[275] Roberts and Richardson (n 14) at 86.
[276] Joint Committee on Human Rights, *The Right to Privacy (Article 8) and the Digital Revolution* 8.
[277] Roberts and Richardson (n 14) at 92.
[278] D K Citron and D J Solove, "Privacy harms" (2022) 102 Boston University Law Review 793 at 814.
[279] B van der Sloot, "Legal fundamentalism: is data protection really a fundamental right?" in R Leenes, R Brakel, S Gutwirth and P Hert (eds), *Data Protection and Privacy: (In)visibilities and Infrastructures* (2017) 3 at 5.

that "data protection has been fully disconnected from the right to privacy, at least on a terminological level".[280]

(b) Regulation of investigatory powers

In addition to data protection law, the investigatory powers framework can be seen as straddling the boundaries of criminal and civil rules. This framework (comprising the Regulation of Investigatory Powers Act 2000, the Regulation of Investigatory Powers (Scotland) Act 2000 and the Investigatory Powers Act 2016) sets out duties and sanctions for conduct relating to investigations by law enforcement bodies.

The Investigatory Powers Act 2016 introduced "offences and penalties in relation to – (a) the unlawful interception of communications, and (b) the unlawful obtaining of communications data".[281] Notwithstanding these discrete criminal offences, the Act additionally allows for concurrent civil liability for certain unlawful interceptions,[282] and the Investigatory Powers Commissioner has the power to serve monetary penalty notices.[283] This is accordingly similar to the data protection framework, which allows for financial penalties to be imposed on wrongdoers as a response to certain conduct.

The first offence is one of unlawful interception.[284] This prohibits intentional interception of "a communication in the course of its transmission by means of a public telecommunication system, a private telecommunication system or a public postal service".[285] "Interception" is defined as doing a "relevant act" in relation to a telecommunications system, which has the effect of making any content of the communication available to a person other than the sender or

[280] ibid at 7.
[281] Investigatory Powers Act 2016 s 1(3).
[282] ibid s 8.
[283] ibid s 7.
[284] ibid s 3.
[285] ibid s 3(1)(a).

intended recipient.[286] A relevant act may include modifying or interfering with the system[287] or its operation or monitoring transmissions.[288]

The legislation expressly provides that interception of a communication does not cover communications "broadcast for general reception",[289] thereby emphasising the application of the offence to private communications (whether this is by means of a public or private telecommunication system).

Civil action may be pursued by either the sender or recipient (or intended recipient) of the communication in question.[290] Four requirements must be met for this to be an actionable civil wrong. Two of these are the same as for the equivalent criminal offence: the interception must be carried out in the UK[291] without lawful authority.[292] However, the other two emphasise the private nature of the wrong: only interceptions carried out in the course of transmission by a private telecommunication system[293] without the consent of "a person who has the right to control the operation or use of the private telecommunication system" may be actionable.[294]

Furthermore, there is provision for the Investigatory Powers Commissioner to serve a monetary penalty notice in certain circumstances.[295] This penalty is determined by the Commissioner and may be a sum of up to £50,000.[296] There are several conditions that must be met in order for a penalty to be imposed. These are that the Commissioner considers that: (a) "the person has intercepted, in the United Kingdom, any communication in the course of its transmission by means of a public telecommunication system",[297] (b) the person did not have

[286] ibid s 4(1).
[287] ibid s 4(2)(a).
[288] ibid s 4(2)(b), (c).
[289] ibid s 5(1).
[290] ibid s 8(1).
[291] ibid s 8(2).
[292] ibid s 8(5).
[293] ibid s 8(3)(a). S 8(3)(b) also provides that interceptions "by means of a public telecommunication system, to or from apparatus that is part of a private telecommunication system" may be actionable.
[294] ibid s 8(4).
[295] ibid s 7(1).
[296] ibid s 7(2), (5).
[297] ibid s 7(3)(a).

lawful authority to carry out the interception,[298] and (c) the person was not, at the time of the interception, making an attempt to act in accordance with an interception warrant which might, in the opinion of the Commissioner, explain the interception.[299] In addition to these requirements, the Commissioner must be satisfied that the person has not committed an offence under section 3(1).[300]

The second offence that may be rationalised as protecting personal privacy interests is that of unlawfully obtaining communications data.[301] While similar to the offence outlined above, this offence specifically applies to the unlawful act of obtaining communications rather than interception alone. This prohibits a person from "knowingly or recklessly" obtaining communications data from a telecommunications or postal operator.[302] The offence is limited to individuals holding an "office, rank or position with a relevant public authority".[303] A full list of relevant public authorities is provided in a schedule to the Act but includes (among others) police forces, government departments and statutory bodies.[304] Given that this offence only applies to certain public officials, it is accordingly more closely connected with the types of public, regulatory offences examined in other parts of this chapter.

6.6 Evaluation

From the preceding analysis, it can be seen that there is undoubtedly some protection of privacy and reputation interests by the criminal law. What is less clear is (i) the extent to which certain offences are premised on the protection of these interests and (ii) the nature of the interests protected.

[298] ibid s 7(3)(b).
[299] ibid s 7(3)(c).
[300] ibid s 7(4).
[301] ibid s 11.
[302] ibid s 11(1).
[303] ibid s 11(2).
[304] ibid Schedule 4, Part 1.

In respect of privacy, Roberts and Richardson refer to this as being a "blind-spot"[305] and "lacuna" in the criminal law.[306] This was similarly observed by the Australian Law Reform Commission, who found that where the criminal law does appear to protect privacy interests, "the laws are restricted to specific subject matter"[307] and "provide limited privacy protection".[308] From the preceding analysis, this assessment is just as applicable to Scots law.

With reputation, it is perhaps unsurprising given the absence of any criminal defamation, libel or slander from Scots law that the criminal law has been less engaged with the protection of these interests. As will be shown in the next chapter, recent reform of the civil law of defamation, malicious publication and verbal injury gave no consideration of the criminal law's role here, thereby upholding the civil law as the primary guardian of reputation interests.

A consequence of the above is that there is no systematic or principled protection of privacy and reputation interests. This is reflective of the Scots common law tradition in the criminal law. With the exception of sexual offences and certain regulatory offences, codification has been limited. Yet it is a far easier task to identify (among others) offences against the person or dishonesty offences in Scots law. Thus, the reluctance to categorise offences according to privacy and reputation interests cannot simply be explained by reference to the structure of Scots criminal law.

A number of the offences examined above are statutory offences that appear more regulatory in nature. Their rationales are not principally the protection of individual privacy or reputation rights, but rather to safeguard public order and the proper functioning of the state: "there are plenty of 'privacy' cases where public interests are prominent alongside private interests".[309] What are these "public interests"? Examples include the state's interests in protecting national security and upholding democratic practices. Thus, while physical privacy,

[305] Roberts and Richardson (n 14) at 94.
[306] ibid at 96.
[307] Report on *Serious Invasions of Privacy in the Digital Era* (Australian Law Reform Commission Report 123, 2014) para 3.25.
[308] ibid.
[309] Roberts and Richardson (n 14) at 83.

informational privacy and reputation may each be protected through various offences, this is not necessarily the primary purpose of each.

It can additionally be seen that there is some overlap between certain sexual offences (e.g. voyeurism; the non-consensual distribution of intimate images) and the protection of privacy. Such offences fall under the heading "image-based sexual abuse" and specifically concern the protection of one's sexual or bodily autonomy. This can be linked to the increasing scope of offences against the person. Chalmers has observed that this category now includes offences that "protect the individual's interest in personal liberty",[310] while Farmer suggests that "the 'person' protected by the law is no longer just the physical body but now extends to the protection of personal autonomy".[311] This is part of a movement "towards the expansion of law on the basis of the wider conception of personhood".[312] Consistent with this, Robinson includes an offence of "violation of privacy" in the Draft Code of Conduct he proposes, but within the category of offences against the person.[313]

This is just as relevant to extortion, stalking and other types of threatening conduct, which can similarly be viewed through the lens of intrusion, but which may be categorised as offences against the person or public order offences.

Moreover, increasing criminalisation has not only resulted in ad hoc criminal offences being introduced to target specific wrongs (e.g. voyeurism, stalking, the non-consensual distribution of intimate images). There has been a trend towards quasi-criminal law being used as a means of ensuring compliance with rules relating to the use and handling of data. These laws can straddle the boundaries of criminal and civil law. Violations of these laws do not result in criminal prosecution, nor do they lead to criminal convictions. However, the sanctions imposed are more reflective of criminal law sanctions than of civil law remedies. This coercive use of the law to enforce such norms demonstrates the perceived severity of these wrongs and the additional "public" element.

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[310] J Chalmers, "Offences against the person" in M D Dubber and T Hörnle (eds), *The Oxford Handbook of Criminal Law* (2014) 727 at 742.
[311] L Farmer, *Making the Modern Criminal Law* (2016) 254.
[312] ibid 261.
[313] Robinson, *Structure and Function in Criminal Law* (n 15) 213.

To summarise, it has been shown that certain types of privacy and reputation interests attract different levels of protection in Scots criminal law.

In terms of privacy, recently created statutory offences have increased the breadth of the criminal law. Although some of these offences have been shown to protect privacy, as a general observation:

> "inherent in tackling the problems of invasion of privacy through statute is the requirement for a pursuer to bring his particular invasion within the exact wording and envisaged scenarios of the statute".[314]

In other words, the types of statutory wrongs identified here are highly contextual. There is no generally applicable offence that can address privacy (and to an even lesser extent reputation) wrongs. This is most notably the case with informational privacy; only certain categories of information are protected through the criminal law. Disclosure or misuse of such information may result in criminal sanctions. This is particularly the case with data protection laws, which additionally impose quasi-criminal liability for the mishandling or misuse of personal data. However, this is a distinct legal framework that is principally aimed at regulating data handling by public or corporate entities.

Finally, reputation is clearly protected to a much lesser extent than privacy, at least in its own right. While older, common law offences such as extortion and murmuring judges may be rationalised as protecting the reputations of victims, these offences are more obviously explained by other rationales (liberty and privacy for the former, and the administration of justice and rule of law for the latter). As with privacy wrongs, offences involving overt threats and threatening conduct may have reputational consequences. The difference here is that these harms are only likely to flow from conduct occurring in public (or with others present), as is consistent with the one's reputation being measured by others. Private threats and threatening behaviour may place the individual victim in a state of fear or appear as attacks on their honour or character, yet these will not adversely affect their reputation.

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[314] Hogg (n 135) at 24.

Having identified and examined privacy and reputation offences in the criminal law, the next chapter will proceed to take a similar approach in the context of civil wrongs.

7. The Civil Law's Protection of Privacy and Reputation Rights

7.1 Introduction

As has been explained, the civil law is the primary guardian of privacy and reputation rights. While this thesis seeks to assess the criminal law's role in protecting these rights, it is nevertheless important to consider the current ways in which the civil law safeguards them. First, this will show the types of privacy and reputation wrongs that attract civil liability. Secondly, this will allow for a comparison to be made between criminal liability for privacy and reputation violations on the one hand, and civil liability on the other. Thirdly, it will provide a backdrop against which to question when criminal liability should be imposed for these wrongs.

This chapter will begin by outlining the human rights backdrop against which the civil law operates in this area. This is important given the influence that the European Convention on Human Rights and the Human Rights Act 1998 have had on domestic law. It will be shown that developments in human rights law have played a key role in expanding the scope of the civil law in relation to privacy and reputation rights. This is most notably by transposing the right to private and family life under Article 8 ECHR into Scots law.

Having framed this discussion by reference to the ECHR, this chapter will proceed to examine the ways in which privacy and reputation interests are currently protected in Scots law. This will principally be done by reference to the law of delict as the branch of the civil law dealing with wrongs.

Although it is unclear as to whether a general action for breach of privacy exists in Scots law, there is evidently now greater recognition of privacy rights, especially in relation to the disclosure and misuse of private and confidential information. It will be shown that the primary mechanisms for redressing privacy violations are through civil actions for breach of confidence and misuse of private information.

In addition to this, it will be shown that reputation rights have been the focus of legislative attention in recent years with the Scottish government reforming

the law of defamation and verbal injury and introducing a statutory regime for dealing with these wrongs. For reputation wrongs, the primary mechanisms are now civil actions for defamation and malicious publication, as well as an action for malicious prosecution.

7.2 Privacy, reputation, and human rights

Privacy and reputation are protected in several international law instruments as human rights. These "can be understood as legal tools that protect individuals against interference by the state and by private actors".[1] At an international level, the most notable legal instrument is the European Convention on Human Rights (ECHR).[2] Although an international convention, the ECHR has become increasingly significant following its incorporation into UK domestic law through the Human Rights Act 1998.[3] This is in contrast to other international instruments, such as the Universal Declaration of Human Rights (UDHR)[4] and the International Covenant on Civil and Political Rights (ICCPR).[5] The former was published in 1948 following the Second World War and, despite having no legal status, is regarded as a model framework for the protection of rights. The latter – alongside the International Covenant on Economic, Social and Cultural Rights (ICESCR) – is part of international law and was heavily modelled on the UDHR. These instruments collectively constitute the International Bill of Human Rights. While the UDHR and ICCPR expressly protect privacy[6] and reputation rights,[7] these will not be discussed further in this section. These instruments are clearly significant in a global context, yet the rights contained

[1] P De Hert and S Gutwirth, "Privacy, data protection and law enforcement. Opacity of the individual and transparency of the power" in E Claes, R A Duff and S Gutwirth (eds), *Privacy and the Criminal Law* (2006) 61 at 67.
[2] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).
[3] Human Rights Act 1998 s 1 (1), (2).
[4] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).
[5] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[6] UDHR, Article 12; ICCPR, Article 17.
[7] UDHR, Articles 12 and 19; ICCPR, Article 17 and 19.

in the UDHR are not legally binding and may be viewed as aspirational in nature, while those in the ICCPR have not been transposed into UK law.[8]

This section will therefore focus on the human rights protections contained in the ECHR. Not only is this the most prominent framework for protecting human rights, but the provisions themselves are part of domestic law. Thus, the ECHR is not a guiding instrument, but rather forms the basis for privacy and reputation rights themselves.

7.2.1 Privacy and human rights

Privacy is most notably protected through Article 8 (Right to respect for private and family life)[9] of the ECHR. This provides that:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".[10]

Although this was initially described as introducing a general right to privacy into the UK's legal systems,[11] it will be shown that the common law position in relation to privacy (at least in Scots law) remains far from clear.[12]

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[8] Baroness Hale of Richmond, "Equality and Human Rights", Oxford Equality Lecture delivered at the Law Faculty at the University of Oxford (29 October 2018) 1.
[9] It should be noted at this stage that "privacy" and "private life" may be used interchangeably, given that private life encompasses a right to privacy: U Fink, "Protection of privacy in the EU, individual rights and legal instruments" in N Witzleb, D Lindsay, M Paterson, and S Rodrick (eds), *Emerging Challenges in Privacy Law: Comparative Perspectives* (2014) 75 at 76.
[10] ECHR, Article 8.
[11] H L MacQueen, "A hitchhiker's guide to personality rights in Scots Law, mainly with regard to privacy" in N R Whitty and R Zimmermann (eds), *Rights of Personality in Scots Law: A Comparative Perspective* (2009) 550 at 551.
[12] See section 7.3 and particularly section 7.3.5.

The right to privacy provided for in the ECHR operates in both a positive and negative sense.[13] In respect of the former, an individual is permitted to pursue a private life and the state must respect this by ensuring that others do not unjustifiably interfere with the individual's privacy rights.[14] As for the latter, an individual's right to privacy should not be interfered with by the state without good cause. Article 8 therefore promotes privacy on the one hand, and protects it on the other. This means that the state has an obligation not only to protect the rights of their natural and legal persons, but also to ensure that they are able to maintain a degree of privacy from others. Drawing on the work of Whitman,[15] Van der Sloot argues that this positive conception of privacy is what marks it out as a personality right.[16] Personality rights are said to include "a person's interest to represent himself in a public context and develop his identity and personality".[17] This is reflective of the ways in which European lawyers approach privacy, in contrast to those in the US, who regard privacy in a more limited negative sense (stemming from Warren and Brandeis' understanding of privacy as the "right to be let alone").[18]

This positive and negative conception of protecting privacy was explained by the ECtHR in *von Hannover v Germany*:[19]

> "although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to

[13] European Court of Human Rights, *Guide on Article 8 of the European Convention on Human Rights – Right to Respect for Private and Family Life* (updated 2020) at para 4.
[14] N A Moreham, "Violating Article 8" (2007) 66 Cambridge Law Journal 35 at 37.
[15] J Q Whitman, "The two western cultures of privacy: dignity versus liberty" (2004) 113 Yale Law Journal 1151.
[16] B van der Sloot, 'Privacy as personality right: why the ECtHR's focus on ulterior interests might prove indispensable in the age of "big data"" (2015) 31 Utrecht Journal of International and European Law 25 at 25.
[17] ibid.
[18] ibid.
[19] *von Hannover v Germany* (2005) 40 EHRR 1.

> secure respect for private life even in the sphere of the relations of individuals between themselves".[20]

Despite a general right to privacy being purportedly introduced through Article 8, this is "hardly absolute"[21] and it has been argued that "legal protections fail to match privacy's treasured status".[22] As is the case with other ECHR rights, the right to privacy is not unqualified as there are circumstances in which privacy interests may be justifiably breached. Two situations where a privacy breach may be permitted are, firstly, where one (or more) of the qualifications in Article 8(2) applies and there is a competing interest at stake,[23] and secondly, where privacy comes into conflict with another Convention right.[24] It is additionally possible that the competing privacy interests of different parties may have to be balanced against one another with the result that one party's right is trumped by the other's.[25] The scope of the basic right set out in Article 8(1) must therefore be assessed both internally by reference to Article 8(2), and externally by reference to other Convention rights. The right that is most likely to come into conflict with Article 8 is the right to freedom of expression, which is set out in Article 10 of the ECHR. This provides that:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial

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[20] ibid at para 57.
[21] J L Mills, *Privacy: The Lost Right* (2008) 3.
[22] ibid.
[23] National security, public safety, economic well-being of the country, prevention of crime or disorder, protection of health or morals, and protection of the rights and freedoms of others.
[24] K Hughes, "The social value of privacy, the value of privacy to society and human rights discourse" in B Roessler and D Mokrosinska (eds), *Social Dimensions of Privacy: Interdisciplinary Perspectives* (2015) 225 at 232.
[25] Fink (n 9) at 77.

integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

Notwithstanding this apparent tension, it is expressly stated in Article 10 that the exercise of this freedom is subject to legal rules necessary "for preventing the disclosure of information received in confidence". Thus, privacy is given some degree of protection from free speech in cases where the speech in question discloses information that is deemed to be confidential. Where the information is not confidential, the court is faced with the task of deciding whether the right to freedom of expression outweighs the right to privacy.

The structure of the ECHR and its enforcement mechanisms means that there are three stages to successfully bringing a claim under Article 8.[26] The first of these is that Article 8 must be engaged. This means that the alleged breach of privacy is to a relevant privacy interest that falls within the scope of the Article.[27] The second of these is that there has been an interference with this right. The third is that this interference must not have been justified.[28] This section primarily concerns the first of these issues: what is the content of privacy under Article 8?

The Law Commission has stated, "privacy is, perhaps understandably, not defined in the Convention".[29] It has instead been left to the European Court of Human Rights (ECtHR), which has grappled with this question in a long line of case law. What may be found is not a precise, neatly articulated definition of privacy, but rather a series of statements about what privacy does or does not comprise.

[26] ECtHR, *Guide on Article 8* (n 13) at para 1.
[27] ECHR, Article 8(1).
[28] ibid Article 8(2).
[29] Consultation Paper on *Consent and Offences Against the Person* (Law Com No 134, 1994) para 33.1.

To give a full exposition of the ECtHR's case law on privacy would be beyond the scope of this thesis and is a task that has been undertaken elsewhere.[30] However, some of the key features of privacy and "private life" under Article 8 will be set out. These cover "a range of subject matter ranging from the highly sensitive to the mundane and innocuous"[31] and may relate to – among others – an individual's family, relationships, sexual autonomy, professional activities, and data.

It is important to state that the ECHR does not guarantee a specific right to privacy, but rather a right to private and family life.[32] Although it may be claimed that the term the term "private life" is synonymous with "privacy",[33] the former is a significantly broader concept than the latter.[34] As a result, Article 8 has been said to comprise two categories of interests: the privacy component and the personal choice component.[35] This distinction can be traced back to the ECtHR's decision in *X v Iceland*,[36] in which the court clearly stated that private life is broader than privacy alone.[37] The privacy component referred to here is more closely aligned with informational and spatial privacy, whereas the personal choice component concerns "matters that relate to the development and fulfillment [*sic*] of a person's personality or autonomy"[38] and "covers the physical and psychological integrity of a person".[39] What is meant by this? It may include "elements such as…gender identification, name and sexual orientation and sexual life.[40] Article 8 therefore "protects a right to personal

[30] In particular, ECtHR, *Guide on Article 8* (n 13) gives a comprehensive account of the scope of Article 8 by reference to ECtHR judgments. See also H T Gómez-Arostegui, "Defining private life under the European Convention on Human Rights by referring to reasonable expectations" (2005) 35 California Western International Law Journal 153.
[31] E C Reid, *Personality, Confidentiality and Privacy in Scots Law* (2010) para 15.18.
[32] B Hudson, "Secrets of the self: punishment and the right to privacy" in E Claes, R A Duff and S Gutwirth (eds), *Privacy and the Criminal Law* (2006) 137 at 139.
[33] Fink (n 9) at 76.
[34] N A Moreham, "The nature of the privacy interest" in M Tugendhat and C Christie, *The Law of Privacy and the Media* 3rd edn (2016) by N A Moreham and M Warby (eds) 42 at 43.
[35] Gómez-Arostegui (n 30) at 155.
[36] *X v Iceland*, App. No. 6825/74, 5 Eur. Comm'n H.R. Dec. & Rep. 86 (1976) (Commission Decision).
[37] ibid at 87.
[38] Gómez-Arostegui (n 30) at 155.
[39] *Pretty v United Kingdom* (No. 2346/02) (2002) 35 EHRR 1 at para 61.
[40] ibid; *Peck v United Kingdom* (No. 44647/98) (2003) 36 EHRR 41 at para 57.

development, and the right to establish and develop relationships with other human beings and the outside world".[41]

That Article 8 is as much concerned with autonomy as with privacy is illustrated by the case of *Pretty v UK*.[42] In this case, the applicant sought a guarantee from the Director of Public Prosecutions that their husband would not be prosecuted if he helped her commit suicide. The applicant was terminally ill and was unable to end her life without assistance. The ECtHR held that the refusal of the DPP to provide such a guarantee could constitute a breach of Article 8(1).[43] However, they held that their decision was justified in order to protect the rights of others under Article 8(2).[44]

Further meaning is given to Article 8 in *Denisov v Ukraine*,[45] in which the court states that "typical aspects of private life" are "(i) the applicant's "inner circle", (ii) the applicant's opportunity to establish and develop relationships with others, and (iii) the applicant's social and professional reputation".[46]

What is meant by an individual's "inner circle"? This is the space in which an individual "may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle".[47] However, one's private life extends beyond what may be termed "seclusion". It is not simply about an individual's desire to be on their own and live a "private life" in that sense. Rather, it encompasses private social interactions with others. While this does not mean that public interactions may be captured by "private life", it does make it possible for commercial or professional activities to be included in certain circumstances. This also means that the definition covers more than just Warren and Brandeis' "right to be let alone"[48] and notions of informational[49] and spatial privacy examined later in this chapter.[50]

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[41] ibid.
[42] (No. 2346/02) (2002) 35 EHRR 1.
[43] ibid at para 67.
[44] ibid at para 78.
[45] *Denisov v Ukraine* No. 76639/11, 2018.
[46] ibid at para 115. See discussion of this in the context of reputation at section 7.2.2 below.
[47] *Niemietz v Germany* (1993) 16 EHRR 97 at para 29; *Fernández Martínez v Spain* (2015) 60 EHRR 3 at para 109; *Denisov* at para 95.
[48] Fink (n 9) at 77. See earlier analysis of this at section 3.2.3(a).
[49] See section 7.3.2.
[50] See section 7.3.1.

To summarise, "the scope of Article 8 is wider than what would often be labelled "privacy." The provision can well be described as "open and dynamic" in its coverage. Private life is "a broad term, not susceptible to exhaustive definition," which protects "much more than a straightforward right to privacy".[51]

It will be shown later in this chapter that these definitions of privacy are relevant to the question of how Scots law protects these interests. As privacy is protected through the ECHR, and the ECHR is part of domestic law,[52] it logically follows that privacy is protected in domestic law.[53] The introduction of the ECHR into domestic law has acted as a catalyst for further development of privacy law and increased protection of privacy rights,[54] particularly between individuals.[55] Resolution 1165[56] was passed by the Council of Europe in the same year that the UK Parliament introduced the Human Rights Act 1998, and this resolution placed greater emphasis on the horizontal effect of Article 8 by requiring states to make it easier for individuals to bring proceedings against other individuals.[57] In addition to this, the 1998 Act requires that domestic legislation must (so far as possible) "be read and given effect in a way which is compatible with the Convention rights".[58] This therefore highlights the influence that Article 8 has had in shaping not only the content, but also the availability of delictual actions that may be brought in Scots law in remedying privacy violations.

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[51] A T Kenyon, "Defamation, privacy and aspects of reputation" (2018) 56 Osgoode Hall Law Journal 59 at 69-70.
[52] Human Rights Act 1998 s 1 (1), (2).
[53] R J Krotoszynski Jr, *Privacy Revisited: A Global Perspective on the Right to be Left Alone* (2016) 116.
[54] Reid, *Personality* (n 31) para 1.01.
[55] MacQueen (n 11) at 553.
[56] Council of Europe, Resolution 1165 of 1998.
[57] N A Moreham, "Privacy and horizontality: relegating the common law" (2007) 123 Law Quarterly Review 373; J Morgan "Privacy, confidence and horizontal effect: "Hello" trouble" (2003) 62 Cambridge Law Journal 444 at 451.
[58] Human Rights Act 1998 s 3.

7.2.2 Reputation and human rights

Reputation is firstly protected by the ECHR through Article 10(2) (reproduced above). This protects reputation by placing restrictions on an individual's right to free speech. Thus, reputation represents a shield with which an individual may defend themselves against another's exercise of freedom of expression. Reputation is protected in a negative sense, and as was explained earlier in the thesis,[59] it makes little sense to speak of a positive right to reputation. One has a right not to have one's reputation unjustifiably damaged, but one does not have a right to a positive reputation.

Article 10(2) was initially as far as the ECtHR was prepared to go in recognising one's right to reputation within the ECHR framework. As a result of this and the wording of Article 10(2), the court in *Lingens v Austria*[60] (an early defamation case) did not see any need to balance Article 10 against Article 8. However, it is now recognised that Article 8, in protecting private and family life, includes within its scope the protection of reputation.[61] The impact of this has been to allow individuals to rely on Article 8 in bringing what are essentially defamation actions.[62] This is consistent with the aforementioned statement of the ECtHR in *Denisov* that "typical aspects of private life" include "the applicant's social and professional reputation".[63]

However, in the context of Article 8, the two interests should not be conflated. The ECtHR has held that "reputation and private life are conceptually distinct interests: it is the external evaluation of a person which makes up their reputation and, therefore, reputation per se is not related to private life".[64] The position is rather that reputational harm may be actionable where this causes

[59] See discussion of this at sections 2.3.2 and 3.3.
[60] *Lingens v Austria* Eur. Ct. H.R. (ser. A) 14, 25 (1986).
[61] *Chauvy v France* 2004-VI Eur. Ct. H.R. 211; *Pfiefer v Austria* (No. 12556/03, 2007); *Polanco Torres and Movilla Polanco v Spain* (No. 34147/06, 2010).
[62] S Smet, "Freedom of expression and the right to reputation: human rights in conflict" (2010) 26 American University International Law Review 183 at 194.
[63] *Denisov* at para 115.
[64] T Aplin and J Bosland, "The uncertain landscape of Article 8 of the ECHR: the protection of reputation as a fundamental human right?" in A T Kenyon (ed), *Comparative Defamation and Privacy Law* (2016) 265 at 266, citing *Karakó v Hungary* (2011) 52 EHRR 36 at para 23.

interference with one's right to private life. This approach has been developed in three significant judgments.

The first of these was in *A v Norway*.[65] The court introduced a seriousness test in this case, stating that in order for Article 8 to be engaged, "the attack on personal honour and reputation must attain a certain level of gravity and in a manner causing prejudice to personal enjoyment of the right to respect for private life".[66]

The court went further in limiting the ambit of Article 8 in *Karakó v Hungary*.[67] The court sought to draw a contrast between "personal integrity rights" and reputation. They consequently noted that any reputational harm must have some demonstrable impact on the individual's personal integrity.[68] While this appears a conceptually distinct approach, it is unclear whether this in practice goes beyond the previous seriousness test outlined *in A v Norway*.

However, despite affirming the seriousness test,[69] in *Axel Springer AG v Germany*[70] the ECtHR did not clarify the comments made in *Karakó*. Indeed, the court has since failed to apply or engage with the *Karakó* analysis.[71]

In terms of the content and definition given to reputation, this has not been addressed in great detail by the ECtHR. Reputation – at least in the context of Article 10 – has been defined more in terms of dignity and self-worth, insofar as it has been held that businesses do not have "dignity", nor any moral element that may be lowered in the same way as an individual does.[72] A series of decisions of the ECtHR have made important statements as to the nature of reputation under the ECHR. These will now be considered.

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[65] *A v Norway* (No. 28070/06, 2009).
[66] ibid at para 64.
[67] *Karakó v Hungary* (2011) 52 EHRR 36.
[68] ibid at paras 22, 23.
[69] *Axel Springer AG v Germany* (2012) 55 EHRR 6 at para 83.
[70] 55 EHRR 6.
[71] Aplin and Bosland (n 64) at 278.
[72] *Margulev v Russia* (No. 15449/09, 2019); *Kharlamov v Russia* (2017) 65 EHRR 33; *Uj v Hungary* (2016) 62 EHRR 30.

First, in *Margulev v Russia*,[73] it was stated by the court that

> "there is a difference between the reputational interests of a legal entity and the reputation of an individual as a member of society. Whereas the latter may have repercussions on one's dignity, the former are devoid of that moral dimension".[74]

Secondly, in *Uj v Hungary*,[75] the court agreed with this assessment in *Margulev*, noting that

> "there is a difference between the commercial reputational interests of a company and the reputation of an individual concerning his or her social status. Whereas the latter might have repercussions on one's dignity, for the Court interests of commercial reputation are devoid of that moral dimension. In the instant application, the reputational interest at stake is that of a State-owned corporation; it is thus a commercial one without relevance to moral character".[76]

Thirdly, in *Kharlamov v Russia*,[77] it was said that

> "the 'dignity' of an institution cannot be equated to that of human beings. The Court considers that the protection of the University's authority is a mere institutional interest of the University, that is, a consideration not necessarily of the same strength as "the protection of the reputation or rights of others" within the meaning of Article 10 § 2".[78]

Finally, in *Firma EDV v Germany*,[79] the applicant company – a supplier of database software to medical practitioners – claimed that a representative of the Bavarian Protestant-Lutheran Church had damaged its reputation by stating in an interview that the company was a "Company of Christ" and that this posed a risk to the security of company data.[80] The company claimed that a lucrative commercial contract was terminated as a result of this interview and the

[73] *Margulev v Russia* (No. 15449/09, 2019).
[74] ibid at para 45.
[75] *Uj v Hungary* (2016) 62 EHRR 30.
[76] ibid at para 22.
[77] *Kharlamov v Russia* (2017) 65 EHRR 33.
[78] ibid at para 29.
[79] *Firma EDV für Sie GmbH v Germany* (No. 32783/08, 2014)
[80] ibid at para 6.

subsequent media reporting of it.[81] While the court rejected the company's application on the facts, they nevertheless left open the question of the applicability of Article 8(1) to the reputation of a company.[82] It is interesting to note that reference to an individual's reputation here includes their professional reputation.[83]

Thus, despite there not being explicit recognition of reputation in the ECHR, the ECtHR has demonstrated a willingness to take account of reputational harm in certain actions under both Articles 8 and 10. However, there has been some uncertainty regarding the extent to which Article 8 protects reputation. This chapter will now examine the extent to which privacy and reputation rights are protected under domestic law. As has been mentioned, the ECHR has had some impact on domestic law, and this is particularly the case in the context of privacy, which has undergone considerable judicial development since the incorporation of the right to private and family life under Article 8 of the ECHR.

7.3 Privacy

Privacy wrongs are traditionally within the scope of the civil law and are principally protected through the law of delict. One of the leading classifications of privacy wrongs is that proposed by Prosser, who identified four categories of privacy torts in the USA.[84] These are: intrusion, private facts, false light and appropriation. Whitty similarly distinguishes between different privacy delicts in Scots law.[85] These are "seclusion from intrusion", "non-disclosure of private information", "false light privacy", and "publicity wrongs". These broadly map onto the four categories of tort identified by Prosser. Much of Prosser's attention centred on private information at the

[81] ibid at para 8.
[82] ibid at para 23.
[83] *Denisov* at para 115.
[84] W L Prosser, "Privacy," (1960) 48 California Law Review 383 at 389. See also the earlier overview given at sections 3.2.2(b) and 3.2.3(d).
[85] N R Whitty, "Overview of rights of personality in Scots law", in N R Whitty and R Zimmermann (eds), *Rights of Personality in Scots Law: A Comparative Perspective* (2009) 147 at 173.

expense of the others and it has even been argued that "only the first two are genuine invasions of privacy, and the second two protect quite different interests"[86] and that "these two torts are the most applicable to the types of actions and abuses most commonly thought of as personal privacy violations".[87] There is considerable merit to this view and the reasons for this will be outlined later in this chapter.

In terms of the relationship between these wrongs, Prosser states that the torts "have almost nothing in common except that each represents an interference with the right of the plaintiff "to be let alone"".[88] Gormley likewise identifies this as an obstacle to recognising a single right to privacy:

> "legal privacy consists of four or five different species of legal rights which are quite distinct from each other and thus incapable of a single definition, yet heavily interrelated as a matter of history, such that efforts to completely sever one from another are (and have been) disastrous".[89]

This is just as relevant to Scots law. Such differences exist between the analogous delicts and it has been stated that "there has been a strong resistance to developing breach of privacy as an independent delict".[90] This is in contrast to other systems (such as France) that expressly provide for a general right to privacy in the civil law.[91]

Each of these delicts will now be examined with a view to establishing the nature of the privacy interest protected and the types of conduct each wrong captures. It will be shown that the focus of recent developments in this area has been in connection to the non-disclosure (or "misuse") of private information. However, the extent to which other actions adequately protect privacy rights

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[86] J Campbell, "The origins and development of the right to privacy" in A Koltay and P Wragg (eds), *Comparative Privacy and Reputation* (2020) 9 at 10.
[87] P M Garry, "The erosion of common law privacy and defamation: reconsidering the law's balancing of speech, privacy, and reputation" (2020) 65 Wayne Law Review 279 at 288.
[88] Prosser (n 84) at 389.
[89] K Gormley, "One hundred years of privacy" (1992) 5 Wisconsin Law Review 1335 at 1339.
[90] J Burchell and K McK Norrie, "Impairment of reputation, dignity and privacy", in R Zimmermann, K Reid, and D Visser (eds), *Mixed Legal Systems in Comparative Perspective* (2005) 545 at 571.
[91] Civil Code (France) Article 9, para 1: "Everyone has the right of respect for his private life".

remains unclear, as does the question of whether a general right to privacy exists at common law.

7.3.1 Seclusion from intrusion

Seclusion from intrusion is the essence of Warren and Brandeis' definition of privacy as being the "right to be let alone". This encompasses what is often referred to as "spatial" or "territorial" privacy: a zone of privacy that relates specifically to a person's physical space.[92] Such a right protects an individual from "unwanted sensory access",[93] which has been defined as "watching, listening to or otherwise sensing you against your wishes".[94]

What is the content of this wrong? Examples of this conduct may include clandestinely intercepting or interfering with a person's communications (such as phone calls, emails, letters), watching their private activities, reading their diary, or searching through their belongings.[95] Unlike other privacy wrongs that will be discussed, there is no need for disclosure for such a wrong to occur.[96] The very fact that another individual has violated one's privacy is sufficient.[97] Thus, this wrong is constituted principally by "unreasonable surveillance".[98]

In reality, there may be some overlap between this wrong and an action for non-disclosure of private information (discussed in the next section). This may be in cases where an individual obtains information in an intrusive manner (e.g. by tapping a person's phone) and then discloses the information that they have unlawfully obtained. Indeed, Morerham views this as a dual wrong even where there is no disclosure: there is the initial wrong of gaining unwarranted physical

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[92] E C Reid, "Protection of personality rights in the modern Scots law of delict", in N R Whitty and R Zimmermann (eds), *Rights of Personality in Scots Law: A Comparative Perspective* (2009) 247 at 299.
[93] N A Moreham, "Beyond information: physical privacy in English law" (2014) 73 Cambridge Law Journal 350 at 353.
[94] ibid at 354.
[95] R Wacks, *Personal Information* (1989) Chapter 7.
[96] Reid (n 92) at 300.
[97] J Schonsheck, "The unrelenting darkness of false light: a sui generis tort" in A E Cudd and M C Navin (eds), *Core Concepts and Contemporary Issues in Privacy* (2018) 91 at 96.
[98] Whitty (n 85) at 173.

access and there is the subsequent wrong of acquiring the information through the act of tapping the phone. Hogg similarly suggests that a wrong is done when someone searches through documents belonging to you, even if they do not find any personal information.[99] Thus, the interference or intrusion is wrongful in itself, and this means that the pursuer does not have to suffer any additional harm, nor even have knowledge of the violation (although knowledge will obviously be required if the pursuer is to raise an action pursuant to such a violation).[100]

While a violation of this right may be partly remedied by an action for misuse of private information,[101] other common law delicts such as trespass, nuisance, personal molestation and injury (*iniuria*) may capture these harms, while statutory wrongs, criminal offences and the ECHR may also be relevant.[102] From a criminal law perspective, recent statutory offences (such as stalking, voyeurism, and domestic abuse)[103] may be viewed as legal mechanisms through which unwanted intrusive conduct is addressed.

In addition to these, Whitty cites a number of cases where individuals argued that they had suffered breaches of the right to seclusion.[104] It is notable that the majority of these cases concern the admissibility of evidence in separate criminal or civil proceedings, or actions brought against public authorities under section 6 of the Human Rights Act 1998.[105] This reflects the fact that much of

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[99] M A Hogg, "The very private life of the right to privacy" in *Privacy and Property*, Hume Papers on Public Policy, vol 2 no 3 (1994) 1 at 3. Although there would be a separate issue as to the remedy that would be available in the case of such a wrong.

[100] A Schaefer, "Privacy: a philosophical overview", in D Gibson (ed), *Aspects of Privacy* (1980) 1 at 7.

[101] See section 7.3.2 below.

[102] Whitty (n 85) at 173.

[103] Harassment may also provide a means of redress here. Harassment is a civil wrong for which damages, interdict or a non-harassment order may be awarded; however, criminal liability may arise where a wrongdoer breaches a non-harassment order: see Protection from Harassment Act 1997 s 8, s 9(1). See also *McGlennan v McKinnon* 1998 SLT 494 per Lord Justice-General Rodger at 497. This is discussed in more detail in the previous chapter at section 6.4.1(b)

[104] See *Robertson v Keith* 1936 SC 29; *Connor v HM Advocate* 2002 SLT 671; *Martin v McGuiness* 2003 SLT 1424 (OH); *HM Advocate v Higgins* 2006 SLT 946; *Henderson v HM Advocate* 2005 SLT 429; *R v HM Advocate* [2002] UKPC D 3, 2003 SC (PC) 21.

[105] Whitty (n 85) at 173-174. For the avoidance of doubt, while such actions against the state or public body under the human rights framework (Human Rights Act 1998 and ECHR) may be regarded as a civil claim, these are distinct from delictual claims, which have been the focus of much of the treatment of the civil law in this thesis. This type of human right claim is a specific mechanism through which one may hold the state accountable for the violation of their

this conduct appears to represent breaches of Article 8 rights. Yet the problem remains that there is no clear, freestanding basis for establishing liability for such wrongdoing in Scots law.[106] Thus, there remains something of a lacuna in Scots law in respect of mere surveillance or interference as an actionable form of intrusion.

This is illustrated in some of the case law. In *Martin v McGuiness*,[107] the pursuer in a personal injury action questioned the admissibility of evidence led by the defender. This evidence had been obtained by a private investigator hired by the defender who had monitored the pursuer's home, entered his home, and questioned his wife. As well as contending that the evidence had been unlawfully obtained and was therefore inadmissible, the pursuer sought damages for breach of privacy. Although the court found that there had been a *prima facie* violation of Article 8(1), the investigator's conduct was held to be reasonable and proportionate in the circumstances. As a result, the judge did not have to consider the question of whether the investigator had additionally violated the pursuer's right to privacy. However, the judge did not rule out the possibility of such an action succeeding at common law,[108] and the possibility of the pursuer relying on the *actio iniuriarum* was acknowledged.[109] As explained in Chapter 4, this "provided a remedy for an affront brought about by a deliberate attack on a person's dignity".[110] Given the absence of a specific privacy action for interference of this kind, this may therefore enable the pursuer to obtain a remedy.

As will be shown in the next section, there has been a broadening of the tort of "misuse" of private information in English law to capture cases where there is interference with private information without disclosure.[111] However, there has been no recognition of a right to privacy extending to interference with an individual's territorial or physical privacy. This was confirmed by the House of

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Convention rights. This does not preclude a separate action in delict from being raised against the state.

[106] Reid (n 92) at 300-301.

[107] *Martin v McGuiness* 2003 SLT 1424.

[108] ibid per Lord Bonomy at para 28.

[109] E C Reid, *The Law of Delict in Scotland* (2022) para 20.80, citing *Martin v McGuiness* per Lord Bonomy at para 29.

[110] Burchell and Norrie (n 90) at 547.

[111] *Gulati v MGN Ltd* [2015] EWCA Civ 1291, [2017] QB 149.

Lords in *Wainwright v Home Office*,[112] where it was held that the practice of intrusive strip-searches by prison officers did not constitute an actionable breach of the claimant's privacy.[113]

There has been similar reluctance among Scottish courts in cases where there have been arguable breaches of personal privacy. In *Henderson v Chief Constable of Fife Police*,[114] the pursuer was told to remove her bra in a police cell while other officers were present. Although the pursuer successfully obtained damages, these appear to have been awarded for breach of liberty and privacy,[115] and it has been suggested that the judge placed greater emphasis on the pursuer's right to liberty.[116] Indeed, in the later Inner House case of *C v Chief Constable*,[117] Lady Dorrian was critical that this case was decided on the basis of breach of privacy and suggested that the basis for the decision was "the issue of liberty and the limits of police authority was on police powers/liberty".[118]

McKie v Chief Constable of Strathclyde[119] involved similar facts, in which the pursuer claimed to have been wrongfully arrested, detained, strip-searched, and had to urinate while police officers watched. The pursuer claimed that they suffered a loss of liberty and privacy. However, the court did not engage in a detailed discussion of privacy as the pursuer was unable to prove malice, which was required in an action against the police. It is also worth noting that both cases were heard before the incorporation of the ECHR into Scots law.[120] Had these actions been raised after this, it is possible, as they were brought against

[112] *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406.
[113] Although in *Wainwright* it was held by the European Court of Human Rights that this practice was in breach of the claimant's Article 8 rights.
[114] *Henderson v Chief Constable of Fife Police* 1988 SLT 361.
[115] ibid at 367.
[116] E Barendt, "Privacy as a constitutional right and value" in in P Birks (ed), *Privacy and Loyalty* (1997) 1 at 3, fn 10.
[117] *C v Chief Constable of the Police Service of Scotland* [2020] CSIH 61. This decision is examined at section 7.3.5 below.
[118] ibid per Lord Justice Clerk Dorrian at para 84.
[119] *McKie v Chief Constable of Strathclyde* 2003 SC 317.
[120] In the case of *McKie,* although the case was reported in 2003, the incident in question occurred in 1998.

public authorities, that remedies may have been obtained for breaches under Article 8.[121]

Some of these cases go beyond mere interference with an individual's right to territorial or spatial privacy and appear to involve a violation of "personal" (or even sexual) privacy interests.[122] In Scots law, a breach of personal security has historically been protected through the delict of personal molestation, which also protects right to seclusion.[123] This was confirmed in *Ward v Scotrail Railways Ltd*,[124] which concerned an action brought by a train conductor against her employer (in vicarious liability) as a result of sexual harassment suffered at the hands of her colleague. The court held that the action could be brought against the employee[125] on the basis that this conduct constituted personal molestation. In reaching this decision, the court referred to the earlier case of *McGlennan v McKinnon*[126] and suggested that the Protection from Harassment Act 1997 may now capture such conduct.[127] Lord Justice-General Rodger expressly acknowledges the relationship between harassment and this type of privacy in *McGlennan*, stating that:

> "The provisions of the 1997 Act can be seen as recognising an actionable right to be free from unwelcome pursuit, which in some legal systems forms part of a wider right of privacy."[128]

As with the previous cases discussed, these decisions pre-date the incorporation of the ECHR into domestic law. It is likely that Article 8 would provide a means of redress where a person suffers a violation of this kind, although it remains unclear as to the basis for such an action in cases where the proposed defender is a private individual. Whitty even suggests that Article 8 may play a residual role in catching conduct that falls short of Article 3

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[121] See also Human Rights Act 1998 s 6.
[122] Reid, *Delict* (n 109) para 20.82.
[123] Whitty (n 85) at 169.
[124] *Ward v Scotrail Railways Ltd* 1999 SC 255 (OH).
[125] The court rejected the pursuer's argument that their employer (Scotrail) could be vicariously liable in these circumstances.
[126] *McGlennan v McKinnon* 1998 SLT 494.
[127] *Ward* at 261.
[128] *McGlennan* per Lord Justice-General Rodger at 497.

(Prohibition of torture),[129] and suggests that "circumstances which do not meet the threshold test for inhuman and degrading treatment or punishment may nevertheless fall within the sope [*sic*] of respect for private life".[130]

These decisions not only demonstrate a lack of engagement with violations of personal privacy, but also the extent to which this particular type of privacy interest overlaps with other personality rights such as physical liberty, personal security, and bodily autonomy. This failure of Scots law to recognise a seclusion-based privacy right means that it falls to existing discrete (civil and criminal) wrongs to capture wrongdoing related to unwanted access or interference. This is in contrast to other jurisdictions such as South Africa,[131] Canada,[132] New Zealand[133] and Ireland,[134] all of which have either introduced or developed this as a standalone right or as part of a general or constitutional right to privacy. As will now be explained, Scots civil law remains largely focused on informational privacy at the expense of interference itself.

7.3.2 Misuse of private information

While seclusion from intrusion principally covers unwarranted surveillance or interference, the right not to have one's private information disclosed relies upon the act of disclosure. This right gives specific protection to informational privacy and is often thought of as the core of breach of privacy.[135]

Informational privacy covers a number of similar (albeit distinct) wrongs. These include the disclosure or misuse (whether by accessing, retaining, or mishandling) of information about an individual. This information may be

[129] ECHR, Article 3: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".
[130] Whitty (n 85) at 169.
[131] Constitution of the Republic of South Africa (1996) s 14.
[132] *Jones v Tsige* 2012 ONCA 32 (CA (Ont))
[133] *C v Holland* [2012] NZHC 2155 (HC (NZ)).
[134] *Kennedy v Ireland* [1987] IR 587.
[135] Reid, *Delict* (n 109) para 20.14.

either confidential or private;[136] true or false;[137] or damaging or not.[138] These distinctions have a strong bearing on the nature of the wrong and the action that may be brought.

This branch of privacy has in recent years come to dominate judicial consideration of privacy rights in the UK. This has partly been fuelled by the introduction of the Human Rights Act 1998 and the incorporation of the ECHR into domestic law. Although the focus of this thesis is on Scots law, it is difficult to ignore the impact of English case law in this area. In particular, this is because of the challenge that courts have faced in protecting rights enshrined in the ECHR under existing actions, a problem that the Scottish courts have similarly had to grapple with. In the specific context of breach of confidence, it is also thought that the substance of the law is the same in England and Scotland,[139] irrespective of the different legal basis for the action.[140]

The incorporation of the ECHR has been instrumental in developing privacy rights by giving individuals an express right to private and family life under Article 8.[141] This previously only gave individuals a right to bring an action where their rights had been breached by a public authority.[142] It did not provide a mechanism through which to bring an action against another private individual or entity. This changed with the passing of the Council of Europe Resolution 1165 of 1998, which provided that the rights under the ECHR would have horizontal as well as vertical effect.[143] This means that the government (and public authorities) not only has to act in compliance with Article 8, but that they

[136] In practice, this may determine whether the appropriate action is one for breach of confidence or misuse of private information. Although it will be shown that this distinction has, to some extent, been eroded by recent judicial decisions.
[137] Where the information disclosed is false, it may be that the relevant action is one for defamation rather than for misuse of private information. This action may be brought where the disclosure is defamatory. See section 7.4.1 on defamation.
[138] The nature of the harm suffered will be relevant to the assessment of damages that the pursuer is able to recover. However, it may be that the privacy violation is a harm in and of itself for which the pursuer may compensated.
[139] *Lord Advocate v Scotsman Publications Ltd* 1989 SC (HL) 122 per Lord Keith at 164 and Lord Jauncey at 170; *William Morton and Co v Muir Brothers and Co* 1907 SC 1211 at 1224.
[140] The law of delict in Scots law; the law of equity in English law.
[141] ECHR, Article 8.
[142] Human Rights Act 1998 s 6.
[143] Council of Europe, Resolution 1165 of 1998.

additionally have to ensure that private individuals do not breach the rights of one another.[144]

Given the absence of a legislative response to comply with this, the English courts sought to use the existing action for breach of confidence as a vehicle through which to develop the law of privacy.[145] In doing so, there was a "continued willingness of the English courts to develop the law as a tool to protect privacy".[146] Despite improving privacy protections in line with Article 8, it will be shown that using the action for breach of confidence has been conceptually flawed.

Although it took some time for a distinct delictual action for misuse of private information to emerge in Scots law, the development of this action was far less convoluted than for the equivalent tort in English law. Both actions had their origins in breach of confidence. Unlike English law, this was already recognised as a delict in Scots law;[147] in English law it was merely an equitable action.[148] Thus, in English law, there was no recognised tort for any form of breach of privacy until the 21st century.[149] In this period, "privacy interests continued to be protected piecemeal by a range of discrete torts such as trespass, nuisance, defamation and malicious falsehood, and the equitable action for breach of confidence".[150]

In Scots law, an action for breach of confidence is long-established[151] and is premised on the basic principle that secrets should be kept.[152] The availability of this action usually rests on the nature of the relationship that governs the

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[144] N A Moreham, "Privacy and horizontality: relegating the common law" (2007) 123 Law Quarterly Review 373; Morgan (n 57) at 451.
[145] R Errera, "The twisted road from Price Albert to Campbell, and beyond: towards a right to privacy?" in M Andenas and D Fairgrieve (eds), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (2009) 373 at 386.
[146] MacQueen (n 11) at 555.
[147] Burchell and Norrie (n 90) at 571.
[148] *Kaye v Robertson* [1991] FSR 62
[149] ibid per Glidewell LJ: "It is well known that in English law there is no right to privacy and accordingly there is no right of action for a breach of personal privacy." See also *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406 per Lord Hoffmann at para 30; *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 per Lord Nicholls at para 11.
[150] Reid, *Delict* (n 109) para 20.08.
[151] Reid, *Personality* (n 38) para 12.01.
[152] Reid, *Delict* para 19.02.

obligation of confidence. The most obvious relationship where such an obligation arises is a contractual one; notable examples are between members of certain professions (e.g. doctors, lawyers, financial advisers) and their clients, and between employers and their employees (particularly in respect of trade secrets). In some cases, the contract itself may expressly or impliedly provide that certain information is to be treated as confidential. However, in other instances, property law may provide a remedy through an action for breach of copyright.[153] As a result, the backdrop of an action for breach of confidence is often a commercial relationship, and it has been suggested that the interest at stake is an economic one.[154]

Notwithstanding this, liability in delict may arise in cases where "breach of the obligation of confidentiality…is an incident of that relationship".[155] The roots of this delictual action lie in *Cadell and Davies v Stewart*,[156] in which the court held that there was an implied duty of confidence in letters that they should not be published without the permission of the author. The basis for this decision appeared to lie in the reputational harm that could arise if letters were published without the author's consent.[157] This line of reasoning was developed in *White v Dickson*,[158] with the court approving Bell's statement[159] that this was an action for the protection of one's reputation rather than for their property.[160] The scope of this action has been further expanded to include relationships where there is no contract or relationship akin to contract. Rather, the requirement is that a "pre-existing relationship between the parties creates a duty upon the confidant to observe confidentiality".[161] The most prominent example of this is in the

[153] See H L MacQueen, "Property part II: intellectual property" in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 18 (1993) paras 1452-1453.
[154] Burchell and Norrie (n 90) at 572.
[155] Reid, *Delict* (n 109) para 19.35. Where the breach of confidence occuts in the course of pre-contractual negotiations, an action in delict may be available: see Reid, *Delict* para 19.21; *Levin v Caledonian Produce (Holdings) Ltd* 1975 SLT (Notes) 69.
[156] *Cadell and Davies v Stewart* (1804) Mor App Literary Property No 4, 1 June 1804 FC.
[157] Reid, *Delict* (n 109) paras 19.11-19.12.
[158] *White v Dickson* (1881) 8 R 896.
[159] Bell, *Principles* 1357.
[160] *White* per Lord Craighill at 899–890. Notwithstanding this, confidential information does not have to be information that, if disclosed, would have a negative impact on the subject's reputation. Various types of confidential information (e.g. a person's medical or financial records) will not necessarily result in reputational harm.
[161] Reid, *Personality* (n 38) para 14.01.

context of an intimate relationship, as recognised in the well-publicised case of *Duchess of Argyll v Duke of Argyll*.[162]

In English law, confidentiality was traditionally derived from the relationship between the parties. This requirement therefore limited the scope of this action. However, in widening its parameters, there has been a noticeable shift from requiring a relationship of confidence to simply needing there to be "notice of confidence".[163] This is essentially an objective test as to whether the recipient of the information would reasonably have known that it was confidential. While all confidential information may be considered private, it is not the case that all private information is confidential. Indeed, most private information would not be considered confidential.

This came to a head in the landmark case of *Campbell v MGN Ltd*.[164] In this case, the model, Naomi Campbell, raised an action against a newspaper group after they published photographs of her leaving a Narcotics Anonymous meeting in London. A key issue was that the photographs of Campbell were taken in a public place, and it could not therefore be said that the information was confidential. Campbell nevertheless claimed that the publication of these photos had breached her right to privacy. The House of Lords overturned the Court of Appeal's decision that had previously rejected Campbell's claim, and instead found in her favour. Notwithstanding that the photos were taken in a public place, the court held that the surrounding circumstances were such that the information should be considered "private". In particular, this was because the photos provided details about Campbell's treatment for drug addiction. This was a particularly sensitive matter, and an analogy could be drawn between this information about her treatment and the information contained in a person's medical records.[165] This decision therefore dispensed entirely with the requirement of a prior confidential relationship between the parties.[166] In its place, the test now appears to be whether the claimant had a "reasonable

[162] *Duchess of Argyll v Duke of Argyll* [1967] Ch 302.
[163] *Attorney-General v Guardian Newspapers Ltd* [1990] 1 AC 109.
[164] *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457.
[165] ibid per Lord Hope at para 91.
[166] ibid per Lord Nicholls at para 14.

expectation of privacy".[167] The House of Lords stated that this enquiry should take account of the surrounding context. This is consistent with the ECtHR decision in *von Hannover v Germany*,[168] which drew a distinction between functional and spatial privacy.[169] This means that "the intrusiveness of the defender's actions must be judged against what it is the pursuer was doing as well as where he or she was doing it",[170] thereby introducing an element of subjectivity into this assessment. In particular, this means that there are a number of factors to consider when assessing whether the pursuer would have had a reasonable expectation of privacy. Among others, these include the location of the alleged breach, the identity and/or characteristics of the claimant, and what they were doing at the relevant time.

Thus, the House of Lords articulated the test as being "what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity".[171] By framing the test in this way, this enables claimants to allege a breach of privacy even where the information in question was (or remains) publicly available. This can be seen in the case of *Murray v Express Newspapers,* in which a photo of J K Rowling's child was taken in a public street and published without consent.[172] As with *Campbell*, there was clearly no way in which this information could be said to be confidential. Any number of people could have observed the child on the street at the time the photo was taken, and, in any event, it is difficult to claim that the information was of a sensitive nature, which was a relevant consideration in *Campbell*. However, the court nevertheless held that this was actionable on the basis of Article 8. In doing so, they placed specific emphasis on the fact that the subject of the clandestine image was a child,[173] stating as a matter of principle that "subject to the facts of the particular case, the law should indeed protect children from intrusive media attention".[174] This decision further

[167] ibid per Lady Hale at paras 134-137.
[168] See also the decision of the ECtHR in *von Hannover v Germany* (2005) 40 EHRR 1.
[169] *von Hannover* at para 54.
[170] Reid, "Protection of personality rights" (n 92) at 299.
[171] *Campbell* per Lord Hope at para 99.
[172] *Murray v Express Newspapers plc and Big Pictures (UK) Ltd* [2008] EMLR 12.
[173] ibid per Clarke MR at paras 37, 45-47.
[174] ibid per Clarke MR at para 57.

illustrates a move away from the protection of confidential information to the protection of private information.

Yet what is unclear is whether *Campbell* and subsequent cases really represented a shift in the requirements of a breach of confidence action in England and Wales, or rather a change in the action itself. Not only did the substance change (expectation of privacy has replaced obligation of confidentiality as relevant test), but the form of the action changed (from an equitable action to a distinct tort). There certainly appeared to be a blurring of the distinction between confidential information and private information, and "there is a high degree of artificiality in arguing that the wrong suffered [in *Campbell*] is breach of confidentiality".[175] This is significant, not least because privacy and confidentiality are underpinned by different rationales. Morgan argues that "at a basic level confidence is about disclosure of secrets reposed in trust, and privacy about intrusion upon sensibilities and feelings".[176] As a result, Reid is critical of the expansion of breach of confidence and states that it "cannot be regarded as standing proxy for breach of privacy more generally".[177] Despite these objections, the result of this convergence of the law of confidentiality and the law of privacy is that breach of confidence in England may now be viewed as a "de facto right of privacy in the context of public disclosure of private facts".[178]

To summarise, *Campbell* therefore resulted in "the transformation of breach of confidence into what may now be termed 'the tort of misuse of private information",[179] which "emerged from the shell of the equitable wrong of breach of confidence".[180] Having charted the development of this wrong, what then is its substance? The wrong is generally constituted by two elements: (i) unauthorised use of (ii) private information.

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[175] Reid, "Protection of personality rights" (n 92) at 293.
[176] Morgan (n 57) at 451.
[177] Reid, *Delict* (n 109) para 20.01.
[178] Krotoszynski Jr, *Privacy Revisited* (n 53) 127.
[179] G Phillipson, "The 'right' of privacy in England and Strasbourg compared", in A T Kenyon and M Richardson (eds), *New Dimensions in Privacy Law* (2006) 184 at 202.
[180] Reid, *Delict* (n 109) para 20.11.

In terms of the first requirement, this represents a move away from disclosure. While disclosure may range from simply communicating the information to another person to publishing the information in a newspaper or on a website, misuse extends to interference with, or acquisition or retention of, private information.[181] A person may access another's personal data and retain this material for an indefinite period without disclosing it. Such conduct, on its own, would previously not have been an actionable wrong. However, the scope of disclosure has been dispensed with by the judiciary in recent years and replaced by the broader term "misuse".[182] The leading English case is *Gulati v MGN Ltd*,[183] in which the Court of Appeal recognised loss of control over private information as actionable. The claimants in this case were victims of phone hacking. Although information obtained as a result of the hacking was reported by the press in a number of cases, in some, there had been no disclosure of the material. The court held that this still constituted a misuse of the claimants' information and that this was an actionable wrong. It is possible that similar conduct could therefore be held to represent misuse of private information (e.g. recording or monitoring individuals and/or their data).[184]

As for the second requirement, the meaning of private information has similarly been the subject of judicial expansion. This is clearly evidenced by the aforementioned decisions in *Campbell* and *Murray*. Although it has been confirmed that the test is now whether the claimant had a reasonable expectation of privacy in relation to the information, this has been difficult to assess in practice. *Murray*, in particular, highlights the difficulties with photos taken in public where it may seem paradoxical to argue that the claimant had any expectation of privacy.

Moreover, although one often characterises the wrong as involving the misuse of true information (in contrast to defamation), this is not necessarily a requirement. In *McKennit v Ash*,[185] it was argued by the defendant that what

[181] Moreham, "Beyond information" (n 93) at 354.
[182] It remains unclear whether "misuse" requires intentional conduct on the part of the wrongdoer or whether information may be negligently misused: see Reid, *Delict* (n 109) para 20.35, fn 152.
[183] *Gulati* (n 111).
[184] Reid, *Delict* (n 109) para 20.34.
[185] *McKennit v Ash* [2008] QB 73.

was written in an unauthorised book was false. The court held that the defendant cannot escape liability by subsequently claiming that the information they disclosed was in fact false.[186]

From a Scottish perspective, it appears that Scots law has followed English law in this area, partly as a result of the incorporation of the ECHR. However, there has been a dearth of Scottish cases from which this can be confirmed. In the case of *X v BBC*,[187] there appeared a willingness to follow the House of Lords decision in *Campbell*. In this case, a young woman brought an action against the BBC for broadcasting recorded footage of her in a heavily intoxicated state in public as part of a documentary. An interim interdict was granted, which prevented the documentary from being aired. In reaching this decision, the judge seemed to rely on the test set out in *Campbell*,[188] thereby confirming that an action could be brought in Scotland for misuse of private information.

Thus, in the course of this century, the courts have shown a far greater willingness to protect against the disclosure of information that is merely private rather than confidential. Although this was a notable change in approach to privacy law in England and Wales, the development in Scotland was far less radical. Given the limited case law in Scots law on this issue, it remains to be seen whether the Scottish courts will be more heavily influenced by ECtHR jurisprudence than decisions from south of the border. This may be highly significant, for the protection of privacy under Article 8 rests on an altogether different basis: the protection of autonomy and dignity.[189] This takes account not just of an individual's private information, but also their private sphere.

Indeed, it is important to stress that despite these judicial developments, this has not resulted in anything as broad as a general action for "breach of privacy" (at least not in the Warren and Brandeis sense of a broad category of different privacy wrongs) in either Scots law or English law.[190] Rather, the action

[186] ibid per Longmore LJ at para 87.
[187] *X v BBC* 2005 SLT 796.
[188] ibid per Temporary Judge M G Thomson QC at paras 48 and 57.
[189] *Campbell* (n 164) per Lord Hoffmann at para 51.
[190] See section 7.3.5 below for further consideration of this issue. See also Reid, "Protection of personality rights" (n 92) at 294.

specifically relates to private information,[191] which is just one element of an individual's private life.

7.3.3 False light

The third and fourth privacy torts set out by Prosser[192] differ in character to those previously discussed.[193] These specifically concern an individual's "identity and image".[194] Identity is thought to encompass a number of attributes such as "physical appearance, name, signature, voice, and any other recognizable characteristic"[195] and is therefore extremely broad in scope. The importance of image rights was stressed by the ECtHR in *Reklos and Davourlis v Greece*.[196] This case concerned photographs that were taken of a new-born child in a hospital's sterile unit without the parents' consent. Although there was no disclosure of the photos, the court held that "a person's image is one of the characteristics attached to his or her personality…an essential attribute of personality".[197]

The wrong of false light privacy has been described as "publicity that places the plaintiff in a false light in the public eye".[198] Solove refers to this as "distortion", which he views as the "manipulation of the way a person is perceived and judged by others" and "involves the victim being inaccurately characterized".[199] The wrong is intended to capture conduct in which false statements are attributed to the pursuer, or where the pursuer is falsely shown to be connected with something.[200] In common with the misuse of private

[191] Reid, *Delict* (n 109) para 20.11.
[192] Prosser (n 84).
[193] R Wacks, *The Protection of Privacy* (1980) 166.
[194] Whitty (n 85) at 195.
[195] S Bate and G de Wilde, "Copyright, moral rights, and the right to one's image" in M Tugendhat and C Christie, *The Law of Privacy and the Media*, 3rd edn (2016) by N A Moreham and M Warby (eds) 389 at 419.
[196] (No. 1234/05) [2009] EMLR 16.
[197] ibid at para 40.
[198] Prosser (n 84) at 398.
[199] D Solove, *Understanding Privacy* (2008) 160.
[200] Prosser (n 84) at 398-399. Reid gives the example of a pursuer's image being included alongside photos of convicted criminals in a "rogue's gallery", thereby implying that the pursuer has been involved in criminal wrongdoing: see Reid, *Personality* (n 38) para 18.01.

information, the wrong requires publicity; the key difference is that the disclosure in this case must be false.[201]

The harms that may be suffered by the pursuer here are varied. There may be damage to a pursuer's privacy interest insofar as casting them in a false light interferes with their right to be free from intrusion or involves the disclosure of private information. Despite this, it is not clear that all cases of false light wrongdoing involve such violations.

In Scots law, it appears that false light privacy is not an actionable delict, but that the relevant interest(s) would rather be protected through actions for defamation or malicious publication.[202] This is consistent with the view of some commentators that the characterisation of false light as a privacy tort conflates privacy with reputational harm. Schonsheck argues that false light "is neither parasitic upon, nor dependent upon, the iniquity of violating privacy rights",[203] while Parent similarly states that "the spreading of falsehoods or purely subjective opinions about a person does not constitute an invasion of his privacy".[204] Prosser even suggests that "the interest protected is clearly that of reputation".[205] This is because of the requirement of falsity, which may mean that the conduct of the wrongdoer is also defamatory in nature. In such cases, it should be left to the law of defamation to provide a remedy rather than privacy law. Indeed, there are both conceptual and procedural difficulties in remedying reputational harm through privacy actions.[206] These have been identified in a number of cases involving media reporting of police investigations into people who have not been charged with a criminal offence.[207]

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[201] Prosser (n 84) at 400. Although Prosser claims that the misuse of private information tort "involves truth", there is no strict requirement that the information disclosed must be true.
[202] See discussion of these actions at sections 7.4.1 and 7.4.2.
[203] Schonsheck (n 97) at 102.
[204] W A Parent, "Privacy, Morality, and the Law" (1983) 12 Philosophy & Public Affairs 269 at 269, fn 1.
[205] Prosser (n 84) at 400.
[206] *Bloomberg v ZXC* [2022] UKSC 5, [2022] 2 W.L.R. 424; *Sicri v Associated Newspapers Ltd* [2020] EWHC 3541 (QB); *LNS v Persons Unknown* [2010] EWHC 119 (QB).
[207] See earlier discussion of these cases at section 2.6.

Nevertheless, there may be cases where there is no damage to reputation.[208] Examples include where the pursuer is falsely shown in a positive light,[209] or where the pursuer is shown to have acted in a way that is not objectively harmful to their reputation, but which causes them personal dissatisfaction.[210] It can therefore be said that "the cases that are uniquely reached by false light are those which involve nondefamatory falsehoods".[211] These may still cause harm and "can have a significant adverse impact on people's well-being and self-perception",[212] yet it is unclear that one's privacy will necessarily be violated in these instances. There is a much closer connection to reputation in terms of the impact that the conduct may have on an individual's standing, honour, sense of worth, and the way that others may view them.

7.3.4 Publicity wrongs

The final privacy tort Prosser refers to is that concerning "publicity wrongs". This is defined as "the exploitation of attributes of the plaintiff's identity",[213] and is specifically characterised by "appropriating [the plaintiff's] name or likeness for private advantage".[214]

As with the false light wrong, this wrong sits less comfortably among other privacy wrongs and has been "frequently cited as a cuckoo in the nest".[215] The reason for this is because it is unclear whether the central interest at stake is a privacy interest, or whether it is a property interest. The harms suffered in such cases may concern the individual's personality rights (e.g. dignity, reputation or privacy) and/or their property rights.

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[208] P Le Morvan, "Information, privacy and false light" in A E Cudd and M C Navin (eds), *Core Concepts and Contemporary Issues in Privacy* (2018) 79 at 85.
[209] Le Morvan gives an example of a biographer who invents stories involving the pursuer acting heroically, which may offend the pursuer by subjecting them to unwanted and undeserving praise: see Le Morvan at 85.
[210] ibid.
[211] D L Zimmerman, "False light invasion of privacy: the light that failed" (1989) 64 New York University Law Review 364 at 396.
[212] Moreham (n 34) at 59.
[213] Prosser (n 84) at 401.
[214] R Bagshaw, "Obstacles on the path to privacy torts" in P Birks (ed), *Privacy and Loyalty* (1997) 133 at 140, fn 19.
[215] ibid at 140.

In the USA, the courts in some states have developed a specific "right of publicity",[216] yet this right is regarded as an intellectual property right.[217] As with false light privacy, no such right is recognised in Scots law, but redress may nevertheless be found in the law of delict and intellectual property law. In particular, an action for passing-off may provide a means through which a pursuer can obtain a remedy where their identity or image has been used by the defender in the marketing of their (the defender's) goods or services. In some cases, the wrong may have a greater impact on the commercial interests of the individual than their reputation. This explains the use of the term "appropriation" in relation to this wrong, for it may result in economic loss for the pursuer.

The most relevant authority in Scots law is early 20th century case of *M'Cosh v Crow and Co*.[218] In this case, the pursuer objected to the defender displaying photos of the pursuer's daughters in the defender's photo studio. The photos had been taken by a third party who had previously owned the defender's photography business. What is interesting about this case is that the display of photos resulted in no apparent damage to the reputation or dignity of the subjects. In awarding the pursuer an interdict preventing the photos from being displayed, the court stated that there had been an implied term in the contract governing confidentiality. The pursuer was therefore entitled to rely on this term, and the court held that the defender had become bound by this term when acquiring the business.

In addition to passing-off, an action for breach of confidence (or misuse of personal information) may be relevant. While information such as the pursuer's name or image cannot be regarded as confidential, given the increased scope of breach of confidence, the pursuer may now have a right concerning how their private information is used by others.[219] The most prominent case dealing with this issue in the UK is the English case of *Douglas v Hello! Ltd*.[220] The actors Michael Douglas and Catherine Zeta-Jones had entered into a commercial

[216] *Haelan Laboratories Inc v Topps Chewing Gum Inc* 202 F.2d 866 (2d Cir. 1953).
[217] Reid, *Personality* (n 38) para 18.07.
[218] *M'Cosh v Crow and Co* (1903) 5 F 670.
[219] *Murray v Express Newspapers* (n 172); *X v BBC* (n 187).
[220] *Douglas v Hello! Ltd* [2008] 1 AC 1.

arrangement with *OK!* magazine. This gave the magazine an exclusive right to publish photos from their wedding. Photos from the wedding were later published by *Hello!* magazine without the consent of either party. Actions for breach of confidence were then brought against the *Hello!* by both the couple and *OK*! magazine. The couple were awarded damages for the distress caused by the breach of their privacy rights. The court was convinced that the couple had lost control over the use of their images and that this represented a wrong analogous to the disclosure of confidential or private information. However, it is questionable as to whether the case was indeed decided on the basis of breach of confidence and Lord Phillips' judgment acknowledged the awkward manner in which the Court of Appeal granted a remedy:

> "We cannot pretend that we find it satisfactory to be required to shoehorn within the cause of action of breach of confidence claims for publication of unauthorised photographs of a private occasion".[221]

Burchell and Norrie are similarly critical and suggest that "*Douglas* was, in reality, a case raised to protect the plaintiffs' economic interests rather than their privacy in its dignity sense".[222] It was additionally argued by the couple that loss of control over their image constituted a particular invasion of their commercial interests. The court agreed and relied on the law of equity to

> "protect the opportunity to profit from confidential information about oneself in the same circumstances that it protects the opportunity to profit from confidential information in the nature of a trade secret".[223]

An equitable remedy in the form of an account of profits for any profit made by *Hello!* magazine was therefore granted. However, it is unclear as to whether the same approach would be taken in Scotland, particularly in respect of the second award of damages specifically for publicity rights since there is no possibility of an equitable remedy in Scots law.

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[221] *Douglas v Hello! Ltd* [2006] QB 125 per Lord Phillips MR at para 53.
[222] Burchell and Norrie (n 90) at 573.
[223] *Douglas* per Lord Phillips MR at para 113.

In any event, these wrongs have a much closer tie to (intellectual) property and commercial interests.[224] Wacks convincingly claims that "although generally considered to be privacy issues, the appropriation of an individual's identity and the false light in which it is depicted, are best regarded as peripheral to the central problem of protecting privacy".[225] For the reasons explained, the central question of how the criminal law should protect privacy interests will not, for the purposes of this thesis, include reference to identity and image rights. While the issue of false light wrongdoing may be relevant to parts of the thesis dealing with reputation, publicity wrongs cannot be separated from the surrounding commercial context and cannot be addressed here.

7.3.5 A general right to privacy?

It has been shown that two privacy delicts dominate Scots law: the historic action for breach of confidence and the newly developed action for misuse of private information. Both actions concern the specific privacy interest relating to informational privacy. This is despite the rights guaranteed in Article 8 extending beyond this.[226] Aside from Article 8, whether there exists a general common law right to privacy in Scots law is a question that has attracted much judicial attention and discussion among legal commentators.[227] The question is essentially whether there is a single right which can accommodate the multifaceted nature of privacy, as opposed to informational privacy alone. Given the preceding account of privacy wrongs, this right would encompass "seclusion" of the type examined at section 7.3.1 above.

This issue notably arose in *C v Chief Constable of the Police Service of Scotland*.[228] This case concerned inappropriate electronic messages sent by ten serving police officers on WhatsApp groups. These messages were discovered by another serving officer who reported them to their superiors. The messages

[224] R Wacks, *Law, Morality, and the Private Domain* (2000) 252.
[225] Wacks, *The Protection of Privacy* (n 193) 166.
[226] Whitty (n 85) at 162.
[227] Reid, *Delict* (n 109) para 20.87; N A Moreham and M Warby (eds), *Tugendhat and Christie: The Law of Privacy and the Media*, 3rd edn (2016) paras 2.04-2.37.
[228] *C v Chief Constable of the Police Service of Scotland* [2020] CSIH 61.

were then referred to the Police Service of Scotland's Professional Standards Department. Although the content of the messages could not be said to be criminal, misconduct proceedings were brought against the officers in question on the basis that they were nevertheless in breach of the Police Service of Scotland (Conduct) Regulations 2014 due to their highly offensive nature.

The petitioners sought an order from the court declaring that the use of these messages to bring misconduct proceedings against them was unlawful and a violation of their right to private and family life under Article 8 of the ECHR, and that an interdict should be granted preventing any misconduct proceedings from being raised or continued. Although the Inner House affirmed the Outer House's decision that there had been no violation of the officers' Article 8 rights, a difference in view emerged between the two regarding the existence of a general common law right to privacy. Counsel for the petitioners in the Outer House argued that a common law right to privacy did exist.[229] They argued that such a right had been recognised under English law[230] and that there had been implicit recognition of this right in two Scottish decisions.[231] While the Lord Ordinary stated that such a right did exist in Scots law,[232] this was not fully embraced by the Inner House bench.[233]

In support of this argument, the Lord Ordinary began by observing that "given privacy is a fundamental right I think it highly likely that it exists in the common law of Scotland".[234] In setting out its importance, the Lord Ordinary states that "it is a right which can I think be described as a core value and one which is inherent in a democratic and civilised state".[235]

The Lord Ordinary goes on to note that this would be in line with English law and that "if it does not exist in Scots common law a very odd conclusion is reached that Scottish and English law in relation to this fundamental matter are

[229] *C v Chief Constable of the Police Service of Scotland* [2019] CSOH 48 at paras 8-12.
[230] *Campbell* (n 164).
[231] *Henderson* (n 114); *Martin v McGuinness* (n 107).
[232] *C v Chief Constable of the Police Service of Scotland* [2019] CSOH 48 per Lord Bannatyne at para 126.
[233] *C v Chief Constable of the Police Service of Scotland* [2020] CSIH 61 at para 77.
[234] *C v Chief Constable of the Police Service of Scotland* [2019] CSOH 48 per Lord Bannatyne at para 116.
[235] ibid at 106.

entirely different. I think that is an inherently unlikely result.[236] Given the historical divergence between Scots and English law, this is not a particularly convincing reason. While there may be a normative argument that the law should be aligned between the two jurisdictions, this is not the case. This may therefore support the argument that a right ought to be introduced, but not that a right already exists. In any event, it is questionable that English has recognised a general right of the kind envisaged by the Lord Ordinary. The Lord Ordinary's reasoning was that *Campbell*[237] had created a general right to privacy.[238] It is acknowledged in *Campbell* that "unlike the United States of America, there is no over-arching, all-embracing cause of action for 'invasion of privacy'".[239] While the Lord Ordinary points to the development of a right to privacy stemming from the existing tort of breach of confidence in England, this right to privacy is still rooted in private information,[240] with one author referring to "English common law's (virtually exclusive) focus on the informational aspects of privacy".[241]

It was additionally the Lord Ordinary's view that Scottish case law pointed towards the existence of such a right.[242] The Lord Ordinary relied upon the judgments in *Henderson v Chief Constable of Fife Police*[243] and *Martin v McGuiness*,[244] the facts and decisions of which are outlined earlier in this chapter.[245]

The Outer House's decision in *C v Chief Constable of Police Scotland* was the first decision in which the possibility of a common law right to privacy was expressly acknowledged by the court. However, even having regard to the Lord Ordinary's statements and his acceptance of a general common law right to

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[236] ibid per Lord Bannatyne at para 116.
[237] *Campbell* (n 164).
[238] *C v Chief Constable of the Police Service of Scotland* [2019] CSOH 48 per Lord Bannatyne at paras 109-110.
[239] *Campbell* (n 164) per Lord Nicholls at para 11.
[240] Reid, *Delict* (n 109) para 20.87.
[241] T D C Bennett, "Emerging privacy torts in Canada and New Zealand: an English perspective" (2014) 36 European Intellectual Property Review 298 at 298.
[242] *C v Chief Constable of the Police Service of Scotland* [2019] CSOH 48 per Lord Bannatyne at para 118.
[243] *Henderson* (n 114).
[244] *Martin* (n 107).
[245] See section 7.3.1.

privacy, there was no engagement with the issue of what such a right would consist of. The Inner House stated that "the process by which the nascent right became fully established is not developed, at least in terms which specify the nature, degree and scope of the right, or how it has progressed over time."[246]

When the case reached the Inner House, the court took the opportunity to pass comment on the Lord Ordinary's remarks, despite this issue not forming part of the appeal.[247] The Inner House did not completely dismiss the idea but were less convinced that a general common law right to privacy is part of Scots law:

> "There is no doubt that the law in this area continues to evolve, and that the scope of protection given to private information has expanded considerably, but I beg leave to doubt that it has reached the absolute stage suggested by the Lord Ordinary."[248]

The Inner House criticised the Lord Ordinary's reasoning. They first state that the Lord Ordinary took an over-expansive view of the decision in *Campbell* and that this should be characterised as a decision relating specifically to the misuse of private information rather than developing a broader right to privacy.[249] They quote Lord Nicholls' statement that *Campbell* concerned "one aspect of invasion of privacy: wrongful disclosure of private information".[250] The Inner House went on to declare that "*Campbell* thus elaborated on, or explained, the extent to which private information may be protected at common law, but did not go as far as to say that a fully protected right of privacy had been established".[251]

The Inner House additionally cast doubt on the strength of authorities referred to by the Lord Ordinary.[252] They first noted that the judgment in *Henderson* only made fleeting reference to privacy (when assessing damages) and that this concerned the right to liberty in the context of a police search of a person in

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[246] *C v Chief Constable of the Police Service of Scotland* [2020] CSIH 61 per Lord Justice Clerk Dorrian at para 76.
[247] ibid at para 75.
[248] ibid at para 86.
[249] ibid at para 78.
[250] ibid at para 78, citing *Campbell* per Lord Nicholls at para 12.
[251] ibid at para 80.
[252] ibid at para 84.

custody.[253] As for *Martin*, the Inner House regarded Lord Bonomy's statements as being "entirely *obiter*",[254] which while leaving the door open to the recognition of a privacy right as stemming from *Campbell*, failed to reach a conclusion on the issue.[255]

As Reid summarises, "leaving aside the specific delict of misuse of private information, therefore, the scarcity of modern authority leaves delictual liability for breach of privacy in a state of regrettable uncertainty".[256] While broader aspects of Article 8 may be protected through other delicts and criminal offences, the focus of civil privacy law is very much informational privacy. It remains to be seen whether a more expansive approach may be adopted by the courts going forward in light of the infrequent *obiter* remarks referred to in section 7.3.1 above and the more recent comments made by the Outer House in *C v Chief Constable*.

7.4 Reputation

As explained earlier in the thesis, what is central to reputation is the way in which others view us. When we talk about a "reputation wrong", we are dealing with conduct which (wrongfully or unjustifiably) causes others to view us in a less favourable way.

Warren and Brandeis – in setting out the differences between privacy violations and reputational harm – state that damage to reputation is "injury done to the individual in his external relations to the community, by lowering him in the estimation of his fellows".[257] This is consistent with definitions of reputation outlined in Chapter 3. Thus, what is important here is that (a) the individual's reputation is lowered (b) in the eyes of others.

From a Scots law perspective, Walker similarly states:

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[253] ibid at para 85.
[254] ibid at para 86.
[255] ibid.
[256] Reid, *Delict* (n 109) para 20.86.
[257] S Warren and L Brandeis, "The right to privacy" (1890) 4 Harvard Law Review 193 at 197.

> "A person has a legally recognised interest in the preservation of his own self-esteem and honour from unjustifiable attacks, and this has come to be extended to include an interest in his own public reputation and good name in the eyes of others."[258]

Walker therefore identifies a third component that is necessary in order for the law to recognise reputational harm. This is that there must be (c) an "unjustifiable attack"[259] on one's reputation. This simply means that there must be an element of wrongfulness and the absence of a legally recognised defence.

How then does reputational harm therefore manifest itself as a legal wrong? It does so primarily in the form of defamation and malicious publication: "the function of defamation law is, first and foremost, to protect reputation".[260] The requirements of these actions will now be examined in order to assess the ways in which in which they protect individuals from reputational harm. However, it should be noted that the wrongs of malicious prosecution may also be rationalised as protecting reputation and will be considered later in the chapter.[261]

7.4.1 Defamation

The law of defamation in Scotland has undergone largescale reform, similar to that which had previously happened in England and Wales.[262] The purpose of this law reform project was to modernise and simplify the law in order to strike an appropriate balance between freedom of expression and the protection of reputation.[263] This law reform project led to the publication of the Scottish Law Commission's Report on *Defamation*,[264] which in turn formed the basis for the

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[258] D M Walker, *The Law of Delict in Scotland*, 2nd edn (1981) 729.
[259] Although Warren and Brandeis' use of the word "injury" in their definition implies that there would have to be some wrongful element to the lowering of the individual's reputation in the eyes of others.
[260] Report on *Defamation* (Scot Law Com No 248, 2017) para 2.11.
[261] E Descheemaeker, "Protecting reputation: defamation and negligence" (2009) 29 Oxford Journal of Legal Studies 603 at 619.
[262] Resulting in the introduction of the Defamation Act 2013.
[263] Report on *Defamation* (n 260) para 1.1.
[264] Report on *Defamation* (Scot Law Com No 248, 2017).

Defamation and Malicious Publication (Scotland) Act 2021. This Act changed the law by placing defamation on a statutory footing and amending the common law delict.[265] At the time of writing, it nevertheless remains to be seen what impact these changes will have in practice as the majority of the provisions in the statute only came into force in 2022 and there have been few reported cases.

To begin with, while frequent mention is made to "reputation" in this statute,[266] it does not contain a definition of reputation. It was possibly thought that the meaning of reputation remained the same as it had been in the existing common law, or that its meaning was self-evident (having an ordinary language meaning) and did not therefore require definition. In their consultation paper preceding the Bill, the Scottish Government stated that reputation is "a component of the right to private life" and "an integral and important part of the dignity of the individual".[267] Such a statement is reflective of reputation's relationship with privacy in the ECHR framework[268] and of one of its rationales in upholding one's dignity.[269]

In terms of content, section 1 of the 2021 Act provides that "a statement about a person is defamatory if it causes harm to the person's reputation (that is, if it tends to lower the person's reputation in the estimation of ordinary persons)".[270] What makes defamation distinct from other types of verbal injury is that defamation typically requires falsehood; it is a defence to defamation in Scots law that the defamatory statement is "true or substantially true".[271] By communicating false information about us, we may suffer harm to our reputation. Falsehood is what – in the words of Walker – makes the reputational harm suffered by the individual "unjustifiable". It is this element that makes the harm a "reputation wrong" and something that the law ought to protect against.

[265] Defamation and Malicious Publication (Scotland) Act 2021, introductory text. It did not abolish the common law action but did make widescale and significant changes to this.
[266] ibid s 1(2), (3), (4), s 5(2)(b).
[267] Scottish Government, *Defamation in Scots Law: A Consultation* (January 2019).
[268] See section 7.2.
[269] See section 2.2.2(c).
[270] 2021 Act s 1(4)(a).
[271] ibid s 5(1).

Walker further identifies two bases of action for defamation. These can be linked to the historical grounds examined in Chapter 4. The first of these is the *actio injuriarum*,[272] which is an action for "affront to personality in the shape of *convicium*, insult or derogatory communication to a man, harmful to his feelings and self-esteem".[273] This is an action for what would now be called solatium. The second action is one under the *lex aquila*, which is an action where the pursuer suffers patrimonial loss.[274] While these have now been superseded by the 2021 Act, some provisions of this Act can still be traced to these historical foundations.

There are four requirements that must be satisfied in order for the pursuer to succeed with a defamation action. There must have been (i) a statement made about the pursuer, which must have been (ii) published to a third party; this statement must have been (iii) defamatory, and (iv) caused (or be likely to cause) serious harm to the reputation of the pursuer.[275] Further content is given to this in the rest of section 1 and these requirements will now be explained in turn.

It should be noted that defamation has been described as "a delict of de facto strict liability".[276] This is because "liability is determined not by subjective assessment of D's (the defender's) intention to injure, but by an objective evaluation of whether the imputation was injurious".[277] There is essentially a presumption that the defender intended to harm the pursuer's reputation.[278]

7.4.1(a) Statement about the pursuer

In establishing liability for defamation, the starting point is clearly a statement about the pursuer. The statement may take any number of forms. It may include a verbal or written statement or "words, pictures, visual images, gestures or any

[272] Also referred to above at sections 7.3.1 and 7.3.5.
[273] Walker, *Delict* (n 258) 729.
[274] ibid 730.
[275] 2021Act s 1(2).
[276] J Brown, "The Defamation and Malicious Publications (Scotland) Bill: an undignified approach to law reform?" 2020 Scots Law Times (News) 131 at 132.
[277] Reid, *Delict* (n 109) para 18.51.
[278] Brown (n 276) at 132.

other method of signifying meaning".[279] This therefore covers an array of communication mediums. Notable examples include written letters or articles, emails, online publications, social media posts, and photographs or films.

While most cases of defamation are likely to involve express mention of the pursuer, there may be cases where the reference is implied. In determining whether the statement refers to the pursuer, the key question appears to be whether the individual mentioned or depicted can reasonably be said to be the pursuer.[280]

7.4.1(b) Published to a third party

The statement must be published to a third party.[281] Private communications between the defender and pursuer are not actionable. This represents a change from the common law position and is consistent with our understanding of reputation as being dependent on the thoughts and opinions of others.[282] As the SLC state in their report, where a statement has only been made to the pursuer, this

> "may give rise to hurt feelings or damage to self-esteem, but there can be no reputational damage if no third party is aware of what has been said…it fails to recognise what is the fundamental purpose of defamation law, namely to protect reputation.[283]

What is meant by publication? The statute describes this as "communicating the statement by any means to a person in a manner that the person can access and understand",[284] which must be seen or heard by the recipient.[285] In particular, since the emergence of the internet and technological advancements,

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[279] 2021Act s 36(b).
[280] *Caldwell v Monro* (1872) 10 M 717.
[281] 2021 Act s 1(2)(a).
[282] For the relevance and importance of this, see sections 2.2.2 and 3.3.
[283] Report on *Defamation* (n 260) para 2.4.
[284] 2021Act s 1(4)(b).
[285] ibid s 1(4)(c).

it has become far easier to circulate defamatory material.[286] Scots law draws no distinction between libel and slander as is the case in English law[287] and other common law systems.[288] Verbal communication therefore attracts the same liability as written communication in Scots law.

7.4.1(c) Defamatory

The published statement about the pursuer must be defamatory, by which it is meant that the statement itself must cause damage to the pursuer's reputation. As has been explained elsewhere in this thesis, that the statement is defamatory is particularly relevant in distinguishing between an action for defamation and an action, for example, for misuse of private information.

Whether a statement is considered defamatory is a matter of law.[289] In assessing this, the court takes account of the statement as a whole.[290] If the court is satisfied that the statement is capable of conveying a defamatory meaning, a factual assessment is undertaken in order to establish if the statement refers to the pursuer, is false, and is, in the given context, defamatory.[291]

What may be considered defamatory? Statements suggestive of criminality on the part of the pursuer is an obvious example of a defamatory statement.[292] Similarly, imputations of immorality, dishonesty and drunkenness will likely be considered defamatory.[293]

The test for a defamatory statement is generally derived from Lord Atkins' statement in the English House of Lords case of *Sim v Stretch*: "Would the words

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[286] D J B Svantesson, "The right of reputation in the Internet era" (2009) 23 International Review of Law, Computers & Technology 169 at 169. E.g. this may be done by blogging, tweeting, or posting on social media sites, thereby increasing the likelihood of the statement reaching a third party.
[287] R Parkes, G Busuttil, D Rolph et al (eds), *Gatley on Libel and Slander* (13th edn, 2022) para 1-005.
[288] E.g. Australia, Canada, New Zealand, USA.
[289] *Russell v Stubbs* 1913 SC (HL) 14 at 20 per Lord Kinnear.
[290] *Campbell v Ritchie &* Co 1907 SC 1097.
[291] W M Gloag and R C Henderson, *The Law of Scotland*, 15th edn, by H L MacQueen and Lord Eassie (2022) para 29.04.
[292] ibid Gloag and Henderson para 29.06; Reid, *Delict* (n 109) para 18.22.
[293] ibid Gloag and Henderson.

tend to lower the plaintiff in the estimation of right-thinking members of society generally?"[294] This was affirmed by the Scottish courts in *Steele v Scottish Daily Record and Sunday Mail Ltd*[295] and continues to represent the law in Scotland.[296]

As the law of defamation developed from its historical origins into a more sophisticated set out rules (influenced by English law), the Scottish courts "came to formulate an irrebuttable presumption of malice in all cases in which it was established that the words complained of had, or were capable of having, a defamatory meaning".[297]

In addition to this presumption, "in all cases in which the defamatory nature of the words complained of was established, it also came to be presumed that the words complained of are untrue".[298] The difference here is that this was rebuttable and – as explained below – the defender may rely on the *veritas* defence by establishing that the statement in question was true.[299]

Thus, liability for defamation rests on presumptions that do not form part of other civil reputation wrongs. As long as the four elements are proved by the pursuer, it is presumed that the defender's statement was made maliciously (i.e. with the intention of lowering the pursuer's reputation) and that the defamatory statement is false.[300] While it is certainly true that "the pursuer in any defamation action starts in a strong position",[301] it will now be shown that the 2021 Act has limited the pursuer's ability to bring actions where they cannot demonstrate that they have suffered "serious harm".

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[294] *Sim v Stretch* [1936] 2 All ER 1237 at 1240 per Lord Atkins.
[295] 1970 SLT 53.
[296] Discussion Paper on *Defamation* (Scot Law Com DP No 161, 2016) para 2.8.
[297] Brown (n 276) at 132.
[298] ibid.
[299] See section 7.4.1(e) for an overview of defences.
[300] Burchell and Norrie (n 90) at 551.
[301] Brown (n 276) at 132.

7.4.1(d) Caused or likely to cause serious harm to the pursuer's reputation

The final requirement in successfully establishing liability for defamation is that the defamatory statement must be shown to have caused (or be likely to cause) serious harm to the reputation of the pursuer.[302] It is provided that a statement causing "harm to reputation" is one that "tends to lower the person's reputation in the estimation of ordinary persons".[303]

By requiring "serious" harm, the defamation action amended by the 2021 Act is narrower in scope than its common law predecessor, which did not require the pursuer to aver any losses.[304] Assuming that the serious harm requirement will be the same as the equivalent English provision,[305] the pursuer must now prove actual or prospective harm.[306] This represents a "shift of emphasis towards actual harm to reputation",[307] rather than an objective test. This means that harm cannot be assessed on the basis of the meaning of the words alone.[308] As a result, the balance between free speech and reputation has tilted in favour of the former by making it harder for victims of reputational harm to bring defamation actions.[309] Reid is critical of this "significant, and arguably unwise, change of direction",[310] noting that "Scottish litigants now confront a significant additional hurdle".[311]

In addition to this practical concern, this marks a change in the conceptual basis of defamation in Scots law and a departure from its civilian foundations. By mirroring English law, Scots law no longer takes account of reputational attacks that do not result in quantifiable patrimonial loss.[312] The result is that patrimonial loss now eclipses solatium in terms of the loss that may be recovered

[302] 2021Act s 1(2).
[303] ibid s 1(3).
[304] Reid, *Delict* (n 109) para 18.39.
[305] Defamation Act 2013 s 1(1).
[306] *Lachaux v Independent Print Ltd* [2019] UKSC 27, [2020] AC 612.
[307] Gloag and Henderson, *The Law of Scotland* (n 291) para 29.01.
[308] *Lachaux* per Lord Sumption at para 13.
[309] Reid, *Delict* (n 109) para 18.42.
[310] ibid para 18.39.
[311] ibid para 18.43.
[312] Brown (n 276) at 131-132.

and "injury to feelings without serious reputational damage will not found an action".[313]

This is further reflected in section 1(3), which provides that:

> "For the purposes of subsection (2) (b), where B is a non-natural person which has as its primary purpose trading for profit, harm to B's reputation is not "serious harm" unless it has caused (or is likely to cause) B serious financial loss".[314]

This is enlightening in setting out the substance of reputation in respect of non-natural persons. By providing that a non-natural person whose primary purpose is trading for profit may only suffer "serious harm" to its reputation where it has "suffered serious financial loss", the law reflects just one of Post's values underpinning reputation: property. This approach is nevertheless consistent with that taken by the ECtHR in such cases.[315] Reputation therefore does not cover the honour or dignity of a business, for the reason that it is not thought that businesses may possess such values.

7.4.1(e) Defences and privileges

The success of a defamation action is as dependent on the overcoming the defender's defences as it is on establishing the grounds of liability discussed above. Given the competing interest at stake (the defender's right to freedom of expression), the defender may wish to argue that notwithstanding their statement about the pursuer being defamatory and causing serious harm to their reputation, they were justified in doing so. The former common law defences[316] were abolished by the 2021 Act,[317] and in their place, three statutory defences were introduced. While new defences, these retain similarities with the common

[313] Gloag and Henderson, *The Law of Scotland* (n 291) para 29.02.
[314] 2021 Act s 1(3).
[315] *Margulev v Russia*; *Kharlamov v Russia*; *Uj v Hungary* (n 72). Cf. *Firma EDV v Germany* (n 79).
[316] Innocent dissemination, veritas (truth), *Reynolds* (public interest), fair comment.
[317] 2021 Act s 8(1).

law defences. There remains a defence of truth[318] and public interest,[319] and the former defence of fair comment was replaced with a defence of honest opinion.[320]

In particular, the defence of truth (*veritas*) is significant. It is provided that "it is a defence to defamation proceedings for the defender to show that the imputation conveyed by the statement complained of is true or is substantially true".[321] Where the defender is successful in relying on this defence they may escape liability for defamation, but liability may still arise for breach of confidence or misuse of private information.[322]

The public interest defence has its roots in the common law *Reynolds*[323] defence.[324] In addition to the statement being made on a matter of public interest,[325] it must be shown that the "defender reasonably believed that publishing the statement…was in the public interest".[326]

The final defence is that the comment complained of by the pursuer was the honest opinion of the defender. The SLC explain the rationale for such a defence, stating that "comments are not liable to mislead anyone, since they do not purport to state the truth but only to convey a point of view".[327]

A final point to note on defences is that, while not defences, there are grounds on which a defender may claim absolute or qualified privilege. The only new statutory ground of absolute privilege is that the published statement was a "fair and accurate report of proceedings in public before a court".[328] Other grounds

[318] ibid s 2.
[319] ibid s 4.
[320] ibid s 3.
[321] ibid s 5(1).
[322] Gloag and Henderson, *The Law of Scotland* (n 291) para 29.10.
[323] *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.
[324] Gloag and Henderson, *The Law of Scotland* para 29.11.
[325] 2021 Act s 6(1)(a).
[326] ibid s 6(1)(b).
[327] Report on *Defamation* (n 260) para 3.14.
[328] 2021 Act s 9(1).

are statements made in the UK Parliament or Scottish Parliament[329] and statements made in the course of judicial proceedings.[330]

There are a number of grounds of qualified privilege, including peer-reviewed statements in a scientific or academic journal,[331] and the contents of various reports.[332] Common law grounds include where the defender would have had a duty to pass the information on (had it been true),[333] where the statement was made by a party in the course of civil proceedings,[334] and where the statement was made by the defender in response to an attack on their own reputation.[335] The key difference between absolute and qualified privilege is that the latter may only apply if the statement is made without malice.[336] Thus, the pursuer must show that the defender's statement was "motivated by ill-will rather than by the objectives for which the privilege was granted".[337]

What then do we mean by malice? Malice may be "actuated by motives of personal spite or ill will, independent of the occasion on which the communication was made".[338] Consistent with this explanation, Reid refers to this as "motive malice".[339] While consideration of surrounding context will usually be relevant in determining malice, in exceptional circumstances, "a statement may be so violent as to afford evidence that it could not have been fairly and honestly made".[340]

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[329] Scotland Act 1998 s 41(1)(a).
[330] Reid, *Delict* (n 109) para 18.102. The privilege applies to statements made by judges, advocates and other professional addressing the court, and witnesses. See Gloag and Henderson, *The Law of Scotland* para 29.16.
[331] 2021 Act s 10.
[332] ibid s 11; Schedule 1.
[333] *Fraser v Mirza* 1993 SC (HL) 27.
[334] *Campbell v Cochrane* (1905) 8 F 205; *Forteith v Earl of Fife* (1821) 2 Mur 463.
[335] *Chapman v Barber* 1989 SLT 830.
[336] Reid, *Delict* (n 109) para 18.100, 18.105.
[337] ibid para 15.20.
[338] *Wright v Woodgate* (1835) 2 C.M. & R. 573 per Parke B at 577, quoted by Lord Hunter in *Cochrane v Young* 1922 SC 696 at 701–702. See Gloag and Henderson, *The Law of Scotland* (n 291) para 29.18.
[339] Reid, *Delict* (n 109) para 15.19-15.20.
[340] See Gloag and Henderson, *The Law of Scotland* para 29.18.

7.4.1(f) Remedies

Finally, this section will consider the remedies that are available if a pursuer successfully proves defamation.

The most common one is an award of damages. As has been explained, damages in Scots law are compensatory and cannot (aside from in exceptional cases) go beyond compensating the pursuer for any losses they may have suffered. They are "restricted to the idea of monetary compensation for loss suffered by the party bringing the claim".[341] This loss can include damages for solatium, which may be awarded to reflect emotional harms and suffering that the pursuer has experienced, or even "annoyance and embarrassment".[342]

In cases where there is no loss or harm averred by the pursuer, there remains the possibility of merely nominal damages being awarded where there the action has been raised to clear the pursuer's name.[343] This provides some incentive for the pursuer to proceed with an action against the defender, although it may seem an unrealistic approach for those pursuers with limited resources and without a notable public persona.

At the other end of the scale, in particularly egregious cases of defamation, aggravating damages may be awarded. These are only available where the *loss* is aggravated (e.g. by repeating the defamatory statement). Such damages will not be awarded by reference to, for example, the malice or motive of the defender.[344] This means that the fact the defender acted out of spite or to pursuer a personal vendetta against the pursuer is not relevant to the assessment of damages, although this may make it difficult for them to rely on certain defences (e.g. honest opinion) or claim qualified privilege.

While there was previously statutory authority for a defender to put forward an "offer to mark amends" as a means of avoiding liability,[345] this was recast by

[341] M A Hogg, "Disgorgement of profits in Scots law" in A Janssen (ed), *Disgorgement of Profits: Gain-Based Remedies Throughout the World* (2015) 325 at 328.
[342] Reid, *Delict* (n 109) para 18.25.
[343] K McK Norrie, "Obligations" in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 15 (1996) para 550.
[344] ibid at para 552. See *Stein v Beaverbrook Newspapers Ltd* 1968 SC 272.
[345] Defamation Act 1996 s 2-4.

the 2021 Act,[346] alongside other innovations considered in Chapter 8.[347] These are collectively referred to as "discursive remedies".[348]

Finally, there is the remedy of interdict (or interim interdict if before proceedings are concluded), which may be sought in order to prevent an ongoing wrong from occurring. With defamation, this may be to prevent publication of a defamatory statement or to retract defamatory content posted online. When applying for an interim interdict, the relevant test is set out in the Human Rights Act 1998. Section 12(3) provides that in cases where the granting of an interim interdict may restrict a party's Article 10 right to freedom of expression, the court must be satisfied that there is a likelihood of the pursuer succeeding with their action.[349] This represents a far greater hurdle than in other actions where an interim interdict may be sought and shows the extent to which the courts are required to take account of freedom of expression at the expense of potential damage to reputation.[350]

Thus, in distinguishing between defamation and misuse of private information, the dividing line lies in the statement being defamatory and false. Such requirements are absent from an action for misuse of private information, which although may cause some harm to reputation, is primarily concerned with whether information is disclosed that the pursuer was entitled to reasonably regard as private.

7.4.2 Malicious publication

In addition to reforming the law of defamation, the Scottish Law Commission consequently recommended abolishing a category of wrongs relating to verbal

[346] 2021 Act s 13-18.
[347] See section 8.4.3 for further consideration of these remedies.
[348] Reid, *Delict* (n 109) para 18.128; Discussion Paper on *Defamation* (n 296) para 9.6.
[349] Human Rights Act 1998 s 12(3). See also Report on *Defamation* (n 260) paras 6.4-6.5.
[350] In other cases, the court is simply required to assess whether the party seeking the interim interdict has a prima facie case and whether the balance of convenience favours granting it. See *Toynar Ltd v Whitbread & Co Ltd* 1988 SCLR 35; *Highland Distilleries Co plc v Speymalt Whisky Distributors* Ltd 1985 SC 1 at 6.

injuries.[351] This was implemented by the Scottish Government in the 2021 Act.[352] The decision to abolish "verbal injuries" recognised that such actions were "neglected", "typically passed over by pursuers",[353] and widely viewed as ineffective.[354] In their place, the Act introduced a new statutory delict of malicious publication in respect of statements that are "injurious to reputation but need not be defamatory".[355]

Malicious publication was nevertheless modelled on the historical verbal injury wrongs. Of the five categories of verbal injury recognised at common law, three (slander of title, slander of property and falsehood about the pursuer causing business loss) were retained within this new action of "malicious publication".[356] The remaining two (exposure to public hatred, contempt or ridicule; and slander on a third party) were completely abolished. In addition to these forms of verbal injury, the wrong of *convicium* was abolished. In recommending this, the Scottish Law Commission noted that:

> "whilst originally developed by the institutional writers as a form of wrong separate from verbal injury, should, in its more modern incarnation, be regarded as verbal injury by exposure to public hatred, contempt or ridicule, simply known by a different name. To the extent that *convicium* is to be recognised as a free-standing wrong in Scots law, this is likely to be in relation to truthful disclosures".[357]

The verbal injuries abolished by the 2021 Act can be said to relate to "individuals and feelings", whereas those retained clearly centre on the protection of commercial interests rather than one's individual reputation.[358] This is reflected in the requirement that the publication has caused financial loss

[351] Report on *Defamation* (n 260) para 9.23.
[352] 2021 Act s 27(1).
[353] Brown (n 276) at 132.
[354] Reid, *Delict* (n 109) para 18.130.
[355] Gloag and Henderson, *The Law of Scotland* (n 291) para 29.24.
[356] 2021 Act ss 21-27.
[357] Report on *Defamation* (n 260) para 9.5.
[358] E C Reid, "Making law for Scotland: the Defamation and Malicious Publication (Scotland) Act 2021" (2024) 28 Edinburgh Law Review 42 at 58.

(or is likely to cause financial loss).[359] Despite this, the court may still award damages for anxiety and distress suffered by the pursuer.[360]

How then does malicious publication differ from defamation? The fundamental difference between the two is that, unlike defamation, the pursuer in malicious publication actions bears the burden for establishing each element of the wrong.[361] In particular, as the name suggests, malicious publication requires the pursuer to prove that the defender acted with malice. This means that defender must have "intended to cause injury by making the statement complained of";[362] a simple falsehood is clearly not enough. Thus, even where the defender makes a statement that they know to be false, no liability will arise unless they were additionally "motivated by a malicious intention to cause harm".[363]

As with defamation, those forms of verbal injury that have been reformulated on a statutory footing all require falsehood. Malicious publication "requires a false imputation presented as fact which is sufficiently credible to mislead a reasonable person".[364] In addition to proving malice, the pursuer must also prove that the defender either knew that the statement was false or was recklessly indifferent as to the statement's truth.[365] This again is a clear divergence between the two actions, with the pursuer in defamation actions benefiting from a presumption of falsity in respect of the statement.

For these reasons, it is unsurprising that malicious publication is less often relied upon by pursuers in contrast to defamation, particularly when coupled with the relative limited scope of the actions.[366]

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[359] 2021 Act s 21(1)(b), s 22(1)(b), s 23(1)(b). Although in practice, this evidential burden is discharged by the pursuer "if the statement complained of is more likely than not to cause such loss": 2021 Act s 24.
[360] ibid s 26.
[361] Norrie, (n 343) para 555.
[362] Report on *Defamation* (n 260) para 1.2.
[363] 2021 Act s 21(2)(b)(ii), 22(2)(b)(ii), 23(2)(b)(ii).
[364] Gloag and Henderson, *The Law of Scotland* (n 291) para 29.24.
[365] 2021 Act s 21(2)(b)(i), s 22(2)(b)(i), s 23(2)(b)(i).
[366] J M Thomson, "Obligations" in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 15 (1996) para 573A. For an overview of the meagre case law from the equivalent common law actions in Scots law see paras 559-563.

7.4.3 Malicious prosecution

Finally, in addition to those delicts relating to verbal injuries, the common law delict of malicious prosecution[367] may also cause significant harm to a person's reputation.[368] Liability for this wrong may arise where a prosecution is brought in a way that is both malicious and without probable cause.[369] An action may be brought against two parties: the person who initiates criminal proceedings against the pursuer (the prosecutor in Scotland will either be the Lord Advocate or a procurator fiscal) or the person whose reporting is responsible for the prosecution being brought (the complainer).[370] While the Lord Advocate and those acting on their behalf were generally regarded as having absolute immunity from malicious prosecution actions,[371] the Inner House has since confirmed in *Whitehouse v Lord Advocate*[372] that these parties only have qualified immunity.[373] Given the already stringent hurdles that must be overcome to prove liability for malicious prosecution, this seems a reasonable development of the law. If the pursuer can overturn a presumption of malice against the Lord Advocate and their agents, then it is only right that these parties should be open to a finding of liability should this be proved.

In the case of summary proceedings, there is statutory authority in the Criminal Procedure (Scotland) Act 1995 for malicious prosecution proceedings to be raised where:

> "(a) the person suing has suffered imprisonment in consequence thereof; and (b) such proceedings, act, judgment, decree or sentence has been quashed; and (c) the person suing specifically avers and proves that such

[367] Reid refers to this as "malicious instigation of criminal proceedings": Reid, *Delict* (n 109) para 18.130.
[368] Norrie (n 343) para 446.
[369] ibid para 447.
[370] ibid para 448.
[371] *Hester v MacDonald* 1961 SC 370 per Lord President Clyde at 377.
[372] *Whitehouse v Lord Advocate* [2019] CSIH 52, 2020 SC 133.
[373] Cf the absolute immunity that the Lord Advocate and agents have in respect of defamatory statements made in criminal proceedings: see section 7.4.1(e) above.

> proceeding, act, judgment, decree or sentence was taken, done or pronounced maliciously and without probable cause."[374]

In addition to the requirements in (a) and (b), the wording in (c) mirrors the common law test set out above.

While there is clearly an interest in holding those responsible for conducting malicious prosecutions accountable, given that those reporting offences may also be found liable at common law, it is important for this wrong to be narrowly framed. This ensures that victims are not deterred from reporting claims of criminal wrongdoing.[375] Indeed, malicious prosecution is essentially focused on the motive of the defender rather than simply whether it was inappropriate to bring a prosecution against the pursuer. As Reid explains:

> "Malicious prosecution may follow from proceedings that were in themselves perfectly lawful; the wrong is perpetrated by instigating lawful proceedings on spurious grounds, and so the requirement to prove malice is central".[376]

The purpose is not to retrospectively judge whether a prosecution ought to have been brought, it is specifically about whether the party responsible did so maliciously and without probable cause. Probable cause involves consideration of whether the relevant party has acted in good faith and has been described as "acting in a way in which a reasonable man, swayed by no illegitimate motives, would act".[377]

The delict clearly serves an important function. It provides an opportunity for those who have been maliciously targeted to receive redress from the party responsible. While other mechanisms may exist in cases of miscarriage of justice,[378] malicious prosecution (at least at common law) does not require the pursuer to have been wrongly convicted of a crime. In some cases, this may operate to the detriment of the pursuer since a successful conviction on the basis of the evidence presented may demonstrate that the prosecutor had probable

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[374] Criminal Procedure (Scotland) Act 1995 s 170(1).
[375] Reid, *Delict* (n 109) para 17.52.
[376] ibid para 17.56.
[377] *Mills v Kelvin & White* 1913 SC 521 per Lord President Dunedin at 528.
[378] Criminal Justice Act 1988 s 133.

cause to bring proceedings. On the other hand, an acquittal does not in itself mean that there was no probable cause as there may have been sufficient justification for prosecuting the pursuer, even if this did not lead to a conviction.[379]

In summary, malicious prosecution

> "involves a conclusion that the judicial process has been used as an instrument to inflict injury on the pursuer, a finding which should not lightly be reached. That may justify imposing a more stringent test of intention – malice – for that delict."[380]

By ensuring that there is a high threshold for the pursuer to meet in such cases, it enables prosecutors to undertake their work and for complainers to report alleged criminal acts without fear of liability in the event that a conviction is not secured. Thus, liability for malicious prosecution will only arise where it can be shown that there is essentially a dual-wrong: a positive act (acting with malice) coupled with a negative act (proceeding without probable cause). This limits liability to only the most egregious of cases.

7.5 Conclusion

This chapter has sought to show the ways in which privacy and reputation interests are defined and protected through the civil law.

It was shown in section 7.2 that international law instruments offer significant protection of these interests. The ECHR is the primary mechanism through which privacy rights are protected or promoted. While mention is made of "private and family life", "home" and "correspondence" in Article 8, no explicit definition of privacy is found therein. The decisions of the ECtHR and domestic courts are therefore the primary sources of any definition, at least in setting what is within the scope of one's right to privacy. Reputation is given less express

[379] See Gloag and Henderson, *The Law of Scotland* (n 291) para 25.46, citing *Hill v Campbell* (1905) 8 F. 220 and *Chalmers v Barclay, Perkins & Co* 1912 SC 521.
[380] B Lindsay, "Relegated no longer? The role of malice in the delictual protection of liberty: *Whitehouse v Gormley*" (2019) 23 Edinburgh Law Review 75 at 79.

protection through international law, but there is growing recognition of its protection through Article 8 of the ECHR (falling within "private life"). Otherwise, its role is as a limiting principle in Article 10: freedom of expression must not unduly lower the reputation of another.

In section 7.3, attention turned to the ways in which privacy is protected through Scots civil law. Using Prosser's classification of privacy torts as a guide, it was argued that the second category "non-disclosure of private information" is the most easily identifiable privacy interest in Scots law. This is protected through two distinct actions: breach of confidence and misuse of private information. To a lesser extent, seclusion from intrusion (or physical or territorial privacy) may also be protected. There are some *obiter* remarks in Scottish judgments supporting this and this led to the suggestion that there is a general common law right to privacy in Scots law. However, the existence of such a right appears doubtful and the Inner House declined to endorse this view. Given the limited judicial discussion of these wrongs, privacy remains an underdeveloped concept in the civil law.

The law concerning false light privacy and publicity wrongs is less clear cut. In any event, it was argued that these ought not to be regarded as privacy interests and do not share the same characteristics as the other two discussed.[381]

Section 7.4 then considered the ways in which reputation is protected in Scots civil law. This explained the ways in which the wrongs of defamation and verbal injury have recently been reformed and placed on a statutory footing, with malicious publication replacing common law verbal injury actions.

A key difference between reputation wrongs is that the primary wrong of defamation (aside from statements attracting qualified privilege) does not require proof of malice, while malicious publication and malicious prosecution evidently do.[382]

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[381] P M Garry, "The erosion of common law privacy and defamation: reconsidering the law's balancing of speech, privacy, and reputation" (2020) 65 Wayne Law Review 279 at 288.
[382] Norrie (n 343) para 446.

As with privacy, reputation is ill-defined in Scots law. While it is protected primarily through the wrong of defamation, little has been said of what is meant by reputation. This is so even in respect of the statutory reforms to defamation and malicious publication, and the preceding publications of the Scottish Law Commission, and consultation by the Scottish Government. On the whole, this would benefit from clearer definition under Scots law.

There is a concern that defamation "rarely offers a meaningful remedy for reputational harm" and that "this may result not only from an overvaluing of speech, but also from an undervaluing of reputation".[383] This is reflected in the increasing emphasis on defamatory speech having to cause identifiable serious harm. This is something that will be considered further in the next chapter.

It is also important to note that defamation only concerns false statements:

> "While false speech can generally be proscribed by the laws of defamation, on the basis that one's reputation deserves protection even in the face of free speech guarantees, the idea of limiting truthful speech has been more problematic".[384]

This still leaves a gap in the regulation of harmful speech that is nevertheless true. This is where privacy wrongs can still play a role, even in the protection of reputation. The disclosure of information that a person is reasonably entitled to keep private may cause damage to their reputation, which illustrates the extent to which there exists overlap between privacy and reputation rights. Thus, defamation protects one element of reputation[385] and "should be understood to concern an interest in not being evaluated based on false facts, while privacy should be understood as an interest in not being evaluated based on private facts".[386] Some privacy violations may nevertheless appear to result in damage to the pursuer's reputation, which is also exemplified by Article 8's dual protection of these interests.

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[383] Garry (n 381) at 316; Gloag and Henderson, *The Law of Scotland* (n 291) para 25.06.
[384] J D Lipton, "Mapping online privacy" (2010) 104 Northwestern University Law Review 477 at 485-486.
[385] A T Kenyon, "Defamation, privacy and aspects of reputation" (2018) 56 Osgoode Hall Law Journal 59 at 60, 77.
[386] ibid at 78.

Having assessed the ways in which the criminal and civil system each protect privacy and reputation interests, the final chapter will now focus on how these interests should be protected by the criminal law, which will partly be informed by the existing primary protections afforded through the civil law as examined in this chapter.

8. A Normative Assessment of the Criminal Law's Protection of Privacy and Reputation Rights

8.1 Introduction

In this final chapter, it will be argued that privacy and reputation wrongs are indeed appropriate subjects for criminalisation. This argument will build on the foundations provided in Chapter 5, which set out the key conceptual and practical differences between the systems of delict and criminal law, and on the earlier discussion in Chapter 2 setting out the underlying value that these interests have and their status as fundamental rights.

While it may seem somewhat trite to state that at least some privacy and reputation wrongs may be suitable targets for the criminal law, this chapter goes beyond this. What will be considered is specifically *why* and *how* the criminal law ought to protect privacy and reputation interests. This will draw on the evaluation of the current ways in which privacy and reputation interests are protected by the criminal law.

Two questions are posed in terms of criminalisation. The first of these is whether the existing criminal and delictual schemes currently offer sufficient protection and the second is whether further expansion of the criminal law is required?[1]

It will be argued in this chapter that both informational and physical privacy merit further consideration in the criminal law context. While it is acknowledged that this is very much the domain of the civil law, that does not mean that the criminal law has no role to play here. This is particularly the case where such wrongs are egregious and may be characterised as malicious (encompassing intention or recklessness), and where there are compelling public interests at stake.

In terms of reputation, it will be argued that the criminal law has been eclipsed by the civil law in this area, but that the protection of reputation interests is still

[1] P Alldridge, *Relocating Criminal Law* (2000) 110.

evident and that the law would benefit from clearer articulation of the circumstances in which one's reputation may be protected.

Following this, it will additionally be shown that there may be some practical considerations that are relevant to the question of criminalisation. Extending the reach of the criminal law to cover civil wrongs has an impact in terms of the procedures used and the remedies available to the wronged party.

Finally, there is acknowledgement of concerns regarding overcriminalisation, which will be addressed at the end of the chapter. It is intended that the proposals outlined in this chapter will ensure that fundamental features of the criminal "along with all its traditional protections, should be employed as the primary means of dealing with cases of egregiously wrongful conduct that result in serious harm".[2]

8.2 Reviewing the law's protection of privacy and reputation rights

The purpose of this section is to provide a short summary of the ways in which both the criminal and civil law currently protect privacy and reputation rights. This will bring together the earlier findings set out in Chapters 6 and 7.

First, it has been shown that the express protection of privacy and reputation rights is difficult to identify in Scots criminal law. Whereas the law offers protection of these rights through individual offences, this has typically been done in an ad hoc manner. The result is the lack of principled consideration as to how the criminal ought to protect such rights in a systematic and coherent way.

Secondly, it is evident that the criminal law's protection differs according to the nature of the right in question and the surrounding context of the criminal wrong. Not only may a distinction be drawn between privacy and reputation rights, but even within privacy rights, there is a distinction between the type of privacy right being protected. This summary will therefore distinguish between

[2] A Roberts and M Richardson, "Privacy, punishment and private law" in E Bant, W Courtney, J Goudkamp, and J M Paterson (eds), *Punishment and Private Law* (2021) 83 at 84.

the criminal law's protection of intrusion (physical privacy) and informational privacy.

8.2.1 Intrusion

Returning to Prosser's fourfold classification, intrusion is the species of privacy wrong least obviously protected by the civil law. The common law has been slow to develop in this area and it has not been straightforward for pursuers to obtain redress for this type of wrong. Part of the reason for this is because of the way in which actions for breach of privacy have developed from breach of confidence. The focus has therefore traditionally been on the protection of private information.

In the criminal law sphere, intrusion may be divided into physical privacy (encompassing bodily and sexual privacy) and territorial privacy. There has been a growing pattern of criminalisation in areas relating to physical privacy. Examples include the introduction of the following statutory offences: voyeurism, the non-consensual distribution of intimate images, causing fear and alarm, and stalking. Each of these offences represents a legislative response to a particular type of conduct. As a result of the way in which these offences have been introduced, there has been no opportunity for policymakers and legislators to consider the protection of personal privacy rights. Even in the context of offences that strengthen privacy rights, there is inconsistency. This can be seen in the differences between the two offences of voyeurism and the non-consensual distribution of intimate images. While the former prohibits the viewing of an individual doing a "private act" (restricted to using the lavatory, engaging in a sexual act or exposing genitals, breasts or buttocks with or without underwear),[3] the latter prohibits the non-consensual distribution of "intimate" images (restricted to those showing an individual engaging in or being present during a sexual act or similarly exposing intimate parts of their body).[4] As such, both offences may at first seem to be beneficial developments in the protection

[3] Sexual Offences (Scotland) Act 2009 s 10(1).
[4] Abusive Behaviour and Sexual Harm (Scotland) Act 2016 s 3(1).

of privacy, but it transpires that the focus of these offences is on intimacy and sexuality rather than anything more than this. The result is that it means it may be a criminal wrong to engage in a voyeuristic act, but not to disclose a recording or photo of this (or *vice versa* depending on the circumstances).

Where territorial privacy is protected, the rationale tends to be the protection of state interests. It is not individuals' privacy rights that are necessarily the emphasis, but rather there is recognition that there is a public interest in limiting access to certain places. Individual territorial privacy is less obviously protected, aside from circumstances where there is some additional aggravating element that may justify the criminal law's intervention. This may be (among others) where the violation is threatening, causes the victim to suffer fear or alarm, or forms part of the commission of another offence such as theft by housebreaking or stalking.

Thus, the position is that physical privacy, while undoubtedly a significant interest, is far from adequately protected by both the criminal and civil law. Identifiable offences apply to specific conduct and can be justified more on the basis of protecting sexual autonomy, as a response to threatening conduct, or as a means of safeguarding state interests.

8.2.2 Informational privacy

In contrast to physical privacy, it has been shown that informational privacy is very much the domain of the civil law. As a result, less attention has been paid to the criminal law's protections of this interest. It is also difficult to identify any criminal offence *exclusively* targeting this type of wrongdoing. Where offences were identified, it was argued that these are premised on non-privacy rationales (e.g. public policy, national security). Examples include the disclosure of information relating to privileged categories of information such as who a person voted for in an election, or classified information and state secrets.

However, there has been a more recent trend towards the introduction of quasi-criminal protections in this area (or what might be terms "public law mechanisms") in respect of wider categories of information. These may be characterised as such on the basis that proceedings do not require an individual complainer and that fines (i.e. punishment) may be imposed rather than compensatory damages. Thus, these may be more appropriately labelled as "public wrongs" rather than "private wrongs", the significance of which is outlined below.

Moreover, "the collection, retention and transmission of vast quantities of personal information pose a substantial threat to privacy as well as to other aspects of our lives, with the criminal law slow to respond".[5] Indeed, what we have seen in recent years is a shift from concerns over individual informational privacy breaches to larger scale violations. Two examples of this type of conduct that have been mentioned are hacking and leaks.[6]

Hacking may be covered by the offence found in the Computer Misuse Act 1990. Leaking data is less obviously protected by the criminal law but may be covered by data protection regulations (notably the GDPR). Again, where this data relates to particular categories of information then this may be a discrete criminal wrong (e.g. leaking matters pertaining to national security may be criminalised under the Official Secrets Act 1989).

The harms caused by such conduct make this more akin to public wrongs in the sense that they harm the community at large. Such incidents may additionally cause consequential reputational harm to bodies (whether public or private) who have been targeted by this conduct. This is because it reflects poorly on their ability to adequately keep data safe and secure. Thus, there are two victims in these cases: the body that has been targeted and the individuals whose data may be compromised. This partly (alongside the fact that this conduct is often perpetrated by legal entities) explains why this conduct has increasingly been the subject of punitive sanctions in the form of fines.

[5] Roberts and Richardson (n 2) at 96.
[6] One example being the Police Service of Northern Ireland data leak in 2023.

This outline accordingly shows that wrongdoing related to information may be subject to criminal law sanctions. However, the determining factor here is the nature of the information itself and the surrounding context. The criminal law is less concerned with the culpability of the wrongdoer or the harm(s) caused to the party whose informational privacy is violated.

8.2.3 Reputation

Reputation is an interest that appears to be incidentally protected through substantive criminal law. Unlike some jurisdictions, there is no criminal wrong of defamation[7] or slander. Recent legislative reform has cemented the civil law's role as the guardian of reputation rights through the existing wrong of defamation and the newly introduced wrong of malicious publication.[8]

In some cases, there may be a fine line between criminal threats and related offences[9] on the one hand, and defamation and malicious publication on the other. Where communication is threatening then this may engage the criminal law. This is in contrast to conduct that lowers one's reputation. While the latter has the potential to inflict considerable harm on the victim, it does not fall within the criminal law. This is even the case where the statement may be extremely offensive (to either the individual in question or others), with the criminal law traditionally making a distinction between threatening communications and offensive communications.[10]

Similarly, in balancing reputation against the competing interest of free speech, the offence of murmuring judges illustrates the importance of context. There is again a particular public interest rationale in ensuring that justice may be administered without the judge, court, or decision being the subject of

[7] Cf. Japan (Penal Code, Article 230, para 1); China (Criminal Law of the People's Republic of China, Articles 87 and 246); Bangladesh (Penal Code 1860, Chapter XXI); Singapore (Penal Code 1871, section 499); India (Criminal Code 2023, section 354).
[8] Defamation and Malicious Publication (Scotland) Act 2021.
[9] E.g. Communications Act 2003 s.127; Hate Crime and Public Order (Scotland) Act 2021 s.4.
[10] A P Simester and A von Hirsch, *Crimes, Harms and Wrongs* (2011) 37.

defamatory comments (as opposed to legitimate scrutiny of the merits of a decision).

Finally, as with privacy, there may be reputational harm in cases of certain categories of information being unjustifiably disclosed. Examples include the revealing of private information in cases of extortion, hacking, interception of private communications, and the non-consensual disclosure of intimate images. Reputational harm does not appear to be the primary harm in such cases, but rather a consequential (or secondary) harm. Despite this, it should be acknowledged that this harm may have a greater impact on the individual concerned than the primary harm.

In summary, this suggests that while secondary reputational harm may be captured by some criminal offences, primary reputational harm is typically not. It is striking that even the most egregious and malicious cases of defamation do not attract criminal liability. Rather, for the criminal law to protect one's reputation there must be some violation of a separate interest (e.g. liberty, sexual autonomy) that is deemed worthy of protection. The criminal law's approach therefore fails to recognise the value of reputation as an asset with significant individual and social worth, the public nature of the wrongdoing, and the culpability of some actors who may unjustifiably damage one's reputation.

8.3 Guiding principles

Having offered an overview of the ways in which Scots criminal law currently protects privacy and reputation rights, the focus will now shift to the normative question of how these rights ought to be protected by the criminal law. In developing a normative account, it is necessary to set out some guiding principles that will inform this.

To begin with, there must be an appropriate normative basis for criminalising such wrongs. These may be viewed as "a set of conditions that must be satisfied

before the state subjects offenders to punishment".[11] It has been shown that the criminal law is more stigmatising, more coercive, and more normatively loaded than the civil law.[12] This reflects the differing aims of the two systems. Given that its distinctive feature is the imposition of punishment, criminal law should only be used where compliance cannot be achieved through other means.[13] As explained, existing means currently exist for the protection of privacy and reputation rights (through the law of delict and human rights law). We must therefore identify cogent reasons justifying the criminal law's role in this area. This section seeks to establish a basis for when this may be justified by reference to three principles: social harmfulness, moral wrongfulness, and culpability.[14] This is consistent with Ashworth and Horder's claim that criminalisation should depend on "the public element of the wrongdoing and the magnitude of the harm or wrong involved".[15] Put simply, the conduct in question must cause some (or at least non-trivial) social (or public) harm, must be wrongful *per se*, and there must be sufficient culpability on the part of the wrongdoer. Where the conduct is either not wrongful, causes no social or public harm, or where the actor is not sufficiently culpable, criminal liability ought not to be imposed. That is not to say that civil liability may not be imposed; it has been shown that the civil threshold is much lower. Nor does the justification of criminal liability for a particular wrong conversely mean that there should be no civil liability. It is common for the criminal and civil law to impose concurrent liability[16] and this is not problematic.

Following this, the next section will look towards the impact of criminalisation and argue that there may be some important practical benefits to the criminal law's regulation in this area. This will pay particular regard to the structural and procedural differences between the two systems, the different outcomes

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[11] D N Husak, "The criminal law as last resort" (2004) 24 Oxford Journal of Legal Studies 207 at 209.
[12] See generally Chapter 5.
[13] For more on "criminal law as last resort" see: Husak (n 11); A Ashworth J Horder, *Ashworth's Principles of Criminal Law*, 7th edn (2013) 33; A Ashworth, "Is the criminal law a lost cause?" (2000) 116 Law Quarterly Review 225.
[14] S P Green "Why it's a crime to tear a tag off a mattress: over-criminalisation and the moral content of regulatory offences" (1997) 46 Emory LJ 1533 at 1547-1553.
[15] Ashworth and Horder, *Principles* (n 13) 33.
[16] See section 5.5.

available, as well as the historical basis for criminalising certain species of privacy and reputation wrongs.

8.3.1 Harmfulness

The starting point for determining the extent to which the criminal law may regulate privacy and reputation wrongs is harmfulness. This section outlines the harm principle, which provides a minimum criterion for the imposition of criminal liability. Following this analysis, the chapter will go on to consider the other two relevant principles: wrongfulness and culpability.

(a) Harm principle

What must first be established for conduct to be the subject of criminal sanction is harmfulness. This is most notably advanced by Mill, who articulated what is known as "the harm principle".[17] Mill's conception of criminal law is that it promotes:

(i) "not injuring the interests of one another; or rather certain interests, which, either by express legal provision or by tacit understanding, ought to be considered as rights"; and,
(ii) "in each person's bearing his share (to be fixed on some equitable principle) of the labours and sacrifices incurred for defending the society or its members from injury and molestation".[18]

The first of these concerns the protection of the rights of other individuals. The second focuses on the distinction between public and private wrongs. It will be argued that certain species of privacy and reputation wrong may be characterised as public wrongs, thereby satisfying the traditional requirement that the criminal law should only intervene in such wrongs.

[17] J S Mill, *On Liberty* (Cambridge University Press, 2012). See the earlier reference to this at section 6.3.
[18] ibid 21, 22.

Relying on Feinberg's seminal articulation of Mill's harm principle, the principle may be expressed as follows:

> "It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor and there is probably no other means that is equally effective at no greater cost to other values".[19]

Thus, while the harm principle represents a positive basis on which to justify the imposition of the criminal law,[20] this has been referred to as the permissive aspect of the harm principle.[21] It serves an important function in ensuring that the criminal law does not impose liability for non-harmful conduct and has "served as a valuable antidote, a way of keeping the scope of the criminal law modest".[22] This is consistent with a rights-based approach to the criminal law, whereby – at the very least – criminal liability should only arise where the rights of another are violated.

As the harm principle is very much a minimum criterion, we typically must look beyond harm alone in assessing whether certain conduct may reasonably be criminalised. Moreover, in the context of existing privacy and reputation wrongs, it is not the identification of harm that is in question. Rather, it is how these harms ought to be addressed by the law that is key.

Feinberg lists several factors that should be taken into account when deciding whether to impose criminal liability for harmful wrongdoing. These include the gravity of the harm, the probability of harm occurring, and the value of the harmful conduct.[23] In summary, "a responsible legislator should consider the gravity and likelihood of the wrongful harm and weigh that against the social value of the conduct to be prohibited and the degree of intrusion upon citizens'

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[19] J Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others* (1987) 26.
[20] ibid.
[21] J Horder, *Ashworth's Principles of Criminal Law*, 8th edn (2016) 74.
[22] A von Hirsch, "Extending the harm principle: 'remote' harms and fair imputation" in A P Simester and A T H Smith (eds), *Harm and Culpability* (1996) 259 at 259.
[23] Feinberg, *Moral Limits* (n 19) 216.

lives that criminalisation would involve".[24] This may additional entail balancing the harms against the rights that other citizens may have (e.g. freedom of expression).[25]

Thus, this chapter will now assess other factors, including the seriousness and wrongfulness of the conduct, the culpability of the actor, and the potential impact of criminalisation in determining whether the criminal law is an appropriate vehicle for regulating wrongful conduct.

(b) Public wrongs and private wrongs

In assessing the appropriateness of imposing criminal liability, it is necessary to look beyond harmfulness in itself. Just because conduct is capable of causing harm, it does not necessarily follow that this conduct should be criminal. Even where the conduct is wrongful, there is still the question of whether this is a criminal or civil wrong. While much of Chapter 5 concerned the descriptive differences between criminal and civil law and procedure, these only take us so far. Many of the substantive and procedural differences are symptoms of the conflicting aims of each system. They illustrate the practical consequences of conduct being criminal or civil, but they do not explain *why* conduct ought to be characterised as criminal or civil in the first place. We may ask whether particular conduct is deserving of punishment or whether criminalisation is likely to deter individuals from engaging in the wrongful conduct, but such an approach would not take us much further; it simply leads us to question why conduct should be punished.

What then *should* set apart crimes and delicts? To begin with, Duff and Marshall state that the concept of a "wrong" is common to both criminal and civil law, but that it is the nature of the wrong that is important in distinguishing

[24] Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 10) 45.
[25] ibid.

between crimes and delicts.[26] In particular, Blackstone's characterisation of wrongs as public or private has been influential in criminal law scholarship:

> "Wrongs are divisible into two sorts or species; *private wrongs*, *and public wrongs*. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed *civil injuries*: the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of *crimes* and *misdemesnors*".[27]

(i) Public wrongs

Criminal wrongs are traditionally thought of as "public wrongs".[28] That is not to say that all public wrongs are criminal wrongs; such an approach would be overly simplistic. Rather, the public nature of the wrong is an *essential* element in imposing criminal liability. Before assessing the relevance of this to the treatment of privacy and reputation wrongs, we must first consider what are meant by "public wrongs" and "private wrongs". Duff and Marshall have written extensively on this and define a public wrong as

> "a kind of wrong that properly concerns "the public" – a wrong that is a matter of public interest in the sense that it properly concerns all members of the polity by virtue simply of their shared membership of the political community".[29]

Husak similarly states that a public wrong is "conduct that wrongs and thus concerns the whole community and not merely those persons who are immediately victimized"[30] and Melissaris argues that it is "somehow of concern

[26] R A Duff and S E Marshall, "Public and private wrongs" in J Chalmers, F Leverick, and L Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (2010) 70 at 71.
[27] W Blackstone, *The Oxford Edition of Blackstone's Commentaries on the Laws of England: Book III: Of Private Wrongs*, by T P Gallanis (2016) 1.
[28] Duff and Marshall, "Public and private wrongs" (n 26) at 71.
[29] ibid.
[30] D N Husak, "Does the state have a monopoly to punish crime?" in C Flanders and Z Hoskins (eds), *The New Philosophy of Criminal Law* (2016) 97 at 103-104.

not only to the actor and the immediate victim but also the community at large".[31] Thus, while public wrongs are still primarily wrongs against individuals that harm individual interests, it is their additional harm to the wider public that distinguishes them from private wrongs. As Farmer observes:

> "Crimes violate the rights and subjective sense of security of individual victims, but they are not solely a matter of private right. They are usually seen as a form of public wrong, engaging a collective or community interest in condemning the wrong and calling the perpetrator to account. This kind of public response requires justification."[32]

This therefore introduces an additional element regarding the response. This is that the public nature of the wrong is reflected by the way in which the wrongdoer is called to account for the wrong.[33] Irrespective of whether the accused initially admits to the wrong or not, they will be publicly called upon to enter a plea. As outlined in Chapter 5, where the accused pleads not guilty, this will result in a public criminal trial, in which the public holds the accused to account through a prosecution (normally) brought by an organ of the state.[34] It is significant that the accused is publicly answerable not just to the victim but to the community as a whole.[35]

In defining public wrongs, other commentators place much greater emphasis on this procedural aspect. Lamond states that public wrongs are "wrongs that the community is responsible for punishing, but not necessarily wrongs against the public itself".[36] Lee concurs, stating that "'public wrongs' should not be understood merely as wrongs that properly concern the public, but more specifically as those which the state, as the public, ought to punish".[37] This focus on the response to the wrong has some merit. While Lamond's definition

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[31] E Melissaris, "Theories of crime and punishment" in M D Dubber and T Hörnle (eds), *The Oxford Handbook of Criminal Law* (2014) 355 at 366.
[32] Farmer, *Making the Modern Criminal Law* (2016) 13.
[33] Duff and Marshall, "Public and private wrongs" (n 26) at 72.
[34] ibid.
[35] S Marshall, "Victims of crime: their rights and duties" in C Flanders and Z Hoskins (eds), *The New Philosophy of Criminal Law* (2016) 153 at 161.
[36] G Lamond, "What is a crime?" (2007) 27 Oxford Journal of Legal Studies 609 at 614.
[37] A Y K Lee, "Public wrongs and the criminal law" (2015) 9 Criminal Law and Philosophy 155 at 156.

may be rooted in the descriptive realm, Lee's takes it a step further by stating that criminal wrongs are those that the state *should* punish, thereby introducing a normative element. This is consistent with Farmer's suggestion above that these are wrongs for which there is "a collective or community interest in condemning…and calling the perpetrator to account".[38]

What is more important here is not that the wrong results in a public legal process; this is true of both crimes and torts/delicts.[39] Rather, the key difference is that criminal wrongs subject the offender to a "distinctive kind of legal process"[40] that is "uniquely coercive".[41] By focusing on responses to criminal and civil wrongs, it acknowledges one of the difficulties with separating the wrongs according to their nature: that there is often overlap between the two.[42]

(ii) Private wrongs

What then is a private wrong? In contrast to a public wrong, a private wrong is typically understood as a wrong that does not "properly concern the public, but only the victims (or plaintiffs)".[43] Stevens uses the term "interpersonal wrong", drawing a parallel with private law rights that individuals owe one another.[44] Yet Lee is critical of the idea that a private wrong ought necessarily to be treated as a tort; he questions why a wrong that only concerns an individual should be subject to legal regulation at all?[45] Lee argues that crimes and torts are all public wrongs (i.e. wrongs that properly concern the public) and that a distinction between public and private wrongs should be made within this overarching category of wrongs.[46] However, such a categorisation is overly broad. It is not clear that all torts are public wrongs, at least not in a manner

[38] Farmer, *Criminal Law* (n 32) 13.
[39] R A Duff, *The Realm of Criminal Law* (2018) 24.
[40] ibid.
[41] Farmer, *Criminal Law* (n 32) 13.
[42] Lamond (n 36) at 630.
[43] Lee (n 37) at 158.
[44] R Stevens, "Private rights and public wrongs" in M Dyson (ed), *Unravelling Tort and Crime* (2014) 111 at 112-113.
[45] Lee (n 37) at 159.
[46] ibid at 160.

consistent with the characterisation above. Not all torts will truly harm or concern the public as a whole, but this does not mean that they should not be subject to any legal regulation. Where an individual's rights have been violated it is vital that the law recognises this and provides individuals with a mechanism for achieving redress. Moreover, although the civil process may be said to be public as the state provides an institutional framework through which the pursuer may seek justice,[47] it is private in the sense that the victim retains control over the process and may decide whether or not to pursue an action.[48] Torts may therefore be more appropriately characterised as private wrongs that concern individual rights, that do not concern the public as a whole, that the public does not (and ought not to) share in, and that are dealt with through a process that is initiated and conducted by private individuals.

It is additionally important to stress that private wrongs do not necessarily relate to "privacy". For example, on one understanding, domestic abuse could be described as a private wrong, insofar as the conduct may occur behind closed doors in the privacy of a family home. However, just because conduct takes place in private, this does not mean that it is a private wrong.[49] In terms of domestic abuse, the wrong may be better described as public as it represents a threat to the community as a whole.[50] It follows from this that those responsible for these wrongs should be called to account for their actions through a public procedure.

Private rights may still be harmed but the wrong may nevertheless be a public one. A number of traditional *mala in se* criminal offences are wrongs that first and foremost are directed against individuals (such as rape, theft, and murder).[51] Indeed, Duff and Marshall state that "what figure in public consciousness as paradigmatic crimes tend to be crimes which directly victimise individuals",[52]

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[47] R A Duff and S E Marshall, "Criminalization and sharing wrongs" (1998) 11 Canadian Journal of Law and Jurisprudence 7 at 18.
[48] ibid at 15. For the significance of this, see N Christie, "Conflicts as property" (1977) 17 British Journal of Criminology 1.
[49] Ashworth and Horder, *Principles*, 7th edn (n 13) 30.
[50] Duff and Marshall, "Public and private wrongs" (n 26) at 72; Duff and Marshall, "Criminalization and sharing wrongs" (n 47) at 14.
[51] ibid Duff and Marshall, "Criminalization and sharing wrongs" at 7.
[52] ibid at 8.

and that "the state has a duty to use the criminal law to promote respect for such significant individual rights".[53]

Taking this idea further, a privacy wrong is not the same as a private wrong. A wrong may violate an individual's privacy interest(s) but may "properly concern the public":[54] "offences directed at the privacy of individuals, for instance, could be characterized as public wrongs, despite protecting something very private".[55] We must overlook the linguistic awkwardness of stating that a privacy wrong may therefore be a public wrong.[56] These two terms must not be equated with one another for they are referring to different levels of wrongs. When referring to a private wrong, we are referring to that broad category of wrongs that – as set out earlier – does not properly concern the public. We are doing so in order to provide a conceptual means of distinguishing between different wrongs. A privacy wrong, on the other hand, is referring to the content of the wrong.

(iii) Reconciling public and private wrongs

Having considered the two categories of wrong, can we therefore say that all public wrongs are criminal wrongs, and all private wrongs are civil wrongs? To begin with, it is misleading to think that just because a wrong is public, it ought to be a criminal wrong. While it may be a necessary condition of criminalising conduct, it is not a sufficient one.[57] This is similar to the application of the harm principle outlined above: just because conduct causes harm, it does not mean that criminalisation is justified. In order to overcome this concern, Duff and Marshall suggest arranging public wrongs into three categories.[58] These are:

(1) Wrongs that are "too trivial to merit the law's attention at all".

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[53] ibid at 9.
[54] Duff and Marshall, "Public and private wrongs" (n 26) at 71.
[55] K Nuotio, "Theories of criminalization and the limits of criminal law: a legal cultural approach" in R A Duff, L Farmer, S E Marshall et al (eds), *The Boundaries of the Criminal Law* (2010) 238 at 242.
[56] See section 6.3.1.
[57] Lee (n 37) at 159.
[58] Duff and Marshall, "Public and private wrongs" (n 26) at 83.

(2) Wrongs that "the victim should have formal control over whether a prosecution is brought – either through a system of private prosecutions or…by allowing a prosecution to proceed only at the victim's request or only with the victim's consent".

(3) Wrongs over which "the victim has no such formal control: the prosecution can go ahead with or without the victim's consent".

Duff (in a later work) additionally identifies three types of criminalizable wrong consistent with those listed above but substituting "trivial wrongs" at (1) for "wrongs that lack an identifiable victim".[59] However, the problem with dismissing the need for the criminal law to regulate "wrongs that lack an identifiable victim" is that this fails to recognise the significant public harm that may be caused in some such circumstances. For example, in cases of privacy violations, it may not be obvious that there is a victim, nor may the victim even be aware that they have suffered harm (e.g. if someone's computer or phone is hacked).

The other two categories of wrong broadly correlate to those above. Duff refers to are:

> (2) "a class of victimising wrongs that may be pursued as criminal, but only with the victim's consent, or only at the victim's request" and,
>
> (3) "another class of victimising wrongs (these might be the paradigm criminal wrongs) that we will be ready to insist on pursuing as criminal, even if the victim does not wish them to be pursued – wrongs that we will be ready to insist on sharing (or, as the victim might see it, taking over) as out wrongs, whether or not the victim wants to share them".[60]

These proposed categorisations give some idea of the types of public wrongs that may justifiably be criminalised by reference to the resulting process and the role played by the victim. But what are those wrongs that ought to proceed

[59] R A Duff, "Torts, crimes and vindication: whose wrong is it?" in M Dyson (ed), *Unravelling Tort and Crime* (2014) 146 at 171-172.
[60] ibid.

irrespective of the victim's consent? It is difficult to avoid mentioning seriousness here; however, as has already been stated, crimes and delicts cannot be distinguished by reference to seriousness alone. Duff and Marshall reject such an approach and contend that "the difference lies not in the degree of seriousness but in its character".[61] In any case, there is no need to distinguish between criminal and civil wrongs here as the two are not mutually exclusive. A wrong may be deemed worthy of criminal sanction even where it is already prohibited by the civil law.

Yet regardless of whether a violation of privacy or reputation results in harm to an individual, a broader principle may be invoked to justify the criminalisation of privacy and reputation wrongs. This is that the wrongs infringe the rights of others.[62] As a result, we must go further than asking whether a specific wrong is a public or private one, for this is unlikely to assist in telling us whether a wrong ought to be classified as criminal or delictual.[63] It must additionally be questioned whether the underlying interest protected by the criminal wrong offence is one that the criminal law *ought* to protect. This question will now be examined.

As explained in the previous section, a wrong being public is a necessary but not sufficient condition of a criminal wrong. In addition to a wrong being public, Husak contends that the state must have a "substantial interest" in criminalising conduct and Dubber refers to a "vague notion that crimes are 'serious' violations of another's interest".[64] This is because "trivial state interests, however real, do not warrant a punitive response".[65] This is consistent with Duff and Marhsall's threefold categorisation of wrongs set out above. What is therefore required is a "catalogue of state interests that are permissibly pursued through the penal law".[66]

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[61] Duff and Marshall, "Criminalization and sharing wrongs" (n 47) at 8.
[62] T Hörnle, "Theories of criminalization" in M D Dubber and T Hörnle (eds), *The Oxford Handbook of Criminal Law* (2014) 679 at 691.
[63] R A Duff, *Punishment, Communication and Community* (2000) 63.
[64] M D Dubber, "Criminal law between public and private law" in R A Duff, L Farmer, S E Marshall, M Renzo and V Tadros (eds), *The Boundaries of the Criminal Law* (2010) 191 at 212.
[65] Husak (n 30) at 104.
[66] D N Husak, *Overcriminalization: The Limits of the Criminal Law* (2007) 135.

It should be stressed at this point that while a trivial interest ought not to be a target of the criminal law, this does not conversely mean that *all* serious interests must be protected. For reasons already provided, it is important to move the discussion away from seriousness. This raises the question of how we then identify interests that are worthy of the criminal law's protection. At this stage, we are not so much concerned with the nature of the wrong in question, for this is considered elsewhere in the thesis. Rather, the purpose is to examine whether abstract (or *prima facie*) wrongs caused to privacy and reputation interests are public wrongs that violate fundamental interests and may therefore be appropriate targets of the criminal law.

Duff and Marshall refer to "*Rechtsgifter*", which they state "figures prominently in German discussions of the proper aims and functions of the criminal law…as capturing the notion of a significant legally protected interest".[67] There is no objective classification of such interests and the values that ought to be protected by the criminal law. In a general sense, Marshall explains that public wrongs involve a "violation of the values that go to define us as a political community".[68] Which values then "define us as a political community"? These are likely to differ between states, although Duff suggests that "any political community will have some set of shared values given which some wrongs will count as public wrongs".[69] Duff goes on to note that these will include what we would regard as values protected by core *mala in se* offences.[70] Where we are going to encounter more difficulty is where an interest does not fall into this category (such as privacy or reputation interests). These interests do not provide a basis for *male in se* offences (e.g. murder, rape, theft). Thus, offences should be premised on the protection of these interests: "the idea is that all offences are there to defend specific *Rechtsgüter*, legally protected

[67] Duff and Marshall, "Criminalization and sharing wrongs" (n 47) at 8, fn5.
[68] Marshall (n 35) at 160.
[69] Duff, *Punishment* (n 63) 63. At least in the context of a liberal polity in which Duff discusses these ideas.
[70] ibid.

interests, which denote the substantial sphere of protection that penal provisions represent".[71]

The individual and social significance of reputation and privacy have been detailed in Chapter 2. However, by way of summary, Lord Nicholls' detailed explanation in the landmark House of Lords case of *Reynolds v Times Newspapers Ltd*[72] further emphasises this:

> "Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good".[73]

This is similarly the case with privacy, whether this is informational or physical privacy. Regarding the former, society has a strong interest in "the contours of the protection of personal information"[74] and privacy violations may cause ""more general societal harms in the sense of creating a culture of unease where people feel insecure about their personal information".[75] Intrusion additionally "undermines a person's ability to play a full part in the collective enterprise of securing conditions of freedom" and "will be a matter of public interest".[76]

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[71] Nuotio (n 55) at 244.
[72] [2001] 2 AC 127.
[73] ibid per Lord Nicholls at 201.
[74] D K Citron and D J Solove, "Privacy harms" (2022) 102 Boston University Law Review 793 at 818, citing J R Reidenberg, "Privacy wrongs in search of remedies" (2003) 54 Hastings Law Journal 877 at 882-883.
[75] J D Lipton, "Mapping online privacy" (2010) 104 Northwestern University Law Review 477 at 505.
[76] Roberts and Richardson (n 2) at 96.

Thus, given the significant underlying social value that privacy and reputation have, there is a strong case to be made for resulting wrongs to be properly classified as "public". This provides a basis on which to consider the circumstances in which the criminal law may appropriately regulate privacy and reputation violations.

8.3.2 Wrongfulness

Simester and von Hirsch point to moral wrongfulness as a condition of criminal liability[77] and note that the criminal law "speaks with a distinctively moral voice".[78] This is referred to as the "wrongfulness constraint".[79] There is less to be said on this issue given that the conduct in question is typically protected by civil law mechanisms. No case is being made for the creation of new wrongs. Rather, the question turns on whether the criminal law is the appropriate mechanism for regulating these wrongs. The case for wrongfulness in respect of relevant privacy and reputation wrongs has been made in the course of the thesis. What is of greater concern for present purposes is the *degree* of wrongfulness[80] and, in particular, the culpability of the perpetrator (see section 8.3.3 below).

The legal wrong of defamation may not be typically thought of as a "core" wrong,[81] of the type of *mala in se* wrongs associated with the criminal law. While defamation is clearly a wrongful act, it has been argued that it "is not synergistic with moral wrongs".[82] As a general characterisation, this may not seem striking. It can be partly explained by defamation's characterisation as a

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[77] Simester and von Hirsch, *Crimes* (n 10) 22. See also M Dyson, "Overlap, separation and hybridity across crime and tort" in M Dyson and B Vogel (eds), *The Limits of the Criminal Law* (2018) 79 at 81, who refers to the "moral character or nature of the wrong as being significant".
[78] Simester and von Hirsch, *Crimes* (n 10) 4.
[79] A R Pearce, "Evaluating wrongfulness constraints on criminalisation" (2022) 16 Criminal Law and Philosophy 57.
[80] Ashworth and Horder, *Principles*, 7th edn (n 13) 33.
[81] What might be termed a "*mala in se*" wrong in criminal law.
[82] D Mangan, "Regulating for responsibility: reputation and social media" (2015) 29 International Review of Law, Computers & Technology 16 at 17.

strict liability wrong, in which the pursuer benefits from presumptions.[83] These are that where a statement is shown to be defamatory, it is presumed to be (i) false and (ii) maliciously made by the defender. We might not think that spreading false information without due regard for the implications is necessarily inherently wicked. However, that is not to say that there are not instances of defamation that are morally wrong and capable of causing the victim considerable harm.

Turning to privacy, Moore sets out a number of factors that may be relevant in distinguishing privacy wrongs from losses or violations of privacy.[84] These are motive, magnitude (duration, extent and means), context, consent, and public interest.[85] Hogg takes this further by identifying circumstances not only where the privacy breach may be wrongful, but where it may be appropriate to look to criminal law responses "by reference to the reasonable expectations of an individual in a given situation, and the nature of the diminution of privacy".[86] The latter "impacts on the first" and concerns:

> "the character of the information discovered (in other words, it must be of a private, personal nature), or the locus of the invasion (such as one's own home, or even an area set apart as private in the midst of a public space, such as a changing room, locker, or hospital room), or the repeated nature of an action (such as repeatedly telephoning or pestering an individual)."[87]

This comes against the backdrop in which privacy and reputation wrongs continue to be perpetrated in a variety of ways through the use of the internet and increasingly advanced technology. The sheer quantity of content on online platforms (including - but not limited to - social media websites) has resulted in

> "a mass of user generated content…participating in discussion of public interest, but frequently also revealing aspects of the private life of others,

[83] A Ripstein, *Private Wrongs* (2016) 204. See sections 7.4.1(c) and (d).
[84] A Moore, "Privacy, speech and the law" (2013) 22 Journal of Information Ethics 21 at 36-37.
[85] See further discussion at section 8.3.3 below.
[86] M A Hogg, "The very private life of the right to privacy" in *Privacy and Property*, Hume Papers on Public Policy, vol 2 no 3 (1994) 1 at 4.
[87] ibid.

> if not containing libellous insult or defamatory allegations. Often the tone and style of user generated content and digital platforms is aggressive, insulting, or rude and allegations that tarnish one's reputation may lack a factual basis or be blatantly malicious".[88]

Moreover, criminal liability would better address the problem of aggregate or cumulative wrongs.[89] This is where a person or body causes "a very small amount of harm but on a very large scale to hundreds of thousands the harm is or even millions of people".[90] While each individual may only experience a reasonably minor harm, there is a far greater harm caused to society as a whole that is inadequately captured by, for example, a single civil law action. Thus, there is a concern that the current legal responses to such wrongdoing fail to recognise the seriousness of the conduct and the resulting harms caused. Relying on civil proceedings being raised for breach of confidence or misuse of private information is far from ideal, especially given the limited ability to bring class actions in the Scottish courts.

8.3.3 Culpability

Notwithstanding the preceding discussion, it is not *sufficient* that harmful and wrongful conduct should necessarily fall within the scope of the criminal law. In addition to these factors, "a relevant consideration in reaching a decision about the body of law that ought to be used might be the degree of culpability on the part of the wrongdoer".[91] The criminal law generally differs from the civil law by requiring proof a greater degree of culpability on the part of the wrongdoer.[92] Sullivan explains that:

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[88] D Voorhoof, "Freedom of expression versus privacy and the right to reputation: how to preserve public interest journalism" in S Smet and E Brems (eds), *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony* (2017) 148 at 151.
[89] Citron and Solove (n 74) at 816.
[90] ibid.
[91] Roberts and Richardson (n 2) at 99.
[92] See generally the account provided in Chapter 5.

> "the conception of a criminal wrong should comprise some harm or threat of harm for which D [the defendant] is at least in part responsible, together with some form of fault present at the time he caused, contributed to or failed to prevent the harm or threatened harm".[93]

How then do we determine culpability? One element of this concerns responsibility and the idea that only those who are responsible for their wrongful actions should be found to be criminally liable:

> "the key characteristic of a serious criminal offence is that subjective fault must be established, since a defendant should only be punished for a crime where he or she can be considered to have *voluntarily assumed responsibility* [emphasis added] for the commission of the offence".[94]

Assuming that the defendant is responsible for their actions (which should generally not be difficult to determine in this context) we must consider how to assess the level of fault required. In doing this the following statement is helpful:

> "A person might be considered more or less blameworthy depending on their motivation, foresight of the possible consequences of their actions and attitude towards those who suffer the harm".[95]

As a result, the criminal law does not typically extend to negligent wrongs, but rather focuses on reckless and intentional conduct.[96] This means that in the context of privacy and reputation wrongs, our focus should principally be on reckless or intentional breaches. While these civil wrongs do not necessarily require this level of fault to be shown, it is not proposed that faultless or negligent actors should be the target of the criminal law here. This is particularly relevant to reputation wrongs, where there is the need to ensure that freedom of expression is not unduly threatened or restricted by criminal law rules. Only those individuals who are expressing themselves with the intention, knowledge

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[93] G R Sullivan, "Wrongs and responsibility for wrongs in crime and tort" in M Dyson (ed), *Unravelling Crime and Tort* (2014) 82 at 82-83.
[94] G Virgo, "We do this in the criminal law and that in the law of tort" in S G A Pitel, J W Neyers and E Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (2013) 95 at 114.
[95] Roberts and Richardson (n 2) at 99.
[96] Although negligence (and even strict liability) may commonly be found in mala prohibita offences.

or disregard of the harm this may cause to another should be appropriate subjects for criminalisation. Such an approach would ensure consistency with Article 10 of the ECHR, with Article 10(2) permitting a restriction of the right to freedom of expression where this is necessary "for the protection of the reputation or rights of others".[97]

Given that defamation is essentially a no-fault liability delict, any criminal liability attaching to the most culpable conduct would have to be framed in such a way as to reflect this heightened culpability. The test would therefore be more akin to that of malicious publication and the former verbal injury wrongs. This would be that the wrongdoer acted with malice in attacking the reputation of another.

While motive itself is not typically relevant to whether or not an individual is found to have satisfied the mens rea of an offence, it can still be something from which an inference of fault can be drawn. To put it simply, "we all know that acting from a bad motive makes an act worse".[98] Ripstein proceeds to state "in the criminal law context…bad motive aggravates what is already a wrong".[99] Thus, where there is what Reid describes as "motive malice" then there is further justification for the imposition of criminal liability.[100]

In respect of privacy wrongs, there is an argument that "certain flagrant breaches of privacy, constituted by clearly intended acts, are worthy of redress by the criminal law".[101] At present, the principal common law wrongs of breach of confidence and misuse of private information involve a two-stage assessment of whether the pursuer had a reasonable expectation of privacy and, if so, whether the defender was entitled to use or disclose the information (a balancing of the two parties' respective interests).[102] Any criminal regulation of privacy interests should move the discussion away from an objective assessment of whether an individual had a reasonable expectation of privacy to consideration

[97] ECHR, Article 10(2).
[98] Ripstein, *Private Wrongs* (n 83) 165.
[99] ibid.
[100] See the discussion of malice at section 7.4.1(e).
[101] Hogg (n 86) at 26.
[102] See section 7.3.2 in the previous chapter and the analysis of the leading case of *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457.

of the culpability of the wrongdoer. Thus, the focus should be on the (i) malicious disclosure of (ii) private information.

Building on this, where the misuse of information is done with a heightened degree of malice, this may be characterised as "doxing".[103] This has been described as the "intentional public release…of personal information about an individual by a third party, often with the intent to humiliate, threaten, intimidate, or punish the identified individual[104] and "a range of acts in which private, proprietary, or personally identifying information is published on the internet against a party's wishes, usually with malicious intent".[105]

There is a link to endangerment here as these wrongs may place victims at the risk of harm, which reflects the broader concern that "privacy harms often involve increased risk of future harm"[106] The gravity of the harms has already been established and the disclosure of private information can lead to serious harms including consequential damage to reputation, anxiety, distress, shame, isolation, ostracism, risk of physical harm, and financial loss.

On the whole, "the law does not address situations in which an actor uses doxing for purely malicious purposes, such as revenge, harassment, or stalking".[107] While there is the possibility that some of this conduct may be captured by existing criminal offences (most notably stalking, improper use of public electronic communications network, the non-consensual disclosure of intimate images, causing fear and alarm, and extortion) these offences have been shown to only apply in limited circumstances and are context-dependent.

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[103] This is derived from the phrase "dropping documents" or "dropping dox": see D M Douglas, "Doxing: a conceptual analysis" (2016) 18 Ethics and Information Technology 199 at 200. This is also referred to as "doxxing".
[104] ibid at 199.
[105] B Anderson and M A Wood, "Doxxing: a scoping review and typology" in J Bailey, A Flynn and N Henry (eds), *The Emerald International Handbook of Technology-Facilitated Violence and Abuse* (2021) 205 at 205. However, this is not an essential element of this practice: see A Cheung, "Doxing and the challenge to legal regulation: when personal data become a weapon" in J Bailey, A Flynn and N Henry (eds), *The Emerald International Handbook of Technology-Facilitated Violence and Abuse* (2021) 577 at 579; D M Douglas, "Doxing: a conceptual analysis" (2016) 18 Ethics and Information Technology 199 at 200.
[106] Citron and Solove (n 74) at 816.
[107] J M MacAllister, "The doxing dilemma: seeking a remedy for the malicious publication of personal information" (2017) 85 Fordham Law Review 2451 at 2454.

In addition to malicious disclosure of private information, current legal responses regulating the use of private information could take greater account of conduct as a whole, as opposed to relying on wrongs focused solely on either accessing, interfering with, misusing, or disclosing information. There may be cases where the wrongdoer accesses and then discloses private information (or accesses and interferes with it), yet the law may only capture one of these acts, or the victim may have to rely on different mechanisms for each act.

Finally, in terms of intrusion, it should be noted that "where the intrusion is blameworthy, the justificatory grounds for the imposition of punishment will be made out".[108] As referred to in Chapter 6, the Younger Committee Report had previously proposed a criminal offence of "surreptitious surveillance".[109] Although surveillance may give connotations of intrusion by public bodies, the Younger Committee was limited to privacy intrusions by private individuals.[110] Similarly, the Calcutt Report recommended the introduction of three criminal offences related to physical intrusion (entering private property, placing a surveillance device on private property, and taking a photograph or recording the voice of an individual on private property), but only where this conduct was done in order to obtain private information with a view to publishing this.[111] While this recognises the wrongfulness of such conduct, by requiring there to be an intent to obtain and publish private information, this disregards the physical intrusion itself and shifts the emphasis onto the potential informational privacy breach. This has the effect of essentially treating the intrusion as a preparatory wrong and not a wrong worthy of criminal sanction in itself. This is misguided and intrusion should be treated as distinct wrong, regardless of whether there is an accompanying threat to informational privacy.

These proposed offences illustrate the relationship between intrusion wrongs with current offences such as trespass and voyeurism. However, as explained in Chapter 6, these offences are limited to particular types of conduct. The civil

[108] Roberts and Richardson (n 2) at 96.
[109] Report of the Committee on Privacy (Cmnd 5012: 1972). See also section 6.4.1(a).
[110] R J Krotoszynski Jr, *Privacy Revisited: A Global Perspective on the Right to be Left Alone* (2016) 121.
[111] Report of the Committee on Privacy and Related Matters (Cmnd 1102: 1990) para 6.33.

law has failed to develop adequate responses to physical intrusion, even in the years following the incorporation of Article 8, ECHR into Scots law.

It should be clarified that since any offence would require a high degree of culpability, it is not necessary to consider whether any additional protection or defences should be available to particular classes of individuals (e.g. journalists). This is because proof of malice would negate the availability of defences that might plausibly apply. Thus, any consideration of this would form part of the assessment of the wrongdoer's fault and mens rea rather than as a defence.

To summarise, culpability is significant in marking out the territory of the criminal law. It is only right that criminal liability should attach to those individuals who are responsible for the relevant wrongful conduct and demonstrate a sufficient level of fault as to their wrongdoing and the harmful consequences that result from it. As explained in Chapter 5, this idea that the criminal law censures wrongdoers and sends a message to others through punishment and deterrence is key (and will be considered further below). The criminal law additionally serves a labelling function[112] as it "conveys a public declaration of culpable wrongdoing" in a way that is not done through the civil law.[113] Declaring someone to be a "criminal", "imports all the resonance and social meaning of that term".[114] The impact and stigma of this should be reserved only for the most culpable wrongdoers.

It has therefore been shown that in formulating a criminal response to the violation of privacy and reputation rights, it is important to establish a conceptual, normative basis. The minimum criteria of harmfulness, wrongfulness and culpability have been outlined here. In addition to the wrongful conduct being capable of causing harm to others, the conduct should

[112] J Chalmers and F Leverick, "Fair labelling in criminal law" (2008) 71 Modern Law Review 217.
[113] Simester and von Hirsch, *Crimes* (n 10) 5.
[114] ibid.

be shown to be sufficiently wrongful to justify the criminal law's coercive response. This is more difficult to determine; it is clear that violations of privacy and reputation interests are wrongful. Indeed, much of this conduct (at least in respect of informational privacy and reputation wrongs) are existing civil wrongs. Yet it is only where the wrong is a public one that the involvement of the criminal law should be justified. To summarise, the focus of criminal regulation should be on "conduct in respect of which the imposition of punishment is justified; that is to say, a wrong that has resulted in significant harm, in respect of which there is a public interest in punishment".[115]

8.4 Impact of criminalisation

Having considered criteria for when criminal liability may be imposed, it is now important to examine the impact that criminalisation may have.[116] Building on the earlier comparison of the criminal and civil systems, there are clear implications that follow from the determination of a wrong as criminal or civil one. Duff and Marshall refer to three. The first of these is that criminalising certain conduct "is to make its purported wrongfulness salient".[117] The second is that it removes the victim from the wrong by transferring it to the criminal process.[118] The third is that criminal punishment is imposed on the wrongdoer rather than simply censure or compensation.[119] Tadros similarly provides that there are three distinctive features of the criminal law: condemnatory function, punishment, and the criminal process (or the presence of certain procedural safeguards).[120] Each of these will now be considered under the following headings: (a) seriousness/wrongfulness, (b) procedure, and (c) outcomes/disposals.

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[115] Roberts and Richardson (n 2) at 95.
[116] See also Ashworth and Horder, *Principles*, 7th edn (n 13) 22: "To criminalize a certain kind of conduct is to declare that it is a public wrong that should not be done, to institute a threat of punishment in order to supply a pragmatic reason for not doing it, and to censure those who nevertheless do it".
[117] Duff and Marshall, "Public and private wrongs" (n 26) at 75.
[118] ibid at 76.
[119] ibid.
[120] V Tadros, "Criminalization and regulation" in R A Duff, L Farmer, S E Marshall, M Renzo and V Tadros (eds), *The Boundaries of the Criminal Law* (2010) 163 at 164-165.

8.4.1 Seriousness/wrongfulness

In terms of the first of Duff and Marshall's consequences, Ferguson and McDiarmid suggest that:

> "being punished for a crime is different from being regulated in the public interest, or being forced to compensate another who has been injured by one's conduct…The sanction is at once uniquely expensive. It should be reserved for what really matters".[121]

As explained earlier, the violation of a fundamental right seems like an appropriate starting point for an assessment of whether privacy and reputation wrongs are sufficiently serious to warrant the interference of the criminal law.[122] There is little doubt that privacy and reputation wrongs may be serious, pervasive, cause great harm, and additionally affect more than just individual, private interests.

It has already been shown that certain types of wrong must be sufficiently serious to merit a criminal law response. However, seriousness alone has been criticised as a barometer of criminal/civil liability. Thus, what is meant by seriousness in the context of impact, is that the conduct in question may be *signified* as being more serious: it is to "declare publicly that the proscribed conduct is wrongful".[123] Criminalisation may play a symbolic role here and may also be a means of raising awareness of the wrongfulness conduct.[124] This has been termed the "social significance" of the criminal law, which has "a communicative function which the civil law does not".[125] This accordingly "may help to encourage the consolidation, internalisation,

[121] P R Ferguson and C McDiarmid, *Scots Criminal Law: A Critical Analysis*, 2nd edn (2014) 43 referring to H L Packer, *The Limits of the Criminal Sanction* (1969) 250.
[122] See section 2.3.3 setting out privacy and reputation as fundamental legal rights.
[123] Simester and von Hirsch, *Crimes* (n 10) 11.
[124] ibid 4
[125] ibid.

and perhaps even transformation of social norms regarding the conduct concerned".[126]

Moreover, there ought to be an identifiable basis on which the conduct is wrongful, as opposed to it being wrongful solely by virtue of being prohibited.[127] In this sense, the criminal law is not simply a means of "educating" people.[128] In the context of privacy, the following explanation is helpful:

> "The criminalization of certain privacy-invading conduct marks it out as a special form of wrong, one that should be met with a collective response and public condemnation through the criminal law. Criminalization is significant because it tells us something about the value that lawmaking institutions place on particular aspects of privacy, as well as about the circumstances in which this value is considered particularly salient".[129]

The preceding discussion of public and private wrongs shows the importance of this as a basis on which criminal regulation may be justified or opposed. It is argued that despite the significance of these interests to individuals, violations of privacy represent "seriously harmful conduct affecting not just certain individuals and groups but the public at large".[130] Indeed, "there are plenty of 'privacy' cases where public interests are prominent alongside private interests"[131]

It has been shown that the value of privacy and reputation (at least partly) lies in social factors.[132] This has been acknowledged by other authors and "there is a growing appreciation that privacy is a collective and social good, not only an

[126] A Cornford, "The aims and functions of criminal law" (2024) 87 Modern Law Review 398 at 413.
[127] ibid 11, fn 24.
[128] ibid 11, fn 24, 12.
[129] B-J Koops, B C Newell, A Roberts, I Skorvainek, and M Galič, "The reasonableness of remaining unobserved: a comparative analysis of visual surveillance and voyeurism in criminal law" (2018) 43 Law & Social Inquiry 1210 at 1212.
[130] Roberts and Richardson (n 2) at 83.
[131] ibid.
[132] See the account provided in section 2.2.

individual good, and that some breaches of privacy affect large numbers of people and constitute serious public harms".[133] Defamation has similarly been described as being "above all a social tort, a tort about social relations".[134] Moreover, these interests have been shown to be central to the efficient functioning of commerce and democratic practices. As such, a case may be made for criminalisation of the types of wrongful conduct outlined, by reference to the culpability of the actor and the harmful consequences (both for the individual and wider public).

Another issue is that privacy and reputation violations become normalised because of the knowledge that victims lack the appropriate tools to enforce their rights. Wrongdoers may feel emboldened by the fact that they are unlikely to be held accountable for their conduct. That is not to say that criminal liability will be a quick fix. Problems may remain with identifying perpetrators (especially where the conduct occurs online) and the availability of resources to regulate this type of wrongdoing.[135] However, criminal law regulation – at least for the most egregious acts – would send a clearer message about how this wrongdoing is to be treated and the relative seriousness of it.

8.4.2 Procedure

In addition to a case for criminalisation being made on the basis of wrongfulness, this approach would confer several practical benefits in terms of procedure and outcomes, which will now be examined. As has been explained in Chapter 5, there are fundamental differences between the criminal and civil processes. The most significant is that the burden lies on individual litigants to raise proceedings for in response to civil wrongs and that the conduct must be proved beyond reasonable doubt.

In respect of the first, this means that individuals must have sufficient resources to raise an action. While is not possible in this thesis to undertake empirical

[133] Roberts and Richardson (n 2) at 83.
[134] D Howarth, "Libel: its purpose and reform" (2011) 74 Modern Law Review 845 at 853.
[135] J Feinberg "Harm to others - a rejoinder" (1986) 5 Criminal Justice Ethics 16 at 17.

research into the financial barriers to raising actions to protect one's privacy and reputation, one evident point is that legal aid is rarely available for such actions[136] and "many individual plaintiffs may not have the financial wherewithal or time to litigate to protect their privacy".[137] This is equally appropriate in the context of reputational harm. For example, it has been observed that "*McAlpine* clearly demonstrates…the ability of financially secure individuals to protect themselves from social media defamation".[138] Defamation may be viewed as the domain of the wealthy, who can afford to challenge allegedly defamatory material in court in order to preserve their reputations. As a result, "unless they [potential pursuers] are well-resourced, [they] may hesitate to take the risk of bringing a claim"[139]

Furthermore, the action is not easily accessible: "there are longstanding concerns about defamation law's complexity, litigation costs, predictability, and effects on public debate, concerns which have continuing weight".[140] There are notable procedural difficulties: "the prolixity of its pleadings and its propensity for interlocutory skirmishes as a consequence act as impediments to defamation law effectively vindicating reputations".[141] In summary, "utilising the civil law may be a long and uncertain process".[142]

By contrast, Hogg acknowledges that "the criminal law can react quickly, can provide prompt relief, and can act as a deterrent".[143] It is argued that:

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[136] See the Legal Aid (Scotland) Act 1986 Schedule 2, Part II, para 1, which expressly provides that legal aid is not available for actions concerning defamation or verbal injury, except where certain conditions are met under s 14(1)(C), an amendment introduced by the Legal Profession and Legal Aid (Scotland) Act 2007 s 71. This enables a party to apply for legal aid for such actions where they meet criteria provided by the Scottish Ministers in a direction given to the Scottish Legal Aid Board. See the Scottish Legal Aid Board, *Defamation or Verbal Injury Direction* (2010). Two of the most striking requirements in the Direction are that there must be a "wider public interest" in the proceedings being brought (para 4) and the merits of the case must be deemed to be "exceptional" (para 5). Furthermore, these rules apply in addition to the standard legal aid rules, most notably the financial thresholds: see the Legal Aid (Scotland) Act 1986 s 15. These rules accordingly severely restrict the availability of legal aid in the majority of proceedings.
[137] Lipton (n 75) at 505-506.
[138] Mangan (n 82) at 24.
[139] E C Reid, *The Law of Delict in Scotland* (2022) para 18.43.
[140] A T Kenyon, "Defamation, privacy and aspects of reputation" (2018) 56 Osgoode Hall Law Journal 59 at 64.
[141] D Rolph, "Vindicating privacy and reputation" in A T Kenyon (ed), *Comparative Defamation and Privacy Law* (2016) 291 at 298.
[142] Hogg (n 86) at 21.
[143] ibid at 26.

> "the use of the criminal law does at least provide swift action against privacy breakers, and transfers the economic burden of protecting the right of privacy (which as we have seen, can be regarded as part of the public interest) on to the public as a whole".[144]

At present, the criminal law's current fragmented approach to protecting privacy and reputation means that there is an imbalance when it comes to accessing justice. While some privacy violations may be criminalised through a variety of offences, others are left to the mercy of the civil law, with all the practical difficulties that this may entail for victims.

There is also the possibility of anonymity for complainers (and additional safeguards in the criminal context), which is something that is unavailable in the civil context.[145] This may impact on the willingness of victims to participate in the process, although in any event, "criminal charges do not entail that any information apprehended by the breacher can be kept out of circulation".[146] In reality, this may (particularly given the greater media interest in criminal proceedings) give rise to increased publicity of the proceedings and the privacy or reputational harms suffered.[147] This may be perceived as a shortcoming of criminal proceedings being used in this context, yet similar objections could be made to other offences that victims may not wish to have publicised (e.g. rape and sexual offences or extortion).

This would also address problems caused by the continued decline in defamation proceedings, which over the course of the past century has been rarely relied upon by pursuers, especially in contrast to in England.[148] Norrie attributes this to "the demise of the late Victorian ideal of honour, the unavailability of legal aid, the increasing unpopularity of jury trials and the modest levels of damages awarded by Scottish judges".[149] While some of these

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[144] ibid at 21.
[145] See section 5.4 for further discussion of such procedural issues.
[146] Hogg (n 86) at 22.
[147] Informally known as the "Streisand effect" after the singer and actress Barbara Streisand: see M Mach, "Streisand effect in the context of the right to be forgotten" (2022) 9 European Studies – the Review of European law, Economics and Politics 110.
[148] Report on *Defamation* (Scot Law Com No 248, 2017) para 1.3.
[149] Discussion Paper on *Defamation* (Scot Law Com DP No 161, 2016) para 1.12, citing K McK Norrie, *Defamation and Related Actions in Scots Law* (1995) 4.

factors are no longer relevant, it is still the case that the combination of low awards of damages with restrictions on legal aid disincentivises pursuers from bringing actions. By transferring the burden from the individual to the state for raising proceedings to enforce these rights, this would combat the idea that "privacy harms often have a significant societal dimension, and the law (especially in litigation) often has a highly individualistic focus".[150]

8.4.3 Outcomes/disposals

Moving from the proceedings themselves to the outcome, this is a key differentiating feature between criminal and civil proceedings.[151] In particular, the distinction between punishment and compensation has been shown to be key. It is for this reason that "true criminalization, in a formal sense, lies in the fact that a defined form of conduct is assigned punishment rather than some other sanction",[152] and "the normative problems associated with criminalization are intimately related to those surrounding punishment".[153]

Citron and Solove identify three goals of privacy law enforcement: compensation (awarding monetary damages to people who have been harmed), deterrence (preventing future violations of the law) and equity (making things right by means other than compensation).[154] However, from a civil law perspective, there are limited forms of redress aside from compensation and interdict. Even with defamation and malicious publication – two actions rationalised on the protection of personality rights – there has become an increased emphasis on financial compensation. As noted in the Chapter 2, privacy and reputation harms are varied and encompass a range of psychological and emotional harms, such as distress, humiliation, embarrassment, and isolation.[155] This "increased emphasis on noneconomic harms may suggest that…more thought needs to be given not only to the nature of harms that might

[150] Citron and Solove (n 74) at 816.
[151] As explained in section 5.4.
[152] Nuoti (n 55) at 240.
[153] D N Husak, "Malum prohibitum and retributivism" in R A Duff and S P Green, *Defining Crimes: Essays on the Special Part of the Criminal Law* (2005) 65 at 68.
[154] Citron and Solove (n 74) at 816.
[155] Section 2.4 considers the range of harms stemming from privacy and reputation violations.

be legally compensable, but also to the ways in which those harms are redressed".[156]

These remedies only go so far in remedying the harms sustained by victims, and "damages may be the principal remedy the law currently affords, not necessarily the optimal one".[157] In terms of privacy, the situation is even worse as "the level of damages in privacy claims is modest when compared to defamation claims".[158] This may deter some victims from raising civil proceedings against the defender, particularly when considering the aforementioned drains on time and finances (including the lack of availability of legal aid).

Reputational harm is a social harm that lowers the estimation of the victim in the eyes of those around them. This can have serious consequences not just to the victim's finances, but also their ability to form meaningful relationships and to fully participate in society.[159] Remedying damage to reputation alone poses challenges:

> "the familiar objection that the wrong is a fact in the world that cannot be undone, or especially cannot be undone through a payment of money damages, seems especially pressing in the case of damage to reputation. How can money make this up?"[160]

Indeed, one of the issues with reputational harms is that it can be difficult to adequately remedy the long-term consequences that victims may suffer. An innovation of the 2021 Act is that it empowers the court to make an order (a) requiring the removal of defamatory content from a website,[161] or (b) prohibiting future circulation of the content.[162] The former compels the operator of a website to remove the content, while the latter applies to anyone other than the author, editor or publisher. This may ensure that others are not able to access or share the defamatory material and while an admirable step forward, there are

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[156] Lipton (n 75) at 507.
[157] Rolph (n 141) at 299.
[158] ibid at 305.
[159] This argument regarding the social significance of reputation is developed in Chapter 2.
[160] A Ripstein, *Private Wrongs* (n 83) 186.
[161] Defamation and Malicious Publication (Scotland) Act 2021 s 30(1)(a).
[162] ibid s 30(1)(b).

several practical problems. It may be difficult to enforce such an order against parties in other jurisdictions or to adequately monitor the continued accessibility and future circulation of the content. In any event, some pursuers will argue that by the time the case has been settled, the damage has essentially already been done.

Even where the pursuer succeeds with their action, there is no guarantee that they will be satisfied with the outcome. It is difficult to put a price on the damage caused to one's reputation:

> "it is anything but obvious how one can apprehend, let alone evaluate, an injury to reputation when considered in itself and independently of any associated (and visible) negative consequences, which the defamed person may or may not suffer".[163]

While an attempt may be made to remedy these types of harm through an award of solatium, in the context of defamation, such damages have "been assessed in Scotland at a modest level".[164]

In addition to monetary compensation, Milo notes that a "major factor motivating plaintiffs who sue for defamation is the vindication of their reputation".[165] Even where a victim suffers no identifiable harm, they may nevertheless seek to "clear their name". This would most obviously be the case where the individual is a high-profile, public figure. However, there may still be the need for vindication in other cases, such as where the victim feels shunned, ridiculed or ostracised by their peers. How then might a pursuer secure vindication?

First, "in the case of defamation, that vindication is the public demonstration of success in the action, thereby neutralising the libel or slander".[166] Whether

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[163] E Descheemaeker, "Protecting reputation: defamation and negligence" (2009) 29 Oxford Journal of Legal Studies 603 at 610.
[164] K McK Norrie, "Obligations" in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 15 (1996) para 550.
[165] D Milo, *Defamation and Freedom of Speech* (2008) 15.
[166] Report of Leveson LJ, *An Inquiry into the Culture, Practices and Ethics of the Press* (HC 780, 2012) Vol IV, para 3.12.

this provides satisfactory vindication is considered by Rolph, who is sceptical that it does:

> "There is, however, disagreement as to what aspects of the defamation proceeding effect this vindication and, more fundamentally, whether a defamation trial is indeed efficacious in securing the vindication of a plaintiff's reputation. There is the related issue of the extent to which the vindicatory purpose can be satisfied where a defamation proceeding is not litigated to final judgement".[167]

This is further provided for in the 2021 Act through the power of the court to order a summary of its judgment to be published by the unsuccessful defender.[168] This gives the parties some autonomy since they are expected to agree the "wording of the summary"[169] and the "time, manner, form and place of its publication".[170] However, if the parties are unable to agree the wording of the summary then it is for the court to determine it.[171]

Secondly, it has been argued that "a major purpose of an award of damages for defamation is the vindication of the plaintiff's reputation".[172] Reid notes that "the role of damages in providing vindication is most prominent in regard to the intentional delicts against the person"[173] and expressly refers to reputational harm and misuse of private information as being two examples of cases where such damages may be awarded.[174] This is in contrast to English law, where the approach is set out by Lord Bingham: the "primary role of the law of tort is to provide monetary compensation for those who have suffered material damage rather than to vindicate the rights of those who have not".[175]

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[167] Rolph (n 141) at 292.
[168] 2021 Act s 28(1).
[169] ibid s 28(2)(a).
[170] ibid s 28(2)(b).
[171] ibid s 28(3)(a).
[172] Rolph (n 141) at 292.
[173] Reid, *Delict* (n 139) para 31.04.
[174] ibid, citing J Guthrie Smith, *The Law of Damages: A Treatise on the Reparation of Injuries, as Administered in Scotland*, 2nd edn (1889) 40.
[175] *Watkins v Secretary of State for the Home Department* [2006] UKHL 17, [2006] 2 AC 395 per Lord Bingham at para 9, cited by Duff (n 59) at 146.

As is common with civil law remedies in Scots law, the focus lies on the harms and losses suffered by the victim, rather than the conduct of the wrongdoer. This is not necessarily a negative. As explained, often pursuers in such cases may seek vindication or even something as simple as an apology. This is consistent with the historic remedy of "palinode",[176] and in a modern context, an apology has to some extent been provided for in the Defamation and Malicious Publication (Scotland) Act 2021. This may be through the ability of a party to propose an offer to make amends before lodging defences to the action, which should include a "sufficient apology".[177] An apology may also form part of an agreed statement by parties after settlement of an action, which will be read in open court.[178] In proposing this, the Scottish Law Commission noted that "this is thought to be a valuable end point to a litigation brought to achieve vindication. It provides a means for more publicity to be given to a settlement than would otherwise occur".[179]

The shortcomings of these provisions are that they require settlement by the parties and are accordingly not strictly "remedies"; there is no power to order the defender to make an apology except in these circumstances where the defender has agreed to settle proceedings. Despite this, this is a step in the right direction as this (in certain cases) may go some way towards repairing the reputational harm suffered.

As has been explained, vindication may go some way in providing satisfactory redress for a pursuer whose reputations has been damaged. This is in contrast to those actions based on the remedying privacy violations. It is difficult to identify the same vindicatory motive with privacy actions:

[176] See section 4.3.2(c) and section 4.4 more generally.
[177] 2021 Act s 13(1)(b).
[178] ibid s 29(1).
[179] Report on *Defamation* (Scot Law Com No 248, 2017) para 6.45.

> "In the case of privacy, however, that which was private is no longer so and, irrespective of the condemnation that might flow from a judgement, what was placed in the public domain cannot be erased".[180]

Alongside the possibility of other remedies to address this, this raises the prospect of vindicatory damages being awarded as a distinct head of damages.[181] This argument is put forward by Rolph, who claims that:

> "the award of damages for invasion of privacy should not be limited to an amount by way of solatium for the mental distress occasioned by the wrong. Like defamation, a significant component of the damages should be for the purpose of vindication, to demonstrate and affirm the importance and value of the right to privacy. There is no reason why these damages should be nominal. Like defamation, damages for invasion of privacy, in many cases, should be substantial, to reflect the significance attached to the right to privacy".[182]

The idea of vindication is different here to that in the context of reputation. Vindication for privacy violations may be considered symbolic for the violation itself. This recognises that a legal right has been breached, even if no tangible harm has been suffered or can be evidenced:

> "If a plaintiff's privacy has been invaded and an injunction [interdict] has not been sought or granted, he or she should not only have an award of damages by way of consolation for the distress caused to him or her but should also have an award of substantial damages to mark the fact that the plaintiff's right to privacy has been unlawfully interfered with and to vindicate that right".[183]

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[180] Report of Leveson LJ, *An Inquiry into the Culture, Practices and Ethics of the Press* (HC 780, 2012) Vol IV, para 3.12.
[181] J N E Varuhas, "Varieties of damages for breach of privacy" in J N E Varuhas and N A Moreham (eds), *Remedies for Breach of Privacy* (2018) 55.
[182] Rolph (n 141) at 306.
[183] ibid at 293.

It is additionally important to stress that the imposition of criminal liability does not necessarily displace civil liability.[184] In such cases, "there is a role for tort law in delivering public accountability where the accountability mechanisms of the state have been tried and failed".[185] Thus, a finding of criminal liability would not deprive a pursuer of the right to bring related civil proceedings.[186] This has been illustrated in respect of other wrongs, such as homicide and rape or sexual assault, where victims have been successful in civil proceedings after the defender has been acquitted (or in some cases not prosecuted) in criminal proceedings. Despite the potential criticism of this in terms of conflicting outcomes and uncertainty,

> "there is certainly no obvious inconsistency in the imposition of civil liability without imposing criminal liability, since this may arise from the general need for greater culpability for criminal liability and different standards of proof".[187]

One suggestion that has been made is not that there should be increasing criminal law interference in this sphere, but rather that there should be greater scope for the imposition of punishment through the civil law.[188] This is explained by Roberts and Richardson:

> "as the law of privacy generally tilts more towards the public interest side, greater thought should be given to the benefits of including a punitive element in privacy cases that still ostensibly fit within the rubric of private law (or a data protection regime, or both together) but involve significant public harms".[189]

The authors themselves, however, appear to acknowledge that this is – at best – a stopgap. They proceed to note that:

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[184] See section 5.5.
[185] G R Sullivan, "Wrongs and responsibility for wrongs in crime and tort" in M Dyson (ed), *Unravelling Crime and Tort* (2014) 82 at 87-88.
[186] J R Spencer, "Civil liability for crimes" in M Dyson (ed) *Unravelling Tort and Crime* (2014) 304 at 304.
[187] G Virgo, "We do this in the criminal law and that in the law of tort" in S G A Pitel, J W Neyers and E Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (2013) 95 at 118.
[188] Roberts and Richardson (n 2) at 91.
[189] ibid at 83.

> "Our premise is that citizens will in due course consider criminalisation of the conduct in question to be warranted. It seems to us that when this eventually occurs, the rationale for addressing wrongdoing in the circumstances under consideration in this section will no longer exist, and it ought to be dealt with by means of criminal law".[190]

Thus, there is a willingness to punish, even if this falls short of advocating criminal liability. One problem with this suggestion is that the civil law has limited tools with which to impose punishment. It has already been shown that there is no possibility of exemplary or punitive damages being awarded in Scots law.[191] Furthermore, even assuming that provision could be made for this, this deals with just one problem: the absence of punishment in civil actions. It fails to remedy other shortcomings with the civil law response.

It has been proposed that an increased willingness to embrace gain-based damages in this area may go some way to addressing these problems.[192] This would bring the civil law in this area more in line with the criminal law as "the power to award exemplary damages and the criminal sanction serve common ends".[193] This would partly satisfy a need for a punitive element in respect of this conduct. However, in the context of Scots law, this would be highly unorthodox and contrary to historic principles that have established that such damages are not available.

8.4.4 Overcriminalisation concerns

As explained above, it is important to ensure that the boundaries of the criminal law are constrained. It has reasonably been stated that "a legislator has the power to proscribe conduct for any reason…a conscientious legislator, however, should support proscription only when good reason exists for doing so".[194] It is

[190] ibid at 96, fn 54.
[191] See section 5.6.
[192] N Witzleb, "Justifying gain-based remedies for invasions of privacy" (2009) 29 Oxford Journal of Legal Studies 325.
[193] Roberts and Richardson (n 2) at 103.
[194] von Hirsch (n 22) at 260.

intended that the account provided above is consistent with this statement by ensuring that criminal liability is only imposed in response to culpable, harmful wrongdoing that justifies the state's coercive response.

This section nevertheless seeks to outline overcriminalisation concerns that may be levelled against any proposals for increased criminalisation in this area. What do we mean by this term? A detailed, but helpful, explanation is provided by Plaxton:

> "'Overcriminalization' can refer to the criminalization of courses of action that legislatures (at least those in liberal democratic states) ought not to make criminal. On this understanding, thinkers who address the phenomenon of over- criminalization are more or less talking about the "moral limits of the criminal law." Overcriminalisation, in this sense, is concerned with what the legislature may criminalize: with whether, for example, it may criminalize conduct on the basis of the harm it causes to oneself, specified others, or to society at large; or whether offensiveness is sufficient basis for criminalization; or whether the criminal law-making power may be used to address private in addition to public wrongs".[195]

Alldridge suggests that "the danger, as in many other areas, is that a concerted effort will generate overlapping, irrational and ill-constructed offences".[196] However, what is not being considered here is over-criminalisation in the sense of new regulatory or *mala prohibita* offences that Husak cautions against.[197] Rather, the trend that we have seen is typically overcriminalisation in a broader sense.[198] This is characterised by the introduction of overlapping offences and the creation of new bases of liability for already criminal conduct.[199] This may be to raise awareness of emerging criminal practices or to satisfy the principle of fair labelling.[200]

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[195] M Plaxton, "The challenge of the bad man" (2012) 58 McGill Law Journal 451 at 465.
[196] Alldridge, *Relocating Criminal Law* (n 1) 109.
[197] Husak, *Overcriminalization* (n 66) 20.
[198] Plaxton (n 195) at 466.
[199] ibid.
[200] See Chalmers and Leverick (n 113) at 222; Plaxton (n 195) at 468-473.

Concerns have been expressed over the use of the criminal law to regulate matters relating to privacy and reputation. When considering the types of wrongs to be subject to criminal regulation, Hogg advises that "we should be wary of any such development as the main plank in a reform of privacy law, and that such an avenue should be reserved for extreme cases".[201]

Furthermore, Burchell and Norrie warn that "the use of the criminal law to curb speech is a highly debatable incursion into free speech".[202] This has clearly been illustrated by the significant public debate surrounding the introduction of the offence of stirring up hatred[203] and the failure of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012.[204]

However, this thesis does not seek to challenge the principle of criminal law as a last resort.[205] By limiting the question of criminalisation to the guiding principles set out in this chapter, it is intended to meet some of the criminalisation concerns identified here.

In addition to these conceptual arguments concerning overcriminalisation, it is worth noting that there are certain practical considerations that may be said to undermine the case for further expansion of the criminal law. It is acknowledged that with increased criminalisation, there comes an accompanying burden on the state (notably the police, prosecutors, and courts). There may be difficult challenges in policing and prosecuting such offending, which are exacerbated by recent trends in this type of wrongdoing (e.g. being carried out online, largescale conduct, aggregate harms)[206]. These obstacles can present themselves at both the investigation and prosecution stages, resulting in trial delays, not to mention public expense.[207] While mindful of these concerns, at present, this procedural burden largely falls on the individual, who must rely

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[201] Hogg (n 86) at 21.
[202] J Burchell and K McK Norrie, "Impairment of reputation, dignity and privacy", in R Zimmermann, K Reid, and D Visser (eds), *Mixed Legal Systems in Comparative Perspective* (2005) 545 at 556, fn 52.
[203] See the earlier reference to this at section 6.4.2(b).
[204] For an outline of the criticisms levelled at this Act, see M McBride, "The Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 - assessing the case for repeal" (2017) 21 Edinburgh Law Review 234.
[205] Roberts and Richardson (n 2) at 83.
[206] See the discussion of these harms earlier in this chapter and in section 2.4.
[207] J Horder, *Ashworth's Principles of Criminal Law* (2022, 10th edn) 25.

on civil procedure at their own expense in order to obtain some form of redress. Indeed, "state enforcement will often be more efficient and equitable than enforcement resourced by and at the discretion of victims".[208] The criminal process also enables victims to benefit from appropriate procedural safeguards during proceedings, which may not be available in equivalent civil proceedings. Thus, the criminal law can offer a more effective mechanism through which to provide justice.

8.5 Evaluation and summary

This chapter has sought to present the case for a more principled regulation of two fundamental rights that have become increasingly susceptible to unwarranted attacks. In doing so, it has advocated the introduction of discrete criminal wrongs premised on maliciously perpetrated conduct that has the effect of injuring privacy and reputation interests.

The chapter began by presenting an evaluation of the ways in which the criminal law currently protects privacy and reputation interests. The rest of the chapter was broadly divided into two key parts. The first part put forward minimum criteria for the imposition of criminal liability by reference to three key theoretical concerns: (i) harmfulness, (ii) wrongfulness, and (iii) culpability. The second part built on this by assessing the impact of criminalisation in the context of privacy and reputation wrongs. The impact was assessed by consideration of the communicative function of the criminal law in terms of declaring the conduct to be wrongful, as well as the practical consequences in terms of procedure and outcomes. In doing so, consideration was given to the differing features and aims of the criminal and civil systems, as assessed in Chapter 5.

It was suggested that a gap in the law's response to serious wrongdoing violating privacy and reputation interests could be filled by the imposition of

[208] Cornford (n 126) at 412.

criminal liability for particular types of conduct. This would ensure the law's focus is on the protection of these interests rather than relying on a miscellany of criminal offences combined with delictual wrongs. For the most part, the relevant wrongful conduct would not be anything entirely novel but would represent an extension of existing bases of liability recognised under the civil law to the criminal law. These would map onto the civil wrongs relating to defamation and malicious publication, misuse of private information, and the underdeveloped (at least in Scots law) wrong of intrusion.

9. Conclusion

This thesis has sought to examine two related interests that have notably received limited academic attention in the context of the criminal law and literature on criminalisation. While the protection of privacy and reputation rights is evident in both a civil law and human rights context, this is not the case in the criminal law. This thesis provides a basis for the criminalisation of such wrongs, which is grounded in both theory (by reference to criminalisation principles) and practical considerations (such as procedure and outcomes). It concludes that there is scope for the criminal law to regulate these interests in a more consistent and principled manner. This would help overcome shortcomings and deficiencies in the existing legal framework regulating privacy, and to a lesser extent, reputation.

It is acknowledged that this thesis is broad in scope and raises a wide range of related issues. Some of these have been expressly acknowledged and considered, while others have been fleetingly mentioned. That is not to say that the latter are not important or pressing, simply that they go beyond the boundaries of this particular research project, which has principally focused on the role of substantive criminal law. Most notably, the interplay between the criminal law and privacy and reputation interests in criminal proceedings, as well as the extra protections afforded to suspects, accused, and those either convicted or acquitted of offences, has become increasingly challenging. Issues regulating the extent to which anonymity should be provided to relevant parties, the freedom of the press and individuals to comment on live proceedings, and the rights not to be connected with crimes of which one has not been convicted all pose regulatory dilemmas in balancing the privacy and reputation rights with free speech. This is particularly so in an online context and on social media platforms where the sheer volume of content has made legal regulation difficult. The development of technology has had a similar impact on the law's attempts to deter and remedy violations of individual privacy and reputation interests. The scale, permanence, and magnitude of such wrongs have demonstrated the fragility of these fundamental rights.

This thesis established a conceptual foundation for the protection of these interests through the criminal law. This is general in scope and cannot address each individual context in which privacy and reputation interests may be harmed. However, it nevertheless offered a critical assessment of the treatment of privacy and reputation interests by the criminal law and presented the case for a more expansive role.

In meeting the aims of this research set out in the introduction, this thesis has examined privacy and reputation through conceptual, historical, procedural, legal and normative lenses.

The purpose of Part 1 was to identify the conceptual nature of privacy and reputation interests and to make the case for their treatment by the criminal law. In doing so, Chapter 2 focused on the theoretical nature of privacy and reputation by reference to philosophical and legal literature. This chapter sought to identify the underlying values of privacy and reputation. It was shown that privacy and reputation may both be grounded in individual and social justifications. Reputation's underlying value was illustrated by reference to Post's influential account, with reputation being a crucial means of safeguarding an individual's property, honour and dignity. It was additionally shown that reputation has significant social value, given that it is necessarily dependent on the views and judgements of others.

This chapter proceeded to outline the distinction between interests and rights. In particular, it explained what are meant by privacy and reputation rights and argued that these are fundamental rights that are afforded significant legal weight. This is reflected in the recognition of these rights in leading human rights frameworks. The value and weight attached to each interest supports the case for effective protection of corresponding legal rights, as does the range and magnitude of the harms felt by those who suffer violations of these rights.

This conceptual groundwork was further developed in the next chapter, which focused on the substance of these interests. Chapter 3 offered an analysis of the

ways in which privacy and reputation may be defined, with a focus on conceptual disagreements regarding the former. Reductionist accounts of privacy were rejected, and a pluralistic conception was advocated. There was found to be little value in privacy being a vacuous concept such as a right to be let alone, while framing it in terms of access was found to be conceptually flawed. It was argued that privacy should not be regarded as a "one-size fits all" concept, but rather one that can sub-divided into discrete interests. In particular, as a legal right, it is important to recognise that privacy may include physical privacy (including territorial and sexual privacy), and informational privacy (including secrecy and confidence). This broadly maps onto Prosser's scheme of privacy rights, which was used as the basis for assessing the protection of privacy rights later in the thesis.[1] While this model of sub-dividing privacy into four discrete legal interests (intrusion, private facts, false light, appropriation) was found to be an effective means of doing this, it was suggested that the first two rights are most significant and truly capture what is meant by privacy. This was additionally shown to be consistent with the (albeit limited) conceptualisation of privacy in Scots law.

Defining reputation was found to be decidedly more straightforward and the chapter set out they key features of reputation as comprising (i) a judgement or assessment about ourselves, (ii) as formed by those around us. This drew on the earlier work on the value of reputation and can be seen to reflect the orthodox legal protection of reputation through the civil law (and particularly through the law of defamation).

Part 2 of the thesis saw the focus shift from theoretical conceptions of privacy and reputation to the question of where the protection of these rights belongs. This Part first aimed to chart the historical development of the criminal and civil systems in Scotland in Chapter 4, before assessing the conceptual and practical differences between the two systems in Chapter 5.

The purpose of Chapter 4 was to show the extent to which these rights were historically protected in Scots law and to demonstrate how this has influenced

[1] See D W Prosser, "Privacy" (1960) 48 California Law Review 383.

the current law. This chapter undertook a survey of historical sources in identifying the protection of privacy and reputation interests. In the early (and Institutional) period until the institutional changes of the 18th century onwards, some of the criminal law's influence in this context can be partly explained by the overlap between criminal and civil law, the law's focus instead being on "wrongs" in the broadest sense. This mixed criminal/civil system accordingly made it difficult to clearly identify the parameters of criminal and civil wrongdoing. This had an impact on the actions that could be raised and the available remedies, with there being the possibility of a fine being imposed, palinode (public recantation), or a compensatory award, depending on the nature of the action raised. While any punitive element gradually began to recede as the notion of "crime" developed, the current civil remedies that are available (for solatium and patrimonial loss) can be traced back to these historical origins. Moreover, the former remedies available alongside the jurisdiction of the Commissary courts for certain verbal injury actions indicate a willingness to recognise reputation wrongs as being public wrongs. As argued in the thesis, this is significant in satisfying one of the criteria for the imposition of criminal liability.

In paving the way for an assessment of the legal protection of privacy and reputation rights, Chapter 5 examined the conceptual and practical differences between the criminal and civil law. This analysis of the different responses to wrongdoing provided a strong foundation from which to determine why a wrong may be characterised as criminal or civil, and what the impact of such a characterisation may be. In doing so, it identified the core differences between the two systems, with a particular focus on the significance of punishment as a feature of the criminal law, and of the aims that underpin the imposition of criminal or civil rules. Moreover, the practical and procedural differences were assessed in the context of Scots law. This offered a detailed outline and explained the likely impact of criminal law mechanisms as a means of regulating wrongful conduct in contrast to civil law mechanisms. This account supported the ideas advanced in Chapter 8, both in terms of the conceptual basis for criminalising certain privacy and reputation wrongs, and the practical implications of doing so.

Part 3 of the thesis provided a detailed evaluation of existing legal mechanisms for protecting privacy and reputation in Scots law. Chapter 6 took substantive Scots criminal law as the starting point for this evaluation. The analysis of these offences was divided into those offences that may protect privacy, reputation, and both privacy and reputation.

Criminal offences were shown to apply in certain narrow circumstances, with little regard being paid to the impact of wrongful conduct on privacy or reputation interests themselves. Thus, while there are existing offences that may be rationalised as protecting these interests, there was often found to be a stronger competing justification for the criminal offence, such as the protection of sexual autonomy, property, liberty, public order, national security, or democratic institutions. That is not to say that the criminal law fails to protect privacy and reputation interests, but rather that the protection is typically incidental, meaning that there is little principled discussion of the nature of these interests or the resulting harms.

Chapter 7 focused on the civil law's protection of privacy and reputation rights. While privacy and reputation both feature in leading human rights instruments, this has yet to fully translate into comprehensive protection in domestic law. Privacy was shown to be protected through civil actions in cases where there is misuse of private information, with Scots law appearing to closely align itself to principles derived from English case law. The development of this privacy action was fuelled by the implementation of the European Convention on Human Rights into Scots law through the introduction of the Human Rights Act 1998. Much of the law here developed in the context of Article 8, which provides for a right to private and family life, rather than simply a "right to privacy".[2] The Scottish judiciary has played a limited role in articulating distinctively Scottish principles, with the result that the law may not develop at the pace it might. There is nevertheless even less clarity when it comes to

[2] A T Kenyon, "Defamation, privacy and aspects of reputation" (2018) 56 Osgoode Hall Law Journal 59 at 69-70.

physical privacy, which has failed to achieve express recognition at common law, despite some attempts being made in some cases. It was argued that physical privacy (the wrong of intrusion) is less obviously protected in Scots, either through the criminal or civil law. There is no general right to privacy in the civil law, [3]nor any discrete right to be free from physical intrusion. This is despite Article 8 of the ECHR including this within its ambit.

While this research has focused primarily on the criminal law's role in protecting privacy and reputation interests, Rolph points to a general lack of consideration of the relationship between privacy and defamation actions in law reform projects.[4] Indeed, there has been no discussion of privacy by the Scottish government or Scottish Law Commission, and recent reform of defamation law neglected to take account of the wider legal landscape. It instead sought to modernise the law through partial codification and by a heavy reliance on earlier English law reforms. Thus, there has been no consideration of the relationship between reputation and privacy, which has itself created a lacuna in the civil law context. This is illustrated by Kenyon, who explains that

> "it would clarify and simplify how defamation and informational privacy law coexist, without becoming focused on technical arguments about the boundaries between the actions or the ways in which they can or should be reconciled".[5]

In Scots law, there has accordingly been a missed opportunity given that reputation was recently the focus of reform by the Scottish Law Commission. Furthermore, in the absence of any future reform of privacy law, it seems likely that privacy rights and actions will continue to develop in a piecemeal manner at common law.

Finally, in meeting one of the key aims of this research, Chapter 8 drew on earlier philosophical, historical, and legal analysis in presenting a normative

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[3] See the earlier discussion of *C v Chief Constable of the Police Service of Scotland* [2020] CSIH 61

[4] D Rolph, "Vindicating privacy and reputation" in A T Kenyon (ed), *Comparative Defamation and Privacy Law* (2016) 291 at 291, n 2.

[5] Kenyon (n 2) at 61.

foundation for the criminal law's protection of privacy and reputation interests. The chapter began with an evaluation of current legal mechanisms for protecting privacy and reputation rights following the work done in Chapters 6 and 7 on respective criminal and civil wrongs. This identified certain shortcomings in the legal response to privacy and reputation wrongs, most notably gaps in the civil law's response, a failure to adequately address serious reputational wrongs, and the limited consideration of privacy in substantive criminal law.

A potential solution was offered by advocating a more expansive role that could be played by the criminal law. This argument was developed through the application of fundamental criminalisation principles to privacy and reputation. This assessed whether the thresholds of harmfulness, wrongfulness and culpability were met. These were found to be satisfied in respect of relevant privacy and reputation violations.

The chapter thereafter proceeded to examine the impact of criminalising these types of wrongs. Three important effects were identified: (i) marking out the seriousness of such wrongful conduct and strengthening the legal responses to these wrongs by making improvements in respect of both (ii) procedure and (iii) outcomes. Not only could the law offer a more robust response to privacy and reputation wrongs, but it could improve access to justice for victims and provide outcomes that more appropriately reflect the harms suffered.

To conclude, it remains the case that "we might expect serious breaches of privacy to be punished under the criminal law. But for various reasons criminal law will often fail to live up to this expectation".[6] In examining why this is the case, this thesis has sought to offer a novel and critical account of the protection of privacy and reputation interests in Scots criminal law (and indeed Scots law more broadly). It is hoped that this may encourage greater willingness to consider the potential role that the criminal law might play in protecting privacy and reputation interests. In doing so, this may enable these fundamental and fragile rights to be afforded greater weight in future criminalisation debates.

[6] A Roberts and M Richardson, "Privacy, punishment and private law" in E Bant, W Courtney, J Goudkamp and J M Paterson (eds), *Punishment and Private Law* (2021) 83 at 94.

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