THE ONTOLOGY OF THE SUBJECT OF RIGHTS: POSTMODERN PERSPECTIVES ON THE IRISH CONSTITUTION THROUGH A CASE STUDY ON THE RIGHT TO FREE SPEECH

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A INTRODUCTION

Rights, in their various instantiations ('human', 'Constitutional', 'statutory', etc) seem to be an indispensable feature of modern polities and legal systems. More specifically, what they accomplish for individuals either in terms of protection from State interference, as is the purpose of classical civil and political liberties, or securing certain positive State interventions, as with the more controversial class of socio-economic rights, is rightly deemed praiseworthy. All this said, however, one could not say that rights have gone uncriticised, and they are far from conceptually flawless or unimpeachable.[1] In particular, the actual content of rights and the subjects to whom they are addressed are issues which at first blush seem intuitive and obvious, but once they are not assumed a priori and instead questioned from a more critical perspective, they reveal themselves to be built on very particular, and in some cases restrictive, foundations.

This paper shall argue for an alternative model of rights channeling aspects of post-modernism, particularly the autopoietic theory of law. The aspect of postmodernism, which is most relevant to this paper, is the decentralisation of the subject. As will be seen, the subject of rights is assumed to be a cohesive and obvious concept; however, jurisprudence on the right to free speech suggests that assumed properties of the subject of rights, and ontological presuppositions informing divisions in the treatment of the subject of rights (viz companies and natural persons) may lead to inconsistencies and tensions within the normative theory informing a given right. The postmodern perspective which this paper advances is an attempt at treating these ideas critically as well as supplying an alternative analysis. This alternative understanding of rights is explored in the applied context of the Constitution of Ireland; specifically, the right to free speech is considered at both a theoretical and doctrinal level.

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[1] Joseph Raz, 'Rights and Politics' (1995) 71 Ind L Rev 27.

This applied analysis renders more clearly some more abstract ideas which lie at the core of rights theory.

A particularly distinct theoretical issue with the right to freedom of speech which makes it an excellent right on which to test this rights thesis is the occasionally dualistic rationale underlying the right. There are broadly two types of rationale for the existence of a free speech principle, deontological and teleological theories, and the reliance placed on each in a given case may oscillate. Due to the broad range of circumstances which must be covered by a free speech principle, attempts to provide one umbrella theory have historically failed. In Ireland, this problem has been compounded on a constitutional level by enshrining freedom of expression under two separate rationales embodied in two separate Constitutional provisions. It is for precisely this reason that the Irish jurisprudence on free speech has been criticised for the 'absence of any coherent judicial philosophy'[2] underlying it. The particular problem of dualism on which I shall focus in this paper is that of the legal subject. It is logically anterior to any rights thesis that there must be a subject to exercise those rights. The panoply of potential subjects possessed of different properties in the context of free speech has tended not to procure a closer examination of the concept of the subject; rather, it has prompted the development of different justificatory theories for the right. This leads to the divide between, for example, natural persons and media corporations becoming a substantial one modern free speech theory. This follows more generally from basic ontological assumptions of rights theory, particularly human rights theory, regarding the personhood and capacity of entities which can properly be said to bear (human) rights. Concisely stated, it is my contention that theory on freedom of speech has treated the division between natural and legal persons as both ontological and normative; I wish to recast this division as a purely ontological one, which ontology may then be deconstructed by postmodern theory.

The stage thus set, this paper explores the philosophical movement of postmodernism, particularly Niklas Luhmann's theory of closed systems/autopoiesis. Given the radical constructivism and decentralisation of the subject that the theory posits, by which it presents a different way of parsing both reality and the metaphysical essence of subjects exercising rights, it forms a challenge to many received epistemological and ontological truths in modern rights theory. The case of autopoiesis is particularly interesting in the Irish context, as it has

[2] Tom Daly, 'Strengthening Irish Democracy: A Proposal to Restore Free Speech to Article 40.6.1° (i) of the Constitution' (2009) 31 DULJ 228, 229.

been argued that autopoiesis may be the most viable method to explain the validity of the Irish Constitution and legal order.[3] If this theory is to be more than a jurisprudential abstraction, it must be capable of parsing actual legal objects (such as rights) which are part-constitutive of a legal system in an autopoietic way. With this in mind, this paper assess whether free speech constitutional theory in Ireland could potentially reflect an autopoietic understanding of law on a doctrinal level. If this is feasible, then it may be possible to construct a homogeneous legal theory of the Irish legal system rooted in postmodernism.

Before beginning the discussion proper, I will provide here a brief overview of the progression of ideas in this paper. Section B describes and assesses both human rights theory and free speech theory from the perspective of modernity. This synopsis of modern human rights is an important constituent part of a more specific discussion on freedom of speech; Scanlon has observed that freedom of expression 'as a philosophical problem, is an instance of a more general problem about the nature and status of rights'[4] confirming it as a sound framework in which to apply the theoretical analysis this paper undertakes. Section C sets out to describe the current Irish constitutional position and notes the dualistic protection of freedom of expression thereunder, which stems from the theoretical positions canvassed in Section B. Having established these approaches to the right to free speech through the lens of modernity, Section D delineates some salient aspects of postmodern thought, with particular reference to autopoietic theory and how this understanding applies in the Irish legal order and its potential implications for the legal subject and theories of free speech. Section E concludes the discussion, arguing that if autopoiesis is indeed an adequate theory to describe the Irish legal order then Irish rights must be reconsidered in this new light as constituent parts of an autopoietic system and at least one plausible manner in which this might be done is suggested.

B MODERNIST THEORY: HUMAN RIGHTS AND FREE SPEECH

This section aims to describe both the foundations of human rights generally and free speech theory specifically. Particular attention is drawn to the ontological implications of the normative stances taken in both of these contexts; that is, the construction of the right-exercising subject is to a great extent controlled and delimited by the normative aspirations

[3] Oran Doyle, 'Legal Validity: Reflections on the Irish Constitution' (2003) 25 DULJ 56; Robert Noonan, 'The Kelsenian Paradigm in Irish Legal Theory' (2013) 31 ILT 286.
[4] Thomas Scanlon, 'Freedom of Expression and Categories of Expression' (1979) 40 U Pitt L Rev 519.

and claims of the following theories. By making this clear, a point of contrast and comparison is established for the later discussion on the application of postmodernism to these ontological subject claims.

1 Defining Modernism and Modernist Rights Theory

Modernist thought, which maintains that individual subjective experience is the lens through which phenomena are best explained, has been defined as:

> [starting] with Descartes's quest for a knowledge self-evident to reason and secured from all the demons of skeptical doubt. It is also invoked – with a firmer sense of historical perspective – to signify those currents of thought that emerged from Kant's critical 'revolution' in the spheres of epistemology, ethics, and aesthetic judgement. Thus 'modernity' and 'enlightenment' tend to be used interchangeably …[5]

Building on this ideological framework, it has been argued that underlying modern foundational rights theory is the 'omnipresence of Immanuel Kant's compelling ethic'.[6] The specifics of this compelling ethic are neatly summarised by Shestack as follows:

> Kant's great imperative is that the central focus of morality is personhood, namely the capacity to take responsibility as a free and rational agent for one's system of ends. A natural corollary of this Kantian thesis is that the highest purpose of human life is to will autonomously. A person must always be treated as an end, and the highest purpose of the state is to promote conditions favouring the free and harmonious unfolding of individuality. Kant's theory is transcendental, a priori and categorical (all amount to the same thing), and thus overrides all arbitrary distinctions of race, creed and custom, and is universal in nature.[7]

It has been suggested that some provisions of the Irish Constitution, too, are informed by a

[5] Ted Honderich (ed), *The Oxford Companion to Philosophy* (2nd edn, OUP 2005) 617.
[6] Jerome Shestack, 'Philosophic Foundations of Human Rights' (1998) 20 HRQ 201, 216.
[7] ibid.

'Kantian insight'.[8] This Kantian idea of human dignity as self-determination of the will or independence can be said to form the basis of an autonomy-based principle of rights. However, as against this, some theorists have drawn attention to utilitarian justifications for rights;[9] however these seem somewhat intuitively unpalatable from a modernist perspective, as they are concerned with outcomes rights achieve rather than viewing the rights as something intrinsic or transcendentally human.[10] For example, the right to a fair trial could be justified, at least partially, on concerns of institutional integrity, in the sense that fair procedures preserve the integrity of the courts.[11] Occasionally, a right may alternate between these bases and thus might be said to be dualistic. Freedom of speech is perhaps the quintessential example of such a right.

The issue with the Kantian perception is that it assumes the Kantian notion of personhood as intrinsic to the ontological essence of the subject of rights. This analysis is sufficient for rationalising rights exercised by natural persons, but what of rights exercised by companies? For example, in the *Niemitz* case,[12] the European Court of Human Rights held that companies could avail of protections under Article 8 of the ECHR; those which safeguard private life. This result seems intuitively odd. It is true that companies have a very legitimate interest in the safety of their business premises, but is this really the same as the interest a person has in, say, their home? This case serves as a kind of object lesson in the difficulties of accommodating company rights under rights clauses which clearly evince a Kantian rationale. The distinction for companies between Kantian ethics and utilitarianism has been summarised by Altman:

> Because Kant judges people's actions with reference to their motives, and because businesses are not the sorts of things that choose maxims upon which to act (even though business-people do), Kant's applicability to business ethics is limited in a way that, say, utilitarianism is not. Utilitarianism can evaluate an

[8] Ailbhe O'Neill, The Constitutional Rights of Companies (Round Hall 2007) para 3.31.
[9] HLA Hart, 'Between Utility and Rights' (1979) 79 Colum L Rev 828; Joseph Raz, 'Hart on Moral Rights and Legal Duties' (1984) 4 OJLS 123.
[10] For a classic argument against utilitarianism in rights, see HLA Hart, 'Utilitarianism and Natural Rights' in HLA Hart (ed), *Essays in Jurisprudence and Philosophy* (first published 1983, OUP 2001). For contrasting views see, Philip Pettit, 'The Consequentialists Can Recognise Rights' (1988) 38 The Philosophical Quarterly 42; Richard Brandt, 'Utilitarianism and Moral Rights' (1984) 14 Canadian Journal of Philosophy 1; David Lyons, 'Human Rights and the General Welfare' (1977) 6 Philosophy & Public Affairs 113.
[11] O'Neill (n 8) para 3.34.
[12] *Niemitz v Germany* (1992) 16 EHRR 97.

> action in terms of its consequences, apart from what the subject takes himself to be doing.[13]

Though these remarks were made in the context of business ethics, they apply mutatis mutandis to the present context. This point may be reinforced by reference to the rejection of Kantian construction of personhood of human embryos as persons.[14] These examples share a critical point in underscoring that the prevalence of the Kantian ethic in rights theory is problematic for the extension of rights to entities which are sometimes considered as attracting such rights but do not satisfy the stringencies of Kantian morality and personhood. On what basis, instead, do these Kantian rights lie if they are still extended to non-rational entities? As mentioned above, utilitarianism is often turned to as an alternative in this regard. This distinction is borne out yet more clearly in the focused discussion on free speech theory below. I will return later to a postmodern view of the rights-subject which deconstructs the Kantian view, but for now it is sufficient to note that modern rights are rooted in either Kantian moral theory or on utilitarian justifications, and this has particular implicit views on the properties a rights-subject must possess to be considered as such.

2 Modern Free Speech Theories

Free speech theories, at quite a general level, might be divided between two subheadings: deontological theories and teleological theories. These terms bear much the same meaning as when they are deployed in the field of normative ethics: deontological theories of free speech hone in on the connate value of free speech, or 'free speech as a rule' with regard to the autonomy of the individual; teleological theories, by comparison, assess the instrumental or institutional value of free speech in how it secures ends or goods which are themselves usually determined by another norm. Both of these classes of theory have particular relevance in Ireland, as constitutional loci have been identified for both justifications.

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[13] Matthew Altman, 'The Decomposition of the Corporate Body: What Kant Cannot Contribute to Business Ethics' (2007) 74 Journal of Business Ethics 253, 263.

[14] Bertha Manninen, 'Are Human Embryos Kantian Persons? Kantian Considerations in Favour of Embryonic Stem Cell Research' (2008) 3 Philosophy, Ethics and Humanities in Medicine 4. This position is probably still compatible with the State's pledge under Article 40.3.3° of the Irish Constitution to protect the life of the unborn. This is so because one need not be a Kantian rational being to attract something so basic as the right to life. However, the on this view Kantian theory would be of dubious support, say, to the rather enigmatic statements of Irvine J in *E v Minister for Justice and Law Reform* [2008] IEHC 68, [2008] 3 IR 760 to the effect that the unborn may enjoy more rights than those which flow from Article 40.3.3°.

Most importantly for the purposes of this essay, these divisions in free speech theory evince different views of the ontological subject of the right to free speech. Deontological theories favour the classic Kantian formulation explored above, with a view to fully realising human essence, whereas teleological theories do not require their rights-subjects to be rational or persons, but they merely require that whatever type of entity the subject is be capable of the type of speech which serves the end the teleological theory ultimately serves.

(a) Deontological Theories

As indicated above, most deontological theories of free expression use the notion of individual autonomy as their linchpin. Arguments of this type assert that free speech is essential to a person's self-fulfilment. The immediate objection to this principle is that it is difficult to differentiate here between freedom of expression and a general liberty of the individual; that is to say, it is difficult to articulate a general principle of free speech as opposed to a broader principle of autonomy/dignity/equality, etc.[15] Put another way, it could be argued that the notion of autonomy is so conceptually broad as to diminish the normative guidance this type of theory purports to offer.[16] This type of theory draws the most from the Kantian influences on human rights above, which is unsurprising considering Kant's own deontological ethical system. This will have particular repercussions for the postmodern theories, which will be considered below.

Thomas Scanlon is a notable proponent of this type of theory.[17] His theory focuses predominantly on the rights of the recipient of the communication, taking the 'Millian Principle' at its core.[18] However, he himself came to resile from these views.[19] He has culminated in saying recently that the idea of autonomy:

> would be a poor choice [for an idea which captures the interests at stake in expression that merits protection]. (As someone who once made a mistaken appeal to autonomy as the centerpiece of a theory of freedom of expression,

[15] Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press 1982) 65.
[16] Eric Barendt, *Freedom of Speech* (2nd edn, OUP 2005) 14–5; Susan Brison, 'The Autonomy Defence of Free Speech' (1998) 108 Ethics 312.
[17] Thomas Scanlon, 'A Theory of Freedom of Expression' (1972) 1 Philosophy and Public Affairs 204.
[18] ibid 213.
[19] Scanlon, 'Freedom of Expression and Categories of Expression' (n 4) 533–34; Thomas Scanlon, 'Content Regulation Reconsidered' in Thomas Scanlon (ed), *The Difficulty of Tolerance* (Cambridge University Press 2003) 161–64.

> my position in the Dantean Inferno of free speech debates seems to be repeatedly assailed with misuses of this notion, no matter how I criticize them.)[20]

Seana Shiffrin has recently proposed a modified deontological theory.[21] Her theory represents a new attempt at reviving deontological theories from their relegated status as generally secondary to teleological theories in modern theory. Whereas many deontological theories had heretofore divided between listener-centric or speaker-centric theories, Shiffrin takes her focus to be the thinker as an agent who strives for self-development. Her explanation becomes deeply humanistic when she argues that every individual, rational, human agent qua thinker has an interest in a list of eight values.[22] While this theory has been met with some approving remarks, even from consequentialist quarters,[23] it is potentially under inclusive and elitist for people who do not meet Shiffrin's apparently high standards of introspection and reflection. Whatever its current merits and demerits, Shiffrin herself has characterised her thoughts as 'still preliminary ideas'[24] and her eschewing of traditional listener or speaker based autonomy theories may pave the way for new insights in deontological free speech theory. This is well and good in the context of normative free speech theory; however, Shiffrin's theory is a stark case-in-point of the inescapably humanistic and anthropocentric stance taken by deontological theories of free speech. Since this stance maintains that free speech is an essential aspect of human development, this entails that only human beings in their capacity of rational thinkers could ever exercise this right. Non-rational (in the Kantian sense) entities such as companies or other legal persons, therefore, could not exercise free speech under the ontological implications of this theory.

(b) Teleogical Theories

Theories of free speech of this type identify an end or value to which free speech contributes instrumentally. A particular value which has been earmarked in this regard is that of

[20] Thomas Scanlon, 'Why Not Base Free Speech on Autonomy or Democracy?' (2011) 97 Va L Rev 541, 546.
[21] Seana Shiffrin, 'A Thinker-Based Approach to Freedom of Speech' (2011) 27 Constitutional Commentary 283.
[22] ibid 289–90.
[23] Vincent Blasi, 'Seana Shiffrin's Thinker-Based Freedom of Speech: A Response' (2011) 27 Constitutional Commentary 309; cf Seana Shiffrin, 'Reply to Critics' (2011) 27 Constitutional Commentary 417.
[24] Shiffrin, 'A Thinker-Based Approach to Freedom of Speech' (n 21) 438.

democracy. This argument is often associated with Alexander Meiklejohn,[25] who argued that expression ought to be protected because it enables citizens to better understand political issues and therefore participate more effectively in democracy. One difficulty with this theory is that in taking democracy as its fundamental norm, it debatably precludes protection of speech, which either contributes negatively to the democratic progress (ie speech aimed at criticising democracy) or does not contribute to it at all (artistic expression or commercial expression, for example).[26] Yet more fundamentally, the theory founders on paradox. Since the theory rests on a conception of the people as sovereign, they must be accorded the concomitant unfettered power of sovereignty. This notion resists restraints being imposed on majority power, as they would be by an independent principle of free speech. Effectively, the more vested in the principle underlying the justification for free speech here, the more inert the actual free speech becomes as it becomes more subject to being restrained by the will of the majority.

An alternative, which avoids this paradox, has been posited by Ronald Dworkin, who advocates what he terms the constitutional conception of democracy, as opposed to the majoritarian understanding above.[27] On this view, political institutions must respect the right of all citizens to be treated with equal respect and concern. This solution removes itself from a purely teleological/consequentialist view and effectively hybridises elements of teleological and deontological theory. However, in so doing it opens itself to the familiar deontological criticism that it becomes difficult to distinguish free speech here from other equality based interests. This type of theory laudably moves in the direction of a more comprehensive theory of freedom of expression; however, by relying on deontological postulates such as individual autonomy and equality this class of self-government theory perhaps highlights the inadequacy of democratic rationales alone as capable of forming a theory of free expression.[28]

[25] Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (Harper 1948); Alexander Meiklejohn, 'The First Amendment is an Absolute' [1961] Sup Ct Rev 245.
[26] Robert Bork, 'Neutral Principles and Some First Amendment Problems' (1971) 47 Ind L Rev 1.
[27] Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1978) 15–26. For arguments supporting the application of this understanding to Irish law, see Ronan Costello, 'Back to the Future: A New Approach to Corporate Political Expression' (2011) 14 TCLR 121.
[28] Lawrence Byard Solum, 'Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech' (1989) 83 Nw U L Rev 54, 76–7. For a more general criticism of democracy as a basis for free speech theory, see C Edwin Baker, 'Is Democracy a Sound Basis for a Free Speech Principle?' (2011) 97 Va L Rev 515.

Truth, although perhaps less in vogue now, has also been much-cited as an end to which free speech could be considered instrumental.[29] At first glance, truth is an attractive idea because true/false values can be assigned by a multitude of norms and therefore does not prima facie meet the under inclusive objection that the self-government theories explored above faced. Nor, in fact, does the theory require a specific definition of truth; it should operate equally under any posited definition of truth.[30] However, where the pure democratic theory descended into paradox, the Achilles Heel of truth theories is in their circularity and the spurious nature of the asserted necessary connection between free speech and truth. To aid in establishing this necessary connection, a particular definition of truth (the consensus or survival theory of truth) is often employed.[31] Under this theory, truth is defined as what emerges from the process of free and open discussion. While superficially attractive, this model of truth is very normatively weak as it fails to provide a meta-theoretical basis for the choice of open discussion as a method of rational enquiry. Instead, it defines rational enquiry in terms of willingness to participate in open discussion. Given that truth is what emerges from this process, the argument ultimately collapses into the fallacy of petitio principii. In addition to this fallacy, the enthymematic reliance on the prevalence of reason in society is, perhaps, optimistic and no empirical proof is proffered by the theory in support of this contention.

There is also the objection that not all claims are readily amenable to a binaristic true/false calculus. Though on consensus theories of truth what is commonly accepted as true is what is in fact true, this fails to match up to the somewhat more intuitive correspondence theory of truth that maintains that those statements which bear an accurate descriptive relationship with the state of objects and the external world are true. The free market of ideas[32] meets some epistemological objections based on these concerns. Though it takes a more relativist account of truth and perhaps avoids Millian difficulties there while encountering others,[33] it still

[29] John Stuart Mill, *On Liberty* (1859) ch 2. For a more recent defence of the truth instrumental account, see Eugene Volokh, 'In Defense of the Marketplace of Ideas/Search for Truth as a Theory of Free Speech Protection' (2011) 97 Va L Rev 595.

[30] Schauer (n 15) 18. Though, one might pause at this idea. If one adopted a correspondence theory of truth, which assigns truth to statements based on their correspondence with real-world phenomena, it is difficult to see how a free speech theory would immediately assist the enterprise of the *discovery* of truth outside of the banality of allowing individuals to state true things and thus presumably aiding the dissemination of justified true knowledge.

[31] Alvin Goldman and James Cox, 'Speech, Truth and the Free Market for Ideas' (1996) 2 Legal Theory 1 presents a very cogent criticism on the failure of the marketplace of ideas theory in this regard.

[32] *Abrams v US* (1919) 250 US 616, per Justice Holmes. For a (somewhat dated) academic overview of the truth rationale in American Supreme Court jurisprudence, see Francis Canavan, 'Freedom of Speech and Press: For What Purpose?' (1971) 16 Am J Juris 95.

[33] Schauer (n 15) 19–21.

ultimately substantiates as an enthymematic argument, which rests on potentially unduly optimistic notions of the openness, honesty and rationality of marketplace participants.[34]

Ultimately, teleological theories – while being more popular than deontological theories – are often inadequate on their own to formulate fully consiliant theories which inform the wealth of subjects who exercise the right to free speech and the contexts in which the right is often exercised. While they may be used to expand from the somewhat restrictive ontological premises of the deontological theories explored above, they can fall victim to theoretical syncretism for this reason and risk becoming muddied and unclear.

C RIGHT TO FREE SPEECH IN IRELAND

Section B above canvassed human rights and free speech theories at a rather abstract level of detail. The purpose of this section is to provide a brief overview of the Irish case law on free speech to demonstrate how the case made regarding the ontological distinctions drawn at the level of the subject exercising rights is borne out in the doctrinal Irish constitutional context also. As will become clear, the Irish legal system reflects this bifurcation quite sharply as it goes so far as to protect the same right (free speech) in two separate provisions each under a different rationale.

Irish protection of free speech begins with Article 40.6.1° (i) which reads:

> 1. The State guarantees liberty for the exercise of the following rights, subject to public order and morality:
> i. The right of the citizens to express freely their convictions and opinions. The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.

Though the overarching provision of the Article refers to 'citizens', the specific reference to 'organs of public opinion' clearly guarantees some freedom of expression for media

[34] Stanley Ingber, 'The Marketplace of Ideas: A Legitimizing Myth' [1984] Duke L J 1.

companies also.[35] The nature of this right has been stressed as an educative one in the case law.[36] Specifically, the protection has effectively been framed in terms which bestow a right on the public to know and be educated on affairs of importance, political and legal, so they might better participate in the democratic process. This invocation of democratic theories is also to be seen in the jurisprudence of the European Court of Human Rights,[37] which has been of increasing relevance in the Irish courts.[38]

Irish Times v Ireland[39] is a landmark case on Irish free speech theory. A clear preference for consequentialist attitudes is evinced by the Supreme Court. Hamilton CJ referred to the 'right of the wider public to be informed by the media of what is taking place…'[40] O'Flaherty J pointed to the freedom of the press to report court proceedings, as well as public rights to knowledge of proceedings and the rights of the parties themselves to require that the proceedings in which they are involved be made public.[41] Denham J drew attention to the role of the media in the public administration of justice,[42] though she also noted the freedom of the expression of the community, which she thought central to democratic government, and the free expression of the press.[43] In *Murphy v IRTC*,[44] Barrington J also saw Article 40.6.1°(i) as being concerned with 'the public activities of the citizen in a democratic society'.[45]

The general tenor of these judgments, coupled with the regard to the 'education of public opinion' alluded to by Article 40.6.1°(i) itself, makes it reasonable to conclude that the protection for the media in Ireland is based largely on their instrumental role in disseminating

[35] For differences between companies generally and media companies specifically in the Irish context of freedom of expression, see O'Neill (n 8) paras 9.01–9.17.
Any ambiguous references to companies exercising the right to freedom of expression in my discussion here should be taken to refer to media companies. I leave to one side the more complex issue of non-media companies in the Irish Constitutional context.
[36] *Irish Times v Ireland* [1998] 1 IR 359 (SC); *Cogley v RTÉ* [2005] IEHC 181, [2005] 4 IR 79.
[37] *Handyside v United Kingdom* (1976) 1 EHRR 737; *Jersild v Denmark* (1995) 19 EHHR 1. See also *Observer and Guardian v United Kingdom* (1992) 14 EHRR 153, §59(b) where the media role as 'public watchdog' was emphasised.
[38] In the development of journalistic privilege, for example, ECtHR jurisprudence was greatly emphasised: *Mahon v Keena* [2009] IESC 64 and 78, [2010] 1 IR 336.
[39] *Irish Times v Ireland* (n 36).
[40] ibid 383.
[41] ibid 390.
[42] Enshrined constitutionally in Article 34.1. Keane J also later seized upon this aspect of the case and thus did not consider arguments grounded in Article 40.6.1°(i).
[43] *Irish Times v Ireland* (n 36) 399.
[44] *Murphy v IRTC* [1999] 1 IR 359 (HC). For a forceful criticism of this case, see Robert Cannon, 'Does Expression Have any Freedom Left? *Murphy v Independent Radio and Television Commission*' (1998) 1 TCLR 126.
[45] *Murphy v IRTC* (n 44) 24.

information to the public.

A notable feature of the Irish Constitutional jurisprudence is that it protects freedom of expression in two provisions, differentiating between private and public expression.[46] While public expression falls under the protections outlined in Article 40.6.1°(i), private expression is protected by the unenumerated right to communicate under Article 40.3.1°.[47] As Keane J put it in *Oblique Financial Services v The Promise Production Co*:[48]

> Article 40.6.1° is concerned not with the dissemination of factual information, but the rights of the citizen, in formulating or publishing convictions or opinions, or conveying an opinion; and the rights of all citizens, including conveying information, arises in our law, not under Article 40.6.1° but under Article 40.3.1.[49]

The interaction between these provisions is a vexed question. Fennelly J observed in *Mahon v Post Communications*[50] that the rights under both Articles were inseparable. This was qualified later in the judgment, where it was observed that it mattered little, at least for the purposes of that case, which Article of the constitution expressed the guarantee.[51] It is notable that Fennelly J speaks of the guarantee in a singular sense, which itself might cast doubt on whether he was speaking of two separate guarantees (private and public freedoms of expression); however, he went on to cite with approval Barrington J's judgment in *Murphy* which, it has been suggested, still marks the distinction as applicable in Irish constitutional law.[52] Doyle, by contrast, has suggested that the practical effect of this distinction is minimal. He suggests that it is 'almost certain that both the right to communicate information and the right to express opinions, of both the media and citizens, are protected by Art 40.6.1°(i)'.[53] This disparity of opinion renders clear the lack of conceptual clarity in the relationship

[46] The distinction between the two protections was first advanced in *Irish Times v Ireland* (n 36), and was subsequently approved by the Supreme Court in *Murphy v IRTC Murphy v IRTC* (n 44). That there are different 'philosophical systems' operating behind these articles was observed in the latter case: ibid 25.
[47] *The State (Murray) v Governor of Limerick Prison* (HC, 23rd August 1978); *Attorney General v Paperlink* [1983] IEHC 1, [1983] ILRM 343.
[48] *Oblique Financial Services v The Promise Production Co* [1994] 1 ILRM 74 (HC).
[49] ibid 78.
[50] *Mahon v Post Communications* [2007] IESC 15, [2007] 3 IR 338.
[51] ibid [51]. Similar sentiments had been expressed some time before in *Holland v Governor of Portlaoise Prison* [2004] IEHC 97, [2004] 2 IR 573 [25]–[26].
[52] Eoin Carolan and Ailbhe O'Neill, *Media Law in Ireland* (Bloomsbury Professional 2010) para 2.24.
[53] Oran Doyle, *Constitutional Law: Text, Cases and Materials* (Clarus Press 2008) para 8.06.

between these protections.[54] Irrespective of day-to-day praxis in the courts, the bifurcation of the right has obvious theoretical implications which are the chief concern of my arguments here. Ramifying the constitutional aegis for freedom of expression in this way roughly mirrors the distinction drawn above in Section B between deontological and teleological theories of free speech. The protection in Article 40.3.1° is deontological in its focus, whereas the protection in Article 40.6.1°(i) is grounded in teleological/consequentialist considerations.[55] Attention was drawn to the implications of these normative free speech theories for the constitution of the identity of the subject of the right to free speech; specifically, the applicability of deontological theories to natural persons only. It is suggested, therefore, that the current stance in Irish Constitutional law implicitly supports a distinction between natural persons and companies, but it has failed to outline the precise nature of this distinction and the basis upon which it is drawn.

It also follows from the jurisprudence on Article 40.3.1° that the right to communication identified thereunder is a natural right (I use this term to mean that it derives its authority from what the Irish Constitution has termed natural law). It has been observed that many of these unenumerated, natural rights are based on concerns which would be of no interest to the company,[56] which seems intuitive given the tests which were posited for the enumeration of rights under that particular provision.[57] However, O'Neill has argued that natural law method in constitutional hermeneutics does not necessarily exclude companies, as a constitutional rights provision may be open to either an autonomy-based or utility-based interpretation regardless of natural law overtones. This solution works, but it seems to dodge the question more than resolve it. Deontological theories of free speech have a clear definition of the subject who is capable of exercising the right to free speech. Teleological theories do not have

[54] Daly (n 2).
[55] It is worth noting here some recent developments in Irish constitutional law which might be used to herald a return to a closer textual approach. It might fairly be said that the unenumerated rights doctrine sparked by the case of *Ryan v Attorney General* [1965] IESC 1, [1965] IR 294 marked an era of judicial rights interpretation which was not always explicitly grounded in the constitutional text. More recently, since the 'death' of the unenumerated rights doctrine, Hogan J in cases such as *Kinsella v Governor of Mountjoy Prison* [2011] IEHC 235, [2012] 1 IR 467 has demonstrated that the explicit text of the constitution is still fecund ground for interpretation (in that case using the right of the person in Article 40.3.2° to achieve what was arguably a *Ryan*-like result). Linking this point to present context, it might be said that the right to communicate was a fine right to establish but it was probably established in the wrong place and its existence has enfeebled and frustrated the case for holistic protection of free speech under Article 40.6.1°(i).
[56] O'Neill (n 8) para 13.04.
[57] For an overview of this jurisprudence and the tests articulated, see Gerard Hogan and Gerry Whyte, *J. M. Kelly: The Irish Constitution* (4th edn, Tottel Publishing 2003) 1413–85; Doyle, *Constitutional Law: Text, Cases and Materials* (n 53) ch 4.

such a clear definition as they value speech towards a particular end which is not intrinsic to the subject; rather, it is the end to which the speech is directed which has intrinsic value. On this understanding, O'Neill's solution suggests that in the first instance any right can be justified according to an autonomy theory if a natural person who fits the strictures of the notion of the subject compelled by such theories. If this fails, we may in the alternative turn to a utility-based justification to avoid further consideration of the issue of the subject, preferring instead to focus on the more open-ended notion of an end which the right serves.

Some important distinctions must be emphasised to conclude this section. There remains a divergence in Irish jurisprudence between public freedom of speech, as enshrined in Article 40.6.1°(i), and private expression in which citizens may engage under the right to communicate which is a natural right derived under Article 40.3.1°. While it has been argued that there are few practical consequences arising from this dualism, it nevertheless reflects discrete rationales for free speech protection. The protection in Article 40.6.1°(i) reflects consequentialist theory whereas the right to communicate under Article 40.3.1°, having a more natural law focus and being aimed at 'citizens', evinces deontological rationales. This conceptual partitioning at constitutional level is, it is submitted, confusing and unnecessary. It has been suggested that freedom of expression should return to its roots in Article 40.6.1°(i).[58] I propose to build upon this thesis by suggesting in the following sections a conceptually unified postmodern free speech theory which, if Doyle's argument for an autopoietic Irish legal system is borne out, has a substantial degree of fit with that system.[59] I suggest that if this application to free speech succeeds it paves the way, in principle, for similar theoretical work to be done on other instances of rights.

D POSTMODERNISM AND AUTOPOIESIS: A DIFFERENT VIEWPOINT

Thus far everything discussed has been through the lens of modernity. In the context of free speech particularly, the clear Enlightenment influence in deontological theories was noted. While teleological theories did not share this influence as strongly, they remain largely focused on the individual in pursuit of certain ideals (the good of the polis in democracy theories, truth in Millian variants). This individualistic focus, it was noted, is grounded in a particular view of the proper subject of rights. Postmodernism can be used to challenge this

[58] Daly (n 2) 254ff.
[59] I use 'fit' here in the Dworkinian sense: Ronald Dworkin, *Law's Empire* (Hart 1998) 230. For an application in the context of freedom of speech, see Solum (n 28) 64.

notion. In particular, this paper applies autopoietic theory which, far from the anthropocentric undertones of modernist theories, radically deconstructs the familiar notions of humanity and what it means to be an individual. The theory seeks to replace these notions with a societal focus on systems and discourse as ontologically foundational, as opposed to the rational monad that is the focus of most human righs theory. This section concludes by positing an alternative postmodern understanding of rights in light of this radical reconstruction of rights theory, from which basis a more holistic theory of the Irish legal system as autopoietic could be constructed.

1 Defining Postmodernism

In contradistinction to modernism, postmodernism has been defined '[i]n philosophical terms [as a] critique of Enlightenment values and truth-claims mounted by thinkers of a liberal-communitarian persuasion'.[60] This negative definition, while expansive, is better suited than an attempt at a positive definition, which often fails to capture all of the occasionally contradictory modes of thought which are deemed postmodern.

From a less general and more particularly legal perspective, Feldman has identified eight salient features of postmodern legal theories:

1) rejection of foundationalism and essentialism;
2) defiance of ostensible certainties, inveteracies, edifices, and boundaries, including the borders of academic disciplines;
3) recognition, exploration, and even celebration, of paradoxes;
4) focus on power and its manifestations;
5) social construction of the self or subject;
6) self-reflexivity;
7) irony;
8) political ambivalence.[61]

Many of these themes are identifiable in the theory of autopoiesis. However, it bears mentioning that the extent to which autopoiesis is itself an exhaustively postmodern theory is

[60] Honderich (n 5) 745.
[61] Stephen Feldman, *American Legal Thought from Premodernism to Postmodernism: An Intellectual Voyage* (OUP 2000) 162–87.

contestable.[62] The lack of a constitutive human subject or single organising principle uniting the various systems in the theory are broadly postmodern. However, postmodernists might criticise the theory's relative ambivalence to the concept of power, and its treatment of its systems as supra-individual subjects. Irrespective of these potential avenues of further debate, this paper will take as given that autopoiesis fits sufficiently well in the taxonomy of postmodern theory to proceed on the assumption that it may be classified thus.

2 Autopoiesis

In its political implications, the most significant component of Luhmann's sociological Enlightenment is his response to the theory of the *legal subject*, and it is in this that Luhmann might be seen to make his most far-reaching contribution to the theoretical foundations of modern political thought.[63]

This subsection presents a brief description of the theory of autopoiesis as described by Niklas Luhmann and Gunther Teubner.[64] Substantive arguments on and analysis of autopoiesis fall outside the scope of the current work. The gamut of this section is limited to a brief description of the most salient features of the theory. It is important to note before going on to further explanation that autopoietic theory rests on a constructivist understanding of reality; therefore, it is clearly open to realist objections to such an understanding. One can certainly criticise this aspect of autopoiesis as a significant ontological presumption. This is a criticism of autopoietic method, perhaps. Substantive criticisms of autopoiesis must amount to something more than this methodological critique however, fundamental though the choice of method may be.[65] Therefore, while realist issues may be raised in a broader content, this paper accepts the constructivist hypothesis without argument. This rejection of realism forms a kind

[62] 'Some features of autopoietic theory are consistent with the general approach of postmodernist theories. That is not to say, however, that autopoietic and "postmodernist" theory coincide'. Hugh Baxter, 'Autopoiesis and the Relative Autonomy of Law' (1998) 19 Cardozo L Rev 1987, 2084–85.

[63] Michael King and Chris Thornhill, *Niklas Luhmann's Theory of Politics and Law* (Palgrave Macmillan 2003) (emphasis original).

[64] Luhmann's foremost work on legal autopoiesis is Niklas Luhmann, *Law as a Social System* (David Schiff and Rosamund Zeigert eds, Klaus Ziegert, Fatima Kastner and Richard Nobles trs, Palgrave Macmillan 2004). For Teubner's contribution, see Gunther Teubner, *Law as an Autopoietic System* (Zenon Bankowski ed, Anne Bankowska and Ruth Adler trs, Blackwell 1993).
There are differences between Luhmann's and Teubner's presentation of the theory. For an overview of these, see Michael King, 'What's the Use of Luhmann's Theory?' In Michael King and Chris Thornhill (eds), *Luhmann on Law and Politics: Critical Appraisals and Approaches* (Hart 2006) 42–46. Where there is ambiguity in my account here, a preference for Teubner's position should be presumed.

[65] Michael King and Chris Thornhill, 'Will the Real Niklas Luhmann Stand Up, Please?' (2003) 51 Sociological Review 276, 284.

of armour against reification, which makes the theory highly abstract and difficult to parse and it has been queried whether it is little more than a metaphor.[66] These are important discussions, but they cannot be accommodated here.

Doyle has observed that the validity of the Irish legal system might be explained by the theory of autopoiesis.[67] A substantial discussion of this thesis is unnecessary here. This paper takes as given, on the basis of Doyle's arguments, that the Irish legal system can plausibly be understood as autopoietic. If this theory is to avoid criticisms of syncretism and if we would prefer homogeneous explanations of legal phenomena as opposed to heterogeneous ones, it is incumbent on it to proffer a way in which legal phenomena which (at least partly) constitute a legal system may be explained autopoietically.

What, then, makes a system autopoietic? What is autopoiesis? Gunther Teubner defines autopoiesis by the following three indicia of autopoietic systems:

1) self-production of all the components of the system;
2) self-maintenance of the self-producing cycles by means of hypercyclical linking, and
3) self-description as the regulation of self-production.[68]

Tentatively, then, an autopoietic system is a self-constructing, self-maintaining and self-describing social system. There are many autopoietic systems, and they do not exist in vacuo. They are each surrounded by their environment, with which they cannot communicate directly, though they can communicate *about* it. They distinguish and self-describe themselves from this environment by use of a binary code which differs from system to system. It is also worth noting that the systems are described as being normatively closed to one another, though they remain cognitively open.[69] This entails that they are autopoietic systems are not hermetically sealed from one another and unable to take cognizance of the existence of other such systems; however, they may not incorporate the norms from a foreign system. Each system constructs its own norms through application of its unique binary code.

[66] Stephen Diamond, 'Autopoiesis in America' (1992) 13 Cardozo L Rev 1763.
[67] Doyle, 'Legal Validity: Reflections on the Irish Constitution' (n 3) 95.
[68] Teubner, *Law as an Autopoietic System* (n 64) 24.
[69] Gunther Teubner, 'Introduction to Autopoietic Law' in Gunther Teubner (ed), *Autopoietic Law – A New Approach to Law and Society* (Walter de Gruyter & Co 1987).

While one phenomenon may thus appear in many systems, it will be encoded differently by all of them and thus carry different normative weight in each instance. These systems are the 'primary unit of analysis' for autopoiesis, and they 'consist not of people, but of communications'.[70] Communication takes on a very specific meaning in this theory. It is not necessarily language;[71] rather, a communication is defined as 'a synthesis of information, utterance and understanding'.[72] An exegesis of the finer points of autopoietic communications is unnecessary here. The point to note from this analysis is the primacy of a widely-defined set of discursive norms displacing natural persons and humanity as the central ontological focus of the theory.

At first blush, autopoietic theory might seem quite artificial[73] and abstract; however, arguments have been made that autopoiesis incorporates individual human elements more than it may first seem.[74] Inasmuch as people qua people are integrated into the theory, it is as 'self-referring … biological … and psychic systems'.[75] Teubner takes the point further, and making a general point (though with specific reference to his own project in autopoiesis in law) maintains that:

> the 'persons' the law as a social process deals with are not real flesh-and-blood people, are not human beings with brains and minds … [t]hey are mere constructs, semantic artifacts produced by the legal discourse itself … Not only the corporation, but any legal person – be it collective or individual – is nothing but that famous 'artificial being, invisible, intangible, existing only in contemplation of law' discovered by Chief Justice Marshall in the celebrated case of *Dartmouth College v Woodward* …[76]

[70] King and Thornhill, *Niklas Luhmann's Theory of Politics and Law* (n 63) 2; Gunther Teubner, 'How the Law Thinks: Towards a Constructivist Epistemology of Law' (1989) 23 Law & Soc'y Rev 727, 737.
[71] King and Thornhill, *Niklas Luhmann's Theory of Politics and Law* (n 63) 15.
[72] ibid 11, citing Niklas Luhmann, 'The Autopoiesis of Social Systems' in Felix Grayer and Johannes van der Zouwen (eds), *Sociocybernetic Paradoxes* (Sage Publications 1986); see also Teubner, 'How the Law Thinks: Towards a Constructivist Epistemology of Law' (n 70) 737.
[73] Luhmann himself has noted the incompatibility of his theory with humanism. See Niklas Luhmann, 'The Individuality of the Individual: Historical Meanings and Contemporary Problems' in Thomas Heller, Morton Sosna and David Wellbery (eds), *Restructuring Individualism: Autonomy, Individuality and the Self in Western Thought* (Stanford Publishing 1986) 323.
[74] Michael King, 'The "Truth" About Autopoiesis' (1993) 20 Journal of Law and Society 218, 228.
[75] King and Thornhill, *Niklas Luhmann's Theory of Politics and Law* (n 63) 4.
[76] Teubner, 'How the Law Thinks: Towards a Constructivist Epistemology of Law' (n 70) 741, citing *Dartmouth College v Woodward* 17 US (4 Wheat) 518 (1819).

This radical decentralisation of the traditional subject is at once one of the most innovative and controversial aspects of autopoietic theory. The significance of this, as the above quote from Teubner throws into sharp relief, is the potential for an equivocation of both individual and company at least in terms of legal character and thus legal rights, as they both become 'semantic artefacts' produced by law's self-referential communications.[77] This potentially obviates the need for a rough distinction in free speech theory between media companies and individuals, such as that which arguably subsists in Irish Constitutional jurisprudence.[78] Indeed, this may be in some senses desirable, as the distinction between the media and individual persons becomes harder and harder to draw in the era of the internet and the proliferation of blogging and online commenting which it has ushered in.

3 Postmodern Difficulties with Englightenment Thought: Rethinking Rights

It has been said that '[h]uman rights are the off-spring of modernity. They are one of the central truth claims or "grand narratives" of the Enlightenment'[79] which I outlined above in section B. With this in mind, it has been said that:

> postmodernists have not presented us with any postmodern 'novel way' in which human rights might be seen. It seems to be difficult, if not impossible, for them to show this novel way without taking into account the conceptions of autonomous self and universality. Perhaps they need to begin taking rights more seriously.[80]

This is a criticism that strikes to the heart of my thesis in this paper. That the Kantian ideals drawn upon by it do not co-exist easily with autopoietic theory is made clear by King and

[77] Teubner, for his part, would certainly seem to take the next logical step in making this point as he assigns the status of epistemic subject to the corporation in much the same way as it might be assigned to an individual human person: Teubner, 'How the Law Thinks: Towards a Constructivist Epistemology of Law' (n 70) 278–9. Similar arguments, regarding the moral and metaphysical status of corporations, can be found in Peter French, 'The Corporation as a Moral Person' (1979) 16 American Philosophical Quarterly 207; Susanna Ripken, 'Corporations are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle' (2009) 25 Fordham Journal of Corporate and Financial Law 97.

[78] One might still posit different rationales for different types of statement as opposed to different types of speaker. Factual as against doxastic statements, political speech as opposed to commercial speech, etc.

[79] Zühtü Arslan, 'Taking Rights Less Seriously: Postmodernism and Human Rights' (1999) 5 Res Publica 195, 203.

[80] ibid 215.

Thornhill.[81] How might we respond to this indictment?

As a potential counter to this argumentation, and one which does not necessarily ground itself in postmodern thought, it has been suggested that the concept of the person obfuscates reasoning on human rights and is not so clear as it perhaps first seems.[82] Instead, it might be regarded as a cluster of distinct notions such as the biological concept of the human being, the idea of a rational agent, and a unity of consciousness. This idea of the cluster concept is important, for '[t]o say that personhood is a cluster concept means that the umbrella concept works just fine sometimes but that use of the components instead of the umbrella term would promote clearer legal analysis of the legal issues involved.'[83] With regard specifically to the right of free speech at issue in the discussion at hand, there is no reason why such a right could not be ascribed to rational agents, rather than solely biological human beings. There is nothing necessarily biological about expression, broadly construed. So long as capacity for rationality and language is possessed by an agent, there is no conceptual bar to their being afforded a 'human' right to freedom of expression. That is to say, that as long as both a company and an individual can be seen as rational agents, they will both be afforded the right to freedom of expression for that reason alone.

In the particular context of autopoiesis, legal rights can be seen as part of law's communications. King, for example, has argued that rights can be seen as 'an intermediary concept which performs the double act of (a) reducing and simplifying, and (b) operating as a precursor for the full reconstruction of issues into the legal coding of legal/illegal.'[84] He goes on to provide more insight into point (b), arguing that:

> [i]n the language of autopoietic theory, the transformation from rights-claims into fully fledged legal rights will normally depend on what autopoietic theorists refer to as 'structural coupling'. A perturbation – an event which is identified as disturbing ongoing expectations – will result in 'interference' (the intersection between two or more communicative systems) at the point of

[81] 'The autonomy which characterizes modern society is, in fact, not the autonomy of human beings at all, but the autonomy of systems themselves. . . . Above all, *Luhmann does not see autonomy as a sate in or through which individual agents realize any type of primary anthropological essence'*. King and Thornhill, *Niklas Luhmann's Theory of Politics and Law* (n 63) 141–2 (emphasis added).
[82] Jens Ohlin, 'Is the Concept of the Person Necessary for Human Rights?' (2005) 105 Colum L Rev 209.
[83] ibid 231 (emphasis original).
[84] Michael King, 'Children's Rights as Communication: Reflections on Autopoietic Theory and the United Nations Convention' (1994) 57 MLR 385, 391.

> perturbation. Where law is one of the subsystems involved, this structural 'interference' defines 'the point at which general social expectations intersect with legal expectations.' The legal expectations then become 'validated' and the social expectations become reconstructed within the legal system as law.[85]

Structural coupling is often cited as one of the weaker aspects of autopoietic theory.[86] This alone makes it a potentially unsatisfactory method by which autopoietic theory might explain or incorporate rights. On King's explanation above, it seems that rights are born of general social expectations, which notion does not immediately speak of autonomy, utility, or any of the more familiar bases of rights. The issue here is what autopoietic system law is to be coupled with to produce a right to free speech. A suggestion to structurally couple law with the political sphere to explain free speech is liable to have a tacit predisposition to democratic theory behind it, for example.

At any rate, this metatheoretical choice seems arbitrary and unsatisfactory. Alternatively, to suggest that free speech entitlements are derived from a structural coupling of the law and media systems is also problematic: it might only account for individuals as a corollary (as listeners, perhaps) and is potentially under inclusive as it can only relate to media matters (broad though they are under the information/non-information dichotomy posited for that system by Luhmann).[87] It may be arguable that the number of structural couplings that would be required for a properly inclusive ambit of a free speech right (both for the media and individuals, if indeed they are discernible from one another through the lens of autopoietic theory) renders the concept of autopoietic theory nugatory by reductio ad absurdum, as the systems would be so interdependent as to obliterate any tenable notion of systematic normative closure.[88]

An alternative method for incorporating human rights into autopoietic theory is suggested by Gert Verschraegen.[89] He suggests that most basic human rights are not merely 'biological or physical, they are also inherently social rights … primarily because they enable an individual

[85] King, 'Children's Rights as Communication: Reflections on Autopoietic Theory and the United Nations Convention' (n 84) 393–94 (citations omitted).
[86] Michael Rosenfield, 'Autopoiesis and Justice' (1992) 13 Cardozo L Rev 1681, 1711–12; Baxter (n 62) 2075–80.
[87] Niklas Luhmann, *The Reality of the Mass Media* (Kathleen Cross tr, Polity Press 2000) 17.
[88] Richard Münch, 'Autopoiesis by Definition' (1992) 13 Cardozo L Rev 1463, 1468.
[89] Gert Verschraegen, 'Systems Theory and the Paradox of Human Rights' in Michael King and Chris Thornhill (eds), *Luhmann on Law and Politics: Critical Appraisals and Approaches* (Hart 2006).

to be a "person", to participate in communication and social intercourse'.[90] That is to say, human rights perform the function of allowing an individual the capacity to develop a social identity. It is their capacity for self-presentation that is here being protected. This, for example, incorporates press freedom not as the right to write whatever one wants to write, but rather as 'the right to publish, to take part in the system of the media'.[91]

This model protects the right to life, bodily integrity, freedom of movement as they secure a person's physical presence, genuine gestures and the non-verbal communications secured thereby. The right to freedom of expression is obviously protected under this rubric in a different way to the theories explored above in section B. To couch it in familiar language, it is a fusion of elements of deontological and teleological theory. It embraces deontological theory as it is a right which directs an individual towards their (social) self-realisation, but it is teleological in that it holds participation in society as a good towards which the individual contributes. The teleological element here, however, is weak as it is because of the free choice of the individual (including potentially antisocial choice) that the structure of modern society is strengthened. To locate this theory conceptually within autopoietic theory, it maintains that individuals exist in the environment of the autopoietic social systems and human rights facilitate persons in re-entering a social system under specific conditions.[92]

E CONCLUSION

In a sense, the conclusion of this paper functions as a coda to Doyle's initial thesis on autopoiesis. He concluded that if the Irish legal system is indeed an autopoietic one, 'common perceptions of law [would] require revision.'[93] I would add that if his thesis is made out, then the manner in which we conceive of legal rights must also be revised. In the opening paragraphs of my discussion I noted that Daly had charged the right of freedom of expression in Ireland of having no coherent philosophy underlying it. While it is perhaps unduly optimistic to envisage the judiciary drawing upon the complex tenets of autopoietic theory to formulate such a philosophy, it is the concluding thesis of this paper that autopoietic theory

[90] ibid 114, noting in fn 44 that this social or communicative dimension to rights is rarely discussed.
[91] ibid 115.
[92] Verschraegen, 'Systems Theory and the Paradox of Human Rights' (n 89) 120. For a more recent exposition by the same author along much the same lines see Gert Verschraegen, 'Hybrid Constitutionalism, Fundamental Rights and the State' (2011) 40 Rechtsfilosofie & Rechtstheorie 216, 222. See also Gert Verschraegen, 'Human Rights and Modern Society: A Sociological Analysis from the Perspective of Systems Theory' (2002) 29 Journal of Law and Society 258.
[93] Doyle, 'Legal Validity: Reflections on the Irish Constitution' (n 3) 101.

may well provide such a philosophy in our legal system. Such an answer would certainly be internally consistent for providing a systems theory based answer in a systems theory understanding of law.

It is submitted that Verschraegen's model of human rights in systems theory is a compelling one in this light. Conceived of as a deontological-teleological hybrid justification for a person to willingly construct and present their social identity as it manifests in different autopoietic systems, it provides a good degree of fit with the Irish legal order as a whole if autopoiesis prevails. The normativity of this stance, and of autopoietic theory generally, is certainly open to criticism.[94] The theory may inform us little of the types of speech which ought to be permitted and thus risk being overinclusive. Nevertheless, as a descriptive account it seems apposite. Indeed, the answer to the normative question in autopoietic thought may well rest in the political system and not the legal one (structurally coupled as they are by the constitution).[95]

It might be noted here in passing that the thesis of this paper may evoke an uneasy reminder of the much-criticised decision of the US Supreme Court in *Citizens United v Federal Election Commission*.[96] In that case the court effectively equivocated natural persons and corporations for the purposes of the First Amendment protection of free speech. This decision has been criticised for widening the role of corporate monies in political speech, which may distort political discourse. I would respectfully submit that the theory of rights I have outlined in this paper does not necessitate that conclusion, though I do think it could be used to rationalise or justify the decision. I have attempted to provide a framework for rights which deconstructs ontological preconceptions of the subject of rights. I have not here considered expressly the content of those rights for the legal subject, nor how they may be regulated. Put simply, I have constructed a case which marshals against ontological discrimination between natural and legal persons. Whether or not the normative theory which informs the permissible and non-permissible actions under any given right (in this case free speech) permits of or justifies a given action is to my mind a related, but logically separate, inquiry.

[94] This normative inertia is to some extent conceded by autopoiesis theorists: see Verschraegen, 'Systems Theory and the Paradox of Human Rights' (n 89) 281 for comments on the limits of sociological systems theory in this regard.
[95] Verschraegen, 'Systems Theory and the Paradox of Human Rights' (n 89) 110.
[96] *Citizens United v Federal Election Commission* 558 US 310 (2010).

There doubtless remain incomplete aspects to the stance herein delineated; however, I hope to have provided in outline the uncertainties and assumptions which persist in the ontology of modern rights theory, the constitutional conception thereof in Ireland and an alternative, better fitted explanation based specifically on Irish legal theory. Despite the undeniably controversial and divisive nature of postmodern philosophy, it is submitted that the arguments formulated within this paper may at least provide some tentative steps towards setting the stage for a more nuanced and conceptual debate of rights theory in this jurisdiction both at an abstract level and in their more specific constitutional contexts.