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A Just Balance or Just Imbalance?
The Role of Metaphor in Misuse of Private Information

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Abstract [229 words]

This article undertakes analysis of misuse of private information (MPI) case law informed by deconstruction and wider literary and critical theory. It specifically considers the operation of the *'balance'* metaphor in MPI case law: What rhetorical effects might it foster, and how? What insights can the balance metaphor in MPI case law reveal about the nature of legal discourse more generally? This article starts by providing an account of select theorists who explore the subtle but vital role that metaphor plays in non-literary texts. Though metaphors have traditionally been viewed as poetic or literary devices, deconstruction indicates that they often exert a hidden influence in the texts of other disciplines such as philosophy and law, with inevitable implications for claims based on truth, objectivity and reason. This account ultimately highlights the fundamental - but often overlooked - role of metaphor in legal discourse. Following this discussion, the article proceeds to investigate the key *'balance'* metaphor in misuse of private information judgments. It identifies and analyses two distinct ways in which the balance metaphor subtly benefits and supports judicial reasoning in these judgments. First, it creates an impression of certainty by drawing on connotations of the quantifiable and calculable. Second, it fosters the moral appeal of a decision by alluding to notions of justice and equilibrium. In doing so, the balance metaphor marginalises the non-rational, inexpressible, even mysterious, aspects of judicial rights balancing.

"In Demonstration, in Councell, and all rigorous search of Truth, *Judgement does all; … But for Metaphors, they are in this case* utterly excluded. For seeing they openly professe deceipt; to admit them into Councell, or Reasoning, were manifest folly."

T Hobbes, Leviathan, Ch 8 (1651)

"What then is truth? a mobile army of metaphors, metonyms, and anthromorphisms, in short, a sum of human relations which were poetically and rhetorically heightened, transferred, and adorned, and after long use seem solid, canonical, and binding to a nation. Truths are illusions about which it has been forgotten that they are illusions, worn-out metaphors without sensory impact, coins which have lost their image and now can be used only as metal, and no longer as coins."

F Nietzsche, 'On Truth and Lies in an Extra-Moral Sense' (1873)

Introduction

Lawyers, like poets, are no strangers to metaphor. For example, legal discourse has adopted the notion of 'ripeness' for judicial review,[1] likened property rights to 'bundles of sticks',[2] excluded evidence as the 'fruit of the poisonous tree,[3] implicitly condemned claimants' 'fishing expeditions'[4] and retained Lockean agrarian imagery in copyright.[5] Law then, it seems, has its very own mobile army of metaphors. This article is concerned with one particular metaphor, that of 'balance'. The notion of balance is widely used within, and long associated with, law; in particular it constitutes 'one of the central features of postwar Western legal thought and practice'.[6] This article focuses on the role of the 'balance' metaphor in the specific context of misuse of private information jurisprudence.

Misuse of private information (MPI) is a relatively new doctrine that has emerged from a series of post-Human Rights Act 1998 legal disputes, many involving high profile claimants seeking to restrain

[1] James E Murray, 'Understanding Law as Metaphor' (1984) 34 J. Legal Educ. 714, 720-22.
[2] Thomas Ross, 'Metaphor and Paradox' (1989) 23 Georgia Law Review 1053, 1055-1063.
[3] ibid, 1067-1069
[4] Elizabeth G Thornburg, 'Just Say 'No Fishing': The Lure of Metaphor' (2006) University of Michigan Journal of Law Reform vol 40(1) 1.
[5] William Patry, 'Metaphors and Moral Panics in Copyright: the Stephen Stewart Memorial Lecture' [2008] I.P.Q. 1, 1-13, 8-10.
[6] Jacco Bomhoff, Balancing Constitutional Rights, The Origins & Meanings of Postwar Legal Discourse (2013, Cambridge University Press) 1.

publication of personal information by tabloid defendants.[7] The core of the action is an 'interright conflict'[8] between the Article 8 right of privacy[9] and the Article 10 right to free expression,[10] and to manage this conflict judges have created the 'balancing exercise'. Elsewhere, the author has undertaken deconstructive analysis of this binary opposition, examining how Articles 8 and 10 and their primary underlying dichotomy, 'public interest' versus 'interesting the public', are in some senses reversible, mutually reliant and not entirely distinct.[11] That analysis revealed some of the culturally specific assumptions that silently shape understandings of the public interest dichotomy, including Enlightenment-era ideals of intellectual debate, objective truth and democratic participation and the related privileging of political over non-political speech, the serious over the trivial etc. It also found that the notion of the 'public' across MPI discourse is subject to varying constructions for rhetorical ends, shifting from empowered consumers to politically engaged citizens to the voyeuristic masses according to speaker, agenda and context. However, another strand of deconstructive thought has further insights to reveal in this area, namely its concern with the role of metaphor in discourse.

This article undertakes analysis of MPI caselaw informed by deconstruction and wider literary and critical theory. First, it provides an account of select theorists who explore the subtle but vital role that metaphor plays in non-literary texts. It pays particular attention to Derrida's work on metaphor, though academic interest in metaphor extends far beyond deconstruction. This discussion of the shared origins and history of metaphor and rhetoric is valuable here for three reasons. First it highlights the various hierarchies operative across political-philosophical history; hierarchies that remain influential, particularly in law and therefore MPI specifically. Second it shows that metaphors, often hidden, play a rhetorical role in discourses such as philosophy or science, with inevitable implications for claims based on truth, objectivity and reason. Third it demonstrates the crucial role of metaphors in legal discourse generally, and the role of such metaphors in constituting and shaping our experiences. The second part of this article proceeds to investigate the use of 'balance' as a metaphor in MPI judgments. It considers the rhetorical effect of the rights-'weighting' process, asking what underlying subjectivities such metaphors might betray, what rhetorically beneficial assumptions they might engender.

[7] Rebecca Moosavian, 'Charting the Journey from Confidence to the New Methodology' E.I.P.R. [2012] 34(5) 324-335.

[8] Jeremy Waldron, 'Rights in Conflict' Ethics 99 (April 1989): 503-519, p. 514.

[9] Article 8, European Convention on Human Rights & Fundamental Freedoms 1950. Art 8(1) states: 'Everyone has the right to respect for his private and family life, his home and his correspondence.'

[10] Article 10, European Convention on Human Rights & Fundamental Freedoms 1950. Art 10(1) states: '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.'

[11] Rebecca Moosavian, 'Deconstructing "Public Interest" in the Article 8 vs Article 10 Balancing Exercise' [2014] Journal of Media Law, Vol 6(2), 234-268.

[1] Metaphor, Rhetoric & Law

A metaphor is form of trope, the essence of which entails 'understanding and experiencing one kind of thing in terms of another'.[12] It is a device whereby a speaker refers to two different things at once, e.g. by a drawing a comparison, link or substituting one term for another, the second term being redeployed in a different context. In doing so metaphor draws upon similarities or resemblance between the two things. Metaphor has been traditionally viewed as a figurative or poetic form of expression, as distinct from literal, descriptive speech. Unlike the latter, it entails an open-ended form of communication, 'pregnant' with meaning and mystery, drawing links across contexts. Metaphors are seen as non-rational, appealing to the senses (especially visual senses) and playing on emotional responses. One such example is provided in the seminal Illness as Metaphor, where Sontag critiques the various metaphors that recur in literary depictions of cancer and tuberculosis.[13] She analyses cancer's portrayal as a parasite and a form of contamination, and the 'language of warfare'[14] with which it is depicted. For Sontag, such imagery cumulatively instils undue fear and dread regarding the disease and is thus ultimately misleading. Despite this (or perhaps because of it) cancer comes to be adopted in turn as a metaphor in other disciplines. For example, in a political context cancer is a 'specifically polemical' disease;[15] describing an issue as a social cancer highlights the severity of the matter, raises the stakes and justifies drastic measures.[16]

[1.1] Classical Views of Rhetoric & Metaphor

The origins and characteristics of metaphor are closely entwined with that of rhetoric. Rhetoric, the art of using language to persuade an audience of a particular position, emerged to prominence with the sophists in classical Greek culture. Metaphor was viewed as a rhetorical device which could aid persuasion. Successful participation in the Athenian democratic system necessitated skills of persuasion on the political stage and particularly in the law courts.[17] The origins of rhetoric are thus at least partly legal.

Plato was highly critical of rhetoric as a practice[18] and denounced it in two of his dialogues Phaedrus[19] and Gorgias.[20] In the latter Plato condemned rhetoric as a mere knack or technique,[21] a

[12] George Lakoff & Mark Johnson, Metaphors We Live By (2003, University of Chicago Press) 5.
[13] Susan Sontag, Illness as Metaphor & AIDS and its Metaphors (Penguin, 2002).
[14] ibid 65. See also: 59; 86.
[15] ibid 74. See also 86.
[16] ibid ch 9; 82-3; 84.
[17] See HC Lawson-Tancred, Introduction in Aristotle, The Art of Rhetoric (Penguin Classics 2004) 8-14.
[18] This is linked to his hostility to the democratic system: Plato, Republic (Oxford 1998) 555b-562a.

form of flattery[22] that panders to the desire of its audience[23] and requires no specific expertise.[24] Instead it forms 'a phantom branch of statesmanship'.[25] Plato depicted rhetoric as inferior and opposed to philosophy in numerous respects. For example, rhetoric is concerned with attaining successful outcomes rather than engendering moral virtue;[26] it involves persuasion[27] rather than education,[28] manipulating[29] audiences in disregard of the truth.[30] Woven throughout Plato's account of rhetoric is a cynicism about the motives of rhetoricians and the capacities of their audiences,[31] a dynamic incidentally replicated in judicial understandings of the tabloid press and its readers.[32]

Aristotle also made a significant early contribution to the area, creating The Art of Rhetoric, a manual for effective speech. This aimed to put the practice of rhetoric on a more systematic, philosophical footing by attempting to organise discourse into a series of topics. Nonetheless, Aristotle's project still rested upon an implicit distinction between analytics and rhetoric.[33] Aristotle categorised rhetoric as either deliberative (political),[34] forensic (legal)[35] or display. Each was directed to a particular audience[36] with the objective of 'bringing the giver of judgement into a certain condition'.[37] Aristotle made a significant distinction between deliberative and forensic (political and legal) oratory; the latter requires greater accuracy, precision and only 'the smallest amount of rhetoric' because the judgment it appeals to is 'pure'.[38] For Aristotle rhetoric is not inherently opposed to truth, but could be used to

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[19] Plato, Phaedrus (Oxford 2009).
[20] Plato, Gorgias (Oxford 2008). For an illuminating reading of Gorgias see: James Boyd White, When Words Lose their Meaning, Constitutions & Reconstitutions of Language, Character & Community (University of Chicago Press 1984) ch 4.
[21] Gorgias (n 20) 462c.
[22] ibid 463a-b; 466a.
[23] Socrates: *'[Flattery] isn't interested in the* slightest in the best course of action, but she traps and deceives foolish people with the promise of maximising immediate pleasure, which makes her seem better than any alternative'. Ibid 464c-d. See also: 502e; 518e-519a.
[24] ibid 459a-c; 462b. See also: Phaedrus (n 19) 206a; 206c.
[25] Gorgias (n 20) 463d.
[26] ibid 506c-507e; 515a; 517b-c.
[27] Gorgias: '*I'm talking about the ability to use the spoken word to persuade* – to persuade the jurors in the courts, the members of the Council, the citizens attending the Assembly – in short, to win over any and every form of public meeting in the citizen body.' ibid 452e-453a.
[28] Socrates: '*A rhetorician, then, isn't concerned to educate the people assembled in lawcourts and so on about* right and wrong; all he wants to do is persuade them.' ibid 455a. See also: 454d-455a.
[29] Phaedrus (n 19) 267c-268a. On the ethics of persuasion see also: James Boyd White, *Heracles' Bow, Essays* on Rhetoric & the Poetics of the Law (University of Wisconsin Press 1985) ch 1.
[30] Gorgias (n 20) 521d-e; 526b-e. See also Phaedrus (n 18) 272e-273b.
[31] Stanley Fish, Doing What Comes Naturally, Clarendon Press, 1989, 473
[32] Moosavian (n 11) 250-255.
[33] For an account of Aristotle's rhetoric see Peter Goodrich, 'Rhetoric as Jurisprudence: An Introduction to the Politics of Legal Language', OJLS (1984) Vol 4, No 1, 88, 100-105.
[34] Aristotle (n 17) ch 1.4.
[35] ibid ch 1.10.
[36] ibid ch 1.3
[37] ibid 1377b
[38] ibid 1414a.

serve truth by mobilising audience support for it.[39] Rhetoric offered general guidance on matters such as understanding the character of an audience,[40] adopting a suitable style[41] and instilling appropriate emotion in speech.[42] Drawing upon his earlier work in Poetics,[43] Aristotle provided some discussion of metaphor as an ornamental, stylistic device and made recommendations for its use in rhetorical speech.[44] He viewed simile and metaphor as a fundamental aspect of style and, crucially, linked their use to a general psychology. The power of metaphor rests 'on the charm of unfamiliarity',[45] and to be effective metaphors must be used clearly and proportionately.[46] Goodrich summarises Aristotle's view of metaphor thus: "Just as rhetoric is less than philosophy, so too metaphor is less than truth. Metaphor may be persuasive, pleasurable or pleonastic but it will seldom be necessary".[47]

It is apparent from the preceding account that, as Fish argues, the classical philosophy/rhetoric divide is pervaded by a number of implicit (but contestable) hierarchies such as deep/surface, reason/passion, reality/illusion, fact/opinion and neutral/partisan.[48] Fish traces how the classic opposition rests on an innate privileging of apparently accurate, factual, transparent language over partisan, distorting, fictional language.[49] This classical suspicion of rhetoric and its associated qualities has remained influential. Goodrich charts the historical decline of rhetoric and its subordination to logic[50] and later Enlightenment-era empiricist, rationalist philosophies.[51] He shows how rhetoric has been consistently marginalised or dismissed as trivial, claiming it became 'the other of philosophy'.[52] Fish also shows how such oppositions have recurred across history in various guises,[53] spanning many disciplines, including law.[54] For example, a literal/metaphorical language divide informs criticisms of metaphor

[39] ibid 1355a.
[40] ibid chs 2.12-2.17.
[41] 'Experts in these [style and delivery] more or less carry off the prizes at the contests, and just as in the case of the tragedy actors now have more effect than the poets, so is it also in political contests, through the baseness of the citizenry.' ibid 1403b.
[42] ibid ch 2.1.
[43] Aristotle, Poetics (Penguin, 1996), ch 21, ch 25.
[44] For an account of Aristotle's metaphor see Goodrich (n 33) 106-7. Interesting discussion can also be found in: Jacques Derrida 'White Mythology: Metaphor in the Text of Philosophy' in Margins of Philosophy (University of Chicago Press, 1984) 230-245; Paul Ricoeur, The Rule of Metaphor (2003, Routledge Classics) Study 1,
[45] '*There lies behind Aristotle's whole account of style the unargued assumption that the essence of literary* pleasure is the combination of *the familiar with the exotic'*. HC Lawson-Tancred (n 17) 40. See also 42.
[46] ibid ch 3.2.
[47] Goodrich (n 33) 107.
[48] Fish (n 31) 474.
[49] ibid 474-5; 482-5.
[50] Peter Goodrich, 'Law & Language: An Historical and Critical Introduction', Journal of Law & Society (1984) vol 11(2), 173, 177; Goodrich (n 33) 100-104.
[51] Goodrich (n 33) 90.
[52] ibid 108.
[53] Fish (n 31) 478.
[54] ibid 474-5; 482-5. For an example of this distinction in law see, e.g.: Pierre N Leval, 'Judicial Opinions as Literature' in Peter Brooks & Paul Gewirtz (eds), *Law's Stories, Na*rrative and Rhetoric in the Law (Yale University Press 1996). Here Justice Leval claims that literary devices in law have the potential for harm and

as deceitful and dangerous in the works of thinkers such as Hobbes, Locke, Bentham and Kant. As Lakoff and Johnson claim, 'The fear of metaphor and rhetoric in the empiricist tradition is a fear of subjectivism – a fear of emotion and the imagination.'[55]

[1.2] Deconstruction & Metaphor

Deconstruction brought into question many of the assumptions of the classical philosophies outlined above. In general terms the deconstructive method of textual analysis entails drawing out multiple meanings, ambiguities and veiled ideologies.[56] Deconstructive strategies include an interest in metaphor which had been traditionally viewed as a literary or fictional device. Yet Derrida focussed on the silent role of metaphor in philosophy; despite its claims to be a discipline based on reason and concerned with seeking higher truths, many leading texts were based on disguised metaphorical devices. The precursor to such deconstructive strategies is present in the work of Nietzsche, who claimed that human certainty rested on forgetting its origins in the 'primitive metaphor-world'.[57] For Nietzsche:

> "the origin of language is not a logical process, and the whole material in and with which the man of truth, the scientist, the philosopher [and, one might add, the lawyer] works and builds, stems, if not from a never-never land, in any case not from the essence of things."[58]

In White Mythology[59] Derrida continued this theme, highlighting the various ways in which metaphor is central to philosophical language. Derrida questioned whether philosophy can ever purge itself of metaphorical language, and indeed whether its leading metaphors can be identified in the first place. The very distinction between philosophy and literature itself rests on metaphor, and such metaphors can only be explained in metaphorical terms.[60] Derrida explained this circularity in the following terms:

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deception, that rhetoric 'seduces the speaker as well as the audience' and sacrifices clarity for power, at 207-8, 210.

[55] Lakoff & Johnson (n 12) 191

[56] I have provided an account of deconstruction elsewhere: (n 11).

[57] F Nietzsche, 'On Truth & Lying in an Extra-Moral Sense (1873)' in Friedrich Nietzsche on Rhetoric & Language (Oxford, 1989) 246-257, at 252.

[58] [My addition]. ibid 249.

[59] Derrida (n 44).

[60] For example Derrida notes the texts of '*Renan, Nietzsche … Freud, Bergson, and Lenin, all of whom in their* attentiveness to metaphorical activity in theoretical or philosophical discourse, proposed or practiced the multiplication of antagonistic metaphors in order better to control or neutralize their effect.' ibid 214. See also: Jonathan Culler, On Deconstruction, 25th Anniversary Edition (Routledge 2008) 147; Anthony Reynolds, 'The Afterlife of Dead Metaphors: On Derrida's Pragmatism' Revista de Letras (2009) Vol 49(2), 181-195, 184-5.

> "The appeal to criteria of clarity and obscurity [of language] would suffice *to confirm ... this entire philosophical delimitation of metaphor already* lends itself *to being constructed and worked by 'metaphors'. How could a* piece of knowledge or a language be properly clear or obscure? Now, all the concepts which have operated in the definition of metaphor always have *an origin and an efficacity that are themselves 'metaphorical'* ".[61]

To acknowledge this casts doubt on whether philosophical language can objectively and accurately represent the nature of things. Indeed Derrida suggested that such an enterprise is impossible because, as Harrison explains, 'the metaphysician, to say what he wants to say, needs to view matters from a standpoint outside language, a standpoint in principle inaccessible to him.'[62] Influenced by Derrida, De Man also analysed metaphor to question the broad philosophy-literature divide, claiming that:

> "All philosophy is condemned, to the extent that it is dependent on figuration, to be literary and, as the depository of this very problem, all literature is to some extent philosophical."[63]

In *Plato's Pharmacy* Derrida undertakes analysis of Plato's medicine metaphor by deconstructing the sign 'pharmakon' as used in the dialogue, Phaedrus. The dialogue depicts a discussion between Socrates and Phaedrus about the nature of writing. Throughout the text writing is referred to as 'pharmakon', a Greek word with a dual meaning of both 'remedy' and 'poison',[64] [thus] a term with a reversible and ambiguous structure.[65] Derrida traces silent, unwitting shifts in the meaning of 'pharmakon',[66] claiming that Plato's text 'manifests a series of slidings … that are highly significant'.[67] The sign 'pharmakon' is used to contain a selection of oppositions,[68] the most significant of which is that between speech (logos) over writing, a privileging seen throughout Western philosophy. Writing is seen (at once) as both a remedy and a poison via its association to pharmakon, a word that 'harbor[s] within itself [a] complicity of contrary values'.[69] Thus in one sense writing can be seen as a cure or beneficial remedy which aids memory and the growth of knowledge.[70]

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[61] Derrida (n 44) 252. See also 228.
[62] Bernard Harrison, ''White Mythology Revisited: Derrida and His Critics on Reason and Rhetoric' (1999) Vol 25(3) Critical Inquiry 505-534, 515
[63] Paul de Man, 'The Epistemology of Metaphor' (1978) Vol 5(1), Critical Inquiry, 13-30, 30.
[64] Jacques Derrida, Dissemination (University of Chicago 1981) 70.
[65] ibid 112.
[66] ibid 71-2. He calls it a concept of 'malleable unity'. See also: 95.
[67] ibid 83. For an interesting discussion of Plato's Pharmacy see: Jacques de Ville, 'Revisiting Plato's Pharmacy' International Journal for the Semiotics of Law (2010) 23:315-338.
[68] Pharmakon 'constitutes the medium in which opposites are opposed, the movement and the play that links *them among themselves, reverses them or makes one side cross over into the other ... The* pharmakon is the *movement, the locus and the play: (the production of) difference. ... It holds in reserve in its undecided shadow and vigil, the opposites ... that the process of discrimination will carve out. Contradictions and pairs* of opposites are lifted from the bottom of this diacritical, differing, deferring, reserve.' Derrida (n 64) 127.
[69] ibid 125.
[70] ibid 97

Yet writing can also be seen as a pernicious poison, making worse that which it claims to cure.[71] These non-rational qualities of Plato's philosophy have been widely acknowledged. Huizinga, for example, notes elements of 'the archaic sphere of play' across Plato's dialogues despite his denunciation of rhetoric,[72] and Goodrich also claims that Plato's defence of philosophy appeals to emotion rather than reason.[73]

Derrida returned to metaphor and related devices in the The Beast & the Sovereign, a series of lectures tracing the imagery of animals and beasts across a range of political philosophy texts, particularly those concerning sovereignty.[74] He discussed political philosophy as fable; though such discourse is presented as separate and different to fable,[75] Derrida sought to draw out its fable-like (or 'fabular') qualities. For example, noting the recurrence of the wolf across historical works, including mythology, The Bible and Rousseau's philosophy,[76] Derrida asked why certain political philosophers are compelled towards animal figures.[77] One reason may be the conventions of genre which involve the use of 'metaphors, metonymies or even [allegories], ..[and] animal fables'.[78] Derrida thus proposed that we pay attention to 'the logic of political unconscious' which is involved in these animal visions and note the '*symptoms [that] show up on the surface of political ... discourse*'.[79] Ultimately, The Beast & The Sovereign identifies further instances of philosophical models drawing upon metaphor and figurative, literary, non-rational devices. Deconstruction highlights the operation of such metaphors and the means by which they have been disguised, thus breaking down the apparent distinction between philosophy and literature.

Within philosophical or other texts metaphors or tropes will often have a rhetorical effect, discreetly buttressing the arguments being made. '*Derrida's line of attack is to pick out ... loaded metaphors* and show how they work to support a whole powerful structure of presuppositions.'[80] An ideal example discussed by Derrida is Hobbes' Leviathan which depicts men in the lawless state of nature entering a social contract to found a sovereign who brings protection and order via laws that all must

[71] ibid 97-98; 102-3.
[72] Johan Huizinga, Homo Ludens, A Study of the Play Element in Culture (Martino 2014) ch IX, esp 151.
[73] Goodrich (n 33) 101. See also: Lakoff & Johnson (n 12) 190.
[74] Derrida claims sovereignty is often depicted in animal terms: 'the essence of the political and, in particular of the state and sovereignty has often been represented in the formless form of animal monstrosity, in the figure without figure of a mythological, fabulous, and non-natural monstrosity, an artificial monstrosity of an animal.' Jacques Derrida, The Beast & the Sovereign, Volume I (University of Chicago Press 2009) 25.
[75] '[I]n the prevalent or hegemon*ic tradition of the political, a political discourse ... should in no case come under the category of [fable] ... a mythical narrative, without historical knowledge, a legend, ... in any case a* fiction supposed to give something to be known'. ibid 34.
[76] ibid First Session.
[77] ibid 80-1.
[78] ibid 81.
[79] ibid 82.
[80] Christopher Norris, Deconstruction, Theory and Practice (3rd edn, Routledge 2006) 27.

obey.[81] Despite his denunciation of metaphor, Hobbes envisages the sovereign state created by the social contract as a monstrous, artificial man-made animal[82] representing a copy of God's work.[83] Hobbes' extended metaphor sees sovereignty as the being's artificial soul,[84] and various state institutions as corresponding parts of the artificial body: 'The analogistic description of the Leviathan *follows in the body of the state ... the whole structure of the human body*'[85] This metaphor is supplemented by other science-based imagery in the text.[86] According to Derrida, the key human motivation that underlies Hobbes' account of humankind is fear, panic, and terror.[87] His social contract represents men moving from one fear (of threat in the state of nature) to another (fear of the sovereign's punishment).[88] Thus, for Derrida, Hobbes' Leviathan is ultimately an 'animal-machine *designed to cause fear ... which runs on fea*r and reigns by fear'[89] Significantly, Derrida further claims that such 'fabular' dimensions in the rhetoric of political philosophy ultimately impact upon real world political actions regarding matters such as warfare or terrorism.[90]

Because of its implications for objective truth claims, and thus the very foundations of Western thought, deconstruction has been accused of detached, reckless nihilism or 'textual vandalism'.[91] However, these have been rejected as misrepresentative by numerous commentators.[92] Culler, for instance, claims that deconstruction does not lead to destruction, but to reinterpretation or re-inscription of the relevant binary oppositions.[93] Such reinterpretation involves acknowledgement that the unspoken theoretical foundations of our thought systems are historically and culturally specific rather than universal, self-evident, objective or immovable:

> "The deconstructive critique reminds us that our social vision and system of laws are not based on human nature as it really is, but rather upon an interpretation of human nature, a metaphor, a privileging".[94]

Derrida specifically made such observations in relation to the foundations of existing liberal legal systems. In The Force of Law he claimed that legal discourse is based upon 'theoretically weak and

[81] Derrida (n 74) 40-41.
[82] ibid 26-7.
[83] ibid 53-4.
[84] ibid 47.
[85] ibid 28.
[86] Midgley notes that Hobbes adopted ideas regarding matter, particles and motion from physics. Mary Midgely, The Myths We Live By (Routledge, 2011) 47-49; 71.
[87] Hobbes' Leviathan is just one political theory that '*has made fear or panic ... an essential and* structural *mainspring of ... [being a subject in political society]*'. Derrida (n 74) 39.
[88] ibid 42.
[89] ibid 39-40. 'Sovereignty causes fear, and fear makes the sovereign'.
[90] ibid 35.
[91] Barbara Johnson: 'Deconstruction is not a form of textual vandalism designed to prove that meaning is impossible.' 'Introduction' in Derrida (n 64) xiv.
[92] Harrison (n 62) 518-9.
[93] Culler (n 60) 133. See also: Johnson (n 91).
[94] J M Balkin, 'Deconstructive Practice and Legal Theory', 96 Yale L.J. 743 (1987) 763, 760, 764.

crude [axioms]' and that its resulting limitations have 'massive and concrete' effects.[95] Yet here Derrida also expressly denied the charge of nihilism, arguing that deconstruction does not involve an abdication of questions of justice.[96] Rather it requires one to consider the history, development and limits of concepts such as justice and law; to consider the assumed 'values, norms and prescriptions that have been … sedimented there'.[97]

Fish defends anti-foundational outlooks such as rhetoric and deconstruction against classic, objectivist accusations. He rejects the distinction between literal and rhetorical speech, claiming that all languages (legal, scientific, poetic) are innately rhetorical because they occur within inescapable socially constructed paradigms.[98] This realisation need not entail cynicism and nihilism[99] because ultimately, for Fish,

> "the radically rhetorical insight of Nietzschean/Derridean thought can do radical political work; becoming aware that everything is rhetorical is the first step in countering the power of rhetoric and liberating us from its force. Only if deeply entrenched ways of thinking and acting are made the objects of susp*icion will we be able 'even to* imagine that life could be *different and better."*"[100]

Derrida demonstrates that powerful metaphors can be found in unexpected places, and that despite appearances they can be employed for rhetorical effect remarkably effectively, prompting (perhaps subconscious) emotions and responses which contradict the stated ideals of the text. The potential implications of such strategies for legal discourse are patent.

[1.3] The Rhetorical Effects of Metaphor in Law

Despite its legal origins, rhetoric is a technique or form of language that lawyers do not generally associate with the apolitical rationality of law. Yet the 1980s-90s saw renewed attention in law as a form of rhetoric. This interest was partly stimulated by the emerging law and literature movement which is not only concerned with representations of law in literature, but also reading law as literature.[101] The latter, of particular relevance to this article, raises questions about the implicit

[95] Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"', 11 Cardozo L. Rev. 920, 1989-1990, 965.
[96] ibid 953. For an interesting and clear account and analysis of Derrida's essay see Douglas Litowitz, Postmodern Philosophy & Law (University of Kansas Press 1997) ch 5.
[97] Derrida (n 95) 953.
[98] Fish (n 31) 486-8; 297-8.
[99] ibid 479-481.
[100] ibid 496.
[101] Ian Ward, 'Law & Literature', [1993] vol IV Law & Critique, 44, 58-69; Paul Gewirtz, 'Narrative & Rhetoric in the Law' in Brooks & Gewirtz (n 54) 3-4.

presence of literature (or literary devices such as metaphor) in law. Its general approach claims that literary theory - concerning matters such as interpretation, authorial intention, the construction of meaning – affords valuable insights into legal texts despite their crucial differences to fictional counterparts.[102] Judgments are thus understood as a 'quasi-literary genre',[103] an approach exemplified by White, who has written:

> "in its hunger to connect the general with the particular, in its metaphorical movements, and in its constant and forced recognition of the limits of the mind and language, the law seemed to me a kind of poetry."[104]

But, crucially, the focus on legal judgments as rhetoric does not adopt the derogatory sense adopted by Plato. For example, White characterises rhetoric in a wider, positive sense as the study of how language and speech constitute our community and social world.[105] This is central to his conception of law, viewing it as 'an art essentially literary and rhetorical in nature.'[106] Like White, Goodrich provides a favourable account of rhetoric as the study of public speech, a discipline that emerged with democratic institutions and entailed collective dialogue about community needs.[107] Rhetoric's notion of persuasion was pragmatic, and in acting to decentralise power over meaning it was 'a great leveller of discourse'.[108] Goodrich therefore advocates introducing a critical rhetoric into law as an alternative to the 'authoritarian monologue'[109] of dominant legal discourse which depicts itself as clear, technical and formal, but whose language rests on unarticulated exclusions that reflect power.[110]

One need not subscribe to Goodrich and White's defences of rhetoric, to recognise its pertinence to legal judgments. That such texts are concerned (at least partly) with persuasion is reasonably uncontroversial. Gewitz identifies a judicial opinion as serving three primary functions, the third of which is 'to persuade the court's audiences that the court did the right thing.'[111] Similarly, Levinson claims that judgments are 'rhetorical performances'[112] whose cogency is based upon both the court's inherent authority and the persuasiveness of their text. Interestingly, such views also raise the related question of who constitutes the audience to be persuaded. There may be multiple potential audiences

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[102] White (n 20) ch 1; Fish (n 31); Sandford Levinson, 'Law as Literature' Texas LR (1982) Vol 60, 373.
[103] John Hollander, 'Legal Rhetoric' in Brooks & Gewirtz (n 54) 186. See also: White (n 29) ch 6 ('The Judicial Opinion and the Poem').
[104] White (n 20) xii.
[105] ibid xi.
[106] *'[Law] is most usefully and completely seen as a branch of rhetoric. But 'rhetoric' ... should be seen not as* a failed science nor as an ignoble art of persuasion (as it often is) but as the central art by which culture and community are established, maintained and transformed. This kind of rhetoric – *I call it 'constitutive rhetoric'* – has justice as its ultimate subject'. White (n 29) 28.
[107] Goodrich (n 50), 175-8.
[108] Goodrich (n 33) 95, 99, 100.
[109] ibid 90, 99.
[110] Goodrich (n 50) 173-5.
[111] Gerwitz (n 54) 10.
[112] S Levinson, 'The Rhetoric of Judicial Opinion' in Brooks & Gewirtz (n 54) 187.

including: the losing side; opposed citizens; lawyers; fellow judges; academics; the reporting media and the wider populace.[113]

Metaphors are a common trope in law and their rhetorical effect is no less operative in legal than philosophical discourse. In The Metaphysics of American Law, Peller argues that socially-constructed metaphors pervade law. Such metaphors are contingent in numerous ways. First, only certain metaphors are adopted whilst other possible alternatives are neglected. [114] One interesting example is put forward by Scales who questions the preponderance of sports metaphors in law and legal academia, claiming they are inherently gendered, pro-rule and trivialize legal power. Why, she asks, use sports metaphors rather than, for example, mothering metaphors?[115] Second, metaphors highlight certain similarities whilst suppressing others: "Representational metaphors abstract particular features from the otherwise thick texture of the world. But there is no necessary reason to abstract some features rather than others"[116] Peller's claim here is consistent with Lakoff & Johnson's leading account of metaphor. They claim that metaphors operate by highlighting certain similarities between two things, and therefore inevitably marginalising others.[117] There will thus remain parts of a metaphor that remain unused.[118] The act of metaphoric representation, then, can only ever be an interpretation reflecting a specific culture, context and politics. Peller provides the salient example of consent in rape cases as a supporting example. 'Consent' is a product of interpretation, projected onto events, drawing on 'external signals' and ultimately based on a view of coercion founded on a mind/body distinction.[119]

Crucially, alluding perhaps to Nietzsche's 'worn coins', Peller claims that the metaphorical nature of concepts is gradually effaced and their terminology ultimately comes to be institutionalised, viewed as 'common sense' and merely reflecting an already present objective reality.[120] But Peller claims that rather than reflecting reality, legal metaphors actually constitute reality because they act to mediate and filter[121] our experience of social events. In this regard, Peller's claim is broadly consistent with Lakoff & Johnson's arguments that the human conceptual system is fundamentally metaphorical in

[113] ibid 196-200. See also: Haig Bosmajian, Metaphor & Reason in Judicial Opinion (Southern Illinois University Press, 1992) 28-34.
[114] Gary Peller, 'The Metaphysics of American Law' (1985) 73 California Law Review 1151, 1175.
[115] Ann C Scales, 'Surviving Legal De-Education: An Outsider's Guide' Vermont Law Review, vol 15, 1990, 139, p. 149-52.
[116] Peller (n 114) 1167.
[117] Lakoff & Johnson (n 12) Ch 3.
[118] ibid 109
[119] Peller (n 114) 1187-1191.
[120] ibid 1289-90.
[121] ibid 1155.

nature,[122] and that metaphors thus 'create our realities'.[123] Similarly, for Peller, legal metaphors construct our 'reality' in the process of representing it,[124] and thus influence our actions and social arrangements.[125] Ultimately, like philosophy, 'legal discourse can present itself as neutral and determinate only to the extent that it denies its own metaphoric starting points and instead pretends to reflect the positive content of social relations.'[126]

So despite mainstream liberal understandings of law as a neutral, rational discipline, law is as reliant upon tropes as literature or philosophy. According to Goodrich law as an institution relies "upon an unconscious reservoir of institutional connotations, metaphoric structures [and] long-term deployments of meaning which develop in the indefinite time of precedent."[127] Thus exploring figurative and symbolic devices in apparently rational, technical judgments may show that they are beset at some level by certain unarticulated politics, emotions or subjectivities that they explicitly claim to avoid. As Douzinas states:

> "A concern with the figures of the legal text or with the symbolic structure and context of law ... is a concern with a series of highly political yet largely unquestioned aspects of legal governance. The critical scholar attends to the marginal, the peripheral or the surface precisely so as to recapture the politics which has escaped the text, or has been hidden beneath its ritual paraphernalia."[128]

The preceding discussion in this part affords illuminating insights pertinent to the balance metaphor in misuse of private information caselaw. It has highlighted the often-suppressed figurative, imaginative nature of legal discourse, and indicated that these essential characteristics are at odds with law's self-presentation. It has also revealed the unavoidable historically- and culturally-specific hierarchies that inform legal discourse and thus modern rights-balancing techniques. Finally, the discussion here suggests that the balance metaphor does not merely represent - but may actually constitute - judicial understandings of rights conflicts in MPI caselaw. It is to that caselaw that discussion now turns.

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[122] Lakoff & Johnson (n 12) 6. An interesting account of recent cognitive research on metaphor relevant to lawyers is outlined in: Linda Berger, 'Metaphor and Analogy: The Sun and Moon of Legal Persuasion' (2013) 22 Journal of Law & Policy 147.

[123] Lakoff & Johnson (n 12) 158, 145.

[124] Peller (n 114) 1176.

[125] ibid 1151. It should be noted that Peller's metaphors across the article take the form of fundamental binary oppositions such as mind/body, subject/object, knowledge/power etc.

[126] ibid 1182.

[127] My addition. Peter Goodrich. 'Jani anglorum, Signs, symptoms, slips and interpretation in law' in Costas Douzinas, Peter Goodrich & Yifat Hachamovitch (eds) Politics, Postmodernity and Critical Legal Studies (Routledge 2004) 127.

[128] My addition. Costas Douzinas, 'Introduction' in ibid 16.

[2] The Balance Metaphor in Misuse of Private Information

The modern judicial technique of balancing competing rights or interests emerged in the late 1950-60s via a series of broadly parallel decisions by the US Supreme Court and German Bundesverfassungsgericht.[129] In his comparative study of these developments, Bomhoff argues that despite their shared terminology, the US and German understandings of balancing have their own respective intellectual origins[130] and meanings specific to their national legal-jurisprudential cultures.[131] But nonetheless, these US and German traditions have influenced contemporary understandings of balance, the latter playing a particularly prominent role in the metaphor's European meaning.[132] The role of 'balance' in misuse of private information caselaw must be viewed against the backdrop of such influences.

It should be noted that a number of salient metaphors populate MPI caselaw in addition to that of 'balance'. Note for example the recurring vigilant media 'watchdog',[133] an idealisation that implicitly 'casts the media as observer, scrutiniser and also guardian, protector of the public'.[134] Another highly significant metaphor in MPI cases, and indeed wider law, is the metaphor of line-drawing as adopted in Flitcroft[135] and Browne.[136] This line-drawing device, an integral feature of adjudication, has the effect of implying a clear, distinct divide wherever the line is situated; it envisages an issue in spatial terms, definitively splitting it into two clear 'areas' or categories, where a case or set of facts will fall on one side or the other. Yet, it is arguable that 'balance' is the most prominent and influential metaphor in MPI and its metaphorical nature has been acknowledged by leading commentators, though not subject to further metaphor-based scrutiny.[137]

[2.1] 'Balance'

In misuse of private information judgments the notion of 'balance' plays a crucial role. The balancing exercise is reflected in the second of Lord Steyn's four principles that form a key part of the new

[129] Bomhoff (n 6) 28, 72.
[130] ibid ch 2.
[131] ibid ch 3 (Germany) and ch 4 (United States).
[132] ibid 29-30, 238-239.
[133] Campbell v MGN [2004] UKHL 22, [107]; Von Hannover v Germany [2004] EMLR 21, [63]; ETK v News Group Newspapers Ltd [2011] EWCA Civ 439, [13]; Mosley v UK (App. 480009/08) May 2011, ECtHR, [114]; Spelman v Express Newspapers [2012] EWHC 355, [48].
[134] Moosavian (n 7) 249.
[135] A v B (Flitcroft) [2002] EWCA Civ 337, 208 (D).
[136] Browne v Associated News [2007] EWHC 202 (QB) [45]
[137] See e.g. Gavin Phillipson, 'Leveson, the Public Interest and Press Freedom' [2013] Journal of Media Law, Vol 5(2), 220-240, 236.

methodology. It states: "where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary".[138] This requires a relative weighting of each right responsive to the specific facts, though it offers no further guidance on how the mechanics of such a weighting should proceed. Subsequent ECtHR judgments, particularly Axel Springer[139] and Von Hannover 2[140] have provided further elaboration of guiding principles.

The term 'balance' is French but has Latin origins, having evolved from an amalgamation of 'bi' (meaning double) and 'lanx' (meaning a metal dish or pair of scales).[141] 'Balance' has the following dictionary meanings:

> "[noun] (1) E*quilibrium; what is needed to produce equilibrium ... ;* (2) harmony among the parts of anything; (3) stability of body or mind; (4) *equality or just proportion of weight or power; ...* (5) the act of weighing two things; (6) an instrument for weighing, usu formed of two dishes or scales hanging from a beam supported in the middle;"[142]
>
> "[transitive verb] (7) t*o set or keep in equilibrium; ...;* (8) to weigh in a balance; (9) to settle (eg an account);"[143]

In media privacy caselaw the term 'balance' is primarily used in two key senses. First and foremost, it is used as a transitive verb (definition (7)), i.e. to depict the process of balancing objects, in this case the 'objects' being rights. Related to this, judgments use 'balance' to refer to the specific act of weighing two things (as in definition (5)). It is interesting to note that in each of these meanings, the act of balancing produces equilibrium; this is discussed further in part 2.3 below. Second, 'balance' is employed to refer to a set of scales, an instrument for weighing (as per definition (6) and the term's Latin origins); this use is significant and now warrants further attention.

Balance: the scales metaphor

Actual references to 'scales' in the weighing process are present across caselaw, including Douglas,[144] Theakson,[145] Campbell[146] and, Prince Charles[147] and ETK.[148] Additionally, repeated references to 'scales' are present in the leading text, Tugendhat & Christie, as in the following passage:

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[138] Re S (A Child) (Identification: Restrictions on Publication) [2004] UKHL 47 [17].
[139] Axel Springer AG v Germany [2012] ECHR 39954/08),
[140] Von Hannover v Germany (No 2) [2012] ECHR 40660/08.
[141] Chambers Dictionary (10th ed, Chambers 2006) 111.
[142] Numbers added. ibid.
[143] Numbers added. ibid.
[144] Douglas & Others v Hello! Ltd [2001] QB 967 (CA) [171]. Here Keene LJ, discharging an interim injunction, stated '*When [the claimants'] organised publicity is balanced against the impact on the*

> "a claim to privacy in respect of information about health or sexual life is likely to **weigh more heavily in the scales** than a claim to protect information which, though private in character, is intrinsically less intimate."[149]

There are numerous other instances of judicial use of the term 'balance' to indicate 'scales' in caselaw. In Prince of Wales v Associated Newspapers the Court of Appeal stated that ensuring that parties upheld their duties of confidence was 'a significant element to be weighed in the balance'.[150] Elsewhere, in Hutcheson the Court of Appeal stated that the public dimension of family was 'a factor to be weighed in the balance'.[151] An identical use of 'balance' in the scales sense is evident in Campbell,[152] CDE,[153] ETK,[154] WXY v Gewanter,[155] AAA v Associated Newspapers[156] and Rocknroll v News Group.[157] Similarly, in Ferdinand Nicol J made reference to 'the art 8 **side** of the **balance**', later stating that publication of an 'unexceptionable' photo of the claimant and a woman with whom he had an adulterous affair '[did] not **tip** the **balance**' in the claimant's favour[158] In each of these extracts the meaning of 'balance' has subtly shifted, to represent a set of measuring scales.

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defendants of an injunction restraining publication, I have no doubt that the scales come down in this case against prior restraint.'

[145] Theakston v MGN Ltd [2002] EWHC 137 [76]. Here Ouseley J stated 'I consider that the scales would be likely to come down in favour of the freedom of expression of the newspaper and of the prostitutes unless it was clear that there was a strong case for inhibiting it.'.

[146] Campbell (n 133) [29]. Disagreeing with the earlier judgment of Morland J, Lord Nicholls stated 'the judge seems to have put nothing into the scales'.

[147] Prince of Wales v Associated News [2006] EWHC 522 [133] where Blackburne J spoke of 'considerations that must be weighed in the scales'.

[148] ETK (n 133) [20]: 'the additional rights of children are to be placed in the scale.'

[149] Tugendhat & Christie, The Law of Privacy and the Media (2nd ed, Oxford 2011) 5.131. Other references to 'scales' can be found at: 12.125; 12.144.

[150] HRH Prince of Wales v Associated Newspapers Ltd [2006] EWCA Civ 1776 [76].

[151] Hutcheson v News Group [2011] EWCA Civ 808, [47](iv): the public dimension of family 'is a factor to be weighed in the balance'.

[152] Campbell (n 133). Lord Hope discussed the 'weight' to be given to Art 8, claiming 'As for the other side of *the balance, a person's right to privacy may be limited by the public's interest in knowing about central* traits of her personality and certain aspects of her priva*te life'*, at [120]. Lord Carswell also used such terminology, stating '*I would not myself attempt to isolate which … [element of the defendant's publication]* is more harmful or tips the balance', at [170].

[153] CDE and another v MGN Limited [2010] EWHC 3308 [7].

[154] ETK (n 126) [15] (quoting a passage from the original decision).

[155] WXY v Gewanter [2012] EWHC 496 (QB) [110]: "*An additional factor to be weighed in the balance … is the* claimed public interest."

[156] AAA v Associated Newspapers Ltd [2013] EWCA Civ 554 [55]: *"It* is not in dispute that the legitimate public *interest in the father's character is an important factor to be weighed in the balance against the Claimant's* reasonable expectation of privacy." See also: [10].

[157] Rocknroll v News Group Ltd [2013] EWHC 24 [39].

[158] Ferdinand v MGN Ltd [2011] EWHC 2454 [70], [102].

From these caselaw extracts, it is apparent that 'balance' forms, in Lakoff and Johnson's terms, a conventional structural metaphor expressible as ADJUDICATING RIGHTS IS BALANCING SCALES.[159] It is conventional in that it forms part of our culture's ordinary conceptual system, as reflected by its widespread usage in legal – and indeed wider political - discourse.[160] Furthermore it is structural in nature because it allows lawyers to orient, quantify, discuss and structure rights adjudication.[161] As is common in other structural metaphors, the balance metaphor enables this because the defining concept (BALANCING SCALES) is 'more clearly delineated in our experience and typically more concrete' than the defined concept (ADJUDICATING RIGHTS).[162] The MPI caselaw and commentary indicate that privacy-free expression disputes are envisaged as BALANCING SCALES in a number of ways. Disputes occur in binary terms and the opposing sides are 'balanced'. The metaphor is extended with frequent references to the 'weight' of rights representing the cogency of each side's supporting arguments. Further extension occurs with repeated references to sets of scales. Further discussion in parts 2.2 and 2.3 will indicate that the structural metaphor ADJUDICATING RIGHTS IS BALANCING SCALES is supplemented by additional metaphors.

Part 1 discussed numerous theorists who have analysed the rhetorical effect of metaphor across various discourses. Informed by such literature, it is arguable that the balancing metaphor discreetly brings two distinct but related rhetorical advantages that will now be discussed in turn.

[2.2] The Certainty of the Quantitative

First, the balancing exercise connotes a seemingly objective,[163] scientific[164] and precise[165] weighting process; one to be undertaken in relation to two objects, two 'things' with a physical presence. Gauging weight is a quantitative process and this language thus gives a sense of the quantifiable[166] or,

[159] This follows Lakoff & Johnson's presentational format featuring metaphors in capital text (n 12).
[160] ibid 139.
[161] ibid 61 (and ch 13 generally).
[162] ibid 108-9
[163] 'The scales affirm that the workings of justice are both objective and impartial. The process of judgment must be independent of the whim of any individual; judgment is concerned with the objective weighting of *issues in the balance. ... this objective stand*ard which is reflected through law.' Martin Loughlin, Sword & Scales, An Examination of the Relationship Between Law & Politics (Hart 2000) 56. See also: Dennis Curtis & Judith Resnik, 'Images of Justice' (1987) Yale LJ vol 96 1727, 1765; Martin Jay, 'Must Justice be Blind?' in Law & the Image, The Authority of Art & the Aesthetics of Law (ed: Costas Douzinas & Lynda Nead) Uni of Chicago Press, 1999), Ch 1, p 21.
[164] 'The image [of balancing] is of a highly objective process (two weights in a scale, suggesting both science and Blind Justice).' Duncan Kennedy, A Critique of Adjudication (Harvard University Press 1998) 148.
[165] Loughlin (n 163) 56.
[166] Waldron also notes that 'balance' involves 'connotations of quantity and precision' and entails 'quantitative imagery'. Jeremy Waldron, 'Security & Liberty: The Image of Balance', Journal of Political Philosophy, vol 11(2) 2003 191, 192.

in Derrida's terms, the 'calculable'.[167] It is arguably influenced by Aristotle's notion of rectificatory justice, that form of particular justice whereby a judge restores the precise status quo when an injustice has occurred between parties. Aristotle's account of rectificatory justice also draws upon quantitative imagery, viewing it in terms of unequal lines, the longer of which has its excess halved and transferred to the shorter.[168] The likely influence of German jurisprudence should also be noted here. Bomhoff traces similar 'scientific' tendencies through the works of influential German thinkers, for example the Interessenjurisprudenz scholars, including Heck, who viewed balance as a neutral method[169] and later authors, such as Forsthoff, who sought to render balancing more scientific by structuring and formalizing it.[170] A prominent contemporary manifestation of this tradition is the work of Alexy on balancing, optimization and proportionality.[171] According to Bomhoff, the image conveyed by Alexy's account is that of 'a finely calibrated balance ... where all values and interests can receive their **exact** due.'[172]

Crucially, the balancing metaphor also acts to reify rights because it inevitably leads one to view the rights being balanced as tangible objects. Such reification can be seen in MPI cases where the courts include the rights of additional family members in the balancing exercise. In ETK v News Group for example, the Court of Appeal recognised the rights of the claimant's wife and children as separate objects with weight in themselves.[173] Their addition to the 'balance' implied more 'quantity', adding weight to the claimant's Article 8 arguments.[174] The balance metaphor thus also entails the ontological metaphor that A RIGHT IS A PHYSICAL OBJECT OF VARIABLE WEIGHT. Ontological metaphors depict experiences in terms of corporeal items which, according to Lakoff and Johnson, brings numerous advantages: 'Once we can identify our experiences as entities or substances, we can refer to them, categorize them, group them, and quantify them – and, by this means, reason about them.'[175] This seems particularly apt to rights; is it possible to deal with conflicting rights detached from notions of balance and weight? Yet, as discussed in part 2.2, such reifying metaphors necessarily entail limitation, closure and exclusion.[176]

[167] Derrida (n 95) 963, 965, 971. Derrida claims that the 'calculable' is the concern of law, in contrast to justice which is incalculable.
[168] Aristotle, Nicomachean Ethics (Oxford, 2009), book V, ch 4, esp 1132a-1132b.
[169] Bomhoff (n 6) 60-64.
[170] ibid 87-89.
[171] For Alexy balancing is an inherently rational process that can be aided by the formation of scales of degree and methods of quantification. See: ibid 195, 219; Robert Alexy, 'Constitutional Rights, Balancing, and Rationality' (2003) Ratio Juris, vol 16(2) 131-140.
[172] Emphasis added. Bomhoff (n 6) 201.
[173] ETK v News Group (n 133) [14].
[174] 'I cannot agree that the harmful effect on the children cannot tip the balance' (Ward LJ). ibid [18].
[175] Lakoff & Johnson (n 12) Ch 6
[176] Peller (n 114) 1157-8.

Despite judgements drawing heavily on this quantitative metaphor, the balancing exercise involves judges making qualitative assessments, particularly about the social value of the defendant's proposed publication.[177] So despite involving qualitative evaluations, MPI caselaw repeatedly draws upon the quantitative imagery of balancing. For example, in Ferdinand Nicol J stated 'I have to decide where the balance lies between these competing rights as an **objective** matter'.[178] This gives the impression that the weighting process can be undertaken scientifically, mathematically, despite the fact that the Art 8/10 rights are not material objects. Yet elsewhere in MPI discourse, there is isolated acknowledgement in caselaw that the balancing exercise is not a precise science. For example in Campbell Lord Carswell conceded that the weighting process may lead different people to different conclusions[179] In A v B (Flitcroft) the Court of Appeal similarly acknowledged that subjectivities and ambiguities may plague the process of balancing conflicting rights by stating:

> "We are suggesting that frequently what is required is **not** a technical approach to the law but a balancing of the facts. The weight which should be attached to each relevant consideration will vary depending on the precise circumstances. **In many situations the balance may not point clearly in either direction**."[180]

Even allowing for the fact that the Campbell and Flitcroft judgments were provided at the earliest stages of the emerging MPI doctrine, these passages are revealing. The latter passage candidly acknowledges that 'balancing' in this context is actually variable, non-technical and, by implication, subjective. Furthermore, in 'many' cases the outcome will be uncertain, with scope for the process to be legitimately conducted in numerous different ways. This latter point is demonstrated by the split 3:2 Law Lords decision in Campbell and the dissenting judgment of Judge Lopez Guerra in Axel Springer in the ECtHR)[181]. This undermines the impression subtly fostered by the metaphor that the balancing exercise is scientific or objective in nature. Furthermore, it indicates that the balancing exercise is fundamentally different in nature to the balancing of objects in scales, despite the recurrent use of that image; unlike theoretical, metaphysical rights balancing, using scales allows the weight of a particular item to be factually quantified with certainty. Yet such mixed judicial statements also perhaps reflect an ambiguity inherent in the balance metaphor: are the rights are weighed with reference to an 'external', objective scale, or relative to one another? The imagery of scales suggests both.

[177] For a discussion of this see Moosavian (n 11) 243-50.
[178] Emphasis added. Ferdinand (n 158) [103].
[179] Campbell (n 133) [168].
[180] Flitcroft (n 135) 210 (D)-(E).
[181] Axel Springer (n 139). Dissenting opinion of Judge Lopez Guerra, joined by Judges Jungwiert, Jaeger, Villiger and Poalelungi.

The enduring influence of 'balance' in modern human rights discourse is perhaps a reflection of our broader political-bureaucratic culture, with its emphasis on reductive rationalities, binary ends/means trade-offs and social-scientific approaches to crucial community issues.[182] Yet, as White argues, the work of lawyers is inherently creative[183] and legal reasoning works by a range of methods, many of which are distinctly non-scientific.[184] The balance metaphor in MPI is particularly paradoxical; a literary device that discreetly draws on the stature of science. Yet even this quantitative, reifying metaphor entails a subtle rhetoric of its own, its power resting on its implicit claims to be non-rhetorical. In Fish's terms, 'Impersonal method [e.g. of the balancing sort*]* ... is both an illusion and a danger (as a kind of rhetoric it masks its rhetorical nature)'.[185]

Exposing the connotations of calculability and certainty sedimented in the balance metaphor necessarily entails facing uncertainty. Yet, for White, this is an inevitable feature of life, and the lawyerly 'process of meaning-making and community-building ... requires him or her to face and accept the condition of radical uncertainty in which we live: uncertainty as to the meaning of words, uncertainty as to their effect on others, uncertainty even as to our own motivations.'[186] Thus perhaps 'balance' acts as a convenient fiction which overlays an inherently creative, subjective and, to some extent, inexpressible interpretive activity.[187] Ricoeur, for example, notes 'the capacity of metaphor to provide untranslatable information'.[188] Perhaps what the term seeks to represent remains a process the core of which will inevitably elude attempts to articulate, categorise or systematise it. This possibility is embraced by White, who writes:

> "In forcing us to the limits of expression and of our minds, [reading law as literature] is a commitment to openness, to the recognition of mystery, to the value of what no-one has yet found the words to say or do. In all of this we must perpetually acknowledge that we have something to learn."[189]

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[182] White (n 29) ch 2, esp 32. White's preferred method entails 'reading law as a kind of literature (as opposed, for example, to reading law as a kind of policy science or economics or social process)', at 122.

[183] ibid 34.

[184] '*[O]ne reasons not only with 'propositions' but with metaphors, analogies, general truths, statements of feeling and attitude ... and one moves not only by logic but by association and analogy and image, by what* seems natural and right.' White (n 20) 12. See also 14. See also Murray (n 1).

[185] My addition. Fish (n 31) 485.

[186] White (n 29) 39-40. See also 128,130.

[187] 'We require our complexity to be explicit, spelled out, and we call it an aesthetic value and a test of truth. But in its own way this can itself be a kind of simplemindedness – an avoidance of the complexity that underlies and is evoked by some simple texts, or a denial of the importance of what matters most.' ibid 120.

[188] Paul Ricoeur, 'The Metaphorical Process as Cognition, Imagination and Feeling' Critical Inquiry, vol 5(1) (1978) 143, 143. See also, Ross (n 2) 1071-2.

[189] White (n 29) 124. See also: Ricoeur (n 188) 143. Ricoeur states that 'metaphorical meaning compels us to explore the borderline between the verbal and non-verbal', at 151.

[2.3] The Allure of Reconciliation

The second advantage of 'balancing' is its capacity to foster the moral appeal of a decision in a number of discreet but powerful ways. For example, 'balance' contains a trace reference to the traditional symbol of justice; the scales. In this sense it constitutes an image-based metaphor which plays on the visual aspect of 'balance'.[190] Daube confirms that the symbol of the scales in decision-making has ancient origins, with references dating back to the Egyptian Book of the Dead (circa 1400 BC).[191] This depicted the ritual judgment of each individual in the afterlife (Duat) by weighing their heart in a set of scales in order to judge their past conduct.[192] The deceased's heart was weighed against a feather of Maat which represented order, truth and justice. The ideal outcome was equilibrium; an exact balance between heart & Maat. The balancing process entailed purification. The good went to paradise, the evil faced the punishment of being devoured by a hybrid crocodile-headed beast called Ammit. Scales as a form of judgement also feature in The Iliad, where Zeus consulted his golden scales to decide who would die in battle, a process termed 'kerostasia', the weighing of souls. Zeus placed keres (death spirits) in each pan and the heavier sank to Hades.[193] In this context the scales represent death and destruction and, interestingly, there is no moral dimension to the judgment,[194] though Huizinga identifies element of chance or play within the metaphor.[195] References to judgment via scales are also present in religious texts such as the Old Testament and the Koran.[196] Loughlin claims that 'the imagery of the scales has assumed an almost universal significance',[197] perhaps, most prominently, by virtue of the scales held by Lady Justice in legal iconography.[198] These brief historical examples indicate that though the subject matter being weighed has changed over the millennia to reflect the ideals and culture of the day, the image of the set of scales representing (or 're-presenting') judgment has endured. Ancient mystic death spirits and feathers of truth are now replaced with twenty-first century legal rights.

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[190] For a really interesting discussion of the dominance of visual metaphors in legal discourse as a reflection of dominant power, and the more recent shift towards aural metaphors associated with challenging that power, see: Bernard J Hibbitts, 'Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse' (1994) 16 Cardozo Law Review 229.

[191] David Daube 'The Scales of Justice' (1951) Judicial Review, vol 63(2) 109, 113-120. Though references to the process of weighing the heart on scales have been found in the Coffin Texts, circa 19th C BC. John Taylor (ed), Journey Through the Afterlife, Ancient Egyptian Book of the Dead (2010) British Museum Press, 205.

[192] The process is detailed in Taylor (n 191) ch 9 (Judgment).

[193] Homer, The Iliad (Penguin Classics 1965), pp146-7; 310; 359-60; 402,

[194] B C Dietrich, 'The Judgment of Zeus' in Rheinisches Museum fur Philiologie, Nue Foge, 107 Bd 2 H (1964) 97-125, at p 125

[195] Huizinga (n 72) 79.

[196] Daube (n 191) 113-120.

[197] Loughlin (n 163) 56.

[198] For a discussion of the image of Lady Justice, Justitia, through history see Curtis & Resnik (n 163). This article is more specifically focused on the device and meaning of the blindfold on Justitia, but provides some passing discussion of the scales.

Though 'balance' in MPI judgements refers to either the process of balancing or a set of scales, a further meaning becomes significant in this context; balance as equilibrium and harmony (as in the dictionary definitions (1)-(4)). These additional meanings of 'balance' refer to a state of affairs and, in the context of MPI caselaw, imply that equilibrium, an optimum outcome, is capable of being achieved. In this sense, the scales form a recurring figurative device conveying an implicit message; that via the balancing exercise order is achieved, equilibrium restored. Deconstructive readings consider the effect of 'traces' of other meanings within terms employed; the implicit meanings of 'balance' in its other senses (e.g. scales, order, equilibrium, harmony, stability)[199] are also at play in media privacy judgments and their influence cannot be discounted.[200] Judicial use of 'balance' draws silently upon these meanings, thus leaving an accretion of subconscious clues or indicators which cumulatively instil the impression that the conflict between Arts 8 & 10 can be neatly solved. This is supported by select judicial (and academic) comments which seem to indicate that the Art 8/10 conflict can be enigmatically ameliorated by going through the balancing process. For example, in Campbell Lord Hoffmann asked 'How are they to be reconciled in a particular case?'[201] He furthermore appeared to suggest that if one understood the case in terms of the HRA, such opposition was not actually present:

> "If one takes this approach [of balancing privacy and free expression], there often is **no real conflict**."[202]

This particularly interesting statement seems to claim that through the HRA lens the privacy-free expression conflict disappears, or (perhaps) that it was never there in the first place. Lord Hoffmann's comment may have been influenced by Fenwick and Phillipson's arguments that justifications for free expression can actually be employed to undermine and restrict privacy-invading speech. The authors claim, '*at the level of principle … the rights to freedom of speech and to privacy are in many respects* '**mutually supportive**'[203] and 'it will only be in a fairly narrow category of cases that any **real conflict**

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[199] Loughlin: 'The symbol of the scales of justice seems first to embody the idea that justice is primarily concerned with the maintenance of equilibrium, an idea which was central to Greek thought. The Greeks believed that the world exhibits a deep, underlying unity which is revealed through logos, nomos and taxis (reason, legality and order).' (n 163) 56.
Kennedy also notes the link between 'balance' and equilibrium: 'In the force field model, policies vary in strength from one fact situation t*o another, and different rules 'draw lines' by balancing* – that is, by finding the point of equilibrium.' (n 164) 149.

[200] Bomhoff notes the presence of equilibrium in the works of French writer François Gény, one of the earliest jurists to adopt the ideas and language of balance: Bomhoff (n 6) 57-59.

[201] Emphasis added. Campbell (n 133) [55].

[202] ibid [56].

[203] Emphasis added. Gavin Phillipson & Helen Fenwick, 'Breach of Confidence as a Privacy Remedy in the Human Rights Act Era, 63 (2000) Mod. L. Rev. 660, 684.

will arise'.[204] In other words, properly conceived, there is actually no conflict between privacy and free expression at the level of principle in most cases; true conflict only occurs in cases involving privacy-invading speech which actually serves the public interest. Waldron makes a similar Dworkin-influenced point. He proposes viewing interright conflicts via the 'internal relation' between rights rather than as a simple clash of interests. Taking this 'more systemic' approach, argues Waldron, allows free expression conflicts to be viewed in a way which relates disputes back to the animating principles for the rights in question. For example, a dispute between two conflicting free expression arguments should be viewed 'in terms of each person's interest in participating on equal terms in a form of public life in which all may speak their minds'.[205] In doing so, "What looked like a **brute confrontation** between two **rival** *interests,* ... turns out to be resolved by considering the internal relation that obtains between our understanding of the respective rights claims."[206] These arguments display marked similarities to earlier German balancing discourse which reflected a constitutional culture that emphasised the unification and harmonisation of conflicting values or interests;[207] that 'favoured synthesis and reconciliation over contestation and conflict.'[208] Crucially, this culture entailed the view that such conflicts 'could be reframed so as to lessen their impact, or even so as to overcome them entirely.'[209] The approaches of Lord Hoffmann, Fenwick, Phillipson and Waldron all underplay the degree of conflict in MPI cases; they foster the impression that the Art 8/10 conflict might prima facie look intractable and brutal, but it is ultimately underpinned by coherent, harmonious principles. Yet it must be remembered that this coherence is created (or rather imposed) by the interpretation, a constructive interpretation.[210] At the level of abstract value the authors are selecting one particular conception of free expression from many, [211] and one particular conception of privacy from many, in order to find them mutually supportive. This choice, though certainly justifiable, is also eminently contestable. An alternative view is that the 'brute confrontation' between Arts 8 & 10 also inescapably occurs at the level of principle. What judgments provide is certainly a resolution, but it is arguably not one that successfully eradicates the conflict between Arts 8/10 at a more fundamental level. Instead the resolution rests on merely one interpretation that has been preferenced over many other possible interpretations, and as such it represents a political choice.

The efficacy of 'balancing' as a precise technique is questioned by Frug in his deconstruction of bureaucratic models in American law. He considers two judicial review cases involving 'the modern

[204] ibid 685.
[205] Waldron (n 8) 518.
[206] Emphasis added. ibid 517-8.
[207] Bomhoff (n 6) 105, 108-9.
[208] ibid 222.
[209] ibid 110, 109-110. Lord Hoffmann's comment in Campbell that there is no real conflict bears similarities to the German Spiegel case, where the court 'den[ied] the existence of such a conflict altogether': ibid 111.
[210] Ronald Dworkin, *Law's Empire* (Hart 1998).
[211] In Wragg's terms, 'Article 10 represents a particular conception of freedom of speech rather [than] the *concept'.* Wragg, 'Mill's Dead Dogma: the value of truth to free speech jurisprudence' [2013] PL 363, 385.

judicial technique of "balancing"" where courts '*"weigh" the interests to determine which is the most important."*[212] He claims that such balancing functions as a reassuring 'abstraction or reification' because it indicates that 'tensions' between issues can be resolved. But in fact the technique can only fluctuate between two opposing policy aims based upon questionable distinctions. Frug claims that once this is acknowledged, *"the* **image** of judicial **balancing** loses its **power to persuade**".[213] Such critique is equally applicable to MPI caselaw which also, despite its claims, demonstrates an inability to reconcile rather than simply preference one of two particular rights in any given case.

Mainstream comments indicating that adjudication within the HRA framework can fully solve disputes and somehow render Arts 8 & 10 (for the most part) compatible should be questioned. Can the balancing exercise provide reconciliation per se if it must ultimately rest on the privileging of one of the rights in any given circumstances? By the end of the adjudicative process in each case the Art 8/10 rights will have been situated in a temporary hierarchy. Eady J in Mosley stated that the balancing exercise was a matter of 'determin[ing] which [right] should take **precedence** in the particular circumstances'.[214] In Hutcheson (CA) Gross LJ quoted the following passage by Posner: "when cases are difficult to decide it is usually because the decision must strike a balance between two legitimate interests, one of which must give way",[215] i.e. be subjugated. Both of these statements acknowledge that one right will, or indeed must, be privileged over the other. So from a starting point of equality, one right must be prioritised or viewed as hierarchically superior in that case; thus the balancing exercise inevitably results in an imbalance. This ultimate imbalance entails a further orientational metaphor which fosters the understanding of experiences in spatial terms.[216] Lakoff and Johnson identify up/down as a crucial metaphor that pervades human thought, with 'up' being associated with positive experiences (happy, conscious, in control, more) and 'down' with negative (sad, unconscious, under control, less).[217] In the MPI balancing exercise, the successful litigant will be the party whose right is the weightiest. The imbalance represents victory for the party whose scale is 'down', in direct contrast to the common tendency of up/down orientations. This ideal outcome of the balancing exercise can also be contrasted with Zeus' golden scales (where 'down' represented destruction) and with the Egyptian weighing of souls (where equilibrium was the ideal).

So ultimately 'balance' constitutes a disguised metaphorical device that has key beneficial rhetorical effects in MPI judgments. It evokes ideals and draws upon a reassuring cluster of properties (order, equality, equilibrium etc.) that are inconsistent with the methods of reasoning employed (which

[212] Gerald Frug, 'The Ideology of Bureaucracy in American Law' (1984) 97 Harvard Law Review 1276, 1349.
[213] Emphasis added. ibid 1351.
[214] Emphasis added. Mosley v News Group Newspapers Ltd [2008] EWHC 1777 [11].
[215] Hutcheson (n 151) [28].
[216] Lakoff & Johnson (n 12) Ch 4.
[217] ibid 15-17

involve conflict, privileging, imbalance etc.). The balance metaphor instils a sense of elegance, justice and thus confidence in the process. In this sense, perhaps the balancing exercise merely conceals or underplays the conflict. Perhaps its '*"resolutions"* are achieved only by sleight of hand'[218] or, in Rosenfeld's terms, by distortion and suppression.[219] The rhetoric of 'balance' cannot truly resolve; it can only justify the imposed legal outcome, reflecting Goodrich's claim that "The telos [end goal] of rhetorical speech is **victory** rather than **cure**".[220] Yet herein lies a vital ambiguity at the heart of the balance metaphor. Alongside its connotations of moral appeal and equilibrium balance simultaneously represents the inescapably binary nature of judicial decisions.[221] For Daube the scales express 'a deep-rooted tendency to see no shades between black and white, to admit no degrees of right and wrong, to allow no distribution of loss and gain among several litigants, to send a party away either victorious or defeated.'[222] In the end, legal disputes necessitate an inevitable outcome or 'answer' that judgment must provide; for Loughlin this is a crucial connotation of the scales imagery.[223]

Conclusion

The balancing of Articles 8 & 10 is an integral part of MPI caselaw and the 'balance' metaphor fulfils a discreet but crucial persuasive role in two ways. First, it marginalises the non-rational, inexpressible, even mysterious, aspects of judicial rights-balancing and constructs the process by emphasising the quantifiable, concrete properties of 'balancing' rights. Second, it simultaneously highlights and mitigates the zero-sum outcome of litigation. In doing so, 'balance' transgresses the implicit divides between the rational and the imaginative, the quantifiable and unquantifiable, objective and subjective. It forms an important rhetorical device that benefits each individual judgment, the institution of law more generally and, in turn, parties or interests the law may tend to

[218] Clare Dalton, 'An Essay in the Deconstruction of Contract Doctrine', (1985) 94 Yale Law Journal 997, 1109.
[219] Michel Rosenfeld, 'Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of New Legal Formalism' in Drucilla Cornell, Michel Rosenfeld, David Gray Carlson (eds) Deconstruction and the Possibility of Justice (Routledge 1992) 153.
[220] Emphasis added. Goodrich (n 127) 111.
[221] Curtis & Resnik write: 'The scales, like the sword, have potential for absolute rather than compromised outcomes; souls are weighed and sent to eternal life or damnation.' (n 163) 1755
[222] Daube (n 191) 8. This is a particularly interesting point in the context of MPI where disputed stories are often 'split' into parts, the balancing process being undertaken in relation to each respective part.
[223] 'However novel, complex or ambiguous the issue of contention, the one clear duty of the judge is to provide *an answer ... Above all, then, the symbol of the scales is a symbol of order and certainty: the first principle* of legal justice is that an answer will be given to all disputes which arise between citizens.' Loughlin (n 163) 57.

favour. This is significant in light of the wider influence of the balance metaphor beyond media-privacy disputes, particularly in in counter-terrorism discourse for example.[224]

This article does not claim that the subjugation of either privacy or free expression in particular cases is a 'bad thing' per se. Waldron defends 'rights trade-offs' of the sort in MPI caselaw. His quite reasonable point is that moral conflicts between parties are an unavoidable fact and "it is important not to saddle the proponent of [rights] trade-offs with responsibility for the actual existence of moral *conflicts ... [A] hard choice has to be made on any account, and the only way of mitigating its* hardness is to diminish the concern we feel about one or both of the options. It is not the fault of the theorist [or presumably judge] who proposes trade-offs".[225] This article does not seek to 'blame the judge' charged with deciding the case as it comes before them, but it does use MPI caselaw to question more generally law's narrative about itself. It also invites us to become more attuned to the presence and influence of metaphors across legal discourse more generally, and the paradoxes they may both express and obscure.[226] As Ross claims, 'we cannot stay in the shelter of our unexamined metaphors.'[227]

Judicial reference to balance and scales is a recurring metaphor in MPI caselaw. Again, this is not a criticism per se; metaphors such as this are an inherent part of human thought, and the notion of balance and its associated qualities are intuitively appealing ideals. But nevertheless we should not necessarily accept 'balance' as an accurate representation of what occurs in these judgments, or indeed assume that the process is fully representable; perhaps the precise instance of balance must always remain in the sphere of play, eluding rationalisation, classification and articulation. Rather than precisely gauging the exact weight of individual rights and creating equilibrium and order, the judgments entail political choices where certain values are suppressed at the expense of others, and imbalance inevitably results. Deconstructive interpretation de-mythicizes the balancing metaphor and warns us not to assume that equilibrium is ultimately achieved via the balancing process. It disputes the impression that an intractable inter-right conflict can be made to conveniently disappear, or

[224] Consistent criticisms have been made of the liberty v security 'balance' metaphor by MacDonald, though he does not undertake a metaphor-based analysis. He claims 'balance' obscures and simplifies and the complex relation between liberty and security, for example by assuming a basic, binary hydraulic relation between the two (i.e. when one goes up, the other goes down). The balancing metaphor is also insensitive to the issues being weighed and it prevents the opening up of decision-making to consideration of other perspectives. Stuart MacDonald, 'Why we Should Abandon the Balance Metaphor: A New Approach to Counterterrorism Policy' ISLA Journal of International and Comparative Law (2008) 15(1), 95.

[225] My addition. Waldron (n 8) 508.

[226] Ross (n 2) 1053, 1077-80.

[227] ibid 1053, 1083-4.

interpreted away. So, despite the rational, technical language of MPI caselaw, it engages in unavoidable 'textual violence',[228] even where the results may be justifiable or morally appealing.

[228] For an interesting discussion of the relationship between legal interpretation and violence see: Robert Cover, 'Violence & the Word' Yale LJ (1986) Vol 95, 1601. But note that Cover's chosen examples, the sentencing of defendants and the death penalty, are textbook examples of law's coercive force.