MEDIA LAW & ETHICS IN THE 21ST CENTURY

PROTECTING FREE EXPRESSION AND CURBING ABUSES

EDITED BY JAMES LEWIS & PAUL CRICK

INTERNATIONAL BAR ASSOCIATION

Media Law and Ethics in the 21st Century

Protecting Free Expression and Curbing Abuses

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James Lewis and Paul Crick

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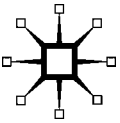

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Contents

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Table of Cases

United Kingdom

European Court of Human Rights

Australia

Canada

New Zealand

United States

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Table of Legislation

United Kingdom

Council of Europe

United Nations

United States

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Mark was made Commander of the Order of the British Empire in recognition of his work in law and the arts and has been conferred with the Freedom of the City of London. He chairs a number of bodies, including the Management Committee of the Programme in Comparative Media Law and Policy, Wolfson College, Oxford University Centre for Socio-Legal Studies, sits on the board as a trustee of Index on Censorship, the Bianca Jagger Human Rights Foundation, the Council of the International Bar Association's Human Rights Institute and is President of the Commonwealth Lawyers Association. Mark also sits on the advisory board of three university schools of media law and/or journalism and regularly appears in print and on radio and television.

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Baroness O'Neill was appointed a member of the Order of the Companions of Honour in the 2014 New Year Honours List.

Alan Rusbridger has been editor of the *Guardian* since 1995. He oversaw the integration of the paper and digital operations, and the *Guardian* is now the third largest English language newspaper website in the world. During his editorship the paper has fought a number of high-profile battles over libel and press freedom, including cases involving Neil Hamilton, Jonathan Aitken, the Police Federation, Trafigura, freedom of information and WikiLeaks. The *Guardian* has recently broken world exclusive stories by publishing NSA documents leaked by Edward Snowden.

Alan has been named editor of the year three times. He and reporter Nick Davies received the UK's Media Society Award for their revelations and coverage of the phone-hacking story in the *Guardian*. Alan was awarded the Goldsmith Career Award for Excellence in Journalism by Harvard's Joan Shorenstein Centre and received the Burton Benjamin Memorial Award for lifetime achievement in the cause of press freedom from the Committee to Protect Journalists.

Pia Sarma is the Editorial Legal Director to Times Newspapers Limited, advising *The Times* and *The Sunday Times* editors and journalists on the law relating to newsgathering methods, and pre-publication issues including libel, privacy, contempt and data protection. She also oversees litigation defended by the newspapers.

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Gavin Millar QC is a founder member of the leading British human rights practice, Doughty Street Chambers. He specialises in defamation, privacy, contempt and reporting restrictions. He has appeared in numerous leading cases. He is the co-author of *Media Law and Human Rights*, 2nd edn (Oxford University Press, 2009). He is a Council of Europe expert on freedom of expression and is the Chair of the Centre for Investigative Journalism in London. In 2004 Gavin represented the media before the House of Lords in *In Re S*, the landmark case which determined how privacy and free speech rights would be balanced by the courts under the Human Rights Act 1998. In 2011 he represented the Telegraph Media Group at the Leveson Inquiry. He was recognised as the Chambers & Partners Privacy/Defamation Silk for 2012, and in 2013 advised the *Guardian* in relation to the disclosures made by whistleblower Edward Snowden.

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Michael Harris is the Director of the Free Speech Bureau. He was Head of Advocacy at Index on Censorship from 2010–2014 and led Index's work in

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Kirsty Hughes was Chief Executive of Index on Censorship between April 2012 and April 2014. Kirsty is a strategic and innovative leader whose career has focused on international current affairs and policy. She has written and published extensively across a range of leading international outlets as a journalist and as a policy analyst and researcher. Her writing ranges from books and policy papers to news analysis and blogs on a number of key international political issues and developments, with an in-depth focus on Europe and South Asia. Kirsty has worked for a range of organisations, including think tanks, NGOs and international organisations, and in senior roles at Chatham House, the Centre for European Policy Studies, Oxfam GB and the European Commission.

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Preface

Mark Stephens

Time was, that we were all libel lawyers. More recently we became libel and privacy lawyers. Now, with the democratisation of the means of publication, we are truly international media lawyers. We deal daily with threats from different legal regimes around the world as our media can now be received electronically virtually anywhere on the planet.

Time was, that media consisted of those that purchased ink by the barrel or electricity by the sub-station. They were nationally based. Few papers travelled between states, and reputations almost never did. In *Kroch v Rossell*,[1] the Court of Appeal set aside orders for leave to serve out of jurisdiction in two libel actions against a French and Belgian newspaper, each of which sold a very small number of copies within the jurisdiction. Although in recent years the case has received attention in relation to the very limited circulation of the foreign newspapers in question, one ground on which it was decided was that the claims had no substance because the claimant had no significant connection with or reputation to protect in this jurisdiction. This is apparent from the judgment of Slesser LJ (with whom Scott LJ agreed):

> I quite agree with Mr Slade that, if there were evidence in a particular case that a person had a reputation in this country to be defamed, or was known here, or traded here, or had professional or social connections, it might be that the circulation of a very few copies might do him very serious or irreparable harm. It is certainly an element to be taken into consideration. The mere fact by itself of a very small circulation, even in a foreign tongue, would not necessarily preclude him from saying that among the people of that nation who read that paper in this country, he would suffer grievously in reputation; but the difficulty with which Mr Slade finds himself confronted is that there is absolutely no evidence from his own client's affidavits, that he has any reputation in, or, indeed, any associations with, this country at all. ...

1 *Kroch v Rossell et Compagnie Société des Personnes à Responsibilité Limitée; Kroch v Societé en Commandite par Actions le Petit Parisien* [1937] 1 All ER 725, CA.

> In this case, there is no evidence whatever that this gentleman, Mr Kroch, knows anybody in this country at all, or has any interest in it.[2]

Kroch v Rossell has been repeatedly followed and held to establish that a libel claim will be regarded as without substance where the claimant has no significant connection with or reputation to protect in this country.

Due to the democratisation of the means of publication, anyone can publish anything, everywhere, simultaneously, and national courts have increasingly been struggling with how to respond to Mark Twain's observation that: 'A lie can travel half way around the world while the truth is putting on its shoes.'

This has been made more complex with the growth of privacy law and the increasing volume of and complex detail in the nature of information provided to journalists (and others) as a foundation for publication.

It is trite to say, but should be noted, that law has always responded to societal changes. In the days of *Kroch v Rossell*, most libel litigants had a national reputation, the newspapers that covered them were nationally based and the disputes were addressed in the litigants' national courts where they had both reputations and connections.

Foreign service broadcasts generated few cases. The advent of both international broadcast via satellite television and more cosmopolitan lifestyles led to an increasing number of international libel claims, with competing jurisdictions for dispute resolution where the claimant had both reputation in and connections to more than one jurisdiction. *Kroch v Rossell* was reviewed in the modern context in *Chadha and Osicom Technologies Ltd v Dow Jones & Co. Inc.*,[3] which was decided between the decisions of the Court of Appeal and House of Lords in *Berezovsky*.[4] In *Chadha*, the Court of Appeal refused to allow service out of jurisdiction where the claimant had not established sufficient connections with and a sufficient reputation to protect in this country. Roch LJ, with whom Otton and Pill LJJ agreed, stated that 'the onus of showing that the plaintiff has sufficient connections with, and a sufficient reputation to protect in this country is on the plaintiff'.[5]

In each of *Kroch*, *Berezovsky* and *Chadha*, the alleged libels were published in foreign newspapers with limited circulations in this jurisdiction, and leave to serve out of jurisdiction was required. However, the rule that a libel claim is not a real and substantial tort unless the claimant can establish a

2 *Ibid.* p. 729.
3 [1999] EMLR 724.
4 *Berezovsky v Forbes Inc. (No. 1)* [1999] EMLR 278, CA, and on appeal to the House of Lords, *Berezovsky v Michaels* [2000] 1 WLR 1004.
5 *Chadha* (n. 3) p. 732.

significant connection with this jurisdiction and a reputation to protect here was also applied in an application to stay proceedings brought by a foreign claimant against an English newspaper. In *Oraro v Observer*,[6] which is discussed by Hirst LJ in the Court of Appeal judgment in *Berezovsky* and by Roch LJ in *Chadha*, Drake J applied the rule to a claim by a Kenyan lawyer against the *Observer* newspaper. In *Berezovsky*, Hirst LJ summarised *Oraro* as follows:[7]

> Finally, Mr Robertson referred to *Oraro v The Observer* (unreported 10 April 1992) where Drake J set aside service under Ord 11 in a libel action by the plaintiff, who was a Kenyan lawyer; the action related to a series of events surrounding the death of a Kenyan citizen, on which there had been a Kenyan judicial commission of inquiry lasting upwards of a year. The plaintiff, as Drake J held, had only a minimal connection with England, leading the judge to conclude that the damage to the plaintiff's reputation occurred substantially in Kenya, and that there was no likelihood that he suffered significant damage in this country. The case was thus very similar to *Kroch v Rossell*, save that of course the main place of publication of the Observer was England not Kenya, where a small number of copies were delivered and confiscated by the authorities, thus, as the judge said, exciting unusual interest in the article. Drake J held that the *forum conveniens* was Kenya and set aside the service of the writ.

In the recent decision of the Supreme Court in *VTB Capital plc v Nutritek International Corp.*,[8] Lord Mance JSC (with whom Lord Neuberger PSC and Lord Wilson JSC agreed) conducted a detailed review of the authorities relating to service out of the jurisdiction and *forum conveniens* in tort cases. In the course of this review, Lord Mance explained the different outcomes in *Kroch* and *Berezovsky* as follows:

> [16] *Kroch v Rossell* [1937] 1 All ER 725 was a case in which a foreigner describing himself as 'a gentlemen of no occupation' claimed that he had been libelled in Le Soir, a publication with a daily circulation in Paris of about a million and a half, and in London of well under 50. He failed to establish any English reputation or connection, save temporary presence here to start the proceedings. Not surprisingly, the Court of Appeal thought

6 10 April 1992.
7 *Berezovsky v Forbes Inc.* (n. 4) at pp. 297–8.
8 [2013] 2 WLR 398.

> that any breach here was technical and of no substance. It described the principles governing permission as requiring an examination of the circumstances to identify where the action should be better tried, in terms which foreshadowed Lord Goff's approach in *The Spiliada*.
>
> [17] *Berezovsky v Michaels* was concerned with an alleged libel of a Russian businessman in a magazine with sales of 785,000 in the USA, 1,900 in England and 13 in Russia. But, in contrast with the position in *Kroch*'s case, the claimant had significant connections with and reputation to protect in England. On the basis that the English tort was a separate one, for the pursuit of which England was prima facie the appropriate forum on the approach taken in *The Albaforth*, the majority in the House upheld the Court of Appeal's conclusion that England was the appropriate forum for its pursuit.

This approach (without the depth of analysis) had been adopted by the Australian High Court in *Dow Jones & Co. Inc. v Gutnik*,[9] a case which effectively opened the way for Internet libel actions. A little-known fact is that the author of the original article took his case under the right of individuals to petition the UN (changing its name in the process to *Alpert v Australia*), and it was settled before a decision could be rendered.

Justice Kirby in the High Court of Australia, whilst agreeing with the majority, described the decision as 'counter-intuitive'. The international differences in free speech protection are certainly not limited to the differences between US and Australian, or indeed Commonwealth law. Justice Kirby also noted in his concurrence in *Gutnik* that the rest of the world 'does not share the American, as others see it, obsession with free speech'. This disparity in views leads to varying levels of protection of speech and varying methods of dealing with speech that is deemed unacceptable. Some countries have very low protection for speech, and many make certain speech a criminal matter. In addition, many repressive governments aggressively prosecute anyone making statements critical of the government. For example, it is still a criminal offence in many African states to speak ill of any government official. These criminal offences were once thought a relic of the colonial oppressors, but seem to have been adopted with alacrity by modern rulers as a similar method of chilling free speech and criticism of government actors.

These societal developments of wider publication, broader reputations and a generally more cosmopolitan approach to world affairs have led

9 [2002] HCA 56.

defence lawyers to consider the laws of many states pre-publication. Cross-border publication and international reputations have led to claimants arbitraging between jurisdictions to seek nationally based vindications, with London being dubbed 'the libel capital of the world' – an epithet first coined by Geoffrey Robertson QC. London's renown for its benign legal regime for claimants led lawyers to encourage foreigners to sue for redress in London.

The challenge for the English judiciary was to provide a global remedy. Increasingly it rose to meet this challenge until confronted by US academic, Dr Rachel Ehrenfeld, who declined to come to the UK to meet her accusers, but rather offered to meet them in her home court in New York, an offer which was declined. This led to President Obama's Speech Act 2012, which precludes US courts enforcing libel awards which do not meet US protections of speech.

Nonetheless, London had become the natural place for everyone to sue for libel, with judgments enforced in most other countries of the world. Anxious for business, ingenious claimant lawyers developed new lines of media business for litigants, such as privacy. Gavin Millar QC gives an exemplary exposition as to how and why this developed and became part of the law.[10] Such privacy claims, as amplified by experienced claimant lawyer, Amber Melville-Brown,[11] demonstrate how cases that might previously have been framed as libel claims are now framed as privacy claims, opening the way to prior restraint (injunction). This remedy is available to those making allegations of breach of privacy, but not to those making libel claims. Max Mosley, former president of the Fédération Internationale de l'Automobile (FIA), brought claims in London framed in privacy and on similar facts in Germany framed in libel, thus cannily affording him a range of remedies.

This book contains important contributions giving perspectives, from judge, claimant, defendant, NGO and even the editor's chair, on the evolution of libel and privacy and how the law seeks to balance one against the other. As can be seen, the balance is an increasingly dynamic one to be struck with ever more care, whilst weighing up an ever greater number of factors.

Following *Gutnik* and its progeny, the limitations on free speech through libel and privacy laws have developed to the point of uneasy equilibrium. The challenge for the future is how nationally based news organisations cope with the threat of claimants emanating from increasingly diverse jurisdictions. Sophisticated claimants no longer arbitrage just for an easy libel or

10 See Chapter 6.
11 See Chapter 5.

privacy win in London. Increasingly, the motives of large corporate and government claimants are about sources and clamping down on leakers.

The ugliness in the newsgathering process has always been the dirty little secret of the media. Until recently, society, i.e. government and specific movements, has been prepared to pay for that secret in return for the media playing its role as the watchdog in society. The media checks the power of organisations by bringing attention to events and actions it believes are unethical or harmful to society. This gives the public the ability to make an informed choice to support a company, government or political party, or its rivals. As both profits and political influence are derived from the public, the media is very powerful. One can see the impact of a media call-out with Egypt's constitution, which was rejected by the people following media campaigns. Conversely, a classic case of poorly targeted media power was the Space Shuttle Challenger disaster in 1986, where the media was perceived as having put pressure on the US administration and NASA to launch the Shuttle as quickly as possible.

The watchdog role of the media in society works well whilst the media is well funded for reliable investigations. The media diaspora resulting from online communications has led us to a position where the media is underfunded – and in many cases rapidly going down the financial plughole. Bloggers and a whole spectrum of online information providers have led to a debate as to what or who constitutes the media.

Reasonable people may differ as to whether they believe, for example, that WikiLeaks is a journalistic endeavour. Why does this matter? Some want journalists and media organisations to have special protections from, for example, revealing sources. The jumping-off point for this was *New York Times Co. v United States*,[12] a landmark decision by the United States Supreme Court on the First Amendment to the US Bill of Rights. The ruling made it possible for the *New York Times* and *Washington Post* to publish the then classified Pentagon Papers without risk of government censorship or punishment. This was all the more remarkable given that the documents had been stolen, were classified and their revelations highly embarrassing to the government of the day.

WikiLeaks is certainly a publisher, by virtue of what it does. To the extent that it edits and contextualises (admittedly to a limited degree), it also carries out further journalistic functions. Many would deny Julian Assange and the workers at WikiLeaks the epithet 'journalists' (although some are members of journalistic associations and professional organisations). However, is there any doubt, had WikiLeaks published the modern-day

12 403 US 713 (1971).

equivalent of Daniel Ellsberg's Pentagon Papers, that it would have been prosecuted in America?

There are a number of reasons for this development:

- With technology, the quantity of information that is leaked has risen significantly. Time was when a journalist was slipped a couple of dog-eared photocopies; now a couple of discs of raw data are not at all unusual. Indeed we now have a new form of journalist – the data journalist.
- Publishers have increasing global reach – from the smallest blogger to the *New York Times* or the BBC.
- Publication is not confined to national legal systems, meaning that the old system of D-Notices or informal censorship – the quiet call from government to editor – can no longer take place effectively.
- Information and gossip travel so much more quickly with the advent of social media.
- Faced with the futility of attempting to regulate publications – particularly on social media – companies and states are increasingly turning to the tracking and criminalising of sources to discourage leaking.

There has been a degree of focus on how the news media obtains its information, whether it is legal or, indeed, in breach of law. Newsgathering has never been pretty. Journalists invariably rely on whistle-blowers or those with an axe to grind – a reason to breach their obligations of confidence, privacy or fidelity – in order to gather information.

It is to encourage the free-flow of information between sources and journalists that society has provided protections against the disclosure of confidential sources. The European Court of Human Rights in *William Goodwin v UK*[13] emphasised the importance of the freedom of expression. The Court restated how it constitutes one of the essential foundations of a democratic society. The protection of journalistic sources was one of the basic conditions of press freedom:

> Without such protection, sources could be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press could be undermined ...

Because of the importance for press freedom in a democracy of protecting journalistic sources and the effect an order of source disclosure would have on the exercise of this freedom, the measure could not be compatible with

13 (1996) 22 EHRR 123.

the European Convention on Human Rights (ECHR) unless it was justified by an overriding requirement in the public interest.

Here, the injunction notice which had been circulated to the press generally had prevented dissemination of the confidential information. Reducing the threat of damage would have three benefits to the company in question: revealing the source; obtaining compensation; and exposing a disloyal employee. They were held to be insufficient in outweighing the public interest in the protection of Mr Goodwin's source.

Recognising the importance of openness, we have freedom of information laws and also protections for whistle-blowers. European courts must now have regard to the Strasbourg case law which insists on a special degree of protection for whistle-blowers under Article 10 of the ECHR.[14]

Both whistle-blowers and confidential sources have been given a special place in society so as to assist the media in acting as a check and watchdog on abuses of power. They clearly have a vital role to play in the flow of information into society at large. However, we are now at a stage where the media and its commentators are trying to feed into these special protections given to suppliers of information an assessment of whether they are 'good' or 'bad' whistle-blowers/sources. This development must be the first warning sign of an erosion of protections for suppliers of information.

There has been an upsurge in media litigation calculated to identify sources. These may be libel claims, which cannot be successfully defended unless the source is disclosed, or confidentiality and privacy claims, which can only be defended by a nascent public interest defence such as applied in a far-sighted decision of Stanley Burnton J in *(1) Long Beach Ltd (2) Denis Christel Sassou Nguesso v Global Witness Ltd.*[15]

This upsurge has had a more international focus than libel because many countries, including the US, have significantly less well-developed protections for sources of information. This is perhaps best exemplified by the US Pulitzer Prize-winning journalist, James Risen, who had his sources exposed in the Wen Ho Lee case, a Los Alamos Chinese-American computer scientist, who was prosecuted for 59 offences of mishandling classified information.

In the summer of 2013, Pvt. Bradley Manning (now known as Chelsea Manning) was jailed for 35 years for leaking and Edward Snowden charged with espionage and the theft of government property. These recent developments have led media lawyers to add to their growing list of considerations the question of ethical journalism and the extent to which news

14 See *Guja v Moldova*, App. No. 14277/04 [2008] ECHR 144 at [74]–[78] and *Heinisch v Germany*, App. No. 28274/08 (2011) 32 BHRC 252 at [62]–[70].
15 [2007] EWHC 1980 (QB).

organisations are obliged to protect their sources. Alan Rusbridger, editor of the *Guardian*, found himself and his lawyers confronted with just this question.

Snowden was a confidential source for six days, the last four of which saw the *Guardian* publish four scoops based on his documents. So for those six days, the *Guardian* treated him as a confidential source. He then chose to go public, revealing his identity in a video published on the *Guardian* website. Media lawyers had, not for the first time, to consider extradition and immigration issues.

On the other side of the planet, William Akel, New Zealand's foremost media lawyer, is also wrestling with just these issues – in a slightly different context – advising Kim Dotcom, the founder of online file-sharing website Megaupload, on the US-led investigation and the US Government's extradition charges against him.

Increasingly, freedom of speech is being curtailed in the name of privacy and confidentiality. Each will come to his or her own conclusion as to where the right balance should be struck, and this balance is debated freely in this volume. There is likely no empirically 'right' answer, as reasonable people can and will differ on where the balance is correctly struck. That said, the balance is struck based on information which is being weighed in the legal scales of competing interests. The real trick against such a dynamic environment and subtly differing legal systems is to ensure that a complete and correct basket of elements is put up for judicial consideration in each case. This volume will assist in considering what should be brought up for such consideration.

PART I
The Legal, Ethical and Editorial Landscape

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1
Privacy: A Judicial Perspective

David Eady

Introduction: the wider context

Towards the end of the 20th century, there developed in most of the 'western' democracies a concern to protect personal privacy and, if possible, by means of enforceable legal remedies. There were a number of factors underlying this general trend, some driven by technological developments in the handling and dissemination of information, others by more elusive social or moral considerations. There were naturally worries about the need to limit state intrusion into the lives of citizens and to safeguard the information nowadays inevitably generated in the course of conducting those lives in a complex and closely regulated society.

Information obviously needs to be gathered for legitimate social purposes, such as the accurate collection of taxes and the production of statistics to facilitate planning for the future. Equally plainly, however, there need to be limits imposed so as to minimise the control of Big Brother and excessive intervention by government, whether national, regional or local. Hence the balancing measures to be found in such legislation as the Data Protection Act 1998 and the Freedom of Information Act 2000 in the United Kingdom. Few would disagree in a modern democracy that a balance needs to be struck between the interests of the individual and those of government, or that the flow of information between them should move in both directions.

More controversial, however, though none the less persistent, has been the gradual recognition that individual privacy sometimes needs to be protected also from the fourth estate. The opposing interests of government and the governed are relatively easy to identify, but the various roles of the media give rise to a more complex set of relationships. In some of its manifestations, the media can wield greater power than government in influencing public opinion. Yet the attitudes of individual citizens towards the print

J. Lewis et al. (eds.), *Media Law and Ethics in the 21st Century*

media, in particular, tend to be more ambivalent: they depend to a large extent upon which of the press's particular functions is being considered at the time.

The privacy debate: who runs it?

The influence of those who communicate through the media, some of them well known and others hardly at all, is undoubted, but in most cases not in any way tempered by the accountability which is supposed to counterbalance the exercise of power by, for example, civil servants and politicians. This is reflected in the old mantra of 'power without responsibility'. The proposition is usually rebutted by newspaper editors or proprietors by reference to market forces. Readers are supposed to reflect any disapproval by transferring allegiance to other media outlets. There is little evidence that this happens on a regular basis, although of course there is the notorious example of the decline in sales of the *Sun* newspaper following its coverage of the Hillsborough disaster in 1989.[1] The persuasive power of the media can be such as to render a genuinely free choice extremely difficult. That is not to suggest that readers or viewers are *en masse* stupid, undiscriminating or unintelligent, but for most of us the time available for scanning and comparing the media treatment of a current news story is strictly limited. Sometimes it will vary between media outlets, and sometimes not. One can only make a critical judgment on the information available. For most consumers, that means the information the media chooses to give them, presented as the media chooses to present it. Readers are sometimes 'groomed' to take a certain view of a particular person or of some topical issue; this would appear to accord with the view expressed by Mr Tony Blair in his evidence before the Leveson Inquiry on 28 May 2012. Hence the difficulty for 'ordinary' readers in making an objective judgement about, for example, Kate and Gerry McCann (whose three-year-old daughter Madeleine was abducted while the family were on holiday in Portugal) or

1 The Hillsborough disaster occurred on 15 April 1989 at the Hillsborough Stadium in Sheffield, England, during the FA Cup semi-final match between Liverpool and Nottingham Forest football clubs. Dangerous overcrowding occurred outside the ground, resulting in an order for an exit gate to be opened. The ensuing influx of supporters caused crushing, resulting in the deaths of 96 people and injuries to 766 others. Four days after the disaster, the *Sun*, a British red-top tabloid newspaper, used 'THE TRUTH' as the front page headline, followed by three sub-headlines: 'Some fans picked pockets of victims', 'Some fans urinated on the brave cops' and 'Some fans beat up PC giving kiss of life'. The newspaper was boycotted by most newsagents in Liverpool and many readers cancelled orders and refused to buy it from newsagents. Despite the allegations being proved to be false and the paper, and its editor, making a number of apologies over the years, sales of the *Sun* remain poor on Merseyside and a boycott is still practised.

Christopher Jefferies (arrested by police who falsely suspected him of the murder of Joanna Yeates in Bristol) following the barrage of propaganda generated in the tabloids (which were eventually brought to account in highly publicised litigation).

The power of the media means that it is often seen by the public as a friend, even though that friendship may sometimes be abused, and we are accordingly reluctant to see restrictions imposed upon it. Similarly, the power of the press means that politicians have long been reluctant to incur the displeasure of proprietors and editors – unless and until the tables are turned as they were, quite exceptionally, in the case of News International in 2011. On 17 May 2012, Mr Kelvin Mackenzie offered on the BBC's *Question Time* a convenient summary of the position as he saw it: 'Blair arse-licked the Murdoch press. Cameron saw that and said "We should do the same." Then the music stopped.' Then some politicians began to see possible mileage in a degree of media regulation. That may prove, however, to be no more than a temporary blip.

One might perhaps have expected that people would see the advantages of protecting individuals against the media, just as they readily understand the need, at least in general terms, to shield their fellow citizens against the state. When it comes to the media, however, the lines are drawn far less clearly. So much depends on how the arguments are presented – in the media. The coverage of the debate on privacy versus freedom of speech may have been a little one-sided. It has so often been explained by reference to its 'watchdog' role (i.e. as a 'watchdog' on behalf of the people). Thus, the media is generally presented as being 'on guard', representing the people, against a rather ill-defined class known as 'the rich and powerful'.

It is obvious that not all rich people are powerful – indeed very few are in modern Britain. Nor are powerful people always rich. The terms are linked, however, in the case of the privacy debate because it is important to convey to the general public that privacy is not about protecting 'ordinary' individuals at all, but about sheltering people who are either to be envied ('rich') or guarded against (as 'powerful'). It thus becomes possible for the media to convey the message that the protection of privacy is a device for covering up misconduct. As it was put by one journalist during the Leveson Inquiry, 'privacy is for paedo[phile]s'.[2] This has been a constant theme down the years whenever the privacy debate returns to the public agenda. It is the standard line of most media proprietors.

It is necessary, on the other hand, to allow for a degree of cynicism. I have occasionally recalled what seemed to me, with hindsight, to have been

2 Evidence of Paul McMullan, 29 November 2011, available at www.levesoninquiry.org.uk/evidence/.

the ultimate tongue in cheek. I observed Robert Maxwell giving his evidence to the Calcutt Committee on Privacy and Related Matters during the course of its evidence gathering in 1989–1990, when he began in his most oracular mode: 'Mr Chairman, if you introduce a law of privacy, many a rogue will go undetected'. Of course, the reason why Maxwell went undetected for so many years was nothing to do with a law of privacy. Nor would it have assisted him had there been one. It is probably true to say, on the other hand, that the law of libel did have something to do with it. Although estimates vary, it seems that there were at his demise not far short of a hundred 'gagging writs' outstanding.[3] It would no doubt be unfair to suggest that another factor was drowsiness on the part of the 'watchdogs' or a reluctance to focus their attention too close to home by cleansing their own Augean kennels.

In the intervening 20 years or so, Robert Maxwell's argument against privacy has been aired on countless occasions, but it is now possible to test it by the proof of the pudding. Over the years during which the 'controversial' law of privacy has been developed, since the Human Rights Act 1998 came into effect, no convincing example has ever been produced where it has prevented the revelation of criminality or wrongdoing.

Indeed, the Maxwell argument was further undermined by the exceptional circumstances prevailing in 2011. Phone hacking came to be recognised generally as an example of the media (or rather 'rogue elements') being caught out in wrongdoing themselves.[4] Both politicians and the public began to ask '*Quis custodiet* … ?'[5] But, even then, the public disenchantment came about not so much because of the 'celebrities' who were being hacked (they being 'rich' and/or 'powerful'), but rather because of those who were dismissively referred to as 'ordinary victims'.

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3 For the most part, the writs were issued for the primary purpose of 'gagging' and thus not pursued to trial, but it is noteworthy, in one case that did go to trial, how the jury seemed to take to him. He was even awarded punitive damages: *Maxwell v Pressdram* [1987] 1 WLR 298. Jurors tended to respond favourably to any claimant who could present himself as a bit of a 'card'.

4 Lord Grabiner QC recently concluded that ' … if we accede to the media's cry that judicial intervention in aid of an amorphous "right to be let alone" smacks of censorship, we risk giving birth to a culture of transparency where, among our moral custodians, would be those responsible for the phone-hacking scandal': Lionel Cohen Memorial Lecture, Jerusalem, 16 April 2012.

5 An opinion poll commissioned by the Institute for Public Policy Research, and published in May 2012, revealed that more than 60% of the public now favour statutory regulation of the press. Of those in favour, 94% thought that it should be 'fairly strict' or 'strict'.

So why does privacy matter?

These developments meant that at last it became possible to recognise that there was another side to the argument and to address it in public. What then was the true rationale for seeking to protect personal privacy and, correspondingly, to regulate the scope of media intrusion? Among the common law jurisdictions, the legal frameworks for doing so, either contemplated or already adopted, vary considerably.[6] Yet there seems to have been a common underlying objective. At its most concise, the purpose is to protect what Lord Hoffmann described in the leading case of *Campbell v MGN Ltd*[7] as 'an aspect of human autonomy and dignity'. Another Law Lord who had attempted to encapsulate the mischief of privacy infringement was Lord Mustill in *R v Broadcasting Standards Commission, ex parte BBC*:[8]

> To my mind the privacy of a human being denotes at the same time the personal 'space' in which the individual is free to be itself, and also the carapace, or shell, or umbrella, or whatever other metaphor is preferred, which protects that space from intrusion. An infringement of privacy is an affront to the personality, which is damaged both by the violation and by the demonstration that the personal space is not inviolate.

Attempts have been made from time to time to acknowledge the importance of such considerations internationally. In 1966, for example, came Article 17(1) of the International Covenant on Civil and Political Rights:

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6 It so happened that Australia and New Zealand were quick off the mark with judicial development of personal privacy protection: see, respectively, *Australia Broadcasting Corp. v Lenah Game Meats Pty Ltd* [2001] 185 ALR 1 and *Hosking v Runting* [2005] 1 NZLR 1. Thereafter much scholarly research was carried out and reports produced on the feasibility of statutory provision by the Australian Law Reform Commission (2008), the New South Wales Law Reform Commission (2009) and the Victoria Law Reform Commission (2010). In September 2011, there came the *Issues Paper: A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy* from the Department of the Prime Minister and Cabinet. In February 2012 Mr Ray Finkelstein QC published the *Report of the Independent Inquiry into Media and Media Regulation*. There have also been various reports on the subject from the New Zealand Law Commission from October 2006 to July 2011: Stages 1 to 4. For a recent decision in Canada, see *Jones v Tsige*, 2012 ONCA 32, 18 January 2012. It was acknowledged for the first time that the common law of Ontario recognises a free-standing tort of intruding upon a person's seclusion. On 28 March 2012, a Privacy Bill 2012 was introduced in Ireland. Although it was opposed by the Minister of Justice, this was 'principally on the ground that it is premature'.

7 [2004] 2 AC 457 at [50].

8 [2001] QB 885 at [48].

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.[9]

In our jurisdiction, the mainspring for the recent developments has been the jurisprudence accumulating round Article 8 of the European Convention on Human Rights and Fundamental Freedoms ('the Convention'). The crucial issue is how the values enshrined in Article 8 interrelate with those protected under Article 10 and how they are balanced against them. It is convenient to set them out:[10]

> **Article 8**
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

> **Article 10**
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law, and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

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The need for a balancing exercise: are some rights more equal than others?

In its Resolution 1165 of 1998, the Council of Europe focused on the interplay between Articles 8 and 10:

> … The Assembly reaffirms the importance of every person's right to privacy, and of the right to freedom of expression, as fundamental to a democratic society. These rights are neither absolute nor in any hierarchical order, since they are of equal value.[11]

It was also made clear in the same Resolution that remedies for infringement of Article 8 rights should be enforceable directly, not only against the state, but also, horizontally, against individuals or corporations – which obviously would include the mass media. A key development in English law, recognised in *Campbell v MGN Ltd*,[12] was that it was no longer necessary for a claimant to establish a pre-existing relationship with the defendant, as had always been required in the more restrictive law relating to breach of confidence. This opened up the possibility of privacy claims against the tabloids. As Lord Hoffmann observed in *Campbell*:[13]

> … I can see no logical ground for saying that a person should have less protection against a private individual than he would have against the state for the publication of personal information for which there is no justification.

Since Parliament constrains the courts in the United Kingdom to take into account Strasbourg jurisprudence, in giving effect to the Convention, it is beyond doubt that judges cannot proceed on the basis of according automatic priority to one Convention right over another. All will depend on the facts of the particular case. It is probably more accurate to acknowledge privacy as a 'value', to be taken into account, rather than as representing a 'right' in itself. Judges are now required to strike a balance between these competing values according to the individual circumstances before them.

Despite this, however, a good deal of time has been taken up by media representatives arguing before Parliamentary committees about the significance, or otherwise, of s. 12(4) of the Human Rights Act 1998, which includes the following words:

> The court must have particular regard to the importance of the Convention right to freedom of expression …

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11 Reproduced with permission of the Council of Europe.
12 *Campbell* (n. 7) at [14], *per* Lord Nicholls.
13 *Ibid*. at [50].

They sought to maintain that the legislature had laid down a requirement that *priority* should be given to Article 10 over Article 8 whenever the courts were called upon to adjudicate upon the grant of an injunction affecting freedom of speech. It was argued that judges were failing to carry out Parliament's wishes and that the law therefore needed to be 'recalibrated' to bring them into line.[14]

A number of points need to be made. First, that is not what Parliament said. The provision, introduced by Jack Straw MP when Home Secretary, certainly refers to the need for judges to pay particular regard to freedom of speech, but there was nothing new in this. It did *not* go on to suggest that it should be given automatic priority. Secondly, any such requirement would have been inconsistent with Resolution 1165 and the jurisprudence giving effect to it. Thirdly, it is by no means clear how automatic priority *could* be given in any particular situation. No examples are ever given of the difference it would make. Which case(s) would have been decided differently? Everything turns on the unique set of facts confronting the court and any competing rights need to be evaluated in that specific context. Last, but not least, the House of Lords made it quite clear that courts in our jurisdiction should *not* give automatic precedence to Article 10 (or any other).[15]

Why protect celebrities?

Because of the nature of the 'tabloid' press in the United Kingdom, and its interest in the cult of 'celebrity', it was natural that the field of play on which the early privacy cases should be worked out was that of 'personal relationships'. This has been perceived in Strasbourg as a central aspect of Article 8 jurisprudence. An early decision was *X v Iceland*.[16] It was there recognised that the right to respect for private life includes 'the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one's own personality'.

The breadth of the concept was highlighted in the recent case of *S v United Kingdom*:[17]

14 Evidence to the Parliamentary Select Committee on Culture, Media and Sport, 23 April 2009.
15 *In re S (A Child)* [2005] 1 AC 593 at [17], where *Campbell* was followed and further explained.
16 App. No. 6825/74 (1976) 5 DR 86.
17 (2009) 48 EHRR 50 at [66].

> The Court recalls that the concept of 'private life' is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can therefore embrace multiple aspects of the person's physical and social identity. Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8. Beyond a person's name, his or her private and family life may include other means of personal identification and of linking to a family. Information about the person's health is an important element of private life. The Court furthermore considers that an individual's ethnic identity must be regarded as another such element. Article 8 protects in addition a right to personal development, and the right to establish and develop relationships with other human beings and the outside world. The concept of private life moreover includes elements relating to a person's right to their image.

There is no warrant in English law, or it seems in Strasbourg either, for seeking to define certain categories of people so as to deprive them, as a class, of any aspect of their Convention rights, including that of respect for private life. Specifically, there is no basis for drawing an analogy with the approach of the US Supreme Court in *New York Times v Sullivan*[18] and, thereby, seeking to limit a person's right to respect for his or her private life simply because the court is inclined to attach a label such as 'public figure', 'celebrity' or 'role model'. As was observed in the Report of the Supreme Court Procedure Committee on Defamation (the Neill Committee) in 1991:[19]

> ... it would be quite contrary to the tradition of our common law that citizens are not divided into different classes. What matters is the subject-matter of the publication and how it is treated, rather than who happens to be the subject of the allegations.

A similar approach has been taken by the European Court of Human Rights. For example, in *Von Hannover v Germany (No. 1)*,[20] the domestic courts had rejected Princess Caroline von Hannover's complaint about photographs taken of her in the street because she was 'a public figure *par excellence*' or a

18 376 US 254 (1964).
19 At XIX.3.
20 (2005) 40 EHRR 1. In her later case, the facts were different but the ultimate test was similar: *Von Hannover v Germany (No. 2)*, App. Nos 40660/08, 60641/08, 7 February 2012 at [118]–[120].

Person der Zeitgeschichte. The European Court of Human Rights concluded that the publication of such pictures could only be justified by reference to a 'debate of general interest to society'. So too, in *Leempoel v Belgium*,[21] it was declared that:

> … publications whose sole aim is to satisfy the curiosity of a certain public as to the details of the private life of a person, whatever their fame, shall not be regarded as contributing to a debate of general interest to society.

This would appear to be entirely consistent with the recent Strasbourg pronouncement in *Mosley v United Kingdom*:[22]

> … there is a distinction to be drawn between facts – even if controversial – capable of contributing to a debate of general public interest in a democratic society, and making tawdry allegations about an individual's private life … In respect of the former, the pre-eminent role of the press in a democracy and its duty to act as a 'public watchdog' are important considerations in favour of a narrow construction of any limitations of freedom of expression. However, different considerations apply to press reports concentrating on sensational and, at times, lurid news, intended to titillate and entertain, which are aimed at satisfying the curiosity of a particular readership regarding aspects of a person's strictly private life … Such reporting does not attract the robust protection of Article 10 afforded to the press. As a consequence, in such cases, freedom of expression requires a more narrow interpretation … While confirming the Article 10 right of members of the public to have access to a wide range of publications covering a variety of fields, the court stresses that in assessing the context of a particular publication whether there is a public interest which justifies an interference with the right to respect for private life, the focus must be on whether the publication is in the interest of the public and not whether the public might be interested in reading it.

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21 App. No. 64772/01, 9 November 2006.

22 (2011) 53 EHRR 30, at [114]. Some commentators are not optimistic as to our tabloids' capacity to adapt to these distinctions. Lord Grabiner QC has observed, 'This seeming inability of journalists to differentiate between matters which have no modicum of public interest, and those which contribute to debates of genuine public importance, only serves to underscore the difficulties associated with self-regulation, and the corresponding importance of the courts.' Lionel Cohen Memorial Lecture, cited above.

Thus, it can be readily understood that what matters, in respect of any proposed intrusion into private life, is not *who* is the subject of it but whether the subject-matter would be of legitimate public interest.

Nonetheless, it has frequently been argued, by journalists and others, that celebrities or public figures are entitled to less protection for their private information, or even none at all, merely because they have to a greater or lesser extent been in the public eye. Of course, as the *Campbell* case itself illustrates, there may be circumstances in which a person has chosen to go public and to invite attention to a particular part of his or her life or activities which would, otherwise, ordinarily attract protection from intrusion. Where this has happened, it is legitimate thereafter to prevent the public from being misled by anything on which that person has chosen to make such a public pronouncement. The classic example often given, albeit by now a cliché, is that of the politician who speaks out on personal moral standards while conducting his or her own life in breach of them.[23] It is generally legitimate for hypocrisy to be exposed. Even so, however, it was recognised by the Court of Appeal in *McKennitt v Ash*[24] that:

> If information is my private property, it is for me to decide how much of it should be published.

No doctrine of 'waiver' has been recognised such that, if a well-known person speaks about some aspect of personal life, for example in an interview, thereafter the press may have a free rein to explore that zone of private life more generally.[25]

The 'new methodology': where does public interest come in?

The approach taken in English law in recent years has been guided by the 'new methodology' identified in *In re S (A Child)*.[26] Consistent with the Council of Europe's Resolution 1165, it was there recognised that a judge must approach such questions on a case-by-case basis and not accord *auto-*

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23 These issues were discussed in *Trimingham v Associated Newspapers Ltd* [2012] EWHC 1296 (QB).

24 [2008] QB 73. The proprietary approach is interesting and perhaps a little old-fashioned. The point was expressed differently, for example, by Anderson J in *Hosking v Runting* (n. 6) at [264]: 'The ordinary person wishes to exercise choice in respect of the incident and degree of social isolation or interaction. Because the existence of such a choice is a fundamental human aspiration it is recognised as a human value.' *Cf.* Schreiber, 'Privacy: proprietary or human right? An Israeli law perspective' (2009) 1 Intellectual Property Quarterly 99.

25 See e.g. the discussion in Tugendhat and Christie, *The Law of Privacy and the Media*, 2nd edn (Oxford: OUP, 2011) at paras 12.76 *et seq.* and *A v B* [2005] EMLR 851 at [22]–[23].

26 [2005] 1 AC 593.

matic priority to any one Convention right over another. The two-stage process, which has generally been followed thereafter, involves first asking whether the information sought to be protected is such that the particular claimant has, or continues to have, a 'reasonable expectation of privacy'[27] in respect of it. If not, that will be the end of the matter. If so, then the next question will be to ask whether in the particular circumstances then prevailing, including the person's own conduct or public pronouncements, there is some countervailing public interest that would permit or require that someone else's Convention right (normally under Article 10) should be accorded priority.

It is in this context that Dame Mary Arden has highlighted[28] a distinction between the Article 10 rights of individual citizens and those of the media:

> Media freedom is not the same kind of right as an individual's freedom of expression, which is ultimately about self-realisation. The Strasbourg court has in fact reached a very sensible rationale for media freedom. Media freedom is about the freedom to contribute to the debate in a democratic society. Media freedom is therefore not limited to seeking the truth, nor is it always limited by the ability to do harm. Rather it is about the communication needs of the audience.

It will be recalled that the Strasbourg Court in *Mosley v United Kingdom* has recently affirmed that reporting 'intended to titillate and entertain' does not attract the robust protection of Article 10 that is normally accorded to the press in its 'public watchdog' role. That is why, in most of the cases that came before the courts in the early years following *In re S*, public interest arguments based on Article 10 were hardly ever raised[29] and very few cases reached the trial stage.

It is perhaps worth stating that 'public interest' cuts both ways. There can be a public interest in the protection of confidence or privacy.[30] Thus, when the weighing up process takes place, it is not simply a private interest being contrasted with a public interest in freedom of communication. It

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27 The expression used by Lord Nicholls in *Campbell v MGN Ltd* (n. 7) at [21].

28 *Media Intrusion and Human Rights: Striking the Balance*, Lecture to the Cardiff Law School, 15 March 2012, at [58].

29 There are, nevertheless, a few instances where 'public interest' arguments have been advanced with at least some measure of success: see e.g. *Lord Browne of Madingley v Associated Newspapers Ltd* [2008] QB 103; *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB); *Spelman v Express Newspapers* [2012] EWHC 239 (QB); *Trimingham v Associated Newspapers Ltd* (n. 23).

30 See e.g. *HRH Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57.

will involve a comparison between two competing public interests and a determination as to which should prevail in the circumstances. The right to criticise the behaviour of another person, whether a 'celebrity' or an 'ordinary citizen', is no doubt important, in general terms, but not unlimited. The question will arise whether that right justifies intrusion into an area (such as that of sexual or other personal relationships or financial affairs) where there remains a *prima facie* entitlement to respect for the private 'space' of the individuals concerned. Only a relatively low value will be attached to freedom of expression where the aim is merely to gossip, titillate or entertain. On the other hand, if there has been wrongdoing, even in private premises, of a criminal or seriously anti-social nature (such as child abuse or tax evasion), priority is likely to be given to the public interest in its exposure. Generally, such intrusion is unlikely to be justified where the position is simply that a journalist disapproves of an unconventional lifestyle (or claims to do so).[31]

'False privacy'

The nature of the mischief to which this jurisprudence has been directed is that of intrusion rather than inaccuracy (by contrast with the tort of defamation). Thus, one of the controversial developments has been the grant of remedies in respect of intrusive allegations which may (or may not) be true and which may (or may not) be damaging of reputation. Some people strongly take the view that it is wrong, as a matter of principle, to afford legal remedies in respect of true allegations.[32] This line of argument, however, misses the point. Once it is acknowledged by law that all individual citizens are entitled to an element of private 'space', it must follow that truth will not in itself be a defence when it is invaded.[33]

On the other hand, it was argued in the early days after the House of Lords decision in *Campbell v MGN Ltd*[34] that if an allegation happened to be false, there should be no remedy available for infringement of privacy. There was no such concept as 'false privacy' and a claimant should be confined, therefore, to recovering damages (if at all) for libel or malicious falsehood. That argument was soon scotched, however, in the Court of

31 *Mosley v United Kingdom* (n. 22).
32 See e.g. D Zimmerman, 'Requiem for a Heavyweight: A Farewell to Warren & Brandeis's Privacy Tort' (1983) 68 Cornell Law Review 291. Similar points were made by bloggers giving evidence to the Joint Committee on Privacy and Injunctions.
33 This is not to say that truth will always be an irrelevance. It may sometimes be necessary to test the accuracy of a journalist's claims in the context of a public interest justification: see e.g. *Mosley v. News Group Newspapers Ltd* [2008] EMLR 20.
34 *Campbell* (n. 7).

Appeal's decision in *McKennitt v Ash*,[35] where it was recognised that false allegations about a person's private life could be just as intrusive and/or damaging as those which turn out to be true. If a complainant has to go through a lengthy article about (say) his sex life or state of health, and spell out publicly which allegations are true and which are false, the protection of the law would become quite illusory.

Prior restraint

The remedies available for the newly recognised cause of action are no different from those granted in respect of longer established forms of claim, but what has caused the greatest controversy in media and political circles is the willingness of the courts to grant interim injunctive relief. This looms particularly large in the context of privacy since, as Professor Gavin Phillipson has argued,[36] unless this form of relief is available, the right to privacy would not be enforceable in any practical sense. At the successful conclusion of a libel action, whether by agreement or otherwise, a large award of damages is at least capable of restoring the claimant's reputation and achieving a measure of vindication (especially if accompanied by a genuine apology). That is certainly not the position, on the other hand, where there is an infringement of personal privacy. Reputation can be restored: privacy, once intruded upon publicly, cannot.

Professor Phillipson argued that there is a need for member states to provide remedies that are actually effective when Convention rights have been shown to be infringed, or there is evidence available that they are about to be.[37] Sometimes an effective remedy can *only* be provided by preventing the wrong occurring in the first place. It will serve no useful purpose merely to award compensation afterwards. In its Report, the Joint Committee on Privacy and Injunctions (see further below) sought to mitigate this hiatus in the law by recommending legislation, if necessary, to ensure that a judge could award punitive damages. Whether this is desirable, as a matter of principle, is a subject for argument but, in any event, such a remedy would be no more capable of providing *restitutio in integrum* than a merely compensatory award. That is the reason why Mr Mosley argued in Strasbourg that there should be an enforceable right of prior notification – so as to enable the subject of a proposed article to apply to the court for an injunction. Although this was rejected by the court, one of the

35 [2008] QB 73.
36 Gavin Phillipson, 'Max Mosley goes to Strasbourg: Article 8, Claimant Notification and Interim Injunctions' (2009) 1(1) JML 73.
37 See e.g. *I v Finland*, App. No. 20511/03, 17 July 2008.

principal factors taken into account was that evidence had been produced that, in this jurisdiction, it is in fact normal practice for journalists to give their proposed 'victims' prior notification, albeit not one that is legally enforceable.

Be that as it may, it is clear that the availability of prior restraint is fundamentally important for complainants in privacy cases. That is why the new cause of action has been so controversial. Prior restraint is still anathema to journalists.

Why is the test for granting an interim injunction in a privacy case different?

Although in theory it was always possible to obtain an interim injunction to prevent the publication of defamatory allegations, in practice it happened very rarely. This was primarily because of what became known as the rule in *Bonnard v Perryman*.[38] Although never the subject of detailed consideration by the House of Lords, or so far by the Supreme Court, it has long held sway and has been reaffirmed by the Court of Appeal since the enactment of the Human Rights Act 1998.[39] The rule acknowledged the high importance attached to freedom of speech and gave effect, in that context, to the traditional abhorrence of 'previous restraint'. This found its most famous expression in *Blackstone's Commentaries* in 1765:[40]

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints on publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.

To similar effect, the First Amendment was incorporated into the US Constitution in 1789 stating that:

> Congress shall make no law … abridging the freedom of the press.

There would not have been any question of the court granting an injunction to restrain a defamatory publication until the enactment of the

38 [1891] 2 Ch 269.
39 *Greene v Associated Newspapers Ltd* [2005] QB 972.
40 Book IV, pp. 151–2.

Common Law Procedure Act in 1854, which rendered the equitable remedy of injunctive relief readily available in the common law courts. Soon thereafter, however, judges recognised that such a remedy was generally going to be inappropriate if it would involve 'previous restraint' upon the exercise of freedom of speech – whether on the part of journalists or anyone else.[41] The principle, as endorsed by the Court of Appeal in *Bonnard v Perryman*, had the practical effect that an injunction could only be contemplated if the relevant plaintiff was in a position to show, even prior to or shortly after the commencement of libel proceedings, that a defence of justification (or truth) was bound to fail. It would rarely be possible to surmount this hurdle.

It was recognised in other cases that the principle applied equally to any other defence, such as fair comment or privilege.[42] All it required was for someone to depose that there was an intention, if the action proceeded, to plead the relevant defence. The court would not enquire into its merits at that stage but would simply refuse injunctive relief. Sometimes, the promised defence never materialised,[43] but that risk was regarded as a price worth paying. The principle has been restated regularly in modern times[44] and this meant that until recently a journalist had little to worry about, whether the story planned was an example of serious investigative journalism or merely an exposé of someone's sexual activities.

It will be noted that the rule in *Bonnard v Perryman* now sits rather uncomfortably with the approach laid down in *In re S (A Child)* in the context of personal privacy. The doctrine did not involve any 'intense focus' upon the facts of the particular case: indeed, it rather eschewed it. Nor did it involve any careful balancing of one Convention right against another. It is difficult to construe it as anything other than the enthusiastic grant of automatic priority to freedom of speech. An applicant's interest in protecting his or her reputation, even though now widely acknowledged to be an aspect of the values protected by Article 8,[45] would definitely have taken a back seat.

Nor does the rule in *Bonnard*, on its face, fit well into Parliament's prescription for the grant of interlocutory injunctions contained in s. 12(3) of the Human Rights Act 1998, as interpreted in *Cream Holdings Ltd v*

41 *Coulson v Coulson* (1887) 3 TLR 846.
42 *Harakas v Baltic Mercantile & Shipping Exchange Ltd* [1982] 1 WLR 958.
43 As in *Maxwell v Pressdram* [1987] 1 WLR 298, 301–3.
44 See e.g. *Fraser v Evans* [1969] 1 QB 349.
45 *Lindon v France* (2008) 46 EHRR 35; *Radio France v France* (2005) 40 EHRR 29; *Pfeifer v Austria* (2009) 48 EHRR 8; *Re Guardian News & Media Ltd* [2010] UKSC 1 at [41]. It will be noted how reputation and privacy were also closely linked in Article 17(1) of the International Covenant on Civil and Political Rights (above).

Banerjee.[46] If it were to be applied in the libel context, it would mean that the court would indeed, contrary to its long tradition, have to investigate the details of the complaint in its attempt to assess what would be the 'likely' outcome at trial. If taken literally, s. 12(3) would have had this effect, but it was generally assumed that Parliament never intended to make it *easier* to obtain a libel injunction – by abolishing the rule in *Bonnard v Perryman*. Sure enough, that seemed to be confirmed in *Greene v Associated Newspapers Ltd*.[47] It is thus probably fair to say that the legislature, by the enactment of s. 12(3), was not setting a universal, but rather a minimum, set of criteria to be fulfilled before a judge could impose an injunction restricting freedom of speech.

By contrast, however, when the courts are called upon to apply the two-stage test laid down by the House of Lords in the case of *In re S (A Child)*, it has always been s. 12(3) that had to be applied. The distinction between the test for granting an injunction on privacy grounds and the *Bonnard v Perryman* rule, applying in defamation claims, gave rise to conceptual difficulties. Both are concerned with balancing freedom of speech against rights protected under Article 8 yet are based, for largely historical reasons, on different priorities. The distinction looms largest in circumstances where it is not immediately clear whether the true purpose of the complaint is about preventing intrusion or about protecting reputation. In the *Mosley* case, it was always clear that the issue was intrusion into private life, since there was no claim regarding reputation. On the other hand, where a sportsman is seeking to prevent publicity about his sex life, it is necessary to investigate whether the true motive might actually be about safeguarding a public image in order, perhaps, to maintain lucrative sponsorship deals.[48] If the judge decides that the claim is primarily aimed at the protection of reputation then, as the law stands at the moment, it will be necessary to apply the stricter *Bonnard v Perryman* test.

It was this lower hurdle in privacy claims which seemed to provoke louder and louder protests, culminating in the campaign of 2010–2011. This led to the appointment of the Joint Committee on Privacy and Injunctions, reporting on 27 March 2012,[49] and also to the formation of the small committee set up under the Master of the Rolls which resulted in the provision of 'Practice Guidance', coming into effect on 1 August 2011. This gathered together rules of practice, which had gradually been developing, with a view to ensuring that as much protection could be given as possible

46 [2005] 1 AC 253.
47 *Greene* (n. 39).
48 See e.g. the discussion in *Terry v Persons Unknown* [2010] EWHC 119 (QB).
49 HL Paper 273, HC 1443.

to respondents and third parties whose Article 10 rights were likely to be affected.[50] It does nothing, however, to reconcile the clash of legal tests as between *Bonnard v Perryman* and s. 12(3) of the Human Rights Act 1998. At some point this will need to be resolved.

Judges versus Parliament?

The arguments raised by the campaigners were not always consistent or well focused. One of the more persistent was the assertion made by various journalists (and by some politicians) that the law of privacy was 'judge made' and thus 'undemocratic'. It had, of course, been expressly acknowledged in Parliament, several years before the Human Rights Act 1998 came into effect on 2 October 2000, that judges were going to be *required* to develop the law of confidence and personal privacy by carrying out a balancing exercise, taking due account of both Article 8 and Article 10.[51] Eventually, this was recognised by the Joint Committee in its Report and, moreover, it was suggested that this process of gradual judicial development, familiar in all common law jurisdictions, should continue.

From time to time, ministers had suggested that judges might need to be reined in by the introduction of a statutory 'steer' or 'nudge', with a view to giving greater emphasis, in some unspecified way, to freedom of expression. Yet the Report concluded that there was no need for any further legislative intervention going beyond the provisions already laid down in the Human Rights Act 1998. It broadly favoured the status quo, which had been neatly summarised by the then Master of the Rolls, two years earlier, in a lecture on 28 April 2010 to the boys of Eton College:

> Parliament has enacted the general policy, and has left the application of that policy to particular cases in the hands of the judiciary.

It has sometimes been said, before the Joint Committee and elsewhere, that any law of privacy should be put on a more specific statutory footing to give it 'greater democratic legitimacy'. That is a hazardous path to go down. We do not have a system of graduated laws, some more 'legitimate' than others. We live in a common law framework that has served us well, and many others around the globe, for quite a long time. We do not have a system

50 'Practice Guidance: Interim Non-Disclosure Orders'. See also earlier decisions such as *X v Persons Unknown* [2007] HRLR 4; *WER v REW* [2009] EMLR 304; *TUV v Persons Unknown* [2010] EMLR 19.

51 See e.g. the express acknowledgment of this by Lord Irvine LC when the Bill was before the House of Lords on 24 November 1997: HL Deb col. 772.

where the laws to be enforced derive exclusively from statute. The rule of law requires that all established laws currently in force should be acknowledged and enforceable. Laws can become obsolete and, even if not repealed, may nevertheless be given a quietus by law enforcers. This may be true equally of statutory and common law rules. (Take, for example, the Treason Act of 1351 or the common law form of contempt known as 'scandalising'.)[52] But any law which is currently valid should be implemented. It would be impractical, and in any event undesirable as a matter of public policy, to try and break down rules or principles into categories of greater or lesser authority.

It is fair to say that the judicial process put into effect following *In re S (A Child)*, although resembling traditional common law practice very closely, did represent something of a new departure – as was recognised by the phrase 'new methodology'. It was this factor, despite having been clearly sanctioned by Parliament, which contributed to the mythology of a 'judge-made' law. It was exacerbated by reason of the need for UK judges to have regard, in implementing the 'new methodology', to Strasbourg jurisprudence. It has become fashionable of late in certain political circles to decry the judges in Strasbourg as alien or unsuited to their task.[53] By contrast, one recent commentator with direct experience of the court in operation[54] has seen their influence as altogether more benign. She expressed the view that:

> … the Strasbourg court has made an enormous contribution in the field of freedom of expression by the press. It has worked out detailed principles of responsible journalism. The Strasbourg judges have brought to their jurisprudence their wide knowledge, and their experience from many parts of Europe. As an international court the Strasbourg court has the perspective not only of a developed Western democracy but also of a new democracy which has seen the problems for society where the press is controlled by the government. The rulings of the Strasbourg court in this area display great sensitivity and

52 Its demise is discussed in Arlidge, Eady & Smith, *Contempt*, 4th edn (London: Sweet & Maxwell, 2011) at 5–204 *et seq*. There was recently a short-lived attempt to revive this doctrine in Northern Ireland after a Westminster politician published some unguarded remarks in a memoir reflecting on a Northern Ireland judge's integrity. In the end, it was all sorted out. Subsequently, this form of contempt (though effectively extinct in England and Wales for more than a century) was finally abolished by s. 33 of the Crime and Courts Act 2013.

53 As happened, for example, on the BBC *Newsnight* programme on 19 April 2012.

54 Dame Mary Arden, *Media Intrusion and Human Rights: Striking the Balance* (n. 28) at [81] and [84].

> wisdom … We should assume that the Strasbourg court will continue to develop its case law in this area wisely, as it has done in the past.

If these words were to penetrate as far as the newspaper offices in Wapping, or even as far as the Home Office, there would no doubt be much spluttering in the dovecotes. Yet her thesis would at least merit a reasoned response. The fact remains that English and Scottish judges will continue, for the time being, to look to Strasbourg for guidance in carrying out their new task – as the legislature has directed them.

Judges had long been called upon, in certain well-recognised situations, to exercise a discretion (for example, concerning the upbringing or residence of a child). What was unfamiliar about the 'new methodology' was that they were being required to make personal evaluations (rather than merely exercising a discretion) after first applying 'an intense focus' to the facts of the particular case and, thereafter, what was called the 'ultimate balancing exercise'. It would be quite possible for one judge to come to a different conclusion, on those particular facts, from that of another. Moreover, if the right questions had been asked in applying the methodology, it would not necessarily be right to describe one conclusion as 'correct' and the other 'wrong'.[55] It is obvious that the methodology called for such decisions to be made upon the basis of individual judgment rather than purely the application of established precedents. It thus became inevitable that this process would result in opportunities, whenever the outcome was unpopular with elements of the press, for criticism to be directed at judges personally rather than, for example, to the existence of the law itself. This tendency was naturally exacerbated by the corresponding reluctance on the part of appellate tribunals to overturn individual decisions (provided always that the judge in question had followed the application of the prescribed tests).[56]

Unpredictable outcomes: are they just inevitable?

It was also inherent in this system that journalists and in-house lawyers would have difficulty in predicting the outcome in the case of a challenge to any particular story they were planning to publish. This uncertainty can be to some extent diminished, as time goes by and judges' reasons are

55 *Murray v Express Newspapers Plc* [2009] Ch 481.

56 This approach corresponds to the reluctance on the part of the Strasbourg Court to interfere with domestic courts where they have addressed the specified criteria when balancing Articles 8 and 10. As Dame Mary Arden put it, 'There has been a quantum leap here in what we call subsidiarity.' (n. 28) at [57].

explained in a series of reported judgments, but each new case will still present its own unique features to be weighed and assessed. There is bound to be some uncertainty where any individual is called upon to carry out a balancing exercise between two or more competing Convention rights and the concomitant public interest objectives. As it happens, this has also been shown to be the case in the context of *Reynolds* privilege. In the first case in 11 years in which a trial judge had upheld a *Reynolds* defence, it was overturned by a unanimous Court of Appeal and then restored in a unanimous Supreme Court – nearly three years after the original hearing.[57]

Unpredictability is in itself undesirable. In *Goodwin v United Kingdom*[58] it was stated by the European Court of Human Rights that:

> … the relevant national law must be formulated with sufficient precision to enable the persons concerned – if need be with appropriate legal advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

The question may be legitimately raised whether we have complied with that statement of principle in relation to the development of our law of privacy or, for that matter, in relation to *Reynolds* privilege. It is a problem inherent, however, in the 'new methodology' of balancing competing rights according to an individual judgment made on the unique facts of the case in hand.

The problem is naturally intensified when a court is asked to grant an interim injunction in accordance with s. 12(3). At that stage, the evidence will almost always be inchoate and incomplete. The judge will have to make an assessment of whether the claimant is 'likely' to succeed at a hypothetical trial in obtaining a permanent injunction of similar effect and extent on whatever evidence is presented at the time and often, in the first instance, without knowing what the proposed defendant has to say about the matter. All this would appear to make for greater uncertainty. Yet, whenever one tries to think of ways of achieving predictability, it soon emerges that there is no effective alternative.

The question was often asked, in the course of the Parliamentary hearings on privacy and injunctions, whether it would be useful to introduce legislation with the object of at least bringing greater clarity into this area of law. On the other hand, no one ever suggested how this could be achieved. An attempt had been made to draft a statutory tort, more than 20

57 *Flood v Times Newspapers Ltd* [2012] UKSC 11.
58 (1996) 22 EHRR 123, 140. See also *Purdy* [2009] UKHL 45 at [40]–[41].

years before, in the course of the deliberations of the Calcutt Committee.[59] But such an exercise would inevitably have to take into account the very same issues; in particular, whether there was a 'reasonable expectation of privacy' and whether the circumstances would give rise to 'a public interest' justifying intrusion upon the individual's Article 8 rights. It would thus immediately become apparent that this would involve a balancing exercise to be carried out by reference to a particular factual scenario. Almost every case that comes along presents new and unforeseen features. It is thus difficult to envisage a set of circumstances in which a statutory intervention would make the outcome any easier to predict.

Yet the problems of uncertainty may not be quite as bad as at first appears. It has always been good practice to let the respondent(s) know as soon as possible that an injunction has been sought and to afford an opportunity of answering the claimant's allegations. It is a practice embodied in s. 12 itself and now also reflected in the Master of the Rolls' 'Practice Guidance'. The court is not to entertain an application for an interim injunction unless satisfied that all practicable steps have been taken to notify the respondent or, alternatively, that it is necessary, for some compelling reason, not to do so.[60] If an injunction is granted on an urgent basis, without the respondent(s) having had an opportunity to respond, there will usually be a 'return date' appointed, in the near future, to enable him or her to put the other side of the case. In practice, what will happen more often than not is that the respondent will choose *not* to appear or not to oppose the continuation of the injunction (which is what happened, for example, in the *Ryan Giggs* case[61]). If, unusually, an answer is provided, the judge will at least be able to make a more informed assessment as to the likely outcome at a future trial.

Spycatcher seems to be alive and in moderate good health

More difficult to manage can be the question of protecting the Article 10 rights of any third parties who may be affected by the grant of an injunction. In a typical privacy case, the primary target for an injunction will be an acquaintance of the claimant – perhaps a former lover, friend or employee – who is threatening directly or indirectly to sell a salacious story for tabloid consumption. Or it may be someone who has stolen or obtained

59 Cm 1102, 1990.
60 s. 12(2).
61 *CTB v News Group Newspapers Ltd (No. 3)* [2011] EWHC 1326 (QB); *(No. 4)* [2011] EWHC 1334 (QB); and *(No. 5)* [2011] EWHC 3099 (QB); *Giggs v News Group Newspapers Ltd* [2012] EWHC 431 (QB).

unauthorised access to a computer or mobile phone. Sometimes, it may be necessary to go beyond this person and obtain an injunction against a particular media group, as a defendant in the litigation, where there is reason to suppose that the individual is already negotiating with a particular journalist. Obviously, where this is the case, the media defendant is entitled to be notified of any application and to have a chance to respond. On other occasions, however, it may be necessary to serve one or more newspaper publishers, even though not themselves to be made defendants to the proceedings. The objective here is to make sure that they know of the injunction and, correspondingly, of the risks of publishing the categories of confidential information identified in the injunction (normally by way of a 'confidential schedule').

In this latter case, once notified of an injunction, the publisher in question may be inhibited from revealing the information because of the known risk (actually quite slight) of proceedings for criminal contempt. This is derived from what is called the *Spycatcher* doctrine, named after Peter Wright's memoir about the security service which was, some 25 years ago, the subject of the litigation in which the doctrine was fully explained and applied.[62] It is founded on the simple proposition that someone who publishes confidential information, knowing that an injunction has been granted for the purpose of preventing its infringement pending the outcome at trial, may be criminally liable for thus defeating the court's objective. That would not be an instance of civil contempt because the third parties involved would not *ex hypothesi* be parties to the litigation and thus not directly bound by the order. Liability would arise, as a matter of criminal contempt, because the person concerned chose to publish the material with knowledge that a court order (against the relevant defendants) had been granted with that purpose in mind.[63]

This distinction is of some topical interest because, in the Report of the Joint Committee, the suggestion was canvassed that the Attorney General might become more active in taking proceedings for civil contempt. In general, the appropriate person to initiate proceedings for civil contempt would be the party who obtained the injunction. It would have been for his

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62 *Attorney General v Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109; *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191; *Attorney General v Newspaper Publishing Plc* [1988] Ch 333.

63 For a brief discussion of the distinction between civil and criminal contempt in this context, see e.g. the words of Lord Oliver in *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191, 217–18. The full reach of the *Spycatcher* doctrine is subject to some uncertainty at the moment as a result of the Court of Appeal's decision in *Hutcheson v Popdog Ltd* [2012] 1 WLR 782. In particular, it is unclear to what extent the law of criminal contempt would apply to any third party, not personally bound by it, who sought to publish confidential information the subject of a *permanent* injunction.

or her benefit that it was granted and, mostly, it will be a purely private matter. The role of the Law Officers, by contrast, is primarily to protect the public interest rather than that of private individuals. Yet it has been recognised, in certain limited circumstances, that they might have a role in taking proceedings for contempt where the party to the litigation is, for some reason, under an inhibition about enforcing by process of contempt. An example was to be found in the litigation to which the coalminers' strike of 1984–85 gave rise. The position was explained by Megarry V-C in *Clarke v Chadburn*:[64]

> It is perhaps not generally realised that where the party who has obtained an order from the court is content that it should not be performed, the court, generally speaking, has no interest in interfering so as to enforce what the litigant does not want enforced. The order is made so as to assist the litigant in obtaining his rights, and he may consult his own interests in deciding whether or not to enforce it. If he decides not to, there may in some cases be a public element involved, and the Attorney General will judge whether the public interest requires him to intervene in order to enforce the order. If neither the litigant nor the Attorney General seeks to enforce the order, the court will act of its own volition in punishing the contempt only in exceptional cases of clear contempts …
>
> There seems to me to be a clear case for considering whether there should be some relaxation by the courts of their present restraint on themselves in enforcing their orders in cases where these are being openly flouted and the administration of justice is being brought into disrespect. For the courts to say, as they often say, that 'Orders of the court must be obeyed', becomes idle if there are daily instances of open and notorious disobedience remaining unpunished. If the courts became more ready to enforce orders of their own motion, no doubt consideration should be given to the machinery by which this might be done. But I have to apply the law as it stands.

On the other hand, the Joint Committee in its Report seems to have had in mind circumstances where the infringements of the court's orders were not by parties to the litigation, but rather by third parties with knowledge of the order in question. Since that would represent an example of *criminal* contempt, the Attorney General, while still needing to take into account

64 [1985] 1 WLR 78. Se also *R v IRC, ex parte Kingston Smith* [1996] STC 1210.

the public interest in maintaining the rule of law, would not necessarily be subject to the same inhibitions as in a case of purely civil contempt – where only a party had disobeyed the order and where only private interests were at stake.

Bloggers and the 'Wild West'

What was exercising the Joint Committee, it appears, was the experience during the spring of 2011 when there was a widespread determination in certain circles to try to render a number of court orders effectively unenforceable. Some of what went on had little thought or planning behind it, but a significant element in the campaign might well have been to prevent judges effectively enforcing the law and thus, it was hoped, bring about a change in the law (or perhaps a disinclination on the part of judges to enforce it) not by the democratic process, in the legislature, but by simply challenging the rule of law.

It is necessary to take into account nowadays the existence of the Internet and the facilities available for social network communications.[65] These present opportunities for anyone (journalist or otherwise) who gets wind of a privacy application to spread the word in the hope of not being identified as being responsible for undermining a court order. Once this has taken place, the next step would be to go back to the court and say that the injunction has ceased any longer to be effective, or to serve any useful purpose, and that it should accordingly be discharged.

As is well known, the fact that information is already genuinely within the public domain may be a very good reason for not granting an injunction in the first place. The court will generally not commit itself to futile gestures.[66] Different policy considerations come into play, however, once an order has been granted. The rule of law may need to be enforced or protected. For these reasons, the courts will not necessarily accept the argument that widespread disobedience or defiance must lead automatically to discharge of the order. It may well be, if a newspaper is making such an application, that this will in itself demonstrate that there is money yet to be made out of further revelations. Where that is so, the continuation of the injunction could obviously still serve some purpose in preventing further intrusion. Sometimes what is revealed on the Internet is the identity of the

65 Discussed by A Marsoof, 'Online social networking and the right to privacy: the conflicting rights of privacy and expression' (2011) 19(2) Int. Journal of Law & Information Technology 110. See also the New Zealand Law Commission's recent issues paper, 'The News Media meets "New Media"', NZLC IP 27.

66 See e.g. *Mosley v News Group Newspapers Ltd* [2008] EWHC 687 (QB) and *Re Stedman, sub nom East Sussex County Council, Re* [2009] 2 FLR 852.

claimant. That is often, however, only half the story. The injunction may remain effective in preventing the primary defendant from publishing details about his or her former relationship. In such a case, the judge would clearly have a duty to continue the injunction for the purpose of preventing such intrusion.[67]

One possible view is that the instantaneous and widespread nature of modern electronic communications is such that any law of privacy is effectively unenforceable. It was interesting, therefore, to see the reaction of the Joint Committee in its Report in March 2012. The emphasis there appeared to be on pursuing enforceability *despite* the reach of the Internet and to explore ways of supporting court orders with the assistance of ISPs or others with access to the relevant websites or postings. Furthermore, it is surely uncontroversial that judges should not simply give up the ghost and refuse to grant injunctions, or to continue them, in circumstances where the statutory criteria of s. 12(3) have been fulfilled. It is for judges to attempt to comply with Parliament's intentions, as embodied in the legislation, unless and until the law has been abrogated by democratic means. It is not for judges to decide that the law has become unenforceable.

Although the Attorney General in his evidence to the Joint Committee emphasised how unusual it would be for the Law Officers to intervene to enforce court orders in cases of civil contempt, he has nonetheless elsewhere made clear that in his view the Web should not be regarded as a 'Wild West' where ordinary laws do not apply. In his Kalisher lecture on 12 October 2010, 'Contempt of Court: Why it still matters', he observed 'that the same editorial rigour which generally does and should continue to apply to the traditional printed press should also apply to online publication'. That may be an understandable aspiration, but we all know that the Internet presents quite new problems of enforceability; for example, because of the speed and potential reach of publication, the anonymity of many who blog and the uncertainties as to jurisdiction in respect of international communications. Steps can be taken to prevent search engines from tracking certain images or information and to remove them from storage, but this will take time. It will depend also partly on technological development and a degree of international co-operation.[68]

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67 See e.g. *CTB v News Group Newspapers Ltd (No. 4)* (n. 61) and *Goodwin v News Group Newspapers Ltd (No. 3)* [2011] EWHC 1437 (QB).

68 Some of these problems were addressed in *AMP v Persons Unknown* [2011] EWHC 3454 (TCC).

'Super-injunctions': much ado about (virtually) nothing

It is necessary to say a few words (but no more) on the concept of 'super-injunctions'. The term was probably coined in the press towards the end of 2009. It seems to have been used originally to connote an interim injunction restraining the publication of confidential information which included within its terms a bar on mentioning the very fact that it had been granted. It came to be used indiscriminately to refer to orders for anonymity[69] or indeed any court order at all. I propose to refer to it in the original usage. There was nothing new about such an order[70] in the context of claims to protect confidential information. It was inevitable perhaps that there would be a greater focus on the need (or otherwise) for such restrictions once the law of personal privacy began to develop after *Campbell v MGN Ltd*, but the case which actually gave rise to the media furore was nothing to do with that; this was the so-called 'Trafigura case'.[71] It concerned a 'leaked' confidential document commissioned from experts for potential use in litigation (and apparently subject to litigation privilege). It had been obtained at an early stage, was never disclosed to the other side and, by the time it had been leaked to the newspaper, it was out of date. It would have been difficult to contend for a genuine public interest in its publication but, as it happens, the grant of the injunction was not even opposed. Despite this, it was further 'leaked' to a Member of Parliament who revealed its confidential (and out of date) contents under the cloak of Parliamentary privilege.

The widespread campaign that followed generated a number of misunderstandings. It was suggested, for example, that the claimants or the judge had sought to restrain by injunction either what was said in Parliament, or media reports of it, or both. This was not true. There had been some debate in solicitors' correspondence as to a lack of clarity about privilege attaching to reports under the Parliamentary Papers Act 1840.[72] That is all. This lack of clarity was referred to also by the Master of the Rolls before issuing his 'Practice Guidance' in 2011. But it is all rather beside the point when it comes to addressing the merits of 'super-injunctions'.

They were granted very rarely even in the context of privacy cases. Sometimes, a claimant will have become aware that personal information is about to be published in a newspaper, or is being blackmailed by someone

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69 It has long been recognised that it may sometimes be necessary to grant anonymity to a party seeking to protect confidential information. Otherwise, the injunction may be rendered ineffective: see e.g. *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42.

70 One example is to be found in the original order of Hoffmann J in *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1, 5.

71 *RJW and SJW v Guardian News & Media Ltd* [2009] EWHC 2540 (QB).

72 See the Government's Consultation Paper, *Parliamentary Privilege* (Cm 8318) at [70]–[77].

who has come into possession of such material. If an injunction is to be effective in such circumstances, it may be necessary to prevent the suspected culprit from passing on the information before the order is served. If that happens, he or she may well be able to argue that the injunction was served too late and thus escape any potential liability for contempt of court. That is why it may be necessary to prevent his being 'tipped off' before service.[73] Another example of such an order occurred in the case of the couple, David and Judith Tebbutt, who were being held captive by Somali pirates in 2011. An injunction against the media was granted to protect their lives and wellbeing at a time when negotiations for their release had reached a critical stage. Had the information about the injunction been leaked on to the floor of the Commons, or anywhere else, their lives would have been placed in jeopardy. But the grant of this form of order was always exceptional.[74] That is why the media furore was in reality a storm in a teacup. It was a classic example of the phenomenon to which I referred at the outset: a media-driven campaign whereby the British public is fed a story, month after month, and has available no information by which to evaluate it or make up their own minds. It simply became the received wisdom that judges were throwing 'super-injunctions' around like confetti. (Another successful campaign was that on the subject of 'libel tourism'. Everyone came quickly to accept that there were innumerable 'foreigners' (obviously 'rich and powerful' and with no connection to this country) queuing up to bring unmeritorious libel actions in London. Yet the judges who would have had to deal with such a rush never encountered them.)[75]

No secrets on the floor of the House: politicians versus judges?

Nevertheless, the Trafigura case set something of a trend. For a time, it became quite fashionable to defy court orders on the floor of the House of Commons or in the House of Lords. Certain politicians felt it appropriate,

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73 See the standard form of order contained in CPR, PD 25 at para 20, the 'Practice Guidance' at [21] and the cases there cited: *RST v UVW* [2009] EWHC 2448 (QB); *ASG v GSA* [2009] EWCA Civ 1574 at [3]; *DFT v TFD* [2010] EWHC 2335 (QB) at [7].

74 When statistics became available, it emerged that there were only two that had been granted since March 2010, both on a temporary basis. Even *Ntuli v Donald* [2011] 1 WLR 294 is not a good example, since the injunction would have been set aside at first instance and was only kept in place to enable the claimant to argue for it in the Court of Appeal: 'I will not, however, take any step that will have the effect of pre-empting the parties' opportunities to obtain different orders on appeal.'

75 For a robust debunking of this mythology, see Lord Hoffmann's Ebsworth Memorial Lecture of 2 February 2010, 'Libel Tourism': libel-tourism-lordhoffmann-speech-01-02-2010.doc. It is also discussed in P Tweed, *Privacy and Libel Law: The Clash with Press Freedom* (Bloomsbury Professional, 2012).

and no doubt in accordance with their own views of 'the public interest', to announce confidential details which judges had directed should not be revealed. As is well known, there is privilege attaching to what is said in Parliament (deriving from the Bill of Rights, 1689) and no action could be taken in respect of such behaviour (save, potentially, by way of internal disciplinary procedures). It would be a pity to see this hard-won right trivialised or devalued. Yet one commentator shortly afterwards stated that he was glad that 'Parliamentary supremacy' had been vindicated. This is muddled thinking on a rather important constitutional issue. We claim to value the rule of law and seek to proclaim its merits around the world. It is a concept which depends in part upon the recognition of a proper relationship between the courts and Parliament. The way to deal with court orders that are thought to be inappropriate is by way of appeal, where grounds are available, or for the law to be changed through the democratic processes in Parliament.

It is no part of established constitutional law that individual parliamentarians can choose to challenge court orders of their own choice simply because they are in Parliament. To say that there is privilege for what is said on the floor of the House is quite different from saying that individual members of the legislature should feel free to say whatever they like or that they have the right to undermine court orders. What matters is the supremacy of Parliament as a law-making body, not the supremacy of individual parliamentarians, however distinguished.

In general terms, of course, it would be a criminal contempt at common law to seek to defy what a court has ordered, for so long as it stands. There is no general defence of 'public interest' for disobeying or undermining such orders. As Lord Morris observed in *Attorney General v Times Newspapers Ltd*:[76]

> In an ordered community courts are established for the pacific settlement of disputes and for the maintenance of law and order. In the general interests of the community it is imperative that the authority of the courts should not be imperilled and that recourse to them should not be subject to unjustifiable interference. When such unjustifiable interference is suppressed it is not because those charged with the responsibilities of administering justice are concerned for their own dignity; it is because the very structure of ordered life is at risk if the recognised courts of the land are so flouted that their authority wanes and is supplanted. But as the purpose and existence of courts of law is to preserve freedom within the law for all well disposed members of the

76 [1974] AC 273 at 302A–E.

> community, it is manifest that the courts must never impose any limitations upon free speech or free discussion or free criticism beyond those which are absolutely necessary. When therefore a court has to consider the propriety of some conduct or speech or writing, decision will often depend upon whether one aspect of the public interest definitely outweighs another aspect of the public interest. Certain aspects of the public interest will be relevant in deciding and assessing whether there has been contempt of court. But this does not mean that if some conduct ought to be stigmatised as being contempt of court it could receive absolution and be regarded as legitimate because it had been inspired by a desire to bring about a relief of some distress that was a matter of public sympathy and concern. There can be no such thing as a justifiable contempt of court.

There is thus a conceptual problem in contemplating circumstances in which the public interest is supposed to require the rule of law to be undermined. It makes no sense.

It is elementary that nothing can be done outside Parliament in respect of defiance by politicians, but that is a point about enforcement not principle. It is not satisfactory to say merely that politicians should show restraint on the floor of the House of Commons and only breach court orders in a case of genuine public interest. For the reasons given by Lord Morris, there is no public interest in breaching court orders. It is simply inimical to the rule of law. There is obviously no constitutional principle which sets parliamentarians up as an appellate tribunal with the power to overturn court orders – even in cases where it is perceived (by them) to be 'in the public interest' to do so.

Since we have no written constitution, the basic rules are easily overlooked. It is salutary sometimes, however, to acknowledge the doctrine of separation of powers. In a mature democracy, the separate elements within the constitution should ideally be working in harness – recognising their respective functions and limits. It is undesirable for them even to be perceived or portrayed as being in conflict. If parliamentarians act as one-person tribunals of appeal, without troubling to read the evidence in the case, or to hear both sides, it leads to confusion. Judges have always been required to interpret and apply the law, whether embodied in common law principles or in statute. Now, at Parliament's behest, they are also carrying out what appears to be a new function of evaluating competing Convention rights and seeking to resolve those conflicts. Their legitimacy in carrying out that task derives from Parliament. As it was expressed by the Master of the Rolls in his Eton lecture in 2010, Parliament left it to the

judges to 'implement the policy'. It is thus essential for the vindication of the supremacy of Parliament, as a law-making body, that judges are able to make orders that are effective and that they should continue to do so. It is clearly not for politicians, whether elected or unelected, or indeed for any other individual citizen, to hinder or render ineffective the judicial implementation of Parliament's will. That is the antithesis of Parliamentary supremacy.

We are now at a stage where it is beyond argument that a law of privacy has been sanctioned by the legislature, and interpreted by the House of Lords, and the judges will therefore be obliged to continue to do their best conscientiously to carry it into effect through the 'new methodology'. That will require from time to time that they should grant injunctions against the media. If politicians decide at some point that this is wrong, then it is for them to change the law by the usual legislative procedures.

Any effect on investigative journalism?

The principle has thus been established that our law is supposed now to protect private information. Furthermore, it is difficult to see how that position could effectively be reversed in the light of our international obligations. Also, were we to attempt to do so, we should undoubtedly be moving against the general trend in modern societies around the globe. Importantly, however, it should certainly be noted that no evidence has emerged so far that the development of this law, and its associated procedures, has caused any significant inhibition on serious journalism.

It is of some interest to note the conclusion reached in a report published in 2009 by the Reuters Institute for the Study of Journalism, based in Oxford, and written by two experienced journalists, Stephen Whittle and Glenda Cooper. They found that the only 'chilling effect' caused by the recent developments has been upon those in the business of 'kiss and tell'. In due course, that also seems to have been the conclusion reached in 2012 by the Joint Committee on Privacy and Injunctions: certainly no evidence was cited to the contrary.

As was made clear at Strasbourg in *Mosley v United Kingdom*, while courts should strive carefully to protect and maintain the 'watchdog' role of the media, no such robust protection should be afforded to the promulgation of 'sensational and, at times, lurid news, intended to titillate and entertain'. This represents the current status quo and that is what the Joint Parliamentary Committee seemed to favour. While there seems to be no appetite at the moment for a legislative change of direction, it may emerge as a result of the Leveson Inquiry that some new regulatory framework will need to be put in place (statutory or otherwise). If so, it would have to take

account of privacy and to reflect this clear distinction drawn by the Strasbourg judges.

An uncertain future

Finally, however, we need to recognise that all these issues may become academic as we are overtaken by advancing technology and social change. It could be that the debate will soon come to be seen as of purely historical interest. The leading article in *The Spectator* for 19 May 2012 represents an increasingly held view. It is not so much that Leveson will bring about a new settlement in the relationship between the media and their readership. Rather, it may come to represent 'the dying gasp of an industry which will not exist, in anything like its current form, by the end of the next decade'. We shall soon live in an overwhelmingly online world where law enforcement, whether in relation to privacy, libel or contempt, is likely to depend largely on the extent to which it is possible, if at all, to reach international agreement. In the meantime, the 'Wild West' is likely to prove interesting and exciting – and not just for the 'rich and powerful'.

2

The Rights of Journalism and the Needs of Audiences*

Onora O'Neill

Introduction

In Tom Stoppard's play *Night and Day*,[1] one character remarks to another: 'I'm with you on the free press. It's the newspapers I can't stand.' Discussions of the proper configuration of press freedom have not moved very far from this impasse in the 30 years since the play was published. This is evident in the fruitless reiteration of rival claims about supposed speech rights, both by those who think the media – at least the print media – should be self-regulating, and that anything else will lead to censorship, and by those who think that the media – including the print media – should be restricted or regulated in various ways.

Outspoken defenders of media self-regulation insist that any other form of regulation will endanger press freedom, even lead to censorship. At present those who oppose regulation are particularly keen to counter any claims that the right to privacy might receive greater legal or regulatory protection at the expense of media freedom. For example, Paul Dacre, Editor of the *Daily Mail*, has claimed robustly, but with little argument, that those who seek to use regulation to secure greater respect for privacy are enemies of press freedom, in thrall to an establishment 'whose hatred of mass selling papers has transmogrified into a hatred of self-regulation itself'.[2] Others insist that we need to respect rights to privacy even if this means that we have to remove some of the privileges of self-regulation[3] from the media, as

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* This chapter is based on a lecture presented as the Reuters Memorial Lecture 2011, organised by the Reuters Institute for the Study of Journalism, given on 21 November 2011 at St Anne's College, Oxford.

1 Tom Stoppard, *Night and Day* (London: Faber and Faber, 1978).

2 *The Times*, 13 October 2011, based on his evidence to the Leveson Inquiry given the previous day.

3 The claim that these are privileges, and often abused is not new. In his 1806 essay 'Liberty of the Press', Tom Paine complained that: 'Nothing is more common with

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they have been removed from other institutions and professions across the last 30 years: a change enthusiastically supported by most of the media. The debate is confused by the fact that both sides claim to champion 'independent regulation', by which they mean entirely different things.

In my view, unargued appeals to the (supposed) rights of a free press, or (supposed) rights to privacy, or other (supposed) speech rights get us precisely nowhere. They do not show whether adequate self-regulation is possible, or desirable, or whether it is better than other forms of regulation, and they do not show which forms of regulation are compatible with which configurations of press freedom. Nor do they show how the claims of privacy and press freedom are to be dealt with in cases of conflict. If we want a convincing view of press freedom, assertions about rights are not enough.

Yet current debates about speech rights, or supposed speech rights, seldom go beyond appeals to (supposed) rights. Unsurprisingly, they provide a poor basis for thinking about press freedom. The various rights appealed to are indeterminate, and reasons for giving more weight to one rather than another are not articulated. In these inconclusive debates, speech rights are variously taken to include freedom of speech, freedom of expression and freedom of the press, flanked by more specific speech rights such as freedom of information, rights to know (occasionally exotic rights not to know), data protection and privacy rights, and rights intended to protect specific sorts of speech, such as freedom of worship, artistic freedom or academic freedom. However, this comforting rhetoric of rights does not show which of these supposed speech rights matters most, let alone which matters most in specific situations.

Disputes about the proper boundary between rights to freedom of expression and to privacy illustrate the difficulty of resolving these issues by appealing to the rights proclaimed as human rights. Both rights are proclaimed both in the 1948 Universal Declaration of Human Rights (UDHR) (Articles 12 and 19) and in the 1950 European Convention on Human Rights (ECHR) (Articles 8 and 10). Article 8 of the ECHR assigns everyone a 'right to respect for his private and family life, his home and his correspondence', while Article 10 assigns everyone a 'right to freedom of expression [that] shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'. Like other Convention rights, rights to privacy and to freedom of expression are both hedged with numerous restrictions, listed in the second parts of the two Articles. The Convention does *not* assert

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printers, especially of newspapers, than the continual cry of the Liberty of the Press, as if because they are printers they are to have more privileges than other people.'

unconditional rights, and it does *not* rank the rights it asserts. Nor do other proclamations and declarations of rights. Comments about the need to 'balance' these rights against one another point to a genuine problem, but do nothing to resolve it. Moreover it cannot be resolved by invoking the authority of declarations, conventions or constitutions:[4] conflicts between the claims of freedom of expression and of privacy cannot be settled just by asserting that the former right trumps the latter, or vice versa. Arguments from authority cannot vindicate the authority they invoke.

Any defensible account of press freedom, or of other speech rights, needs rather to draw on the political and philosophical arguments that lie behind the landmark proclamations and declarations. Our reasons for taking certain speech rights seriously is not, after all, that they have been declared or proclaimed, or that they are beloved by parts of the human rights movement, or even that they have been incorporated into numerous constitutions or into UK law. Our reasons are rather that certain speech rights are backed by probing and well-explored arguments that have been thought about, criticised and honed in long debates about the nature and needs of liberal and democratic societies. We are more likely to find adequate arguments for one or another conception of press freedom, and of other speech rights, if we do not ignore those arguments.

Three arguments for press freedom

Broadly speaking there are three reputable lines of argument for press freedom in the liberal tradition. Rather inconveniently, they seek to justify quite different configurations of press freedom.

Press freedom and truth seeking

The oldest of these arguments is that freedom of the press allows us to discover and test truth, and to detect and reject falsehood. This cornerstone of liberal thought was central to Milton's argument for freedom of the press. In *Aereopagitica* he claims that:

> … though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?[5]

4 There are parallel limitations with appeals to the First Amendment to the US Constitution.

5 John Milton, *Aereopagitica* (1644). Milton is centrally concerned with truth and error: 'If it come to prohibiting, there is not aught more likely to be prohibited than truth

The rhetoric soars, but unfortunately Milton's claim is not broad enough and not convincing. His argument is too narrow because it is silent about speech that does not aim at truth. It is unconvincing because freedom may be necessary but is rarely sufficient for speech that aims at truth. Truth is quite often put to the worse in 'free and open' encounters. This is why we restrict and regulate freedom of speech with some care when we aim at truth. As Bernard Williams acidly reminded us in *Truth and Truthfulness*:

> ... in institutions dedicated to finding out the truth, such as universities, research institutes, and courts of law, speech is not at all unregulated.[6]

The one conclusion that we can safely take from Milton's argument is that censorship – 'prohibiting and licensing' – damages the search for truth: but refraining from censorship is only a necessary and not a sufficient condition for truth seeking.

Free and open encounters are not enough for speech that makes truth claims, including media speech that makes truth claims. Reporting news or football results is different from publishing horoscopes or short stories, and needs different disciplines (we do not demand checking of horoscopes, or expect editorial corrections when their predictions are wildly incorrect). But those who make or query truth claims need to take account of evidence and argument, of standards of honesty and competence. Here the open question is not *whether* media truth claims need to respect epistemic and ethical standards, but *how* respect for those standards is to be secured.

John Stuart Mill joined Milton in arguing that knowledge of truth improves when ideas are not merely uncensored but freely contested. In *On Liberty*,[7] Mill maintained that:

> ... the peculiar evil of silencing the expression of an opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

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itself; whose first appearance to our eyes, bleared and dimmed with prejudice and custom, is more unsightly and unplausible than many errors ...' and '[S]ince therefore the knowledge and survey of vice is in this world so necessary to the constituting of human virtue, and the scanning of error to the confirmation of truth, how can we more safely, and with less danger, scout into the regions of sin and falsity than by reading all manner of tractates and hearing all manner of reason. And this is the benefit which may be had of books promiscuously read.'

6 Bernard Williams, *Truth and Truthfulness* (Princeton University Press, 2004).

7 JS Mill, *On Liberty* (1859).

Once again the argument against censorship or silencing of truth claims is convincing, but Mill too does not provide an argument for any determinate form of press freedom.

'Collisions with error' only help distinguish truth from error if they use appropriate epistemic and ethical standards. Later appeals to the image of a 'marketplace of ideas' fail in the same way. Like 'free and open encounters' and 'collisions with error', untrammeled exchanges in that famous market place are as likely to lead to a Babel of voices as to comprehension, let alone discovery of truth, or reliable ways of distinguishing true from false claims. Like other market places, a market place of ideas works when, but only when, the right sorts of disciplines and standards are respected.

Press freedom and self-expression

Elsewhere Mill went much further than Milton. He looked beyond speech that aims to communicate truth claims to the whole gamut of self-expression. Acts of self-expression need not be noticed by or directed to any audience, need not be intelligible, and need not be intended to communicate; they need not make truth claims.

In *On Liberty*, Mill approaches self-expression by way of his famous harm principle, which asserts that:

> ... the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of any of their number, is self-protection.

He points out that much individual speech is merely self-regarding (today we would say merely self-affecting). Since speech that does not affect others will not harm them, issues of self-protection will not arise in this case. So if we accept the harm principle, we should neither prevent nor constrain self-regarding speech.

Mill concluded that individuals should enjoy extensive rights to self-expression, which he saw as including:

> ... absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological.

He then claims that this extensive freedom is 'practically inseparable' from 'liberty of expressing and publishing opinions'.

Unfortunately Mill's defence of individuals' rights to self-expression is unhelpful for an account of press freedom. If individuals have rights to publish opinions that will not harm others, they will need media that enable them to do so. But the last thing they need is media with parallel rights of self-expression, since such media would have no obligation to

publish individuals' opinions, so would be entitled to constrain and undermine individuals' rights to self-expression.

The phrase 'freedom of expression' is central both to Mill's account of individual rights to self-expression and to contemporary claims about press freedom. But this, I suspect, is just an unfortunate convergence of terminology. Powerful institutions, including media organisations, are not in the business of self-expression, and should not go into that business. An argument that speech should be free because it generally does not affect, a fortiori cannot harm, others cannot stretch to cover the speech of governments or large corporations, of News International or the BBC.

Yet the phrase 'freedom of expression' has become the established term for media freedoms in the last 60 years, since its use in the UDHR and in the ECHR. I believe it has gained this prominence for reasons that have almost nothing to do with self-expression or rights of self-expression. 'Freedom of expression' is a useful phrase for two quite different reasons. In the first place, it covers the gamut of communication media (broadcasting, print, film, the Internet), whereas some of the classical speech rights focus on specific media of communication (freedom of speech; freedom to publish; in German the deliciously named *Federfreiheit* (lit. freedom of the pen i.e. the quill or feather)). Secondly, the phrase 'freedom of expression' is neutral about the types of individual or organisation that, as we now often say, originate content, and unconcerned about the audiences to whom that content may be directed. Consequently a focus on freedom of expression can readily be taken as a licence to focus on the rights of originators at the expense of the needs of readers, listeners and viewers, and in the media context to focus on the rights of journalism rather than the needs of audiences.

Press freedom and the needs of audiences

Claims about rights to freedom of expression in the broad contemporary sense are remote from Millian claims about rights to self-expression, and we cannot use Mill's arguments to vindicate them. Fortunately there are other arguments for freedom of expression, understood broadly, that are neither restricted to speech that makes truth claims, nor marginalise communication by focusing on self-expression.

Freedom of expression, understood broadly, is required for civic, social and political life, and indispensable for democracy. Without it, communication with and among citizens, as well as between government and citizens, can be impeded or distorted and may leave some or many unable to understand or assess others' speech, or to participate in social, cultural and political life. However, a broad configuration of freedom of expression can be justified by its role in protecting, respecting and contributing to the

communication needed for social, cultural and political life: but this argument will not justify rights of self-expression for the media. Rather it will support media freedom to communicate in ways that are *intelligible* to and *assessable* by readers, listeners and viewers. A plausible vindication of an adequate interpretation of freedom of expression must, I believe, take the needs of audiences seriously.

One way to identify which configuration of press freedom can be justified is to consider more closely why individual rights of self-expression cannot be extended to the media. Individuals can express themselves without anybody noticing that they are doing so, understanding what they mean or grasping what they are doing. Self-expression does not need audiences because it need not communicate. When others merely express themselves we can afford to tolerate a degree of inaccuracy, insincerity, exaggeration, confusion, and the like. Mill is, I think, right that we need take issue only when self-expression risks harm to others.

Matters are different with speech that seeks to communicate, and markedly different when powerful organisations, including the media, seek to communicate. The communication of the powerful can shape and influence, improve and damage others' lives, and in democracies we have long since taken steps to regulate the communication of most powerful organisations. The speech rights of governments, of public bodies and of companies are heavily constrained, and nobody thinks that they should have the privilege of self-regulation.

They must report in prescribed ways on prescribed topics, and submit specified information to audit – there is no right to invent financial or other information; government and public bodies are also multiply open to scrutiny and freedom of information requests and must not be partisan. The media is in quite a different situation, and it is often said that this is essential because anything other than self-regulation would permit censorship of content.

But censorship of media content is not the only risk against which readers, listeners and viewers need protection. The needs of audiences are also disregarded or shortchanged unless others' communication, including media communication, allows them to understand what is said and to assess what is done in saying it. Intelligibility and assessability matter for all communication, and more so for the communication of the powerful.

A requirement that media communication be intelligible should not be at all controversial. Neither newspapers nor broadcasters aim to be or gain by being unintelligible, or have an interest in being unintelligible, although no doubt some content is wearyingly unintelligible to some audiences. But assessability is another matter: why should the media bother to make their content assessable by their audiences? Why do audiences need not only to

understand, but also to be in a position to assess what the media communicates? Should and can regulation seek to ensure assessability?

The short answer to this is that the communication of the powerful, including media communication, is neither infallible nor disinterested. Since it is not infallible, audiences need to be able to assess the reasons or evidence for its claims. Since it is not disinterested, audiences need to be able to identify the interests it may serve. Just as the liberal tradition has argued for measures to secure discipline and transparency in other organisations that exercise power, so it has reason to support measures to secure discipline and transparency in the exercise of media power.

Lack of discipline or transparency in the exercise of media power in liberal societies does not often take the form of crude propaganda – although that is not unknown. It can show up as failure to report on topics that matter for citizens, as reporting that is slanted, selective or confused, as 'reporting' that echoes unacknowledged press releases, as attentive coverage of matters of undeclared financial interest to proprietors or to journalists, as editorials that are really advertisements, as opinion pieces that masquerade as reporting, as covert exercises in product placement, and as tendencies to exaggerate, ignore, exclude, marginalise or mock certain voices or topics.

I emphasise the generic problem of content that is cavalier about the needs of audiences because I think there is danger in focusing too narrowly on the preoccupations with celebrities, scandal and sensation in parts of the media. The problem, as I see it, is not just that some of the media are intrusive, but a more general failure to think enough about the needs of audiences. Too often media communication is driven by undeclared and undetectable objectives and interests, which may hinder audiences who need to assess media claims and commitments. Hidden persuasion is easier for those with hidden powers.

What can be done?

Any adequate account of press freedom must, therefore, take account of the needs of audiences to understand what is said, and to assess what is done in saying it, which both matter for a configuration of press freedom that supports social, cultural and political life. But even those who agree that this is the most convincing argument for press freedom differ about its practical implications. Can anything be done about media standards without risking censorship? Some doubt whether it is worth discussing media regulation, since they find it so blindingly obvious that there should be none – or at most a veneer of self-regulation.

Still, if not now, when? In the wake of the UK phone-hacking scandals that emerged in the summer of 2011, we now find ourselves in the midst of

widespread discussions of the proper configuration of press freedom, of ways in which it can be accommodated to other speech rights, and of the forms of regulation by which it might be best achieved. What could a focus on the needs of audiences bring to that debate? Three areas in which I believe a focus on the needs of audiences points to changes that do not risk censorship are:

- the limitation of media power;
- the protection of privacy; and
- the improvement of media process.

Audiences are assisted in judging media content and claims are helped if they meet a range of perspectives. So if we justify press freedom by its social, cultural and political benefits, we should seek to limit the concentration of media power. In the UK, anti-monopoly restrictions on media ownership were weakened in the Communications Act 2003, and cross-border ownership is permitted. Anti-monopoly provisions could be strengthened without any risk of censorship of content. While greater *plurality* of ownership will not guarantee greater *diversity* of content, it is likely to contribute to diversity and to provide readers, listeners and viewers with more diverse considerations, evidence, issues and opinions.

It may also be relevant to revisit the issue of cross-border control of the media. Are citizens and democracy well served if many of those who own and control significant parts of the media do not share citizenship, domicile or residence with readers, listeners and viewers? Are we really content for some dominant voices in British politics to be controlled by those who pay no personal taxes here and may not share our geopolitical fate? Would we be content if additional News International papers were sold off, and we found that we could add a Chinese and, say, a Qatari owner to our rather healthy list of expatriate owners of major newspapers?

Secondly we shall need to think more about rights to privacy. We are now moving away from the world in which it was plausible, or at least faintly respectable, simply to deny that there are rights to privacy, or to insist that (unlike other rights) they should have no legal protection. In debating the proper configuration of the right to privacy, I believe that we shall need to clarify the scope of public interest defences for publishing content that would otherwise be private. However, the most taxing issues for securing any interpretation of privacy rights are likely to focus on the permissibility, or otherwise, of publishing material placed online anonymously. Is it acceptable to recast undocumented and unauthorised publicity about others' private lives by claiming to report material already in the public domain? Anonymous postings may reflect fantasy, gossip or prurience, or indeed self-promotion and revenge. It is difficult to see how we

might best deal with this problem. Yet if we do not deal with it, media power will remain intimidating for many, and so damaging to social, cultural and political life.

However, discussions both of anti-monopoly provisions and of rights to privacy are both slightly separate from the main line of discussion of media freedom, and of the limits of media regulation, and it is on these that we can expect to find the most fundamental debates. Can self-regulation be made effective? Or is the very notion of effective self-regulation self-deceptive? Is it true that anything but self-regulation will permit censorship? The evidence to date is that self-regulation has not been effective or ethically adequate, so the burden of proof now lies with those who think that it could be reformed to make it effective or adequate.

An alternative way forward would accept that media regulation must have a statutory basis, so that those with responsibility for it can require others to produce evidence and can inflict sanctions, while barring the door to censorship of content. This, I believe, is not impossible.

If so, the following rather narrower question arises: Could media regulation be given a statutory basis while barring external attempts to control content, and so to censor? It seems to me that only a body with a statutory basis could have the necessary powers to call for evidence or to sanction, but that such a body could be confined to regulating media process, and explicitly prohibited from regulating media content. The regulation of process could be useful for audiences, making media claims more readily assessable.

Consider how things might change if media process were regulated to secure assessability. The governing idea of such regulation would be to require media exercise of power to be openly acknowledged, and subject to the sorts of disciplines other powerful institutions and office holders must meet. Why should office holders in public and corporate institutions be required to declare their financial and other interests, while leading journalists, editors and proprietors are not? Why should office holders in public, corporate and charitable bodies be required to declare 'related party transactions', gifts and the like, while those who work for the media are not? Why should the remuneration and tax status of leading journalists, editors and proprietors be private? Why should payments made for content (e.g. for the stories of celebrities and of victims, or for the use of private detectives) not be made known to readers, listeners and viewers. How far should anonymity for sources, sponsors and other paymasters be acceptable? Should not cheque-book journalism declare its true colours? Should not financial journalists, restaurant critics, travel writers, property columnists and many others reveal what they own, who paid them and whom they paid for which content? Could not those who are in the business of

organising and providing content for others be free from censorship, but subject to processes that allow others to judge their claims and commitments? The media has been keen enough on transparency for others with power or influence, and what is sauce for political geese is surely also sauce for media ganders.

3

Why We Write: Three Magic Words – 'The Public Interest'

Alan Rusbridger

It was, it should be said, a canny move by Lord Justice Leveson. The judge quickly put 10,000 miles between himself and the cacophony of debate his Report left behind. As he lectured in Australia, Fleet Street was left to grapple with the detailed recommendations of a man who had spent a year examining the worst excesses of some newsrooms that were, we are all now agreed, out of control.

Even as this book is published, the dust has not yet begun to settle over a year that shook the newspaper industry to its core. Overlapping criminal, judicial, political and civil inquiries into the behaviour of the press have led to the most intense debate about the future of the fourth estate in seven decades. As Leveson said powerfully in the introductory remarks to his report:

> For over 40 years, as a barrister and a judge, I have watched the press in action, day after day, in the courts in which I have practised. I know how vital the press is – all of it – as guardian of the interests of the public, as a critical witness to events, as the standard bearer for those who have no-one else to speak up for them. Nothing in the evidence I have heard or read has changed that view. The press, operating freely and in the public interest, is one of the true safeguards of our democracy. As a result, it holds a privileged and powerful place in our society. But this power and influence carries with it responsibilities to the public interest in whose name it exercises these privileges. Unfortunately, as the evidence has shown beyond doubt, on too many occasions, those responsibilities have simply been ignored. This has damaged the public interest, caused real hardship and, also on occasion, wreaked havoc in the lives of innocent people.

J. Lewis et al. (eds.), *Media Law and Ethics in the 21st Century*

The 2,000-page report was withering in its criticism of standards in the press. Leveson's key recommendation was to establish the first press law in Britain since the 17th century. Fresh legislation would, he reasoned, reassure the public of the independence of the new press regulator and – perhaps in anticipation of the fury that was to follow – enshrine the freedom of the press in law for the first time. That proposal was killed within hours by the Prime Minister, who told the House of Commons of his 'serious concerns and misgivings' of 'crossing the Rubicon' for the first time in 300 years.

What has followed in the months since Leveson's Report thumped into the world is months of frenzied jockeying by editors and politicians. An industry unfamiliar with speaking in a unified voice has – and not without a little humility – reiterated its nervousness about the involvement of statute in press regulation. Oliver Letwin MP, the Prime Minister's chief policy fixer, was handed the unenviable task of shaping this reconstituted press regulator. A number of complex arrangements have been put forward by all sides. Most, but not all, editors balked at the politicians' royal charter plan – whereby the new regulator is overseen by a watchdog backed by royal charter – and put forward their own version. As ever, the devil is in the detail. What is clear, though, is that it is no longer enough for the press to erect straw men or attack the supposed enemies of freedom of expression. The Leveson Inquiry was the seventh in as many decades into the misdemeanours of the press. There cannot be an eighth.

The prize of reduced legal costs

It should theoretically be possible for the press to design a body that is truly independent, fully certified and regularly audited. We should be ambitious in this pursuit, not least because the industry has at last a chance to answer some of the shortcomings that have emerged in the twin realms of libel and privacy.

Newspaper editors – myself included – have whinged endlessly about the soaring costs and gross iniquity of the law courts. It seems sensible for an arbitration wing to be bolted on to the new regulator and act as a one-stop-shop dispute resolution service. It would deal with libel and privacy complaints. For claimants, this would provide quick and affordable access to justice with more various and pragmatic solutions. Those wronged by newspapers would still enjoy the right to go to the courts – as enshrined by both common law and Article 6 of the European Convention on Human Rights (ECHR) – but a new regulator should be the go-to body for many damages claims. What is in it for the press? The same: a speedier, cheaper alternative to the courts.

An experienced group of media lawyers seized the initiative and set up a body closely similar to this in 2012, called Early Resolution. The voluntary arbitration body, founded by the retired High Court judge Sir Charles Gray and the former *Times* lawyer Alastair Brett, has already mediated on several libel claims in which all parties decided to use the service rather than the courts. How does it work? The body has a number of industry experts who decide on a number of key issues at the outset of a libel dispute, including whether the words complained of actually refer to the claimant; if the words are really defamatory as opposed to being just inaccurate; whether the words are honest comment or a statement of fact, and what the words complained of actually mean to the average reasonable reader. A similar set of decisions could be made in relation to privacy. These issues are settled on paper and the eye-watering costs of libel actions heard before a judge are reduced to £2,500 plus VAT in the average case, according to the Early Resolution website.

With the Crime and Courts Act 2013 now creating cost incentives for arbitration, we are moving closer to this arbitral approach. The Act is badly drafted in our view and we believe it needs changing to effectively incentivise publishers to participate. But the direction of travel is right.

Public interest

More broadly, the press must give some sort of reassurance that we recognise some borderlines if we are to argue that we want greater protection from the judiciary when writing about public figures. Three magic words – 'the public interest' – are the cornerstone of this quid pro quo. It would be a mistake if the clamour for press reform concentrated on punishing bad behaviour; it must also serve to embolden newspapers in their endeavour to conduct serious journalism in the public interest. The overwhelming majority of court cases fought by the *Guardian* during my editorship have involved good journalists trying to write about meaningful things about which the public ought to know. It cannot be right that the quicksands of the British legal system continue to make this sort of journalism so punitively expensive and time-consuming.

In 70 years of evolving newspaper regulation in Britain, the definition of public interest has been the responsibility of a small pool of editors. That is, mercifully, beginning to change in line with a greater public participation in journalism. That said, I endorse the Press Complaints Commission's (PCC's) own illustrative definition of what can be described as in the public interest. It states that there may be exceptions to its Editors' Code of Practice for journalism that detects or exposes crime or serious impropriety; protects public health and safety; or prevents the public from being misled

by an action or statement of an individual or organisation. Of course, there is also a public interest in freedom of expression itself.

Under the Human Rights Act 1998, and at the request of the media by virtue of s. 12(4) inserted into the Act before it was passed, judges are obliged to pay special attention to this code. The evidence is that they do – especially when balancing Articles 8 (privacy) and 10 (freedom of expression) of the ECHR. They will normally ask a newspaper whether it is saying that an article is in the public interest, as defined by the industry code. But the law, as it stands, is a mess with regards to public interest. There are myriad interpretations of public interest depending on whether the newspaper is defending a libel action – in which case there are differing interpretations depending on the judge – or a privacy case, a copyright case, or a data protection case. Section 4 of the Defamation Act 2013, passed by the House of Lords after a three-year impasse, provides protection in this area but does not go as far as to offer a definition. The Director of Public Prosecutions went further in guidelines on criminal cases affecting the media. Prosecutors should consider an 'important matter of public debate' as material exposing 'serious impropriety, significant unethical conduct and significant incompetence', the DPP said, carefully emphasising that each case must be judged on its individual facts and merits. Section 4 of the Defamation Act should provide welcome clarity in this area, but there are areas where the industry could itself go further.

It has been suggested that the current PCC definition of public interest could be instantly expanded to incorporate some of the Public Interest Disclosure Act 1998 – or the whistle-blowing legislation – which would be a sensible step. There should also be a positive criterion, similar to this important line in the BBC's exhaustive editorial code: there is a public interest in 'disclosing information that assists people to better comprehend or make decisions on matters of public importance'. That principle was underlined by an important European Court of Human Rights ruling[1] in February 2012, when the Court refused to grant an injunction against the publication of a photograph taken of Princess Caroline von Hannover and her husband while on holiday at a ski resort in Switzerland. In that case, the Grand Chamber resolved that the definition of what constitutes a subject of general interest will depend on the circumstances of the case. It said there was a general interest in the reporting of sporting issues and performing artists, as well as political issues or crimes. But, in a passage that will no doubt have caused some dismay in Fleet Street, the 'rumoured marital difficulties of the

1 *Von Hannover v Germany (No. 2)* (App. Nos 40660/08, 60641/08).

president of the Republic or the financial difficulties of a famous singer' were not deemed to be matters of general interest.

Where each newspaper sets its privacy dial is, rightly, a matter for the respective editor. The *Guardian*, for example, generally considers a public figure's private life to be of low public interest unless there is evidence of harm, hypocrisy, conflict or an effect on public office. The *Guardian* and *Observer* have incorporated into their editorial code a set of five tests of the public interest that could be carried out by any editor, from the *Sun on Sunday* to *The Sunday Times*. The guidelines, based on those originally drawn up by the former Government Communications Headquarters Director Sir David Omand in the context of government spying, go further than the PCC's Code on the criteria for intruding in privacy:

1. *There must be sufficient cause.* The intrusion needs to be justified by the scale of potential harm that might result from it.
2. *There must be integrity of motive.* The intrusion must be justified in terms of the public good that would follow from publication.
3. *The methods used must be in proportion* to the seriousness of the story and its public interest, using the minimum possible intrusion.
4. *There must be proper authority.* Any intrusion must be authorised at a sufficiently senior level and with appropriate oversight.
5. *There must be a reasonable prospect of success.* Fishing expeditions are not justified.

These five criteria – together with the PCC's own guidance – aim to foster a culture within the *Guardian* and *Observer* where journalists know where to draw the line on stories that could breach privacy. If journalists could show that audit trail to a judge – or, better still, the arbitration arm of an independent regulator – and demonstrate that there was reasonable belief that an invasion of privacy was in the public interest then that would be a sensible protection for serious journalism. The Private Eye editor Ian Hislop advocated something similar when he and I gave evidence to the Joint Commons and Lords Committee on Privacy and Injunctions. He said:[2]

> The best suggestion I have seen is where there is a range within which the judge can say not whether it is in the public interest or not, but that it is perfectly reasonable for an editor to think that this is in the public interest. Judges differ [in their interpretation of the public interest]: it depends on who you go in front of, particularly at the moment … If there was a definition which was essentially, 'It is reasonable to have printed that story, you could argue it', that would be great for editors.

2 Privacy and Injunctions – Evidence, 6 October 2011 at Q1495.

Hugh Tomlinson QC also underlined the importance of judging the editorial process alongside content in cases where the public interest defence is engaged. He argued in a submission to the Leveson Inquiry that members of the new regulator should be granted additional protection in civil proceedings when they can show that they followed appropriate internal procedures. Tomlinson wrote:[3]

> A participant which sought to rely on the public interest provisions of the Media Standards Authority code would also be required to demonstrate that appropriate processes had been used for the assessment of whether or not the public interest was engaged in a particular case, including the use of the Media Standards Authority's own pre-publication advice and assistance service.

Judges will normally ask a newspaper whether they contend that an article is in the public interest, as defined by the industry code. But, in the overwhelming majority of privacy injunction cases that arose in 2011, the newspapers did not in fact argue that there was any public interest involved. Judges are nevertheless obliged to consider the merits of the public interest argument in accordance with the Human Rights Act 1998, but they are left with little alternative than to favour the claimant when the media defendant cannot even muster a spirited defence. A moment of humility might concede that, as an industry, we have sometimes done ourselves no favours by testing the state of the law with a series of these really quite weak cases. Supposing we all can agree on a public interest defence – including the 99% of journalists who do not write about other people's sex lives – then there is little that would stop the robust independent regulator/adjudicator from hearing privacy cases as well as defamation cases. It has never been exactly clear what 'the industry' thinks of the idea of policing the boundaries of privacy itself. It is commonplace to decry the judges trying to do it for us. But if we are to command a greater protection from interference from the courts when reporting on serious matters then there must be a greater engagement from the industry.

Privacy injunctions

Like the *Guardian*, the Press Association does not ordinarily find itself writing about the latest kiss-and-tell scandal or recording the extramarital antics of famous footballers. But the esteemed news agency now finds its coverage of such matters at an historic high, as a spate of celebrities made unsuccessful attempts to keep their extracurricular matters private through a privacy

3 Submission by Media Regulation Round Table, 7 June 2012, para. 30.

injunction. As Press Association editor Jonathan Grun noted dryly before MPs and the Lords: 'This is largely as a result of the celebrities making failed attempts to keep stories about themselves secret, which I am sure was an unintended consequence when they embarked on the action.'

The most recent injunction imposed on the *Guardian* and *Observer* was a rather curious case in October 2012. It was at the height of the child sexual abuse scandal around Jimmy Savile, the late disc jockey and television presenter, and ITV News had spoken to one woman who made an allegedly libellous allegation against the comedian Freddie Starr. The news programme approached Starr to put the allegation to him, at which point Starr got his lawyers to make an emergency late-night application to the High Court for an order 'to prevent a false allegation being published'. The duty judge granted the injunction against no fewer than 11 broadcasters and newspapers shortly after 9pm that night, pending a mature hearing the following afternoon where it was summarily dismissed.

The fact that this case was even entertained by the court underlines how muddled the principles around injunctions have become. The *ZAM* injunction[4] had extended gagging orders from privacy to libel, in a classic case of mission creep, but the Starr attempt went beyond that. Mr Justice Tugendhat, the usually unflappable judge who lifted the injunction, said at the time: 'It is one person's word against another where the court is unable to form a view as to who is to be believed, so how can I grant an injunction?' He is quite right. The ability to restrict publication of allegedly defamatory allegations in the absence of any countervailing evidence would infringe dramatically on the right to unfettered freedom of expression.

The *Guardian* and *Observer* had, until that wrong-headed order, not been served with anything that looked or smelled like a privacy injunction since the now-famous restriction sought by Manchester United footballer Ryan Giggs in May 2011. Mercifully, the tide of privacy injunctions appears to be turning at least in part, I dare say, to a couple of high-profile blunders by well-known personalities. But the figures are still concerning: the number of applications for privacy injunctions doubled in the first half of 2012 to nine, up from four in the latter half of 2011, according to the Ministry of Justice. Seven of those cases involved derogations from the open justice principle: all seven imposed restrictions on access to court documents; six restricted access to documents by third parties; and six of the cases provided for hearings to be held in private. The circumstances of these seven cases are, by their nature, private. Should we be asking that judges always give the media the opportunity of making representations? How would the

4 *ZAM v CFW* [2011] EWHC 476 (QB).

media behave were the judges to agree that anyone who got an injunction from the British courts should be named, even if the circumstances or subject matter were concealed? Where possible the courts should provide open judgment and third-party access to documentation unless there is an overriding reason to deviate from the norm.

The industry is right to be concerned at attempts to overreach the parameters in this nascent area of law. And we all reserve the right to be outraged at super-injunctions brought by multinational corporations to cover up illegality or systemic wrongdoing. But in other cases the issues may be less clear-cut. Take one case, which attracted much attention in 2011, *OPQ v BJM and CJM*.[5] According to the judge, this involved a woman and her partner negotiating with a newspaper group to receive a large sum of money for intimate photographs and what he termed 'clearly private information'. It was also described as 'a straightforward and blatant blackmail case'.

The man, the woman and her partner eventually reached an agreement, including undertakings not to publish any of the information. So far so ordinary. But the man feared that, once the case had been settled, there was nothing to stop the media from writing about it. The complicating factor was that the judge said that there was 'solid medical evidence' as to the health of the claimant and various family members. He speculated that this evidence was one of the reasons why various newspaper groups withdrew their opposition to the order being extended to others beyond the parties themselves. The device he came up with – a ban '*contra mundum*', or against the whole world – attracted a mixture of criticism and derision, conjuring up a ban on people discussing the case by water coolers or in pubs. Such injunctions had previously been granted in a very limited range of cases, including in the case of Robert Thompson and Jon Venables, the convicted killers of James Bulger, where the judge granted the order after concluding that there was a real and strong possibility of serious physical harm or death. On the known facts, it is difficult to say that the judge's decision on the privacy issue in *OPQ v BJM and CJM* was completely irrational. If it was a case of blackmail; if the information was about the private activities of consenting adults; if there was clear evidence that someone might come to mental or physical harm through publication, which of us could be certain that we would – even as editors, never mind judges – approve of publication, or publish the identities of the parties? Would there not have to be a really strong public interest in order to justify the distress, or worse, that might result from publication?

5 [2011] EWHC 1059 (QB).

Or take another case, *ETK v News Group Newspapers Ltd*.[6] It involved another really difficult balancing act. On the one hand a man, his erstwhile lover and wife all asking for privacy. On the other hand the suggestion that the affair might have played a part in the lover, a former colleague of the man, losing her job. But the woman, perhaps out of a wish to keep things private, was not pursuing any case against the company. And the wife, who was trying to rebuild her relationship with the man, asked the court for privacy for the sake of the marriage and the children.

The Court of Appeal, while recognising the 'deserved place of the press as a powerful pillar of democracy', granted the injunction after a careful weighing up of the specific facts. The decisive factor, the Court said, was whether a debate about the reasons behind the erstwhile lover's departure from her job contributed to a debate of public interest. Summing up, Mr Justice Ward decided:

> Certainly some members of the public will have noticed the end of her employment: a proportion of them will even have speculated why she left. But the reasons for her leaving give rise to no debate of general interest. The reasons for her leaving may interest some members of the public but the matters are not of public interest. Publication may satisfy public prurience but that is not a sufficient justification for interfering with the private rights of those involved.

We can all imagine situations in which one could argue that there was a genuine public interest in exposure which overrode the privacy concerns outlined above. Maybe the claimants were politicians who took a strict stance on moral issues, or people who had misleadingly used their family image to seek office or commercial gain? Both these cases demonstrate the complexity of the issues affecting free speech – and the fact that there is seldom a black-and-white answer engaging just one of the multiple laws and ethical concerns that cover much of what we do as journalists. This is why it requires arbiters – be they judges or mediators or regulators – to reach a view on the facts.

Two more recent privacy injunctions – both contested by the *Sun* – have teased out where the courts draw the line on the private lives of public figures. The first case[7] involved the hitherto unknown Ned RocknRoll (he changed his name from Ned Abel Smith), who asked for the court's protection from media intrusion just weeks after marrying the actor Kate Winslet

6 [2011] EWCA Civ 439.
7 *RocknRoll v News Group Newspapers Ltd* [2013] EWHC 24 (Ch).

in a low-key ceremony in New York. The newspaper discovered some pictures of RocknRoll partly naked at a fancy dress party in 2010, described by his lawyer as 'naive but innocent'. Unknown to RocknRoll, the pictures had been on Facebook for two years where they were theoretically accessible to anybody with a Facebook account.

The *Sun*'s counter-argument went like this: RocknRoll is a public figure propelled into the public eye by his marriage to Winslet. His lower expectation of privacy was, so the argument went, further eroded by his decision to sell the pictures from a previous wedding to *Hello!* magazine for tens of thousands of pounds. The newspaper also placed emphasis on the pictures having been publicly available on the world's most popular social network for two and a half years. It is the same dangerous argument used in advance of publishing the pictures of Prince Harry but, in this case, against a man described by his own lawyer as a 'relative nobody' before he married a world famous movie star.

The court sided with RocknRoll after two full days of legal argument. A significant swaying factor, in the judge's view, was the 'grave risk' that Winslet's children could be teased or bullied in the school playground if the pictures were printed. With only limited knowledge of the material in dispute, it is difficult to question with much authority whether a robust public interest defence might have swung it in the *Sun*'s favour. It should be said that, absent of the 'potential harm factor', the judgment was already tipped heavily against the newspaper and it chose not to appeal. But an advanced test of the judge's reasoning in relation to the potential for harm to Winslet's children would have proved illuminating for editors at the tabloid end of the industry. At what point is it reasonable to print photographs that are bound to cause embarrassment or distress to a third party's children? The judge also granted an injunction against any description of the contents of the photographs. Was that strictly necessary? Was there much 'embarrassment' (privacy) left to protect after two full days of carefully worded legal argument about the pictures in open court?

Another notable case[8] involved the former England football manager Steve McClaren. McClaren asked the court to grant him an injunction to prevent details of his extramarital affair being published by the *Sun*. He claimed that printing the story would unjustifiably infringe his right to privacy for three reasons:

(a) there was no public interest in the story;
(b) he was not a public figure nor a role model; and
(c) the fact of the extramarital affair did not expose him as a hypocrite.

8 *McClaren v News Group Newspapers Ltd* [2012] EWHC 2466 (QB).

The thrust of the *Sun*'s argument was that McClaren, then the manager of a Dutch football club, was undoubtedly a public figure and that he had in the past put into the public domain details of his private life, including details of another extramarital relationship.

On this occasion the balancing act fell in the *Sun*'s favour. The newspaper had 'legitimate interest' in publishing the story, the judge said, because McClaren was someone 'from whom the public could reasonably expect a higher standard of conduct'. McClaren thus joined the growing list of ex-England football seniority whose private lives have found little favour at the High Court, following the well-documented cases lost by former captains Rio Ferdinand and John Terry.

Of course, these are not the sort of stories the rabble-rousing 18th century editor and MP John Wilkes would have died to protect, but they do occupy more of the time of judges than complex confidence actions – of which the *Guardian* is more commonly on the receiving end. I have had a judge in pyjamas awarding a midnight injunction to take down something about Barclays Bank and tax avoidance which was already on the website. Another judge at home – not quite in her pyjamas – found herself just too late to prevent our vans from driving away from the printing presses. Famously, there were even lawyers that told me I could not report on Parliament itself. This last case involved the oil trading company, Trafigura, which managed to get a super-injunction in September 2009 – partly on the extraordinary grounds that even listing the case in court could unfairly damage the interests of the company. The company's attempt at obscurity was turned into mass notoriety within 42 minutes on a Tuesday evening, as Twitter users quickly pieced together details behind the attempted gag order that temporarily prevented the *Guardian* from reporting Parliament. The case should be taught in business schools across the globe as an example of how not to keep a secret.

The Internet

Trafigura was one of the innumerable examples in recent years where the unruly realm of cyberspace has come into direct confrontation with the judiciary. And there will be many more in the years to come. Yet it would be foolish to think we can extend some form of media regulation to the World Wide Web. The Internet, for all its blemishes, has brought an unprecedented level of freedom of expression to our society. The dissemination of information now happens in milliseconds across legal jurisdictions and news is both created and broken instantaneously on social networking websites. If newspapers are struggling to catch up with the digital revolution, then regulation and the law have been left in a different age.

Each newspaper has adapted in different ways to advances in technology, both commercially and editorially. At the *Guardian*, we have pioneered what we call an 'open journalism' approach that fully knits our journalism into the web of information that exists in the world today. It links to it; sifts and filters it; collaborates with it and generally uses the ability of anyone to publish and share material to give a better account of the world. A year or so ago, when we were trying to work out how journalism should change, we jotted down 10 principles of open journalism:

1. It encourages participation. It invites and/or allows a response.
2. It is not an inert, 'us' or 'them', form of publishing.
3. It encourages others to initiate debate, publish material or make suggestions. We can follow, as well as lead. We can involve others in the pre-publication processes.
4. It helps form communities of joint interest around subjects, issues or individuals.
5. It is open to the Web and is part of it. It links to, and collaborates with, other material and services on the Web.
6. It aggregates and/or curates the work of others.
7. It recognises that journalists are not the only voices of authority, expertise and interest.
8. It aspires to achieve, and reflect, diversity as well as promoting shared values.
9. It recognises that publishing can be the beginning of the journalistic process rather than the end.
10. It is transparent and open to challenge – including correction, clarification and addition.

The Internet has moved journalism from an era in which a reporter writes a story and goes home and that is it. Now, the moment a reporter hits 'send' on his or her story, the responses start coming in. The lifespan of a story now is greater than it was, even five years ago. If you go along with open journalism, you are going to be open to other sources, other than what can be created in your own newsroom. This matters in the discussion around the future of media laws because it means that the reader plays an increasingly significant role in the direction of a story. The cases of Giggs and Trafigura illustrate how information can no longer be contained, as readers disseminate fragments of material across jurisdictions at the click of a button.

The Attorney General, Dominic Grieve, has backed a proposal that privacy and confidentiality injunctions be served on Internet companies like Twitter and Facebook when they bind traditional media companies. This would mean that Twitter and Facebook, both companies registered in

California in a jurisprudence out of reach of the High Court, could find themselves in contempt of court in London for an innocuous status update posted by a teenager in South Korea. This is wholly unrealistic. Newspapers and broadcasters who are served with injunctions are bound, and if it is shown that they are the source of leaks to others then there are legal consequences. Plus, the ability for publishers to demonstrate that they abide by a set of professional standards and ethics should be what distinguishes us competitively from many other online outlets. This is, in part, why the *Sun*'s argument for publishing the (separate) photographs of Prince Harry and Ned RocknRoll should be treated with caution. Put simply, newspapers should not be free to stomp all over the privacy of a citizen because the material already exists online. This threatens the twin effect of damaging our own fight against interference from the courts and the state, while advancing the cause of those who demand greater regulation of the Internet.

Cyberspace does not exist in a legal vacuum. As numerous Twitter users have discovered, the Public Order Act 1986 and the Communications Act 2003 apply and the police are ready to mount prosecutions. 'Social media is a new and emerging phenomenon raising difficult issues of principle, which have to be confronted not only by prosecutors but also by others including the police, the courts and service providers,' said the DPP, Keir Starmer QC, when he attempted to quell concerns of police overreach in September 2012. 'The fact that offensive remarks may not warrant a full criminal prosecution does not necessarily mean that no action should be taken. In my view, the time has come for an informed debate about the boundaries of free speech in an age of social media.'

It is increasingly difficult to look at the laws affecting free speech in isolation from each other – and from the standards and expectations that are being widely debated in society in relation to the Internet, the government, the state, and business. Anyone listening to some of the debate around issues facing the press would think we are the only ones grappling with difficult moral and ethical dilemmas. Issues to do with privacy and intrusion are not unique to journalists: indeed they are issues to which every citizen is becoming more and more attuned. There is a growing general unease about privacy on the Internet.

The wave of innovative Internet companies – think Facebook and Google – regularly misstep the boundaries over privacy because it is unsettled territory. The technologies being developed in heavily secured labs in Menlo Park and Mountain View will serve to dictate the parameters of online privacy for a generation, which, in turn, could lead to changing expectations of where the boundaries lie in other realms of society. The Communications Data Bill, billed by its opponents as 'the snooper's char-

ter', promised to impose a grave new level of surveillance on British citizens before it was omitted from the Queen's Speech in May 2013. The Bill would have handed authorities unprecedented access to our communications data, including who we telephoned, emailed and texted, at what time and for how long. Ostensibly, the Bill aimed to bring authorities up to speed with sophisticated new ways to communicate. But, on the face of it, the proposals looked like a classic case of mission creep and prompted outcry from civil liberties campaigners. It serves as a reminder that the media is not the only hoary old institution feeling its way through this brave new world.

The long slow road to reform

It is a complex new world in which broadcasters and newspapers should be expected to stumble in the endeavour to produce serious journalism. Freedom of expression is about the right to overstep the line when it contributes to public debate; the right to use intrusive methods when there is a robust public interest; the right to make mistakes. David Broder, the late sage of the Washington press corps, coined one of the more timeless definitions of a newspaper. He described a newspaper as:[9]

> a partial, hasty, incomplete, inevitably somewhat flawed and inaccurate rendering of some of the things we have heard about in the past 24 hours – distorted, despite our best efforts to eliminate gross bias – by the very process of compression that makes it possible for you to lift it from the doorstep and read it in about an hour. If we labelled the product accurately, then we could immediately add: 'But it's the best we could do under the circumstances, and we will be back tomorrow, with a corrected and updated version.'

As an industry, we are not known for admitting our own fallibility. But the excesses of a few have forced the industry as a whole into an historic period of self-reflection. This is what we should not lose sight of: it was not the work of the police, the courts, the regulator, or Parliament that exposed the phone-hacking scandal – it was the work of a lone reporter, Nick Davies. He was lied to, threatened and ignored, but painstakingly built up irrefutable evidence of what had gone on at the *News of the World*. It is a story of overwhelming public interest, pursued by a lone reporter with the backing of a strong independent institution. There have been other occasions when that institution has swung into force and underlined the importance of the

9 David Broder, Pulitzer Prize acceptance speech, 1973.

fourth estate: To defend our Moscow correspondent when he is threatened by the Russian state. To get Ghaith Abdul Ahad out of jail when the Libyan government arrests him. To resist the police threats to pursue Amelia Hill under the Official Secrets Act. To pay the £100,000 legal and accountancy bills to publish a 10-day series on tax avoidance. To allow Ian Cobain the time and resources to uncover, inch by inch, the story of Britain's apparent complicity in rendition and torture. To support Paul Lewis in his quest to get at the truth of the death of Ian Tomlinson and Jimmy Mubenga; or undercover policing; or the English riots. To give David Leigh the freedom and backing to investigate the conduct of international arms deals by BAE or the export of toxic waste by Trafigura. To back David Conn as he remorselessly peels back the intersections where big money meets sport. To assemble the team that can make sense of the biggest trove of government, diplomatic and military secrets the world has ever seen – and to publish them comprehensively and safely.

For three centuries, the mere suggestion of a law to bind the press has been met with fierce resistance in the UK. No doubt it is a cultural impulse, informed in part by a glance across the English Channel, where the private lives of public figures are strictly off limits for the French press. But it would be a grave error if we lost sight of what the best of journalism can do as we contend with the seventh inquiry in as many decades into the behaviour of the press. I remain hopeful that it is possible to reconcile a press that can conduct serious investigations into corrupt corners of public life while exercising restraint when reporting on the private lives of individuals when there is little public interest. The legendary Watergate reporter, Carl Bernstein, used the phrase 'the best obtainable version of the truth'[10] to describe what journalists, at their best, seek to achieve. A strong consensus on the public interest would embolden this pursuit, which would be qualified at our peril.

10 C Bernstein, 'The Idiot Culture', The New Republic, 8 June 1992.

PART II

The Practitioner's View – Protecting Free Expression and Curbing Abuses

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4
The Ultimate Balancing Test

Pia Sarma

In a small town nestled in the Andalusian hills lies a closed order nunnery, one of the few in the world. One of its inhabitants has been there almost 60 years and has spoken to no one outside the Baroque tiled building in all that time. Recently she decided to feature in a documentary film which meant a camera crew was permitted to enter the building to observe her. It was the first time since her teenage years that she had interacted with anyone outside the order.

The nun, like others of closed order sects, has her own pact with society. She chooses not to participate and is able to keep her private world hidden from others. Most of us, however, trade up some part of our private thoughts and actions for the part we play in society, whether our links with family and friends and our community, or a role in public life. Since Locke, the notion of that exchange in society has underpinned the debates on where a line should be drawn between public and private life. The forays of the press enthusiastically push the line, questioning when a person in the public eye gives up some part of his or her life which would otherwise be considered private. Its role is to investigate fact, rumour and speculation and report its findings faithfully, responsibly and accurately. The press also enables those who wish to share private details to do so. Much of what is discussed in the media is essentially private, but is published with the consent of the individual. A confession about a life of adultery, a poignant description about recovering from cancer, or honest recollections of childhood, are all private tales. The questions become more complex when those in the public eye attempt to build barriers around themselves. The more prominent the role, the higher the expectations of propriety and the likelihood every step will be of interest to the press. Those who have earned or acquired a reputation have further to fall so are more likely to fiercely guard a secret, and to harness the power of the law (and the depths of their pockets) to do so.

J. Lewis et al. (eds.), *Media Law and Ethics in the 21st Century*

The role that the press has taken in redefining the line between public and private information has often changed events through history. There was no pressing need in society to guard against the excesses of the tabloid press in the 1950s after the UK had signed up to the European Convention on Human Rights and Fundamental Freedoms. The Convention protected from state interference the right to respect for private and family life, home and correspondence. However, society was rapidly changing and with it the expectation of what could be considered private.

The Profumo affair in the early 1960s entailed constant snooping on behalf of the press into a short-lived affair between a 'showgirl', Christine Keeler, and the married Minister for War, David Profumo. Profumo, suspected of compromising state secrets, lied to Parliament over the affair and had to resign from his post. The scandal damaged the Macmillan Government and the Tories lost to Labour in the General Election a year later. While the story is remembered for being salacious and sordid in a time when bedroom doors were firmly closed, it is also an example of the press pursuing a sexual affair with no firm idea of where it would lead. It probably did so because it would not have been acceptable at that time for any Minister to be conducting an affair. Nowadays, whether this aspect of the personal life of a public figure would be fair game would raise more of a question. A public interest which goes beyond the affair, and possibly evidence of compromising state secrets, would have to be shown to justify publication.

In contrast to the approach of the British press, in France the secret second family of President François Mitterrand was kept under wraps until he was no longer in office. As a result, the lines of inquiry which some detail of his private life may have thrown up will forever remain a mystery. Mitterrand's mistress and daughter were occasionally housed in apartments at the Presidential quarters, the Elysée, at the expense of taxpayers, but the French appear to prefer to protect their sexual mores rather than the taxpayers' pocket.

Descriptions of the growth of privacy law in England often start with the image of actor Gordon Kaye lying injured in his hospital room while unruly photographers and journalists posing as hospital staff sneak to his bedside unhindered and without permission. Editors back in 1988 did not hesitate to publish the photographs, but the case became the prime example of all that was lacking in the laws protecting an individual's privacy, and the Court of Appeal asked whether legislation should be the answer. Despite this, the narrative continues; the Calcutt Report[1] decided not to enact a

1 Cm 2135, 1993.

privacy law to tell editors how to make their judgments, partly because the public interest was impossible to define. And then the Human Rights Act was brought into law in 1998, enshrining the rights contained in the European Convention on Human Rights. Privacy rights had come of age in a world where fascination with celebrity had become a national sport.

Legal debate since the Human Rights Act 1998 pits intrusion into private life against the protection for freedom of expression. 'The personal autonomy of every individual' was described as being at stake whenever the right to reputation is considered.[2] But, to survive in a court, any incursion into free speech must be proportionate and necessary in a democratic society. Although the Act did not introduce a free-standing law of privacy, the press argued that it introduced a new law, via a 'back door'. The analysis under the Act requires a focused and lawyerly evaluation of pros and cons, littering the conversation between editor and lawyer with 'on one hand' and 'on the other'. Lord Steyn in the case of *In re S (A Child)* summarised the requirements in four points: neither the right to reputation nor the right to free speech takes precedence; an 'intense focus on the comparative importance' of each is important; the justifications for interference with either must be taken into account; and a proportionality test must be applied. 'For convenience,' he said, 'I will call this the ultimate balancing test.'[3]

The ultimate balance examined by the court is in effect a construct for a process which many editors seem to go through every time a decision is made to publish private information. The 'what if?' questions which it requires appropriately mirror the human dilemma which privacy raises. The press steps daily with the public and unfolding events, attempting to analyse, summarise and then engage and inform the public on matters of interest. It also does not unthinkingly accept that convention is immune from challenge. Decisions in a newsroom are not grounded in legal concepts but in observations about society, and are informed not by analysis of case law but by open debate. As a result, the press will always be one step ahead of the law, reflecting or influencing changing views in society before the law is able to do so. One of the most marked differences between working as a lawyer inside a newspaper and working in private practice is to see at close quarters how the thinking behind a decision to publish evolves and quite how fluid the interpretation of boundaries, quite rightly, is. The key question is not always, 'Is this in the public interest?' Instead, it is what the heart of the story is and why it may be interesting or important. The questions asked are against the backdrop of the prevailing concerns and norms in society. Every decision is fact specific. In legal terms, an editor

2 *Wood v Commissioner of Police for Metropolis* [2010] 1 WLR 123.
3 *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 at 603.

is guided by legal advice and an informed view of whether the public interest in the publication will outweigh any violation of privacy. His assessment of the public interest, however, is one which will often be a gamble. The public interest in an investigation or article cannot be decided by the editor's legal adviser. It follows that editors will take decisions which are legally risky and judgment calls which are open to criticism. But editors also hope that the law will handle a publishing decision in a way which also reflects society.

In the last 40 years, critics of the press have repeatedly voiced strong discomfort about who is best able to make a judgment on what should remain private and whether editors and newspapers can be trusted to make that decision responsibly. Lord Justice Leveson, to whom I inevitably return later, accepted during his Inquiry into the culture, practice and ethics of the press that an editor is the only person to make the call in the first place, as this is a fundamental principle of a free press. But he returned again and again to the question, 'Who guards the guardians?' Another question is whether the voice of the individual is quashed amidst this high level tug-o'-war in the decision process. Buxton LJ said in *McKennitt v Ash*, 'If information is my private property, it is for me to decide how much of it should be published.'[4] That right, however, is qualified by the way in which an individual interacts with society and even more so in an age when sharing information is so easy via the Internet, and controlling that information once shared, increasingly difficult. The desire of the press to 'discharge its vital function as a bloodhound as well as watchdog'[5] means that often the position is more complex than an individual simply managing his or her own information. Even before the digital age, leaks of confidential information and the actions of whistle-blowers mean that information reaches journalists, often unsolicited, without the consent of the individual. The decision about what happens to it is no longer theirs alone, but becomes that of an editor.

In any newsroom the dogged dedication to pursue a good story is foremost. An emerging new story may be the privacy case which resets the dial. Humanity is of course unpredictable and it is impossible to guess what nexus of facts is likely to materialise before an editor. Faced with a novel set of facts, the editor will have only experience, reaction and debate to guide him or her. While a lawyer can recite the requirements of a reasonable expectation of privacy and the public interest and advise on how the courts have handled similar facts before, these fluid concepts are legal shorthand for a much more human thought process. When the court revisits an

4 *McKennitt v Ash* [2006] EWCA Civ 1714, [2008] QB 73, [2007] 3 WLR 194.
5 *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

editor's decision, it does so through its own prism but with the benefit of hindsight and in the cold light of day; in some senses, an easier position to be in. The ultimate balancing test is also one which is difficult for either an editor or a judge to perform without stamping some element of his or her own view of society on the outcome. That view is likely to be informed (if not influenced) by that person's own experience, education, position in society, background, politics and culture.

For many broadsheets, the decisions which editors face about what is private and what is public are often clear-cut. Politicians and those in whom the power of the state is vested top the list of those to be held to account.

Even where a decision about whether matters are private or public is uncontroversial, the decision about each scenario is novel and has to be considered on its own facts. The starting point for financial information, for example, is that its owner has a reasonable expectation of privacy. The scandal over MPs' expenses was an exposure of individuals' personal finance, and spending on moats and duck houses, but essentially it was about the abuse of taxpayers' money. The public interest was clear.

In July 2012 a tax tribunal rejected an attempt by Chris Moyles, a radio DJ, to be anonymised in a Revenue case about his use of a tax avoidance scheme. His application for anonymity was not surprising given the public attitude to tax avoidance at the time. A series of articles in *The Times* only a month before had sparked a heated national discussion about the ethics of tax avoidance, a legal practice which, in better economic times, would not necessarily have caused an individual to be shunned. Once the public noise grew, stoked by the daily front page exposure of well-known figures who were living and working in England but paying as little as 1% tax, it became clear that engaging in tax avoidance was capable of lowering someone in the eyes of many right-thinking members of society. The Chancellor of the Exchequer described aggressive tax avoidance as 'morally repugnant'. The public interest had been clearly made out. None of the individuals challenged *The Times* after publication, although claimant lawyers in pre-publication correspondence complained that the tax affairs of their clients were private. In contrast, in 2000 Lord Levy applied for an injunction against *The Sunday Times* to prevent it from revealing details of his tax records which showed that in one year he had paid as little as £5,000 in tax. Mr Justice Toulson said, '… if he has allied himself to the party to the extent of taking a peerage and taking the Labour whip in the Lords, then I do see force in the point that his own conduct is a matter of legitimate public reporting'. Although he lost, it is hard to see how such a challenge would even have been contemplated today, in a struggling economy.

More difficult is the line between private and public life where the conduct being examined does not relate directly to the role of a person in public life. A case in point is the recent saga involving Chris Huhne and Vasiliki Pryce. Ms Pryce completed a police form stating that she had been behind the wheel when a car registered in her then husband's name had been clocked by a speed camera. In reality she had been at a dinner at the London School of Economics while he, a Member of the European Parliament at the time, had been driving back to London after touching down from a trip to Strasbourg at Stansted. Following a bitter marriage break-up, she gave her story to *The Sunday Times*, intent on destroying her former husband's reputation and career. *The Sunday Times* published, and the media attention which ensued sparked a police investigation which resulted in both their arrests. Huhne initially denied the allegations and resisted prosecution but eventually pleaded guilty. Pryce's defence of marital coercion failed. They each received an eight-month sentence, although served much less. Their personal story played out before the public, complete with acrimony and family tragedy. What was revealed in court about the breakdown of a marriage could be reported, but there were still questions about where the line of privacy lay on information which had not been made public in court. His denials and alleged bullying and her motivation and behaviour suddenly could be coloured by any number of personal facts from their shared past which in theory could form part of a public interest argument.

Another controversial story was that of Fred Goodwin, then Sir Fred, who presided over the Royal Bank of Scotland in the lead up to its government bail-out. At the height of the storm over the courts granting 'super-injunctions' in 2011, he applied for an injunction to protect his anonymity and that of the woman, also employed in a senior role at the bank, with whom he had been having an affair. The challenge on public interest grounds to defend the injunction failed and his name was only published, under Parliamentary privilege, once it had been revealed in the House of Commons. Had there been clear evidence that the affair had distracted him from his pressing task of running a bank which then had to be saved at huge cost to the British public, the public interest in overturning an injunction would have been made out. The heated debates about the injunction focused instead on personal views of morality. Was the fact that he was having an affair sufficient reason to publish? Should a man in that position be having an affair?

Tugendhat J thought that the public interest could include:

> public discussion of the circumstances in which it is proper for a chief executive (or other person holding public office or exer-

> cising official functions) should [sic] be able to carry on a sexual relationship with an employee in the same organisation. It is in the public interest that newspapers should be able to report upon cases which raise a question as to what should or should not be a standard in public life. The law, and standards in public life, must develop to meet changing needs.

He continued:

> The public interest cannot be confined to exposing matters which are improper only by existing standards and laws and not by standards as they ought to be, or which people can reasonably contend that they ought to be.[6]

His judgment acknowledges the task which editors face in reviewing each new set of facts in a quickly changing society. It opens the door wide to the editorial discretion and margin for that judgement which has been described in libel cases as meriting respect. In the words of Lord Bingham:

> Weight should ordinarily be given to the professional judgment of an editor or journalist in the absence of some indication that it was made in a casual, cavalier, slipshod or careless manner.[7]

The same should surely apply to decisions about public interest in all privacy cases, not only those where a claim for misuse of private information is brought in respect of false information.

The arguments about the privacy of those who court celebrity or are in the limelight because they are a famed beauty or a skilled performer or sportsperson appear to be the most difficult to defend in court. Models who rarely speak are caught on camera taking cocaine, and actors who avoid cameras other than when recording are forced to seek injunctions to prevent details of their adultery becoming headlines.

The judgment in *A v B*,[8] a case about a married Premier League footballer's affairs, is broad enough to cover scenarios which might be reported by both tabloid and broadsheet newspapers. The Court recognised the simple principle of the public figure being more susceptible to scrutiny:

> Even trivial facts relating to a public figure can be of great interest to readers and others observers of the media. Conduct which in the case of a private individual would not be the appropriate subject of comment can be the proper subject of comment in

6 *Goodwin v NGN Ltd* [2011] EWHC 1437 at [133].
7 *Jameel v Wall Street Journal Europe Sprl* [2007] 1 AC 359 at [33].
8 [2002] EWCA Civ 337, [2003] QB 195.

> the case of a public figure. The public figure may hold a position where higher standards of conduct can be rightly expected by the public. The public figure may be a role model whose conduct could well be emulated by others. He may set the fashion. The higher the profile of the individual concerned the more likely that this will be the position. Whether you have courted publicity or not you may be a legitimate subject of public attention. If you have courted public attention then you have less ground to object to the intrusion which follows.

In recent years the battle to publish more details about the private lives of celebrities has focused on the hypocrisy argument: you cannot hold yourself out as being 'clean living', particularly when you profit from it, for example through sponsorship, and expect to keep the truth secret if your real life is far from 'clean'.[9] Although the arguments for public interest often seem to fail with applications to overturn injunctions obtained by celebrities, the debate is moved on each time a case is heard. Without the constant pushing of the line by editors, there would be no development in how the court untangles private information from public, and the law would be even further behind the times.

The tabloids which sell these stories are criticised for feeding the public with what they do not ask for; they are not representing the views of society, it is said, but simply exploiting celebrity for commercial gain. To see the tabloid press as solely greedy for gain, and entirely disrespectful of personal dignity does, amongst other things, ignore the complexity of the culture which goes with celebrity. A successful PR company is able to use the press to its advantage by controlling what and when information is revealed about a client. It would be naïve to think that the PR industry does not have as much of a hand in the development of that culture as the press. In the 2012 Woody Allen film, *From Rome with Love*, an ordinary citizen is elevated to celebrity status for seemingly no reason, and after days of being followed and asked whether he eats toast for breakfast, he finally defies the gathering paparazzi and threatens to unleash his lawyers. When the press loses interest in him and he is ignored in the street, he drops his trousers before oncoming traffic, craving the attention the press once gave his daily routine. It was a simple vignette of the fickle relationship between press, celebrity and human nature.

The context for the facts which an editor will review does not only change around moral behaviour. Changes in how technology is used have had a significant impact on the way decisions are made, particularly with

9 *Terry v Persons Unknown* [2010] EWHC 119 (QB).

the advent of the widespread use of social networking sites and the prevalence of mobile telephones with cameras. The decision to publish pictures of Prince Harry cavorting naked at a Las Vegas party may have shocked those who would not expect any pictures to be widely available of someone without clothes on, let alone of a prince. However, the pictures were taken on a phone camera brought, without as far as we know any objection, into a room by one of many young people invited to continue a pool party. Many privileged young people might do the same, fully expecting (if dreading) their pictures to be on Facebook the next morning. The reasonable expectation of privacy has fallen away for many people for whom social networking sites are a way of life rather than the subject of an academic paper. Of course as Prince Harry, although no doubt appalled by the press, chose not to pursue a legal claim, we do not know how a legal argument that he had no reasonable expectation of privacy would have fared.

The press's preoccupation with super-injunctions was presented in the pages of the nationals as the rich and powerful harnessing privacy laws at the expense of freedom of expression. The judges, the press said, were bound to be kind to claimants, as they too feared for their privacy. The views of predominantly white, middle-class men were not broad enough to comprehend diversity in a rapidly changing society. Lawyers who were sceptical about newspapers' editorials, which insisted (again) that this was 'privacy through the back door', argued that there was no abuse of the powers of the court by claimants and that orders for anonymity were being granted perfectly properly. The press, they said, was simply disgruntled that its toes were being stepped on, but newspapers were rarely able to put up a public interest defence of any merit. This, they continued, must have been because there was no public interest in the stories and it was thus right that they should not be published. Concern that short-cuts in legal procedure were being used by claimants and the need for greater transparency were pursued by a working group led by the Master of the Rolls, Lord Neuberger. In their keenness to protect the reputations of their celebrity clients, claimant lawyers were found to be overlooking the very clear obligation under the Human Rights Act 1998 to notify the media that they intended to apply for an injunction, making it impossible for the media to understand what was going on. The incidents of applications being bounced into court without notifying a media respondent seem to have diminished as a result of the review. The real impact of the storm was that the abuse of the principles of open justice, at least, appears to have been stemmed.

The most powerful restraint on an editor's privileged position of being responsible for a decision to publish private information would be the requirement for newspapers to notify the subject of a story before publication. The controversial arguments on this subject became the focus of Max

Mosley's case following the *News of the World*'s notorious exposure of his (also notorious) private sexual preferences under the headline, 'F1 boss has sick Nazi orgy with 5 hookers'. The main argument in favour of obligatory pre-notification is that once a private fact is revealed, it cannot be retrieved and monetary compensation is inadequate for a claimant. Only an injunction can prevent an unjust intrusion. Another argument is that leaving the decision to notify solely in the hands of an editor is inadequate because editors are commercially incentivised, perhaps insensitised, and some at least are contemptuous of both the value of privacy and of the judges who deploy the law. Others add that applications for injunctions are rarely challenged in court because newspapers know that there is often no public interest case to advance but are just 'trying their luck'. However, not only does the obligation to notify create delay which can damage a significant story, but it takes the public interest test out of the hands of an editor. The counter-argument was well encapsulated by Andrew Scott who has written:

> [Delays] would amount to the procedural licensing by the judiciary of the content of media publications. Publishers would have to pay for the right to publish; editorial decisions would be judicially sanctioned.[10]

The European Court of Human Rights rejected Mosley's argument, stating:

> … the Court has emphasised that while Article 10 does not prohibit the imposition of prior restraints on publication, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest. The Court would, however, observe that prior restraints may be more readily justified in cases which demonstrate no pressing need for immediate publication and in which there is no obvious contribution to a debate of general public interest.

It noted that:

> implications for freedom of expression are not limited to the sensationalist reporting at issue in this case but extend to political reporting and serious investigative journalism. The Court

10 'Prior Notification in Privacy Cases: a Reply to Professor Phillipson', LSE Law, Society and Economy Working Papers 09/2010.

> recalls that the introduction of restrictions on the latter type of journalism requires careful scrutiny.[11]

The four volumes of Lord Justice Leveson's Report were pored over and passed around Whitehall in a frenzy of drafting and huddled meetings. As it had been for the Calcutt Report, the focus of the Inquiry was privacy, sparked as it was by the gross intrusions of phone hacking. The Inquiry trawled through a catalogue of complaints, including hearing from celebrities who had arguably courted the press. But it also heard from families such as the McCanns and the Dowlers whose personal tragedies were painfully aggravated by the behaviour of the press. Lord Justice Leveson recorded:

> One of the main complaints advanced by those who testified during the first two weeks of evidence, and subsequently, was that a cultural strand exists within the press betraying an unethical cultural indifference to the consequences of exposing private lives, and a failure to treat individuals with appropriate dignity and respect. This was, in essence, an overarching complaint which encompasses many of the criticisms addressed. Phone hacking, blagging, the widespread use of covert surveillance, harassment, and the publication of private and confidential information all reflect, to varying extents, this cultural indifference.[12]

One of the most difficult concepts the Inquiry tried to grapple with was that of ethics, a subjective concept which underpins so many editorial decisions. The Inquiry at some points seemed to resemble an anthropological study. Leveson LJ asked whether the judgement of an editor can be trusted and how best it can be guided. The Report records that the arguments about curbs on intrusions into privacy were not about censorship but about '… maintenance of standards and the requirement that an editor is held to account by someone for the decisions which have been made …'.[13] He accepted that the press has an important role of watchdog and has the right to enquire and report, but he seemed dissatisfied from the outset at what some have called its 'unregulated power'. It was hard, however, to criticise the judgement of editors on subjective issues while accepting they had to be the decision makers. His scepticism about the protections in the current regulation, whether through the PCC Editors' Code of Practice or

11 *Mosley v UK*, App. No. 48009/08, 10 May 2011.
12 Vol. 2, 593, 2.1.
13 Vol. 2, 591, 8.52.

the law, have led to a wholesale review of how the press goes about its newsgathering and publishing. His recommendations are fuelled by a conclusion that the laws which together regulate intrusions into privacy are insufficient.

A fundamental defence to an action for misuse of private information troubled the inquiry the most. This was the use of the 'public interest' and in particular the definition in the Editors' Code of Practice which includes that there is a public interest in freedom of expression itself.

Editors were asked how they decided to publish private matters and how they weighed up the public interest in doing so. Many of them referred to the Editors' Code of Practice, which is currently written by a code committee of editors as a non-legal document, flexible enough to be amended quickly and easily in response to perceived concerns. Compliance with the Code is a relevant factor to take into account under s. 12(4) of the Human Rights Act 1998 when looking at whether to award an injunction. Clause 3 of the Code states:

> i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence, including digital communications.
> ii) Editors will be expected to justify intrusions into any individual's private life without consent. Account will be taken of the complainant's own public disclosures of information.
> iii) It is unacceptable to photograph individuals in private places without their consent.
> *Note* – Private places are public or private property where there is a reasonable expectation of privacy.

The Code explains there may be exceptions under the clause if conduct can be demonstrated to be in the public interest, which:

> includes, but is not confined to:
> i) Detecting or exposing crime or serious impropriety.
> ii) Protecting public health and safety.
> iii) Preventing the public from being misled by an action or statement of an individual or organisation. (Note 1)

It adds:

> 2. There is a public interest in freedom of expression itself.
> …
> 4. The PCC will consider the extent to which material is already in the public domain, or will become so.

5. In cases involving children under 16, editors must demonstrate an exceptional public interest to over-ride the normally paramount interest of the child.

Editors are now required 'to demonstrate fully that they reasonably believed that publication, or journalistic activity undertaken with a view to publication, would be in the public interest and how, and with whom, that was established at the time' (Note 3). This sensible addition means that the fluid and fast decisions made in a newsroom must be capable of explanation in the event of a complaint.

Tabloid editors faced the most difficulty in convincing the Leveson Inquiry that newspaper reports which are aimed at entertaining the public, often about celebrities who put themselves in the public eye, could ever be in the public interest. The Inquiry formed a view that the explanation of public interest was frequently abused by editors. However, in my experience the Code has been a valuable touchstone for guidance to journalists, and complaints made under the Code are taken seriously. A code will no doubt be an important part of future regulation.

Lord Justice Leveson also examined the commercial imperative to hound down a story, such that it might encourage disregard for privacy. Only a few court judgments acknowledge a public interest in the viability of the press and the need to be able to publish articles which engage a reader. Lord Rodger in *Re Guardian News and Media Ltd* stated:

> A requirement to report [material] in some austere, abstract form, devoid of much of human interest could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspaper and magazines which can only inform the public if they attract enough readers and make enough money to survive.[14]

However, the comments could, unsurprisingly, not persuade the Inquiry that this was good enough when considering intrusions of privacy where the public interest was, it appeared, ill considered or even not considered at all.

Twenty years after Calcutt, the press has found itself yet again in the 'last chance saloon', fighting off the threat of legislation which it fears would enable Ministers and Members of Parliament to control or chill it. A further significant call for reform is a basket of changes to the laws tightening around privacy. Leveson recommended the award of exemplary damages

14 [2010] 2 AC 697.

against publishers who do not become members of the new press body, changes to the data protection laws to narrow the exemption under s. 32 of the Data Protection Act 1998 for journalists, and changes to the Police and Criminal Evidence Act 1984 in relation to material which should be produced in police investigations. The changes are worrying for investigative journalism, where private information can often be a lead which turns into a story which turns into a scandal. That path is often obscure to the onlooker who has not seen at close quarters how a story evolves and thus dismisses the potential for damage to this type of journalism. A particularly strong concern is that reporters following a strong lead for a public interest story arising from private information should not be unduly penalised if the allegation, once investigated, is not what it seemed. The press would be failing in its duty to investigate if it did not follow such leads. Even if a scandal is only occasionally exposed in this way, it is crucial that rules are not imposed which might impede that process. The Lords Select Committee in 2012 spoke of the power of investigative journalism as a 'vital constituent of the UK's system of democratic governance and accountability'. It concluded that this form of journalism, at a time of enormous economic pressures for the press, 'is suffering as a result of inconsistencies and lack of clarity in the law'. Despite the liberalisation in society since Calcutt, there is also a distinct threat to lively, raucous privacy stories. At risk is the entertainment value in journalism and opinion which sells newspapers, which is fundamental to the economic battle which the press currently faces, as hard copy sales dwindle. Most tabloid newspaper lawyers will tell you that the 'kiss and tell' has been quelled, at least for now.

At the coalface of news and journalism, decisions about private information are taken daily. The law's focus on the public interest, and an acknowledgment of how fluid its interpretation is, ought to encourage the courts to take into account the decision-making process of editors. Mr Justice Tugendhat suggested in the *Terry* case that the test on this point might be not whether a publication is actually in the public interest, but whether a journalist reasonably thought it was. This would not only enable the law to truly reflect society and the role of the media but would bring the common law into line with the wording of the Data Protection Act 1998, which requires a journalist to demonstrate a reasonable belief in the public interest. It is also an anomaly between libel and privacy that a discussion of the public interest in libel can explore the thinking of the responsible journalist, but a case brought for misuse of information has no regard to the belief of the journalist in the public interest.[15]

15 *Ibid*. at [70]–[73].

A report from the Reuters Institute of Journalism in 2009 noted that the balancing of competing rights in the Human Rights Act 1998 was difficult for the courts and it was 'better by far … if those decisions are called correctly in the newsrooms or editorial offices in the first instances. The courts are making it clear that they require media responsibility'.[16] That conclusion seems to suggest that editors should think like judges and fails to recognise that editors frequently find themselves considering a novel set of facts which the law has not yet seen. It is the role of the press to examine the facts and decide whether there is a social need to protect privacy or to expose a private fact. It is a huge responsibility and gambles with people's personal lives, but it is also a risk that accompanies a free and inquiring press. The law exists to catch a decision if it oversteps the mark and it is right that it requires an intense scrutiny of competing rights. Privacy is not just a legal question, it is a moral one, a public one and one which is constantly shifting. Decisions about publication cannot be dictated to by intransigent legal certainties. For that reason, those difficult decisions are best left in the hands of editors, with the courts and Parliament taking a valuable but firm second place. The newsroom is where the law starts, not where it ends.

16 Whittle and Cooper, *Privacy, probity and public interest* (RISJ, 2009).

5

Privacy Protection – Luxury Goods or Essential Commodity?

*Amber Melville-Brown**

With approximately seven billion people on the planet, we all need some private time and space every now and again to be able to live cheek by jowl with our fellow man. To achieve this, we need clear and workable rules for privacy protection. These are not mere luxuries or optional accessories for the wealthy, but essential for every person in every culture.

Before those on the other side of the claimant/defendant divide flick to another chapter in disgust, let us be clear: the need for privacy protection is not greater than the need for freedom of expression, and nor should it always eclipse it. In a vital and lively democracy, the right to espouse and share views and news is essential, but, at the same time, the right to respect for privacy should not be belittled as a plaything for pop, film or sports stars or subjugated in the relentless pursuit of free speech, or what passes for it. These sibling, and often warring, rights must equally be protected for our citizens to be able to live without the constant threat of scrutiny and prudent probing, while at the same time allowing our media to fulfil its vital role as bloodhound and watchdog of society, sniffing out wrongdoing and alerting us to it.

The need for privacy is exacerbated by the extent and nature of today's modern media pandering to our growing interest in the private lives of neighbours. Traditional print publications have for generations fed our insatiable hunger for information, whether in public interest stories of intrigue and impropriety, or simply in interesting stories of infidelity and indiscretion. Western society generally, and the British public in particular, certainly appear to have a craving for celebrity, and, from icons of the silver screen to those sacrificed on the altar of reality TV, we are fascinated both by their public persona and by what goes on in their private lives.

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* With additional research by Caroline Thompson and Roger Waite.

J. Lewis et al. (eds.), *Media Law and Ethics in the 21st Century*

It is not just the mainstream media that is blurring the lines of the privacy battlefield. We are equally interested in what goes on behind the bedroom curtains of our neighbours and in the boardrooms of businesses. As the omnipresent, seemingly omnipotent Internet spins its web around the world, with online newspapers, blogs and postings by 'citizen journalists' and gossip spread on social networking sites, there is little room to hide for any of us and every possible risk of kissing our privacy goodbye.

A private practitioner specialising in privacy receives cries for help from all walks of life: from public figures to private people; divorcing couples to diverging work colleagues; from big business to small charities. And with complaints and claims as diverse as the clients that seek protection, we lawyers are required to take a practical and pragmatic approach to privacy protection, tailoring our advice and using our legal tools best to suit the particular matter at hand. The flip side of this potentially positive flexibility is a potentially negative lack of clarity, which can give client, claimant lawyer, media organisation and defendant lawyer a large privacy headache, leaving no-one able easily to predict, let alone guarantee, where the lines would be drawn by the court if action were taken.

I aim in this chapter to shine a light on the areas that often raise concerns for those on the claimant side of the privacy divide and to debunk some myths in the process. And I hope to raise awareness as to why, despite the undoubted importance in a democracy of a right to free speech and a vibrant press, there is a need for our citizens to protect themselves from the slings and arrows of outrageous privacy invasion.

Privacy for prince and pauper

Privacy protection is not just for the rich and famous. From high-profile superstar to high street supermarket shelf stacker, we all have private and confidential information to protect – and we are all at risk of exposure. Whether the risk is from privacy invasion by the media, or being spied on by former spouses or colleagues, as privacy lawyers we have found no difference in the anxiety that a potential exposure can elicit. The mere mortals who have crossed our meeting room thresholds range across the professions – headmistress, lawyer, manufacturer, yoga instructor, administrator, journalist, to name but a few; while celebrity complainants making the headlines might fill a rather entertaining Celebrity Big Brother house – Prince Charles (plus his son Prince Harry and his daughter-in-law the Duchess of Cambridge); radio and TV presenters Sara Cox and Jeremy Clarkson; singers Charlotte Church and Tulisa Contostavlos; and footballers John Terry, Ryan Giggs and Rio Ferdinand.

Although the need for privacy protection is universal, celebrities are most frequently (and repeatedly) in the line of fire and in a stronger position than most to take on the might of the media. It is for this reason that household names have taken such an active role in the creation and development of privacy law. It was, of course, the celebrated and controversial supermodel Naomi Campbell, with a face that launched a thousand designs, who, as the first black supermodel, was instrumental in challenging and transforming the established norms of the fashion world and the legal landscape.

In 2002,[1] Ms Campbell served as the reluctant midwife at the English birth of the cause of action that is misuse of private information, widely referred to as the law of privacy. Sired by the UK's Human Rights Act 1998 out of the grande dame of the existing law of breach of confidence, the new cause of action was then christened in the English case of *Douglas v Hello! Ltd (No. 3)*,[2] brought by Hollywood royalty Catherine Zeta-Jones and Michael Douglas over the unauthorised publication by *Hello!* magazine of photographs of their wedding. In the House of Lords' decision in *Campbell v MGN Ltd*,[3] Lord Nicholls described the way in which the law of breach of confidence had been adapted to embrace the wrongful disclosure of private information, commenting: 'The essence of the tort is better encapsulated now as misuse of private information.' Privacy law as we know it was born. It is now rather a problem child, fast approaching puberty and with all the problems of adolescence, including notably its constant wrangles with its vociferous sibling, freedom of expression.

Identity crisis

While people in every walk of life – from A-list superstar to A-grade teacher – might be threatened with an invasion of privacy, the attitude of the would-be claimant to his or her own private life and to the media generally can easily impact on his or her ability to garner protection. And we have seen that only recently, in a number of decisions framing arguments concerning public figures and role models.

As Mr Justice Eady highlights in Chapter 1, there is a particular tendency to dismiss the private rights of that amorphous body that is 'the rich and the powerful'. But they are particularly at risk because the press is only too happy to push them from any pedestal on which they find themselves, if their feet are shown to be made of clay. Whereas during the golden age of

1 [2002] EWCA Civ 1373.
2 [2003] EWHC 55 (Ch).
3 [2004] UKHL 22.

Hollywood, movie stars were creatures to be admired and their lives aspired to; their fans did not clamour to learn about the minutiae of their private lives, their sexual orientation or their breakdowns to the extent that they do today.

In 2002, at the genesis of modern English privacy law in *Campbell*,[4] the Court of Appeal ruled:

> We do not see why it should necessarily be in the public interest that an individual, who has been adopted as a role model, without seeking this distinction, should be demonstrated to have feet of clay.

Now, becoming an A- (or even Z-) lister appears – in the eyes of certain media outlets – to equate to signing a pact with the publicity devil and accepting probing into every detail of your private life. And, conscious of the public's voracious appetite for tittle-tattle as well as the decline in newspaper and magazine circulation as the way we digest our news morphs with new technology, the press is at pains to normalise this intrusion into the lives of the famous.

In 2012, an increasing distinction was drawn between those in the public eye – the (in)voluntary role models – and those who are private persons, and the extent to which the private information of the former can be disclosed in the public interest. The European Court of Human Rights in the case of *Von Hannover v Germany (No. 1)*[5] drew a distinction between those two categories. Caroline Von Hannover had complained about the unauthorised publication of photographs of her out and about in public, shopping, skiing and so on, but not fulfilling any public role. The Court ruled that there is a fundamental distinction between:

> reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who … does not exercise official functions.

In simple terms, where 'Caroline the woman' was going about her private, everyday life, there was no justification for publishing any such photographs as distinct from when she was fulfilling an official function, in her capacity as 'Caroline the Princess'.

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4 [2002] EWCA Civ 1373.
5 [2004] 16 BHRC 545.

Such a decision is clearly beneficial to those of us advising clients that might have two distinct roles: princess and private person; top business executive and father; footballer and husband. But recent domestic cases have started to blur the lines so that the public persona is, worryingly, having a greater impact on the private person.

In *Spelman v Express Newspapers*,[6] an under-18-year-old aspiring rugby player failed to win an injunction against disclosure of his use of banned steroids, the court finding that 'a condition of participating in high level sport [is] that the participant gives up control over many aspects of private life'. This harks back to the ruling of the Lord Chief Justice, Lord Woolf, in *A v B*,[7] also known as the Flitcroft case (after footballer claimant Garry Flitcroft lost his anonymity; and, for that matter, also referred to colloquially as 'the Garry who? case' on the grounds that few outside the world of football had heard of the Blackburn Rovers midfielder until, ironically, he applied for his privacy injunction).

Lord Woolf controversially asserted in his judgment:

> Where an individual is a public figure he is entitled to have his privacy respected in the appropriate circumstances. A public figure is entitled to a private life. The individual, however, should recognise that because of his public position he must expect and accept that his actions will be more closely scrutinised by the media. Even trivial facts relating to a public figure can be of great interest to readers and other observers of the media. Conduct which in the case of a private individual would not be the appropriate subject of comment can be the proper subject of comment in the case of a public figure.

He went on:

> The public figure may hold a position where higher standards of conduct can be rightly expected by the public. The public figure may be a role model whose conduct could well be emulated by others. He may set the fashion. The higher the profile of the individual concerned the more likely that this will be the position.

This judgment would have been enough to send a chill down the spine of anyone considering engaging in a role that might be the subject of popular attention for fear of exposing the entirety of his or her private life to a vora-

6 [2012] EWHC 355 (QB).
7 [2005] EMLR 36.

cious press. But for the most part, it was not followed, and sports and other personalities were safe to sleep in their beds at night – or the beds of others for that matter – if not with impunity, then at least without excessive anguish.

But now the pendulum appears to have swung back towards the Flitcroft case. On the heels of *Spelman*, another blow to privacy protection was dealt by the High Court in *McClaren v News Group Newspapers*.[8] In this case, Mr Justice Lindblom ruled that a higher standard of conduct should be expected from 'prominent public figures' than from those who are not in the public eye, depriving the former England manager – he had been England football manager for a mere 17 months, more than half a decade previously – of the privacy protection he sought.

Should footballers and their managers – former or otherwise – or young sportsmen or singers be expected to set the tone for public morals or behaviour? The lucky few that make it may be blessed with a good left or right foot or a passable voice or stage presence, but they may be young and unworldly. They may earn vast fortunes, but they do not profess to run our country, or to teach our younger generations how to behave off the football field. Should they really have to trade in their privacy as a result of the day job?

Footballers are fairly well known for behaving foolishly, to say the least, and for seeking the assistance of the courts to prevent that foolish behaviour being broadcast to the world at large. The former England captain, John Terry, failed to convince a court to protect his privacy and to stop publication of details of an extramarital affair when it considered that his aim was in fact to protect his reputation, including lucrative sponsorship agreements. Ryan Giggs' successful privacy injunction was an own goal for the Welsh international when details of the affair he had sought to keep quiet – as well as the fact of the anonymised injunction itself – were posted on Twitter and discussed in Parliament under privilege. And Rio Ferdinand was shown a red card by the judge in his privacy claim after his off-side relationship had been reported by the papers, because, importantly, the court considered that, as former England captain, he had a duty to maintain high standards 'on and off the field'.

Another recent case, *Trimingham v Associated Newspapers*,[9] saw a significant dispute as to whether the claimant was a public figure. The judge decided ultimately that she was not a private individual, partly predicated on her role as a press officer to one of the country's senior politicians but

8 [2012] EWHC 2466 (QB).
9 [2012] EWHC 1296 (QB).

also because, in conducting an affair with Cabinet Minister Chris Huhne, she knew she was engaging in conduct likely to give rise to a political scandal. The judge noted: 'The public has an interest in knowing how the personal life of a leading politician, especially a Cabinet Minister, is likely to affect, or has affected, the business of government.' And, accordingly, her personal life was up for grabs too.

All those, then, with a potential public persona are at risk in today's privacy climate and need careful management of their public actions and pronouncements to protect their private lives from intrusive media. Because not only are their private lives of interest to the public, there is an argument that in doing anything to publicise themselves or their career, they allow their private lives to be revealed in the public interest.

In the Flitcroft case, Lord Woolf had come dangerously close to blurring the lines between what is in the public interest and what is simply interesting to the public:

> In many of these situations [concerning role models as he saw them] it would be overstating the position to say that there is a public interest in the information being published. It would be more accurate to say that the public have an understandable and so a legitimate interest in being told the information.

While the former would justify publication, it had been considered that the latter, generally, would not. But he went on seemingly to suggest that there is a public interest itself in the press being able to give the public what it wants:

> The courts must not ignore the fact that if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest.

If we are also to regress to that proposal from seven years ago, then the private lives of anyone other than Joe Bloggs may be severely under threat.

Claimant lawyers are now having to grapple with the fact that many more of their clients might be considered to be role models or public figures and, accordingly, are at greater risk of exposure in their private affairs. Who are these role models? Football manager and player at any club in any league? Film star, TV personality, musician? But where do we draw the line? Would it extend as far as anyone who fulfils a prominent function in furthering society? What about teachers, the clergy, lawyers and judges? That a category of society might be held to have a weaker right to privacy than the rest of us is a worrying development, especially if, given the parlous state in which the print media finds itself, the courts are also going

to hark back to Lord Woolf's arguments on the benefits of a pluralistic press, giving the media an even greater ability to wear away the privacy boundaries of these otherwise private individuals.

It is dangerous to adopt separate standards for those finding themselves, by accident or design, admired by others and accordingly thrust into the role of role model. Only if their conduct has a direct bearing on the qualities for which they were recognised and which they sought to exploit, would it be appropriate to take it into account on a case-by-case basis in considering whether the proposed publication contributes to a debate of public interest when weighing the respective rights at play. To bastardise Thomas Jefferson's phrase from the US Declaration of Independence, 'all claimants are created equal' and that is how they should be treated by the courts.

Self-interest and soap boxes

It is important, when considering issues of privacy for claimants, not to be lulled into a false sense of security that if one is not famous, then one has nothing to fear. Employers take unnecessary and sneaky peaks at employees' emails; governments spy on citizens with armies of Big-Brother-esque CCTV soldiers; spurned spouses and vengeful lovers kiss and tell; and hospitals and other organisations with access to data spill our private beans, as we saw in December 2012 with the Duchess of Cambridge hoax telephone call by an Australian radio station which had ultimately tragic consequences.

Although the media is not the only defendant to look down the barrel of a privacy claim, it is, as a collective group, most frequently in the hot seat, has deeper pockets and, crucially, a greater incentive in setting precedents than most other defendants. The media has, at the coalface of privacy litigation, forged a way to influence the legal parameters and to construct a law that enables it to speak out as freely as possible. At the same time, however, it is also the medium through which the public is provided with an explanation of and commentary on privacy law as it evolves.

Thus it will come as little surprise that, from the claimant media law perspective, it appears that much of that commentary is self-serving and flawed, coming as it does from the angle of self-preservation. Indeed, it may be argued that the media has sought to exploit its position of trusted guardian to shape the debate on privacy law, at extremes misleading the public on the true extent of the chilling effect of free speech or complaining about decisions taken by what it perceives as free speech-hating judges. The media has, after all, both a vested interest in limiting the privacy rights of the subjects of its stories and a large soapbox from which to preach a message that this is needed.

Of course, not all press is bad press. The distinction between poor journalism and 'quality papers' will at times be blurred, and while it may not be fair to say that the practices of most newspapers compare with the excesses of the now defunct British Sunday tabloid, the *News of the World,* it would be equally naïve to argue that the behaviour of 'quality papers' is always responsible or that self-interest and profit are concepts far too bourgeois for lofty and high-brow editors.

Another truth about chilled free speech

When 'enlightening' the newspaper-reading or broadcast-listening public to the perils of privacy protection, the media's weapon of choice is usually the threat of chilling free speech. Citizens the world over are frightened by horror stories of no stories at all as a result of privacy protection; privacy protection will, if media scaremongers are to be believed, rob mankind of the ability to learn about wrongdoing and corruption – precisely what the bloodhound and watchdog of society is there to root out for us and alert us to. But while anecdotes of this nature might serve the press well in worrying the world that the balance is tipping away from freedom of speech in favour of protecting the private lives of undeserving despots and outrageous oligarchs, editors are generally a little backwards in coming forwards with any actual evidence of stories that they did not print out of fear of a privacy action.

There are, of course, reasons other than fear of litigation that lead to a quietening of the usually loquacious media mouth. While the *Guardian*, *The Times* and the *Independent* reasonably continued to report the story to their readerships, the press was otherwise eerily reticent when it came to reporting the phone-hacking scandal.

The reporting of the Leveson Inquiry has demonstrated such naked self-interest and bias that Lord Justice Leveson felt it necessary to issue a statement clarifying the purpose of 'rule 13' letters (which are sent to those who have been or may be criticised in the inquiry or the report, offering them a right to respond before the report is published) after details of private letters sent to newspaper editors were discussed freely in the press. The statement noted: 'The extent to which these letters are being made the subject of comment and, indeed, misrepresentation, is itself not without significance'. The selective reporting of and spin on coverage of Leveson also prompted the respected International Forum for Responsible Media (Inforrm) blog to start a series of posts documenting the way in which Leveson is reported and the extent to which the industry has excelled in promoting its interests.

While the media's 'right' to publish photographs of a naked Prince Harry in a hotel room while on holiday in Las Vegas was chewed over *ad nauseam*,

the British press was united in a decision not to publish photographs of his royal and topless sister-in-law a matter of weeks later, when they were first produced in the French *Closer* magazine. Was it the fear of litigation that frightened them? Or perhaps good judgement of the public mood and the likely sales that publishing the titillating images would lose, not win them? Equally, the faces in circulation of the children of the famous are often pixellated in glossy magazines; whether it is done out of fear of legal action or the desire not to bite the hand of the celebrity parent that feeds, by selling magazines, is debatable.

The media is a mighty and powerful beast, able to make its own decisions. Its failure to report some matters fully is not, as it might have us believe, always or even frequently as a result of the devilry of privacy claims and 'gagging orders', but often out of editorial taste and commercial imperatives. As the press worried about the chilling of free speech while awaiting the recommendations of the Leveson Report, we shivered at the thought of the media shying away from exposing its own foibles. As first asked by Roman poet Juvenal more than 19 centuries ago, *quis custodiet ipsos custodes*? (or, for those of us brought up in a post-Woolf world, 'who watches the watchmen?'). Put simply, speech does not flow quite so freely when it is not in the media's interest for it to do so.

Testing the limits

While privacy law exists to prevent the dissemination of private information, there is no directory of private material for us privacy lawyers to thumb before advising our clients whether a complaint should be made. A back catalogue of cases is the best that we can do, coupled with an acute awareness of any slight twist of logic or turn of direction in the judgments being handed down. That said, if asked, we would probably all come up with a fairly similar list – save for a few tabloid editors who might profess, at least, to have slightly thicker skins – as to what we would find acceptable and what we would not countenance as tolerable as regards our private information. Advising clients on these issues on a daily basis, I would suggest that at the top of the list of no-go areas for anyone asked would be sexual and relationship matters and the naked body, followed by medical issues, the protection of children and details about the home; for businesses and charities, trade secrets and lists of customers or donors would be added.

In England, Mr Justice Eady has set out the tests and how the courts will balance the competing right of privacy on the one hand, and any other right at play – usually the right to free speech in a media case – on the other. By way of simple reminder, the well-established principles include that the

claimant needs first to show that his or her Article 8 rights are engaged, in that the claimaint has a reasonable expectation of privacy with regard to the information that is under threat and which he or she seeks to protect. It is likely that the client will be advised that he or she has such a reasonable expectation if the material in question falls into any of the categories highlighted above. Then it is necessary to consider whether that Article 8 right may be overridden by any countervailing considerations, such as the Article 6 right to a fair trial or, more commonly, the Article 10 right to free speech.

Neither Article 8 nor Article 10 takes precedence over the other, and where they are in conflict, the court focuses intensely on the facts of the case and, considering the respective justifications for interfering with each right, the comparative importance of the specific rights being claimed. Thereafter, as set out in the case of *In re S (A Child)*,[10] an ultimate balancing test is applied. If the claimant is seeking to have the private information in question protected by way of interim non-disclosure order – the infamous privacy injunction – then he or she will have further to show that there is an immediate threat to publish and that he or she is more likely than not to succeed at convincing a court ultimately at trial that the publication should have been prevented in the protection of his or her Article 8 right (Human Rights Act 1998, s. 12(3)). Moreover, s. 12(4) specifically provides that 'the court must have particular regard to the importance of the Convention right to freedom of expression'.

Prior notice and the privacy injunction

There is no clearer way of seeing where the battle lines are being drawn in the war between privacy and free speech than by looking at the constant skirmishes on the front line – privacy injunctions. Unlike in defamation, where injunction applications are rare, interim non-disclosure orders to prevent a story being published are part of the framework of a breach of confidence/privacy claim. Indeed for the claimant, it is the main remedy that he or she seeks. A chunk of change by way of damages may be very nice, thank you, but it cannot hope to patch up the gaping hole in the claimant's private life once he or she has been exposed. 'Sorry' may be a 'poor plaster', as the phrase goes; so too is an award of damages.

Throughout 2011 the British press preached incessantly about the evils of injunctions, giving the impression that they are scattered like confetti from the judicial pulpit to the media, claiming that the injunction is a

10 [2005] 1 AC 593.

disproportionate weapon unfairly pointed at the media chilling its free speech, putting the brakes on the publication of a scoop and denying their readers the information that the media considers they have a right to know.

There is little more likely to get mouths frothing along Fleet Street than a discussion of privacy injunctions, as the debate has become distinctly polarised. But while the media may bemoan its lot over anything that affects its single-minded march to publication, the potential negative impact on what it sees as the blunt instrument of the injunction was hardly ignored by legislators when the Human Rights Act 1998 was implemented, incorporating the European Convention on Human Rights into the law of England and Wales. Section 12 was deliberately included by way of protection for the media, providing that where a court 'is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right freedom of expression' – such as an injunction – it should not be granted 'unless the court is satisfied that the applicant is likely to establish that publication should not be allowed', in other words, that the claimant has a better than 50:50 chance of establishing his or her claim at trial.

The injunction is indeed a break on free speech, but sometimes that is warranted. Interim non-disclosure orders are the mechanism by which the court can intervene to prevent a disclosure or publication to maintain the status quo until the respective rights at play can be properly decided by the court. This gives the decision as to publication to the experienced and objective judge rather than leaving it in the hands of the partisan editor.

However, to obtain an injunction, the claimant first has to know that a disclosure or publication is about to take place. The media asserts that it normally approaches the subject of a story prior to publication – *Daily Mail* editor Paul Dacre has been reported as saying that his newspaper does so 99% of the time – but in reality and across all publications including in print and on the Internet, this ostensible voluntary approach is not sufficient protection.

Indeed, the prospective publisher is unlikely to give advance notice where it cannot be sure that public interest grounds or another justification for publication will outweigh the privacy right, and consequently risk that notice would raise the possibility of an injunction. So while it may be content, voluntarily, to give notice when it thinks fit, the media has consistently and vehemently opposed the suggestion that pre-notification should be obligatory. That is hardly surprising considering that every bone in an editor's body will be crying out 'freedom of speech' while the publisher devil sitting on his shoulder will be calculating the prospective sales.

While not subject to the jurisdiction of our civil courts, the recent example of the French magazine *Closer*, whose sales increased dramatically after its hard-nosed commercial decision to publish photographs of the topless Duchess of Cambridge, is informative. Not only does this demonstrate the dangers of leaving the media to decide what should and should not be published – there could not have been a clearer and more obvious unjustifiable invasion of privacy – but it demonstrates a need for pan-European protection as this case indicates a change in direction for France, a country renowned for turning a blind eye to the private lives of those in the spotlight and for the stringency of its privacy laws, and a hardening of attitude across the English Channel as publishers awaken to the fact that huge increased sales will dwarf any damages and are an appropriate reason flagrantly to breach the law. What we have to fear is that unless greater protection, enforceable on a pan-European basis, is afforded to privacy, the media will undermine those rights and wield *de facto* power over the private lives of individuals in deference to the god Mammon.

Back in Britain, the media reaction is just as telling. The *Sun*, only a matter of weeks before, had passionately defended its right to publish photographs of a naked Prince Harry. It argued that it was wrong to exclude those without Internet access from seeing photographs available to the 77% of the population with such access, the argument being that it prevented them from participating in a 'national conversation' and that the publication was a 'vital' and 'crucial test of Britain's free Press'. But when it came to Kate, it had 'no intention of breaching the royal couple's privacy by publishing these intrusive pictures' which it claimed 'no decent British paper would touch with a bargepole'.

The inability of the privacy claimant to know when his or her private information may be exposed to the world at large also reverses the inaccurate perception that it is the rich and famous that are on top in the game of cat and mouse between them and the press. Information is power, and where the claimant – rich and powerful or impecunious and weak – does not know about the media moggy about to play a deathly game with their privacy, then he or she can do little to avoid it and the game is anything but fair.

Max Mosley, former president of the motor racing professional body, the Fédération Internationale de l'Automobile (FIA), could hardly be described as impecunious and weak. But he found that the perishable commodity of his privacy was all too soon spoiled when on 30 March 2008 it was exposed to the world at large by the now defunct *News of the World*. Intimate images and video footage of him with a number of consenting women in a private basement engaged in sexual activity had been taken without his knowledge and were published without his consent.

His application for an injunction[11] to prevent further disclosures was unsuccessful – notwithstanding that Mr Justice Eady accepted that the material was clearly private – because it had already been disclosed to such an extent that it could no longer be considered confidential. The court should guard against playing the role of King Canute, ruled the judge. In 1987, the then Master of the Rolls, Sir John Donaldson, likened private information to an ice cube:

> Give it to the person who has no refrigerator or will not agree to keep it in one, and by the time of the trial you just have a pool of water which neither party wants. It is the inherently perishable nature of confidential information which gives rise to unique problems.

As the water of his melting private ice cube fairly gushed across the Internet – 435,000 hits on the online article and 1,424,959 viewings of the video in just a matter of days – Max Mosley had little chance of holding back the tide of publicity.

Mr Mosley found the £60,000 damages awarded to him for this invasion of privacy in his successful claim to be a poor plaster. He applied to the European Court of Human Rights for a ruling that the UK government had not sufficiently protected his Article 8 rights in not providing that there should be prior notice in such cases. However, while the European Court judges denounced the *News of the World's* conduct as 'open to severe criticism', they found, 'having regard to the chilling effect to which a pre-notification requirement risks giving rise' and the 'significant doubts as to the effectiveness of any pre-notification requirement', that the lack of any pre-notification requirement did not constitute a violation of Article 8.[12]

Mosley's attempt to secure pre-notification for claimants by law, rather than at the whim of an editor, failed. And claimants are still left in the position that the juggernaut of the media could at any time be speeding silently towards them. This issue goes to the heart of the responsibility of the media, and one would have expected prior notice to be one of the factors treated with significant importance in the recommendations of Lord Justice Leveson arising out of the recent Inquiry. Sadly, it was not.

Those of us advising claimant clients need to live in the real world as we currently find it with no guarantee of prior notice. If our clients are fortunate enough to be notified of an intended publication, then the prospect of an application to court for a non-disclosure order to keep the confidential

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11 *Mosley v News Group Newspapers Ltd* [2008] EWHC 687 (QB).
12 *Mosley v United Kingdom* (App. No. 48009/08) [2011] ECHR 774.

cat in the bag is at least possible. Whether that order will be granted, however, is a horse of a different colour, to mix our animal metaphors.

Nothing to fear

Injunctions – and especially so-called super-injunctions (where reporting the existence of any proceedings is prohibited, but which is frequently used to misdescribe all injunctions or anonymised injunctions) – are regularly panned in the press as a legal edifice behind which the guilty and indiscreet hide. But we should not rush with unseemly haste to suppose that the law of privacy, and injunctions in particular, are the wrongdoer's protection; or, to use the attention-grabbing vernacular of former *News of the World* journalist Paul McMullan in his evidence to Leveson, that 'Privacy is for paedos' – in other words, if you have done nothing wrong you have nothing to fear.

One of the significant issues to be taken into account when weighing the respective rights at play, and which can provide the would-be publishing media with a justification for publication, is that the exposure of the private information is in the public interest because it exposes hypocrisy. Naomi Campbell, for example, accepted that she could not successfully complain about the exposure of her drug addiction, as opposed to the detail of the therapy that she was obtaining at Narcotics Anonymous, because she had openly commented that, unlike other models, she did not take drugs. Her public statement was at odds with the true position and the media would have been entitled, the argument goes, to publish the private fact in the public interest, so the public did not continue to be misled.

But where that level of hypocrisy is not an issue, the public interest may not be met, and if an injunction is nonetheless granted, the media will argue that this allows wrongdoing to go unpunished and the powerful to go unscrutinised. (It has not escaped the attention of observers that the media's plea to be the moral arbiters of what is and is not private has been entirely undermined by the revelations of the Leveson Inquiry, which laid bare the moral compass of the tabloid press.) But it would do a great disservice to our judiciary to fuel the burning assertion that privacy is a charter for the corrupt, the criminal or the 'Casanova' and that the injunction is a shield behind which the courts allow wrongs in society – which should be exposed for the good of society as a whole – to cower and hide. The courts are only too well aware that the detergent of sunlight must be allowed to expose dirty and smeared reputations that otherwise profess to be squeaky clean. But where the exposure of private matters would contribute more to scurrilous gossip than to any debate of public interest, the courts will rightly prevent the disclosure.

That said, while there do not appear to have been any examples in which genuine criminality has gone unreported by way of civil injunction (although the libel case of *Polanski v Condé Nast Publications Ltd*[13] shows that a crime does not automatically deprive an individual of the opportunity to enforce his or her Article 8 rights), conduct that may engender disapproval, for example adultery, has been protected by the courts on numerous occasions. Indeed, this is the area of personal privacy in respect of which most people become seriously defensive. Accordingly, cases concerning issues of sexual conduct and sexuality feature frequently in the media courts of the Royal Courts of Justice.

Claimant lawyers are justified in advising their clients that they do not have to have been paragons of virtue to be granted the protection of the court. Indeed, had they been, there would hardly be a story to get tabloid juices flowing in the first place. Mr Justice Ball in *Jagger v Darling*[14] for example – where Elizabeth Jagger, the daughter of the Rolling Stones front man Mick Jagger, sought to prevent disclosure of CCTV footage from a nightclub – did not consider that engaging in sexual conduct in a quiet, dark room in the nightclub with Calum, celebrity son of George Best, constituted such 'moral torpitude' as to deprive her of the right to privacy.

The corollary is that if the poor but private behaviour that the claimant wishes to keep under wraps does risk misleading the public, there may be a public interest justification for the publication. The footballer Rio Ferdinand was hoist by the petard of his own autobiography and interviews in which he had repeated that he was a 'reformed character' when he later sought to prevent publication in the *Sunday Mirror* of his text 'infidelity' (with a woman with whom he had previously had a relationship but in fact had not actually met in person during the period in question). His public image of reformation was not reflected in reality, and accordingly the fact of the relationship – albeit not the detail or the private correspondences between the two – could be published in the public interest (*Ferdinand v MGN Ltd*[15]).

But infidelity *per se*, even where one might consider that it denotes a lie to one's spouse and those present at the wedding ceremony, does not necessarily deprive a married claimant of the ability to prevent disclosure of an affair. In *CC v AB*,[16] Mr Justice Eady was asked to weigh the rights of the claimant, who had had an affair with a married woman (and who gave evidence of the deleterious effect of this on his extremely distressed and

13 [2005] 1 WLR 637.
14 [2005] EWHC 683 (Ch).
15 [2011] EWHC 2454 (QB).
16 [2006] EWHC 3083 (QB).

suicidal wife), and those of the other cuckolded husband, whose desire to publish his account seemed to be based on a desire for money and revenge. Unsurprisingly, the court ruled in favour of the claimant, who, despite deceiving his wife, had not moralised publically.

British newspapers and magazines may be full of stories of who is having sex with whom – and where and how and how often – absent any hypocrisy or other public interest argument, but this is rarely going to be considered public interest-type information, the publication of which is worthy of protection for the greater good. In *Mosley v UK*[17] the Strasbourg Court made plain that 'tawdry allegations about an individual's private life' would not attract the Article 10 protection afforded to serious investigative journalism. But this protection can easily be lost by public pronouncements, as Naomi Campbell found out, and as Ms Trimingham learnt to her detriment having passed information about other individuals to newspapers, which factored into the decision-making of the judge in favour of the newspaper, refusing her requested injunction.

Back to blackmail

The impact of the claimant's own conduct on the ability to protect his or her private life becomes all too clear when a client seeking an injunction is the subject of a blackmail threat, which worryingly appears to be on the increase. In today's technology-led society, everyone with a mobile phone is a photographer and a potential publisher. And anyone with a gripe – disenchanted lover, disgruntled employee – can use easily available surreptitious technology to capture an inopportune moment for posterity and then to seek to make a quick buck by a threat to publish to the media.

Threats of blackmail can constitute a criminal offence, an instance of harassment and can evidence an invasion of privacy. And it is the nature of the beast that where the perpetrator is able to demand money with menaces, the threatened disclosure will be of something that the victim would rather stay private. It need not be unlawful activity, but it will often be potentially immoral or unwholesome conduct. But that does not justify criminal blackmail, and it may not justify in the public interest a disclosure that would otherwise constitute an invasion of privacy. For example, a naked young army officer might fear exposure of his antics – and his privates – to his grandmother, whether or not she is the Queen of Great Britain and Northern Ireland, let alone to the world at large.

17 App. No. 48009/08, 10 May 2011.

Meanwhile, the press is not innocent in this equation, because without willing recipients of such titbits lined up along Fleet Street, prepared to offer an outlet for sensational stories of sex and scandal, would-be blackmailers would quickly go out of business.

Harassment

While the victim of press intrusion might reach for a privacy injunction as the weapon of choice to defend himself or herself, it is worth noting that an order to prevent a course of conduct amounting to harassment is available in a claim under the Protection from Harassment Act 1997. While, for some, a privacy invasion is a one-off matter, for others – especially those in the public eye pursued by the paparazzi – it can be a regular occurrence. As such, the Act can be a useful accompaniment to a claim in privacy, or even to a claim in defamation where, usually, a pre-publication injunction is not available. The singers Lily Allen and the late Amy Winehouse, and actor Sienna Miller all obtained orders preventing harassment by various media seeking to photograph them.

But it is not just celebrities who use the Act to seek protection. The legislation is also an extremely important tool when private individuals are faced with harassment and the general threat of misuse of private information, whether this comes from unwanted approaches from former boyfriends or girlfriends, bombarding emails or calls and texts from any third parties. While harassment can be a criminal offence, and the threatened misuse of private information can be restrained by an interim non-disclosure order, civil restraint from harassment is an extremely important string to the claimant's bow when dealing with threatening individuals whom they would prefer not to report to the police.

Images and films

It is a matter of law – as well as common sense – that what one gets up to in the bedroom is usually private. However, difficulties can arise when those private matters are captured on film. Sex videos may not be everyone's cup of tea, but willing participants make them and in the wrong hands they can easily cause severe embarrassment, privacy invasion and a blackmail threat. The proliferation of video phones and digital cameras has made it easier to take and share images and films. And the immediacy of such devices producing images without the need to take them for development encourages some to take intimate shots both of themselves and others where previously they would not have dreamt of doing so. Whilst this may at the time seem like a bit of fun, many have subsequently found

themselves exposed to blackmail and/or public humiliation on the Internet.

In 2005, Hollywood actors Michael Douglas and Catherine Zeta-Jones took on *Hello!* magazine (*Douglas v Hello! Ltd*[18]) not over a sex video, but over the unauthorised publication of photographs of their wedding. The courts have accepted that images – whether still or moving – can cause greater and longer-lasting damage than words alone, and case after case has shown that anyone who seeks to argue that private images – let alone those of a sexual act taking place between two individuals in a private location – are not deserving of privacy protection, faces an uphill battle.

When ruling in favour of Tulisa Contostavlos from the group N-Dubz in the English High Court in July 2012 (*Tulisa Contostavlos v Michael Mendahum and Others*[19]), after a sex tape of the singer was released onto the Internet, Mr Justice Tugendhat proclaimed:

> It has … long been recognised that photographs are more intrusive than a verbal or written description. In the case of intrusive and intimate photographs of the kind in question in this case there is no real prospect of a defence.

However, when passion is running high or the person in possession of such material stands to make a significant sum of money, the temptation to release the material into the public domain may be too great. While celebrity sex tapes are often dismissed as publicity stunts, the spread of camera phones has led to a huge increase in inadvisable 'civilian' activity. The tabloids may readily report the exploits of sportsmen and other celebrities who, with apparent wild abandon and not a thought for their privacy, text photographs of their genitals to girlfriends and would-be girlfriends, but these privacy own goals are not confined to them; it is reported that an estimated 28% of US teenagers have texted fully naked photographs of themselves to others.

A moment of indiscretion could easily come back to haunt clients – or their family and children – and is more likely to do so should a relationship come to an end acrimoniously. However, Tulisa's victory demonstrates that even such unpleasant exposures can be remedied effectively as her team managed to expunge the offending material from more than 60 different websites.

18 [2005] EWCA Civ 595.
19 [2012] EWHC 850 (QB).

Home dis-comforts

After sex and sexuality, one of the biggest privacy concerns is the extent to which clients are protected in their home or in places which they consider private. Indeed, because of their public role and/or their wealth and the need for safety and security at home, many high-profile individuals place a special emphasis on the privacy of the home.

This issue was brought into sharp relief over the photographs of the Duchess of Cambridge published by French magazine *Closer* and showing her topless and in very skimpy bikini bottoms while on private property. No English newspaper touched the photographs, not least because doing so would have been commercially damaging, but also because under English law it would have been the most flagrant invasion of her privacy.

Privacy in the home is protected by Article 8 of the European Convention on Human Rights, and the Press Complaints Commission (PCC) Editors' Code of Conduct reflects this. A particularly helpful judgment was that of Mr Justice Eady in *McKennitt v Ash*,[20] which concerned a book about folk singer Loreena McKennitt written by a former friend and employee. The case laid down a number of principles of the current law of privacy, importantly that information about Ms McKennitt's household, which was trivial and anodyne, nonetheless could give rise to a reasonable expectation of privacy, because there is a 'traditional sanctity accorded to hearth and home'. By contrast the judge found that trivial information about the purchase of furniture during a shopping trip in Italy was not intrusive and there was no need for the law to protect it. The decision was of relief to many clients who value above anything their privacy 'behind closed doors' while accepting a degree of attention when they go out in public. There are limits on the protection of what goes on behind those closed, private doors, for example where criminal activity is going on; 'naturally, if criminal acts are committed, such as child abuse or the cultivation of illegal drugs, there would be a public interest to override the normal protection', said Mr Justice Eady.

The situation becomes more complex for well-known figures once they leave their homes. For example, in *John v Associated Newspapers*,[21] Mr Justice Eady found no reasonable expectation of privacy in anodyne photographs of singer Elton John that were taken not in his home but as he walked from his Rolls Royce to the front gate of his West London house. The numerous cases of celebrities being photographed on holiday, in both private and public locations, and simply walking down the street have given rise to a

20 [2006] EMLR 178.
21 [2006] EWHC 1611 (QB).

difficult test of when they will and will not have a reasonable expectation of privacy. The nature of the act being captured on film, as well as any instances of harassment in obtaining the images, may factor into the decision taken by the court. In *Theakston v MGN*,[22] the court refused an injunction preventing publication of a story concerning British television presenter Jamie Theakston visiting a brothel, but did grant one in respect of photographs that 'constitute an intrusion into his private and personal life and would do so in a particularly humiliating and damaging way'. Therefore, when advising clients whether they have a reasonable expectation of privacy capable of protection, we have to take the kitchen sink approach. In other words, where they were, what they were doing and who they were doing it with, who they are, as well as how the information or photographs were obtained and the proposed purpose of the publication, all have to be taken into account.

From the mouths of babes

Children do not have a general right to privacy simply by virtue of their age but, pragmatically, the courts have long recognised that they do deserve protection in circumstances where perhaps an adult may not.

The case of *Murray v Big Pictures*[23] concerned the toddler son of author JK Rowling, photographed without his, or his parents' knowledge while being pushed in a buggy down an Edinburgh street. While at first instance the court found that 'routine acts' such as a visit to the shops did not merit protection, the Court of Appeal made it clear that a child could have a reasonable expectation of not being photographed in a public place, particularly in circumstances where it was clear that the child, or someone on his behalf, would object.

The PCC Editors' Code also provides for the protection of children with famous parents, providing: 'Editors must not use the fame, notoriety or position of a parent or guardian a sole jurisdiction for publishing details of a child's private life.'

The PCC itself has, however, refused to uphold a number of complaints regarding photographs of children published without the consent of the parents, including where the photographs were not considered to damage the child's welfare and/or where photos had appeared of them previously without complaint. While celebrities have used their children to their own promotional advantage, or where they have voluntarily shared private photographs, there is a more arguable case that there is a lesser expectation of privacy.

22 [2002] EWHC 137 (QB).
23 [2008] EWCA Civ 446.

However, it is hard to see how parents' conduct or otherwise should allow the media a free run at children incapable of consenting themselves. The European Convention on Human Rights guarantees the right to life, the prohibition of torture and the right to liberty and security. Parents – surely first in the line of responsibility – cannot waive these rights on behalf of their children. And if they fail to fulfil their responsibilities, the authorities would soon intervene. When it comes to their Article 8 rights, therefore, can the parent decide unilaterally whether the child's rights should be protected? And if the parent has been irresponsible or has made a valid mistake, allowing a child to be photographed and then thinking better of it, should that be sufficient justification for the media to consider the child's rights to privacy waived for the rest of his or her childhood and until that child is old enough to assert and protect his or her own rights?

Two examples resulted in two very different results. In 2004 the media reported the sentencing of the mother of Maxine Carr, former girlfriend of child murderer Ian Huntley, when she was convicted of intimidating a witness during her daughter's trial. Mrs Hodgson, another of Mrs Carr's daughters, had attended the hearing with her husband and their children, aged two and five. She complained to British broadcast regulator Ofcom that ITV Yorkshire news footage showing them leaving court invaded the children's privacy. ITV argued that they were in a public place and that the parents had made no attempt to hide the children despite the significant public interest in the matter and the obvious presence of the camera. Consequently the complaint was initially rejected. But Ofcom's most senior decision-making body, the Fairness Committee, overruled this, saying that 'the broadcaster's prime concern should have been the vulnerability of these young children'.

By contrast in the same year, a father who had taken his daughter to a televised football match had his complaint to the PCC rejected over the publication by *Zoo* magazine of its article 'Just like Dad', illustrated with a photograph of the pair making similar offensive gestures in the stands. The PCC concluded that the child's 'anti-social gesture and her proximity to her father who was simultaneously giving a Nazi salute … marked this photograph as different from a more innocuous face-in-the-crowd picture'. Given their behaviour at such a public event, the PCC considered that it was 'not unreasonable for some in the media to assume that the complainant was unconcerned about the publication of pictures of him and his daughter using such gestures and that consent had therefore been implied'.

Unwanted media attention may profoundly affect families who are not usually in the public eye, and who do not have the protection of managers, agents and entourages. During the Leveson Inquiry, evidence came from the parents of missing Madeleine McCann to that effect. However, it is

usually the children of celebrity parents who run the media gauntlet every day that are at risk of unwanted media scrutiny. While this is not an altogether appropriate situation for them, the practical outcome is that celebrity parents – and those who may be considered role models in some sense, given recent case law suggesting a widening of the net of this definition – need carefully to protect their children against the media in the same way that they do against any other unwanted approach from a stranger. If they do not, their children may be at risk of becoming liable to exposure as adjuncts of their parents and celebrities in their own right before they even have the chance to consider their future for themselves.

That said, the very celebrity of the glamorous parent may be a saving grace for a child. One only has to take a quick flick through the pages of some of our glossy magazines to note that the faces of many children are obscured. The Faustian pact between publishers and those that feature in their pages means that the industry is not averse to taking a pragmatic and commercial approach. While including an image of the child might infuriate the famous parent and exclude that publisher from the list of those invited to the press conference, a little pixelation can go a long way in keeping the A-lister happy and the magazine on the list for the photoshoot of the year. As a result, the child is protected, the parent is content and the media avoids biting the celebrity hand that feeds it.

Finances

After sex and children, comes money. And nowhere is society's curiosity in the finances of others more acute than with regard to the well-known and the wealthy. As the global economic downturn shows scarce signs of improvement, Britain is facing a drop in living standards at the same time as it is inundated with endless photographs of celebrities in head-to-toe designer clothing and clasping the latest 'it' bag. The ever-widening chasm between the haves and the have-nots has served to intensify and politicise our already somewhat unhealthy interest in the finances of others.

It has been impossible to ignore the deluge of stories emerging about the personal finances of wealthy individuals and companies recently, a trend only set to continue. From comedian Jimmy Carr to Elton John, to 2012 US presidential candidate Mitt Romney, the media has detected a source of voyeuristic exposés capable of tapping into public fear and anger about the economy. Indeed, the media exposure of the global coffee chain Starbucks and resulting public opprobrium forced the chain to agree voluntarily to pay UK corporation tax.

As with most areas of privacy law, there is no easy answer as to whether the invasion of privacy is justified. The K2 tax scheme used by Jimmy Carr

was both legal and fully disclosed to Britain's tax authorities. However, given that the scheme enabled participants to pay as little as 1% tax, many may argue that running the story was justified and in the public interest. Others will argue that the rights and wrongs of a person's tax affairs should be a matter for the taxman and the government rather than the press.

Given the polarised backdrop against which details of finances may be revealed, either with consent or otherwise, even without the threat of the politics of envy rearing its head, it is natural to wish to shield one's finances from prying eyes. Finances give an insight into a person's lifestyle, preferences and what is being planned in the future. If an individual is planning on marrying, moving abroad, making gifts to relatives or selling a company, he or she will want to structure his or her finances accordingly. In the case of the sale of a company, signs of any movement in finances may alert competitors to this change, adversely affecting the position of the business within the sector. Alternatively, those creating a structure ensuring financial provision for their children from a first marriage may wish to keep the exact details of this provision private from their current spouse.

In the majority of cases, intrusion into personal finances is unwarranted and unjustified as the media has no interest in delving into a private individual's bank accounts and financial affairs where there has been no wrongdoing. But there are occasions, as with all aspects of ostensibly private information, where there is a public interest that overrides the otherwise confidential nature of the information. It all comes down to balance and the difficult concept of public interest, the definition and scope of which continues to beset the working lives of anyone involved in media law, on whatever side of the publication fence they reside.

Leveson and beyond

One might have hoped that an inquiry spanning 18 months and costing in the region of £4 million might have given us some clearer indication of what the public interest is. Some media reports portrayed the evidence as a carnival of celebrities, but the victims who were prepared to come before the judge and the cameras and talk about their feelings at the invasions they suffered at the hands of the press were screen idols and 'civilians' alike. And indeed, it was the hacking of the phone of murdered schoolgirl Millie Dowler and the wrecking of the reputation of former teacher Christopher Jefferies (who was falsely accused of the murder of Joanna Yeates) that really brought home to the public the serious damage that the press can do to the lives of normal people, ostensibly in the public interest.

Lord Justice Leveson's Report was ultimately published before Christmas 2012 following much anticipation. But the very next day, having had all of

an afternoon to review it, Britain's Prime Minister seemingly tossed the report out like an unwanted Christmas gift. A year before publication of the Report, David Cameron had told victims of privacy invasion that he would implement Lord Justice Leveson's recommendations, unless they were 'bonkers'. Having considered the victims' evidence over many months and having listened to the press's concerns over state regulation, Lord Justice Leveson came up with what many consider to be a sensible compromise, recommending that the press be subject to independent regulation, backed by statute, in much the same way as the solicitors' profession is regulated by the Solicitors Regulation Authority, backed by law. But he might as well have proposed that Joseph Stalin oversee the running of the British print media for all the clamouring that ensued, with the PM ripping the guts out of the report immediately and confirming his 'serious concerns and misgivings' over this vital plank of the recommendations.

In place of the PCC, which Lord Justice Leveson found to have been 'ineffective and lacking in vigour', the judge proposed the creation of an independent regulatory body with statutory support. To allow further self-regulation, he suggested, would be to allow the press to continue to 'mark its own homework', the result of which had so spectacularly failed the public to date. The standards to be adopted by the regulator should be enshrined in statute. But so too should a legal duty on government to protect freedom of the press and to provide an independent process to recognise the new self-regulatory body. By thus validating the standards code and the anticipated arbitral system of the new body, a system would be put in place that the public could trust and that the press could live with. Or so he thought. In fact, it seems as though the press – and the Prime Minister – are not prepared to live with this at all, and that, once again, they are seeking special treatment and to be allowed to continue to self-regulate, without the spectre of any statute anywhere in sight.

Two rival schemes for implementing Leveson were proposed, both by way of royal charters submitted to the Privy Council for consideration. One of these charters was supported by the Government after a long consultation period that gained cross-party support from the Houses of Parliament. This 'cross-party' charter (as it has come to be known) is seen as coming close to implementing Leveson's proposals, and the Government's intention was to support its implementation. The other royal charter was proposed by the Newspaper Society and was supported by large segments of the press while facing criticism as falling far short of Leveson's recommendations. In October 2013, despite a last minute attempt by newspaper publishers to gain an injunction stopping Ministers seeking the Queen's approval for the charter, the cross-party charter was approved by the Privy Council, and the press is now expected to create a regulatory body compli-

ant with the royal charter's criteria. However, many parts of the industry remain opposed to the cross-party charter and are intent on creating their own regulator, and as at the beginning of 2014 it was unclear how many, if any, newspapers would sign up to the royal charter. Although the press charter may have made enough of a nod at the Leveson proposals to allow it to be sold to the public as a meaningful response to Leveson, it is also sadly a sign that that the rich and powerful print media remains hostile to Leveson's recommendations and appears intent on continuing to fight implementation of any scheme that reflects and complies with his recommendation in full. Until implementation of such a scheme is brought about, Lord Justice Leveson's concern that his Report may end up as a 'footnote' in history remains a real risk, and without the vital statutory underpinning envisaged by Lord Justice Leveson, there is a concern that the press will continue to carouse in the last chance saloon of self-regulation where it has become drunk on its own power.

Privacy in England and Wales is a concept and a reality that we must strive to protect. It is constantly bombarded by threats from modern media technology and by attacks from other jurisdictions. But that is no excuse to lower our standards and to sacrifice ourselves to the pursuit of free speech at all costs. Free speech is a responsibility, as well as a right, and it can be just as badly abused as can any attempt unjustifiably to silence critics. There is always a balance to be struck, and it is unfortunate that the print media is proving reluctant to agree to the fundamental plank of statutory underpinning proposed by Leveson.

Only time will tell whether the press really does see the writing on the wall of self-regulation this time and is prepared voluntarily to put something sensible in place to protect itself, and the public. Or whether it will consider that it has once again been let off the hook to go on drinking in its own perceived invincibility in the happy hour that David Cameron has given it. If so, we should not be surprised to find a bloated, belligerent and bellicose press behaving badly and continuing metaphorically to live up to the worst stereotype of binge-drinking Britain for some time to come.

6

'People are so much more interesting than things': Protecting Free Expression

Gavin Millar QC

In 1885 the British constitutional theorist, AV Dicey, published his seminal treatise, *An Introduction to the Study of the Law of the Constitution*. Chapter VI, 'The Right to Freedom of Discussion', famously identified this fundamental right as being 'in England little else than the right to write or say anything which a jury, consisting of twelve shopkeepers, think it expedient should be said or written'.

To Dicey, and the generations of judges brought up on his thinking, freedom of expression, including media freedom, was a negative freedom. The press could publish anything which was not prohibited by statute or the common law. The biggest restriction on press freedom was the law of defamation. It was applied by Dicey's 'shopkeepers' sitting as jurors in the many libel cases brought against the press in the High Court.

The most notable absentee from Dicey's list of other restrictions (official secrets, blasphemy, obscenity, sedition and so on) was privacy. Neither our parliamentarians, nor our judges 'did' privacy as such in the 19th or 20th century. There were no statutory or common law rules restricting press freedom to publish material about people's private lives.

This was good job from the point of view of the British press. The newspaper proprietor, Lord Northcliffe, revolutionised the publishing of newspapers and magazines in Britain in the early years of the 20th century. Northcliffe considered that the popular press should always tell the news through people because 'people are so much more interesting than things'. Quite often, people, and their private lives, became the news.

The heyday of the British popular press was the early 1950s. No less than 21 million newspapers were sold each weekday and a staggering 31 million each Sunday. Then, as now, the private lives of celebrities and royals provided much of the copy for the popular press. George VI, the father of the Queen and the subject of the wonderful film, *The King's Speech,* reputedly had a scrapbook of press cuttings entitled 'Things my daughters never did'.

J. Lewis et al. (eds.), *Media Law and Ethics in the 21st Century*

The coming into force of the Human Rights Act 1998 has changed our traditional legal landscape in relation to both freedom of speech and privacy. We now have a positive constitutional right to freedom of expression, but also judge-made laws which restrict the freedom of the press to publish about private lives. Many would say that in consequence the press has told less news through people in the way Northcliffe considered so important.

I have appeared as counsel for various media interests in a number of cases on freedom of expression and privacy in the last 10 years. In this chapter I discuss my concerns about how the law of privacy has developed during this period, the consequences of these developments and what the future may hold. I will try to tell the tale as it unfolded.

The 'constitutionalisation' of free speech in the United Kingdom

Our judges anticipated the arrival of the Human Rights Act 1998. In cases like *Reynolds v Times Newspapers Ltd,*[1] decided in October 1999, they were at pains to emphasise that freedom of expression was already a constitutional right in England, even without Article 10, the free speech provision in the European Convention on Human Rights ('the Convention'). The case law suggesting that this was so was a little sparse before 1998.

But the real change came when the Human Rights Act 1998 came into effect in October 2000. Section 2 of the Act required the courts to take into account relevant judgments of the European Court of Human Rights in Strasbourg. Section 6 required them to ensure that all of their decisions were compatible with the Convention rights in issue in the case.

The good news for the press was that UK courts now had to protect journalists' rights to free speech, as understood in Strasbourg, as a fundamental right. The bad news was that under Article 10 of the Convention not all journalism is worthy of protection. As Tugendhat J explained in a case in the High Court, *Commissioner of Police of the Metropolis v Times Newspapers Ltd*:[2]

> There is no special Convention right for proprietors, editors or journalists. … [T]he Strasbourg jurisprudence … distinguishes between types of speech rather than types of speaker. The type of speech to which it gives most protection is that which is directed to informing public debate (or, as it sometimes put, imparting information and ideas on political questions and on

1 [2001] 2 AC 127.
2 [2011] EWHC 2705 (QB).

> other matters of public interest). It is that type of speech which is referred to by a figure of speech as 'the press', or as journalism, in that body of case law. The Strasbourg jurisprudence does not look to the form in which the speech is published, and, if it is in a particular form, categorise it as journalism even if its content is no more than gossip which does not inform public debate.

Worse still for our press, lurking around the corner was some new and problematic Strasbourg case law. This was to be developed under Article 8 of the Convention, the privacy provision. It concerned intrusion by the media, rather than by the state, into privacy.

Why did Strasbourg privacy law turn against the media?

The European Convention on Human Rights was drawn up after the Second World War. It was intended to prevent a repetition of the egregious human rights violations that had occurred during the war. It was also a response to the growth of communism in Eastern Europe. It was intended to protect the Western European member states of the Council of Europe, the body that oversees the implementation of the Convention, from communist subversion. Hence the repeated requirement in the Convention that any state interferences with its qualified, or presumptive, rights (such as Article 10) can only ever be justifiable if strictly 'necessary in a democratic society'.

Article 8(1) of the Convention provides that: 'Everyone has the right to respect for his private and family life, his home and his correspondence.' The eminent English Queen's Counsel, Michael Beloff, has perceptively observed that Article 8 was originally intended to protect against 'the midnight knock on the door from the Stasi'. It was also intended to protect against other, less dramatic but still worrying, state actions interfering with our privacy. In the 20th century nearly all of the Strasbourg cases under Article 8 were about protecting against *direct* actions of public authorities which interfered with people's private lives.

As explained below, in recent years the Strasbourg judges have used Article 8 to restrict media, rather than state, intrusions into privacy. This has brought the right to privacy into conflict with the right to freedom of expression under Article 10 of the Convention. Exactly why Article 8 has come to be used in this way is a matter of fierce debate. There were probably, however, three main reasons.

First, the former communist states of Eastern Europe signed up to the European Convention on Human Rights after the fall of the Berlin Wall in 1989. Their judges had been schooled in the Eastern European communist

legal traditions. They were, let us say, unfamiliar with Lord Northcliffe's dictum. In the Marxist East the official line was that things were so much more interesting than people. As Vasily Grossman says of the Soviet newspaper editor Sagaydak in his 1959 masterwork *Life and Fate*,[3] 'He considered that the aim of his newspaper was to educate the reader – not indiscriminately disseminate chaotic information about all kinds of probably fortuitous events …'.

The domestic civil and criminal codes in the Eastern states contained provisions giving strong protection to personal privacy, albeit not, of course, against the state. These were largely designed to prevent journalists telling the people what the party functionaries were getting up to at their expense. No stories were to be published about politicians' *dachas* in the countryside or their holidays at the Black Sea resorts.

Some of these provisions still exist. Many have only recently been repealed. Until very recently much of the Macedonian Criminal Code, for example, was a hangover from that of the former communist Yugoslavia. It provided that 'whoever expresses or spreads information from the personal or family life of another, being harmful for his reputation' commits a criminal offence. This might be punished with a fine or in extreme cases with imprisonment of up to three years. Truth would be no defence to this offence. These cultural influences should not be underestimated. As more and more Eastern European judges entered the court so the tendency to protect privacy at the expense of press freedom of expression grew.

The death of Princess Diana was also a factor. Periodically, parliamentarians from the member states of the Council of Europe meet together in its Parliamentary Assembly. A few weeks after Princess Diana's death in 1997 the Parliamentary Assembly held a current affairs debate on the right to privacy. This led to Parliamentary Assembly Resolution 1165 the following year on the right to privacy.

Resolution 1165 recognised that 'personal privacy is often invaded, even in countries with specific legislation to protect it, as people's private lives have become a highly lucrative commodity for certain sectors of the media'. It identified *the 'victims'* as *public figures*, the details of whose private lives *serve as a stimulus to sales*.[4] Begging more questions than it answered, Resolution 1165 identified public figures as:

> persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life,

3 V Grossman, *Life and Fate* (completed in 1959 but not published until 1980 when it was smuggled out of the USSR to the West).

4 para 6.

> whether in politics, the economy, the arts, the social sphere, sport or in any other domain.[5]

It noted that such public figures had to 'recognise that the special position they occupy in society – in many cases by choice – automatically entails increased pressure on their privacy'.[6]

Importantly, Resolution 1165 noted that the Article 8 and Article 10 rights are not in *any hierarchical order, since they are of equal value*.[7] Perhaps most telling of all, however, was its assertion that:

> It is often in the name of a one-sided interpretation of the right to freedom of expression, which is guaranteed in Art.10 of the European Convention on Human Rights, that the media invade people's privacy, claiming that their readers are entitled to know everything about public figures.[8]

Resolution 1165 called on contracting states each to ensure that it was possible for victims to take 'action under civil law … to claim possible damages for invasion of privacy'.[9] Ominously it emphasised that 'editors and journalists should be rendered liable for invasions of privacy by their publications, as they are for libel …'.[10]

Such Parliamentary Resolutions often give clues as to how the case law of the Strasbourg Court is about to develop. This was so with Resolution 1165 and it has been cited with approval by the Court in its subsequent privacy judgments against the media.

Thus the stage was set for our judges, finally, to start 'doing' privacy.

The third and last reason was a new found judicial activism in Strasbourg. The judges of the European Court of Human Rights were increasingly recognising that human rights complaints could be about state inaction, just as much as state action. This was particularly so with Article 8. The Convention is concerned on its face, however, with human rights interferences by the state. These occur when public authorities or officials act in a way which penalises or restricts the exercise of the right. So how could the judges adjudicate upon state inaction?

The solution to this problem was the identification by the Court of what the Strasbourg judges describe as a positive obligation on the state to act to protect human rights in certain circumstances.

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5 para 7.
6 para 6.
7 para 11.
8 para 8.
9 para 14(i).
10 para 14(ii).

Perhaps the best known example of this under Article 8, before the recent cases involving the media, is *X and Y v The Netherlands*.[11] X had complained to the Dutch police about a sexual assault by a carer on his daughter, Y, who lacked capacity for mental health reasons. The prosecutor decided not to prosecute, provided the offender did not repeat the offence. X asked the Dutch courts to order a prosecution but they refused on the ground that, even though Y was incapable of making the complaint herself, no-one else was entitled to complain on her behalf. The Strasbourg Court held that the inaction of the Dutch authorities violated both X and Y's rights to respect for their private and family life. It explained the breach of the state's positive obligation under Article 8 thus:

> The Court recalls that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.

In other words the Dutch court should have made the order for a prosecution which X had sought. If Parliamentary Assembly Resolution 1165 set the stage for our judges to 'do' privacy, cases like *X and Y v The Netherlands* ensured that the Strasbourg Court would be able to write them a script.

How did the Strasbourg law turn against the media?

The short answer to this question is that in 2004 Caroline Von Hannover, the eldest daughter of Prince Rainier III of Monaco, gave the judges in Strasbourg the opportunity to turn it (see *Von Hannover v Germany (No. 1)*[12]).

Three German magazines had, over a number of years in the 1990s, published photos of Caroline Von Hannover, including some with her boyfriends, out and about in public. She was shown shopping, leaving her apartment and playing tennis for example. Von Hannover complained to the German courts, seeking non-publication injunctions and compensation. For the most part the German courts upheld the rights of the magazines to publish. They pointed out that the photos of her which they

11 App. No. 8978/80, 26 March 1985.
12 App. No. 59320/00, 24 June 2004.

considered had been published lawfully were not of her in a private, or even in a secluded place. They were not in any way shocking. The German courts considered that Von Hannover was a figure of contemporary society '*par excellence*' and the public had a legitimate interest in knowing how she behaved in public. Their Government argued before the European Court of Human Rights that its courts had struck a fair balance between the applicant's rights to respect for her private life guaranteed by Article 8 and the freedom of the press guaranteed by Article 10 of the Convention. The Strasbourg Court disagreed.

The longer answer is more difficult to give. In disagreeing with the German courts, the Strasbourg Court took three huge steps. First, it dramatically extended the scope of the protection for private and family life given by Article 8. Secondly, it held that Princess Caroline's Article 8 rights were brought into play ('engaged' in human rights jargon) in this sort of litigation where people sued the media for publishing supposedly private photographs or information about them. In doing so it emphasised that contracting states had a positive obligation to provide a civil remedy for the victim if there was an unlawful invasion of privacy by publication. Thirdly, it held that the German courts had violated Von Hannover's Article 8 rights by failing to uphold her claim on the facts.

These were dramatic, and controversial, steps. They were not presaged in any earlier rulings of the Court. Yet the judgment of the Court contains little or no reasoning, by way of analysis or of principle, to explain why concern for human rights compelled them.

The Court did not explain why Von Hannover's privacy rights were engaged by the publication of the photos. Caroline Von Hannover was pictured in public places and was not doing anything private, or even (in many of them) anything at all *with* anyone else. That is unless you consider hitting a tennis ball over a net as highly personal interaction with your opponent. No attempt was made to analyse the various photographs and explain why they fell *within the scope of her private life*, as the Court put it. The closest the Court came to an explanation was at paras 63 and 64 of its judgment. It said that Von Hannover did not *exercise official functions*. The photos could not therefore be of her in this capacity and so, apparently, were private. The problem is that this is not how we usually understand the word 'private'. We understand it to mean those aspects of a person's non-official life for which they seek seclusion or confidentiality.

Nor was any explanation given as to why a positive obligation under Article 8 of the Convention should arise on these facts. The European Court of Human Rights held that German courts, as public authorities, had to act to ensure respect for Von Hannover's Article 8 rights by upholding her claims against the magazines – just as the Dutch authorities had to act to

ensure that Y's abuser was prosecuted. But the two cases are clearly miles apart. A sexual assault on an incapable 16-year-old girl is an attack on the very core of her personal autonomy. Moreover the Court has generally been slow to find positive obligations. You will search long and hard, in particular, to find cases imposing a positive obligation on the state to facilitate the right to freedom of expression or to freedom of assembly or association (under Article 11 of the Convention). In such cases the Strasbourg Court has said that state inaction must prevent any effective exercise of the right or destroy the essence of the right before a positive obligation arises. This is a very high threshold which will only be crossed in the most extreme cases, like *X and Y v The Netherlands*. How can it be said that the publication of these photographs destroyed the very essence of Caroline Von Hannover's right to privacy? We do not know because the European Court of Human Rights did not tell us.

Lastly, there is the finding of violation on the facts. Here the European Court of Human Rights said that once Von Hannover's privacy rights were engaged, they had to be balanced against the publishers' rights to freedom of expression. In this type of exercise, balancing one Convention right against another, the Strasbourg Court usually gives the domestic courts a significant margin of appreciation. This is the latitude given to states in their observance of the Convention. The Strasbourg Court is a court of review. It reviews whether the decision of the domestic courts on the facts is justifiable. It does not offer the applicant a rehearing of the case fought out in the domestic courts. The margin of appreciation allows states to take account of the legal policy and practice in their own jurisdiction, which may differ from that in other contracting states. Yet the judgment in *Von Hannover* ignored altogether the margin of appreciation that should have been afforded to the German courts. Indeed the only mention of it is in passing in para. 79 of the judgment. Here the Strasbourg Court found that the German courts had failed to strike a fair balance between the two sets of rights, despite the margin of appreciation afforded to the state in this area. Nothing more was said about this important principle.

In *Von Hannover* the European Court of Human Rights effectively gave the applicant a rehearing of her grievances when it should only have reviewed the approach of the German courts. It appears to have felt that the time had come, irrespective of the legal arguments, to change the way newspapers and magazines behaved. The crux of its reasoning was in para. 76 of its judgment:

> [T]he decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of

> general interest. It is clear in the instant case that they made no such contribution since the applicant exercises no official function and the photos and articles related exclusively to details of her private life.

Comrade Sagaydak would have heartily approved.

The British judges begin to 'do' privacy

The European Court of Human Rights handed down its judgment in *Von Hannover* in June 2004. In May 2004 the Judicial Committee of the House of Lords had decided the case of *Campbell v MGN Ltd*.[13] The *Mirror* newspaper had published articles disclosing the hitherto denied drug addiction of the supermodel Naomi Campbell. The articles gave details of Narcotic Anonymous meetings she had attended and were accompanied by photographs of her in a street leaving a Narcotics Anonymous meeting. Campbell accepted that the *Mirror* could reveal the fact of her drug addiction and that she was receiving treatment. But she claimed a breach of confidence in relation to the details of the meetings and the photographs, which had been taken covertly. The trial judge found for Campbell. The Court of Appeal disagreed but the House of Lords, by a three to two majority, allowed her appeal.

On one important point, however, their Lordships were unanimous. The common law cause of action for breach of confidence could be re-moulded into a more Convention-friendly form and used as a vehicle for the privacy claims against the media envisaged by Resolution 1165 and the subsequent judgment of the European Court of Human Rights in *Von Hannover*. Publishing private photographs or information could now be misuse of confidential information for the purposes of English law.

Earlier decisions of the Court of Appeal had suggested that breach of confidence might be refashioned in this way, most notably *Douglas v Hello! Ltd*[14] and *A v B plc*.[15] But none of the English cases up to and including *Campbell v MGN Ltd* considered whether Article 8 could have direct 'horizontal effect' – ie, be relied on under the Human Rights Act 1998 to found a civil cause of action between non-state parties. Nor did they give Article 8 a particularly prominent role in the reasoning. It was as if there was a formal acceptance of the obligations imposed on the courts under ss. 2 and 6 of the Human Rights Acts 1998 but nothing much more. On the contrary,

13 [2004] UKHL 22.
14 [2001] QB 967.
15 [2002] EWCA Civ 337.

in developing the law of confidence towards privacy, the domestic courts gave great prominence to common law decisions. In particular they relied on an Australian breach of confidence case called *Australian Broadcasting Corpn v Lenah Game Meats Pty Ltd*[16] in formulating the test for when the privacy right, under the refashioned law of confidence, would be engaged. In Lord Hope's words this would be in a situation 'where the person to whom it relates can reasonably expect his privacy to be respected'.

Von Hannover takes hold

Five months after *Campbell* the Judicial Committee gave its decision in the case of *In re S*,[17] in which I appeared for the press. *In re S* was not a piece of civil litigation between an individual and the press. It considered whether the Family Division of the High Court could prevent the press reporting details of a criminal trial in order to protect the Article 8 rights of a young son of the accused.

In the case of *In re S* the Judicial Committee suggested, for the first time, that Article 8 could indeed have direct horizontal effect in this sort of situation. It considered Articles 8 and 10 in terms and provided authoritative guidance on how our courts were to balance the Convention's Article 8 and Article 10 rights in cases involving publication by the media. This is a tricky issue since both rights are qualified, or presumptive, not absolute. They can lawfully be interfered with to protect the rights and freedoms of others provided the interference is justified as necessary in a democratic society. This requires the interference to meet a pressing social need and be proportionate to that need (ie restrict it no more than is necessary to meet the pressing social need).

Through Lord Steyn the Judicial Committee started by reiterating the principle stated in Resolution 1165: 'First, neither article has as such precedence over the other.'

Lord Steyn then went on to say:

> Secondly, 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. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test.

16 [2001] HCA 63.
17 [2004] UKHL 47.

The first proposition is in stark contrast to the traditional Strasbourg understanding of Article 10 of the Convention. In the leading cases, such as *Sunday Times v United Kingdom (No. 1)*,[18] the European Court of Human Rights had emphasised that, on the contrary, adjudications as to whether Article 10 rights had been violated did *not* involve a balance between rights. Rather, Article 10 provided a strong, general right of free expression which was subject only to narrowly formulated exceptions which had to be convincingly made out on the facts.

It also undermines s. 12(4) of the Human Rights Act 1998. This applies whenever a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression. The court considering this is supposed to have particular regard to the importance of the Convention right to freedom of expression in deciding whether to grant relief. This section was drafted on the traditional Strasbourg understanding of Article 10 mentioned above. In other words, it was intended to emphasise the strong assumed priority of freedom of speech over other rights, such as privacy rights.

Once the Strasbourg Court had held in *Von Hannover* that states were under a positive obligation to protect privacy rights against media intrusion, and that Articles 8 and 10 had to be balanced against each other in doing so, both of these commendable approaches were doomed. *In Re S* put the nails firmly in the coffin in our jurisdiction. But it is rare to find an English case where the ultimate balancing test is applied at all, let alone properly. This is perhaps understandable. Practical effect has to be given to extremely elusive concepts. What are the values underlying the rights in conflict in the particular case? How can the judge arrive at a common scale on which to place and balance out the different considerations? Often courts end up balancing at a very general level and, dare I say it, following their instincts as to what is the right outcome. Often the more emotive arguments made by the claimant for the court's support win out.

By the time of the Court of Appeal case of *McKennitt v Ash*,[19] Lord Justice Buxton felt able to say that 'in order to find the rules of the English law of breach of confidence we now have to look in the jurisprudence of articles 8 and 10'. He considered that English judges were now entitled to give respectful attention to Von Hannover's case. Indeed, to find the content of Articles 8 and 10, Buxton LJ said, we do have to look to Von Hannover's case.

18 App. No. 6538/70, 26 April 1979.
19 [2006] EWCA Civ 1714.

In May 2008 the Court of Appeal considered the case of *Murray v Big Pictures (UK) Ltd*.[20] The author of the *Harry Potter* books, JK Rowling, was walking in the street with her husband and 18-month-old son. Without their knowledge a photo was taken by an agency photographer and sold to the media. The parents brought a claim for infringement of the child's Article 8 rights. The judge struck the claim out as an attempt to apply *Von Hannover* in its most absolutist form. The appeal court disagreed. The claim was reinstated. The Court drew upon *Von Hannover* in order to express:

> little doubt that, if the assumed facts of this case were to be considered by the European court, the court would hold that David had a reasonable expectation of privacy and it seems to us to be more likely than not that, on the assumed facts, it would hold that the article 8/10 balance would come down in favour of David. We would add that there is nothing in the Strasbourg cases since *Von Hannover* which in our opinion leads to any other conclusion.

At the balancing stage, the *Von Hannover* approach is now standard in our courts and considered to accord with the domestic case law. In the Court of Appeal case of *Donald v Ntuli*, for example, the defendant had been prevented by an injunction from publishing details of her relationship with the claimant pop star. The judge had said:

> I am not persuaded that there is any substantial argument for publication based on public interest. Applying the strict modern criteria to be found in the Strasbourg cases … it seems to me that there is no reason to suppose that revelation of the relationship would in any way contribute to a debate of general interest. Nor would it serve to prevent the public being misled or lead to the exposure of hypocrisy.

On appeal, the judge was criticised by Ms Ntuli's counsel for requiring his client to establish a *substantial argument* for publication based on the public interest. The Court of Appeal, however, agreed with the judge, observing that:

> The Strasbourg cases referred to include *Von Hannover v Germany* (2004) … where the court said, at para 76:
>
> > the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a

20 [2008] EWCA Civ 446.

> debate of general interest. It is clear in the instant case that they made no such contribution since the applicant exercises no official function and the photos and articles related exclusively to details of her private life.
>
> … This reflects recent domestic jurisprudence, for example the speech of Baroness Hale of Richmond in the *Campbell* case … para 149, where she said: 'The political and social life of the community, and the intellectual, artistic or personal development of individuals, are not obviously assisted by pouring over the intimate details of a fashion model's private life.'

The new 'prior restraint' jurisdiction

Ever since the days of Dicey, the English courts have refused to grant interim injunctions to prevent publication in defamation cases, provided the defendant had told the court that it intended to prove truth at trial. In *Bonnard v Perryman*[21] Lord Coleridge recognised that:

> unless an alleged libel is untrue, there is no wrong committed; but on the contrary, often a wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed.

So for generations our newspapers, believing in the truth of their allegations, were entitled to publish and then be damned by an award in damages if Dicey's twelve shopkeepers decided at trial that there was no defence. Although juries are less common now, this important rule against pre-publication injunctions in libel cases still applies.

The Strasbourg Court has also recognised that court orders preventing publication are a dangerous interference with free speech rights. In *Observer and Guardian v United Kingdom*[22] the Court explained that:

> the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.

21 [1891] 2 Ch 269.
22 App. No. 13585/88, 26 November 1991.

As mentioned above, in the new era of constitutional free speech, s. 12 of the Human Rights Act 1998 was supposed to ensure that prior restraint would be similarly difficult to obtain in cases other than libel. Section 12(3) precludes such prior restraint 'unless the court is satisfied that the applicant is likely to establish that publication should not be allowed' at trial. Moreover the court is mandated by s. 12(4) to have 'particular regard to the importance of the Convention right to freedom of expression' and, in cases involving journalism, to the extent to which it would be in the public interest for the material to be published.

In privacy cases, however, s. 12 of the Act has failed to ensure that pre-publication injunctions are granted only where strictly necessary in a democratic society. Since 2004, numerous such injunctions have been granted, often to prevent 'kiss and tell' stories about male celebrities and Premier League footballers. Very often the claimant has been given anonymity by the court to ensure that the injunction does not represent a pyrrhic victory.

This has happened, essentially, for two reasons. First the statutory obligation on the court to have particular regard to the importance of free speech was neutered by the decisions in *Von Hannover* and *In Re S*. As we have seen, these gave equal importance to the right to protect personal information from publication in the media. Secondly, the limited definition of the public interest promoted by the Strasbourg Court since the *Von Hannover* case has enabled judges to say that the claimant will probably get an injunction at trial when the ultimate balancing test is carried out. A kiss and tell story about a highly paid sportsman cheating on his wife would pass the Northcliffe test with flying colours. It would indeed be so much more interesting than things. But not many judges would say that it makes a decisive contribution to the high-minded debate of general interest much beloved of the Strasbourg judges.

Yet can one seriously say that such an injunction is strictly *necessary in a democratic society* in order to meet a pressing *social* need? If so, the understanding of this phrase has perhaps been turned on its head. No longer the bulwark against creeping communistic values, it has become a means to protect the reputations of the rich and famous.

A loosening of the shackles?

In the last three years, some judges have begun to loosen the shackles of the public interest test both in the (very rare) trials of privacy claims and in the more common interim injunction cases.

In 2010, refusing the married England football captain an injunction to

prevent reporting of an illicit affair with a team-mate's partner, Tugendhat J, in *Terry (previously 'LNS') v Persons Unknown*,[23] said:

> There is no suggestion that the conduct in the present case ought to be unlawful or that any editor would ever suggest that it should be. But in a plural society there will be some who would suggest that it ought to be discouraged. That is why sponsors may be sensitive to the public image of those sportspersons whom they pay to promote their products. Freedom to live as one chooses is one of the most valuable freedoms. But so is the freedom to criticise (within the limits of the law) the conduct of other members of society as being socially harmful, or wrong. … It is as a result of public discussion and debate that public opinion develops.

These comments have been described as powerful by the Court of Appeal in another prior restraint case.[24] In *Ferdinand v MGN Ltd*[25] Nicol J dismissed the privacy claim of Terry's successor as England captain after a trial. The newspaper had questioned Ferdinand's suitability for the job because he had misled the public in suggesting that he was now a family man. He had concealed a continuing relationship with a former girlfriend from the public. I appeared for MGN Ltd and we argued that the public interest in the story should prevail. Nicol J agreed. He too thought that the comments of Tugendhat J in the *Terry* case were powerful. He added:

> Freedom of expression, after all, is one of the human rights guaranteed in the Convention because it is an integral part of the foundation of a democratic state and pluralism has long been recognised by the Strasbourg Court as one of the essential ingredients of a democracy (see for example *Handyside v UK* (1979–80) 1 EHRR 737 at [49]). While I accept that the subjective perception of a journalist cannot convert an issue into one of public interest if it is not …, the Court's objective assessment of whether there is a public interest in the publication must acknowledge that in a plural society there will be a range of views as to what matters or is of significance in particular in terms of a person's suitability for a high profile position.

In 2012, a former England football manager was refused a prior restraint injunction in the High Court for similar reasons (see *McClaren v NGN Ltd*[26]).

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23 [2010] EWHC 119 (QB).
24 See *Hutcheson v News Group Newspapers Ltd* [2011] EWCA Civ 808 at [29].
25 [2011] EWHC 2454 (QB).
26 [2012] EWHC 2466 (QB).

The Strasbourg Court has also begun to loosen the public interest shackles a bit. In a second case brought by Caroline Von Hannover, the German courts had refused to prohibit publication of a photograph of herself and her husband in a public place on a skiing holiday. The photo accompanied an article about the ill health of her elderly father, the reigning sovereign of the Principality of Monaco, and the conduct of members of his family during his illness. The German Federal Court considered that the illness could be regarded as a matter of general interest and that the press was entitled to report on how 'the prince's children reconciled their obligations of family solidarity with the legitimate needs of their private life, among which was the desire to go on holiday'. The photo was permissible because it illustrated and supported the discussion of the public interest issue in the article. This time the Strasbourg Court agreed (see *Von Hannover v Germany (No. 2)*[27]).

The present and the future

These recent developments are welcome. But none of the recent cases have changed the governing principles, laid down in *Von Hannover*, *Campbell* and *In re S.* These remain the same. All that happened in these recent cases was that the courts took a broader, more realistic, view of what might constitute a debate of general interest in a pluralistic society.

So how might our youthful privacy law develop in the future? So far the English judges have developed recognised equitable obligations in relation to confidential information so as to embrace not just confidential information but also information in which a person has a reasonable expectation of privacy. Such information must not be 'misused' by publication in the media. But this is the thinking and language of traditional confidence law. Will the law of privacy now break free of these constraints so that there is a broad general right, enforceable by the courts, not to have one's privacy unjustifiably interfered with – in particular by journalists?

There are indications that the Strasbourg Court is moving in this direction. For example, in *Reklos and Davourlis v Greece*[28] in 2009, the Court found a violation of the Article 8 rights of a one-day-old child photographed in a sterile unit in a private clinic. The photographs had been taken by a commercial photographer working at the clinic. When offered the photos, the parents complained to the clinic's management about the photographer's intrusion into a unit to which only the clinic's medical staff should have had access. They also complained about the subsequent taking

27 App. No. 40660/08, 7 February 2012.
28 App. No. 1234/05, 15 January 2009.

of photographs of their baby in the unit without their consent. The parents asked the clinic to surrender the negatives of the photographs. The clinic refused. Although the photos were never published, the parents brought civil proceedings claiming non-pecuniary damages on behalf of their child. Their claim and appeals before the Greek courts were unsuccessful, but the Strasbourg Court considered that the Greek courts had not done their job properly. The Court considered that they had failed in their positive obligation to protect the baby's privacy, both in relation to the taking of the photographs and the retention of the negatives. As to the latter the Court said:

> Admittedly, the photographs simply showed a face-on portrait of the baby and did not show the applicants' son in a state that could be regarded as degrading, or in general as capable of infringing his personality rights. However, the key issue in the present case is not the nature, harmless or otherwise, of the applicants' son's representation on the offending photographs, but the fact that the photographer kept them without the applicants' consent. The baby's image was thus retained in the hands of the photographer in an identifiable form with the possibility of subsequent use against the wishes of the person concerned and/or his parents.

Until recently the English courts appeared resistant to any such judicial development of the law. The Judicial Committee of the House of Lords decided *Wainwright v Home Office*[29] shortly before the *Campbell* case. It held that there was no common law tort of invasion of privacy, even following the Human Rights Act 1998. But the courts may now be willing to extend the law of confidence beyond misuse of confidential information by publication, in order to reconcile the common law with the Strasbourg cases under Article 8. The Court of Appeal's decision in *Murray v Big Pictures* showed a willingness to move in this direction.

In *Imerman v Tchenguiz and Others*[30] the claimant's wife had petitioned for divorce. In the two months following the petition, her brother accessed the husband's computer records at his office and made electronic copies of his emails and other documents. He did so believing that the husband would conceal assets in the wife's financial relief proceedings against him. When he found out that his material has been accessed and copied, the claimant started breach of confidence proceedings against the brother and the others involved in accessing the documents.

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29 [2003] UKHL 53.
30 [2010] EWCA Civ 908.

Considering the husband's claim in breach of confidence, the Court of Appeal said:

> 67. As stated in *Stanley on the Law of Confidentiality: A Restatement* (2008), p 6:
>
> > "Cases asserting an 'old fashioned breach of confidence' may well be best addressed by considering established authority [whereas] cases raising issues of personal privacy which might engage article 8 … will require specific focus on the case law of the European Court of Human Rights".
>
> However, given that … with the 1998 Act now in force, privacy is still classified as part of the confidentiality genus, the law should be developed and applied consistently and coherently in both privacy and 'old fashioned confidence' cases, even if they sometimes may have different features. Consistency and coherence are all the more important given the substantially increased focus on the right to privacy and confidentiality, and the corresponding legal developments in this area, over the past 20 years.
>
> 68. If confidence applies to a defendant who adventitiously, but without authorisation, obtains information in respect of which he must have appreciated that the claimant had an expectation of privacy, it must, a fortiori, extend to a defendant who intentionally, and without authorisation, takes steps to obtain such information. It would seem to us to follow that intentionally obtaining such information, secretly and knowing that the claimant reasonably expects it to be private, is itself a breach of confidence.
>
> […]
>
> 76. Communications which are concerned with an individual's private life, including his personal finances, personal business dealings, and (possibly) his other business dealings are the stuff of personal confidentiality, and are specifically covered by article 8 of the Convention, which confers the right to respect for privacy and expressly mentions correspondence.
>
> 77. In this case, as far as we can see, there is no question but that Mr Imerman had an expectation of privacy in respect of the majority of his documents stored on the server.

These passages suggest that any distinction between confidence and privacy is becoming blurred and that increasingly it is the former that is becoming subsumed into the latter, rather than the other way around. They also indicate that privacy claims may succeed even where no private information is

published. If so, journalists will have to justify intrusive newsgathering as being in the public interest.

The phone-hacking scandal at the Sunday national tabloid newspaper, the *News of the World*, which came to a climax in 2011 with the Milly Dowler revelations, has led to greater judicial scrutiny of how journalists gather information than ever before.

The background is well known. It is alleged that for several years up to 2007 journalists at the newspaper employed a private investigator, Glenn Mulcaire, to obtain information from phone companies which would enable journalists to intercept mobile phone messages. It is alleged that information was obtained from these activities which identified stories which the *News of the World* journalists could then investigate.

Hundreds of damages claims have been brought in the High Court by people alleging that the messages in their message box, and those they left in the message boxes of others, were intercepted. Lawyers acting for the claimants assert that their clients had a reasonable expectation of privacy in the details and contents of their own mobile phone messages and those they left on the mobile phones of others – and that the defendants had a duty to respect that privacy. Some of the damages claims allege that private information, obtained in this way, was published but the claims are not dependent on publication. In many cases the defendants say that stories subsequently published about the claimants were later 'stood up' using conventional, lawful journalistic methods. The *Imerman* approach is contended for by the claimants, however, and in one appeal arising out of the litigation, *Gray and Coogan v News Group Newspapers and Mulcaire,*[31] in which I acted for Mr Mulcaire, the Court of Appeal has accepted its validity:

> 64. … Given that the information in the voice messages was confidential, and that Mr Mulcaire had obtained it in an unauthorised way, he must have committed a further infringement of the claimants' rights if and when he passed the information on (or played a recording of the message) to an unauthorised third party.

In early July 2011, the *Guardian* reported that the mobile phones of a murdered schoolgirl, relatives of deceased British soldiers and victims of the 7/7 London bombings had been intercepted by the *News of the World* in this way. A public outcry brought about the closure of the *News of the World*. It also forced the Prime Minister, David Cameron, to announce a judicial inquiry chaired by Lord Justice Leveson to look into the culture, practices

31 [2012] EWCA Civ 48.

and ethics of the national newspapers and, specifically, phone hacking at the *News of the World*. I represented the Telegraph Media Group at the Inquiry.

Lord Justice Leveson has concluded the first part of the Inquiry, into culture, practices and ethics. In this, the Inquiry looked in considerable detail at how journalists gather information and considered when newspaper interferences with privacy might be justified in the public interest.

The Report on the first part of the Inquiry was published at the end of November 2012. It concluded that an independent self-regulatory system is required for the British press in order, principally, to prevent publication of private and defamatory material where there is no public interest justification. Controversially, it recommends that such a system must be underpinned by statute, and that a statutory authority must certify that the regulatory body set up by the industry is independent and must approve its code of press conduct. Lord Justice Leveson would have preferred the television and radio regulator, Ofcom, to take on this role.

Under a system of the sort envisaged by Leveson, it is anticipated that many privacy complaints would go to arbitration or to the regulator rather than the courts, and that the regulator would have powers to levy substantial fines against publishers which breach the code. If this happens, a parallel system of adjudication for privacy complaints will exist alongside the legal system discussed above.

Following publication of the Report, the industry proposed a new regulatory scheme of its own. This would have many features of Leveson's scheme without, however, an entitlement to arbitration of complaints or statutory underpinning. It was submitted to the Privy Council in the hope that a royal charter would be granted to the proposed regulator, known as the Independent Press Standards Organisation (IPSO). This would give legal recognition without the involvement of the politicians in Parliament. A competing scheme from the politicians was also set before the Privy Council. In October 2013, despite a last minute attempt by newspaper publishers to gain an injunction stopping Ministers seeking the Queen's approval for the charter presented by the politicians, it was this scheme rather than the 'IPSO' scheme that was approved by the Privy Council, and legislation will be required to change it. Very few, if any, publishers will sign up to the politicians' scheme, but they will be exposed to the risk of exemplary (punitive) damages and costs penalties in court cases for refusing to do so. The press says that such a scheme of state sanctions would breach its rights to free speech under Article 10 of the Convention, and legal challenges are likely. An impasse has been reached.

My concerns

It will be apparent from the foregoing that I have a number of concerns about the way in which our privacy law has been developed over the last decade. These relate to how the law has developed in, and following, *Campbell* and *Von Hannover*, whether the developments are right in principle, and to the consequences.

I am a strong supporter of both the Convention system of international human rights law and of the Human Rights Act 1998. The requirement that our courts should apply Convention Article 8 principles and the Strasbourg case law under Article 8 has protected the interests of some of the most vulnerable, deserving and discriminated against sections in our society when these interests are not properly recognised by the state. This has enhanced our democracy. But a human right to privacy that can be asserted by anyone against newspapers and journalists is altogether another matter.

I have set out most of my concerns about the way in which the law has been developed in the main body of this chapter. I also believe that the threshold for the new privacy claim against the media has been set too low. It has not proved difficult for claimants to persuade our judges that a 'reasonable expectation of privacy' exists on the facts. Often the 'reasonable expectation' has been that of an adulterous husband in relation to an extramarital affair. Or of a claimant in relation to a photograph in a public place or of a routine, rather than intimate, nature. Nor have claimants been required to show any serious harm as a result of the postulated or actual publication. This is not the stuff of human rights which should be concerned with substantial harm rather than trifling or reputational consequences.

I am also concerned that, in the rush to privacy over the last 10 years, no serious attempt has been made to decide what a moral right to privacy involves.[32] Surely, in deciding whether and to what extent a legal right is needed, one must first consider the nature and extent of the moral right to privacy.

Privacy is a state of affairs that exists between one person and other people. But it is difficult to identify the values or interests which a moral right of privacy should seek to protect, let alone a legal one. This makes it correspondingly difficult to identify the form which the right should take in either context, ethical or legal.

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32 In writing this part of this chapter, I have been greatly assisted by an article entitled 'A right to privacy?' It was published by Nick Barber, Fellow and Tutor in Law at Trinity College, Oxford at [2003] Public Law 602. Published before *Campbell* was decided in the House of Lords, it makes interesting and thought-provoking reading 10 years on.

Writers have variously argued that privacy is valuable because it allows us to control the information which other people know about us and/or because it allows us to build relationships by sharing information about our lives with some but not others and/or because it allows us to do things we would not be comfortable doing in public.

But what should these theoretical states of privacy mean we can assert against others? If a right is to be claimed, it must be derived from the state of affairs and based on the underlying values. This is often not easy to do. For example, if the person with whom we share a piece of information about our lives can be restrained by court order so that the private information cannot be revealed, or sued in damages if it is revealed, why do we need to bother about who we discuss these things with? What 'moral capital' is then built up by discussing them with only certain people?

Then there is the problem of the rights to freedom of expression, of both the source and the journalist who receives the private information from the source and then publishes it. This is at the heart of the celebrity extramarital 'kiss and tell' cases though it could relate equally to cases of abuse or other unwanted behaviour in relationships. Why should the former be prevented from publishing an accurate account of the relationship in which the information was received, or the experience had, through the journalist – simply because the claimant exercises no official function and the tale relates exclusively to someone's private life? Surely the right to tell the story of your own life is a fundamental part of the right to freedom of expression? There may be exceptions to this principle where the information was exchanged in a genuinely confidential relationship or where the relationship was unequal (for example because the other party was a child). But it is worrying how little thought our judges have been prepared to give to the free expression rights of the source in many cases.

The third theoretical justification also provides a weak basis for a legal privacy right if the conduct that would be deterred by public scrutiny is illegal or considered by a body of opinion in society to be immoral. As indicated above, our judges have looked at this issue in relation to the public interest arguments in favour of disclosure (see *Terry* and *Ferdinand*). But they have had to do so within the constraints of the *Von Hannover* public interest reasoning. Those who perform a quasi-official function (e.g. as the England football captain or manager do) are protected but not minor celebrities or less talented sportspeople. But why is a privacy right even being considered in such cases when each theoretical justification is absent?

Most importantly of all, however, why are the truly valuable states of privacy not sufficiently protected by other moral rights? Respect for property rights guarantees seclusion in the home. An English person's home is, after all, his or her castle. This is a moral right we are brought up to respect.

It is wrong to burgle houses or steal personal records such as diaries or intimidate people into giving up their personal secrets. Where Parliament (or indeed a judge) considers that there is a need to bolster the moral obligation by criminalising the conduct, or creating a defined civil right (for example to sue in trespass, conversion or breach of confidence), this can be done. This was done in the case of phone hacking, criminalised under s. 1 of the Regulation of Investigatory Powers Act 2000. I would say that the law already does quite enough to ensure that a state of privacy ordinarily exists.

The most worrying aspect of the meandering development of the 'horizontal' privacy right over the last 10 years is that its reach has gone way beyond publications that strip a person of his or her right of privacy in the sense identified by the privacy theorists. If Strasbourg had confined its use of the positive obligation in this area to that which truly destroyed *the very essence of* the Article 8 right, I would have no problem with an extension of the right in this area. Clearly journalists should not be allowed to use telephoto lenses to photograph a person undressing in his or her bedroom through a gap in the curtain. Nor should they hack the mobile phones of the families of murder victims. But none of the material published about Caroline Von Hannover or Naomi Campbell stripped them of their theoretical state of privacy, or came close to it. These cases exemplify the genuine concern that a wide privacy right against the press can be abused by the rich and powerful and become a means to suppress unwanted or embarrassing publicity.

It is particularly worrying in a Parliamentary democracy that all of this has been achieved by judges alone, without any serious questions being asked about the flaws in the reasoning of the Strasbourg Court in *Von Hannover* (see above). Giving judgment in the trial of the Douglas' claims against *Hello!* magazine in 2003,[33] Lindsay J rejected the claim in privacy observing that:

> … So broad is the subject of privacy and such are the ramifications of any free-standing law in the area that the subject is better left to Parliament which can, of course, consult interests far more widely than can be taken into account in the course of ordinary inter partes litigation. A judge should therefore be chary of doing that which is better done by Parliament. That Parliament has failed so far to grasp the nettle does not prove that it will not have to be grasped in the future …

33 [2003] EWHC 786 (Ch) at [229].

These wise judicial observations seem now to be a long time ago and far, far away.

Finally, I am concerned about the consequences for our press of increasing restrictions on freedom to publish, justified in the name of privacy.

Changing attitudes to news consumption mean that the future for the newspaper industry is highly uncertain. People consume less and less news off the printed page. The weekday publication figure for our national newspapers is now just over nine million and falling. The halcyon days of the 1950s are long gone. Newspapers now have to compete, not just with radio and television news, but also with an ever-growing supply of news and entertainment content, in different forms, on the Internet. There is an ever-growing consumption of news in this form, at the expense of the print, as well. Reduced newspaper sales mean lost circulation revenues, and advertising revenues are lower on the Internet. Online newspapers are increasingly competing in a global market, pitting themselves against low overhead aggregators of other Internet news such as Google and Yahoo and portals like MSN. Their competitors are usually American and do not need to comply with our restrictive privacy laws and regulations.

If our press is to survive in this environment, it must interest and entertain readers as well as educate them. Our contemporary obsession with privacy threatens its ability to do this, by limiting its freedom to publish about people who are indeed *so much more interesting than things*. We should worry greatly that it is doing so.

7

'You say tomato …': A Comparison of English and US Privacy Law Principles

Robert Balin and Yuli Takatsuki

From remote sensing satellites to hidden 'bra-cams', technology is revealing all; and, with the click of a mouse, intimate details (and, of course, photographs) of Royals, celebrities, politicians and sportspeople are launched on news sites and social media platforms to millions across the globe. Privacy issues regularly crop up in more serious news fare as well. Witness the so-called Vatileaks scandal in May 2012, where the Vatican complained bitterly that books and news reports disclosing the details of leaked church records, including the Pope's private correspondence, were a 'violation of the Pope's privacy'.[1] The law races to catch up, with legislatures and jurists around the world trying to find an appropriate – and often elusive – balance between the individual's right to be left alone and the public's right to know.

In this chapter, we will explore how the privacy/free speech balance has been struck quite differently under English law and US law. While both jurisdictions recognise a 'privacy' tort, their differences in approach go well beyond mere pronunciation.

On paper at least, the developing law of privacy in England and Wales looks somewhat similar to the American cause of action for public disclosure of private facts. In both countries, the claimant must show a 'reasonable expectation of privacy' to maintain an action. Yet, while the two jurisdictions may use similar words, they imbue them with very different meaning. Under English and European Court of Human Rights jurisprudence, even public figures photographed in public (for example Princess Caroline von Hannover grocery shopping or on the ski slopes) are deemed to have a 'legitimate expectation' that the 'social dimension' of their private

1 'Pope's butler arrested after leaked church documents revealed allegations of corruption and power struggles with Vatican Bank', Mail Online, 25 May 2012, available at www.dailymail.co.uk/news/article-2150076/Vatican-leaks-scandal-Pope-Benedicts-butler-Paolo-Gabriele-arrested-leaked-documents.html.

J. Lewis et al. (eds.), *Media Law and Ethics in the 21st Century*

lives will be protected – protection that may extend even to their activities in wholly public spaces.[2] This European formulation of the 'privacy' envelope is fundamentally broader than the American view of protectable privacy interests. Under US privacy principles, informed as they are by First Amendment values, '[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.'[3] As a result, revelations deemed private and actionable in England and Europe, particularly if they occur in public venues, or concern non-intimate facts (yes, the Princess does dress down while grocery shopping), would often not make it out of the starting blocks in the United States.

So too, recognising the vital role that a free press plays in democracy, both the English privacy tort and the American private facts claim mandate inquiry into whether publication of the private facts at issue serves a 'legitimate public interest' – or, to use American parlance, is 'newsworthy'. Yet, once again, this seeming similarity ends at the water's edge – with newsworthiness trumping private fact claims in the US (but not necessarily in England, where privacy and free speech are accorded equal weight); and with the courts in the two countries taking markedly different approaches in analysing whether publication of private facts is indeed in the public interest. Lastly, in addition to inherent doctrinal differences, English and US law also differ in the remedies provided in privacy actions: pre-publication injunctions are available (and not uncommon) in English privacy suits, but are exceedingly rare under US First Amendment principles, which prohibit prior restraints on the press in all but the most exceptional circumstances.

Ultimately, these differences in English and US law represent inherently differing views about the relative value to be accorded privacy and free expression in a democratic society. Some complain that free speech rides roughshod over important privacy concerns in the US, and just as many decry English privacy law as too claimant-friendly and under-protective of the press. Our purpose in this chapter is not to resolve that debate, but to provide some clarity on where the battle lines have been drawn.

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2 *Von Hannover v Germany (No. 1)* (2005) 40 EHRR 1, [69].

3 *Time, Inc. v Hill*, 385 US 374, 388 (1967); see also Restatement (Second) of Torts § 652D cmt b (1977) ('there is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye. Thus he normally cannot complain when his photograph is taken while he is walking down the public street and is published in the defendant's newspaper.'); J McCarthy, *The Rights of Publicity and Privacy*, § 5:80 at 5-162 (2nd edn, 2003) ('it is not an actionable disclosure for the press to publish a photograph of a person in a public place'). Compare *Von Hannover (No. 1)* (n. 2) at [75] (rejecting the distinction between 'secluded places' and public places as determinant of privacy rights).

Historical background

The US perspective

While the rebellious American colonies long ago severed allegiance to Albion, they nonetheless eagerly adopted English common law in many areas. Privacy, however, was never one of them. Instead, privacy law developed first in the United States, with England and Wales only recently joining the fray.

Almost 125 years ago, Boston lawyers Samuel Warren and Louis Brandeis (later a US Supreme Court Justice), in their famous 1890 Harvard Law Review article, 'The Right to Privacy', cautioned that, without a sensitive legal balancing of public and private interests, 'what is whispered in the closet shall be proclaimed from the house-tops'.[4] Complaining (with eerie prescience) that '[i]nstantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life', Warren and Brandeis called for the creation of a common law right of privacy.[5] The courts eventually responded, and by the early 1900s privacy law was born in the United States. *Pavesich v New England Life Ins. Co.*[6] is often cited as the first US decision expressly to recognise a right of privacy by that name, though the Georgia Supreme Court cited even earlier decisions by US courts that – if not using the 'right of privacy' moniker – nonetheless extended protection to privacy interests.

As developed over the last century, privacy law in the US has crystallised into four distinct and well-recognised torts:

1. publication of embarrassing private facts;
2. unwarranted intrusion upon seclusion;
3. false light (a relative of defamation); and
4. commercial misappropriation of name or likeness (also called the right of publicity).[7]

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4 S Warren and L Brandeis, 'The Right to Privacy', 4 Harv L Rev 193, 195 (1890–91).

5 *Ibid.* As one leading commentator notes, 'frequently cited but seldom read', the Warren/Brandeis article 'single-handedly started a new field of law in the United States': J McCarthy, *The Rights of Publicity and Privacy*, § 1:11 at 1-12 (2nd edn, 2003).

6 50 SE 68 (Ga 1905).

7 *See* Restatement (Second) of Torts §§ 652A–652E (1977); William L Prosser, 'Privacy', 48 Cal L Rev 383, 389 (1960). These privacy torts are created by state law, and not all of the 50 US states recognise all four privacy torts. For example, New York recognises only a claim for non-consensual use of a person's name or picture for advertising or trade (NY Civil Rights Law §§ 50–51), and New York courts have repeatedly held that, other than this one narrow statutory prohibition of commercial misappropriation, there is no common law right of privacy in New York (*Messenger v Gruner + Jahr Printing and Publishing*, 94 NY2d 436, 441 (2000)). *See also Cain v Hearst Corp.*, 878 SW2d 577, 578 (Tex 1994) (recognising torts of 'intrusion upon seclusion' and 'publicity given to private facts', but declining to recognise a 'false light' privacy tort).

Of these four torts, it is the first two – the private facts claim and the intrusion upon seclusion claim – that most resemble the privacy right that is now developing under English and European Court of Human Rights jurisprudence (at least in terms of the interests sought to be protected).

While the formulation of a private facts claim may vary slightly from state to state, generally a media defendant who publishes truthful private facts about a person will be held liable only if revelation of those facts would be 'highly offensive to a reasonable person' and 'is not of legitimate concern to the public'.[8] Since lack of legitimate public interest (or newsworthiness) is an essential element of the tort, US courts have repeatedly held that where the published private facts relate to a newsworthy matter this serves as 'a complete bar to liability'.[9] Moreover, this bar to liability for publication of newsworthy truthful information is not only a common law limitation, but is compelled by First Amendment principles as well.[10]

Whereas the private facts tort focuses on speech (i.e. *publication* of embarrassing private facts), the intrusion upon seclusion tort is concerned with conduct – and, specifically with respect to the press, conduct during the course of newsgathering. Of the four privacy torts, the intrusion claim perhaps best epitomises the 'right to be left alone'.[11] The tort prohibits unconsented-to physical intrusions into traditionally recognised private spaces (such as home or hospital room) as well as unwarranted sensory intrusions into private areas, matters and conversations through eavesdropping, wiretapping or photographic spying.[12] To prevail, the claimant must

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8 Restatement (Second) of Torts § 652D.

9 *Schulman v Group W Productions, Inc.*, 18 Cal 4th 200, 215 (Cal 1998). Indeed, in their article inviting adoption of a common law right of privacy, Warren and Brandeis noted as their very first limiting principle that '[t]he right to privacy does not prohibit any publication of matter which is of public or general interest' ('The Right to Privacy' at 214); *see also* Restatement (Second) of Torts § 652D cmt d ('The common law has long recognized that the public has a proper interest in learning about many matters. When the subject-matter of the publicity is of legitimate public concern, there is no invasion of privacy.')

10 *Cox Broadcasting Corp. v Cohn*, 420 US 469 (1975) (holding that the First Amendment barred a private facts claim, arising from publication of a rape-murder victim's name obtained from indictment, since criminal proceedings are a matter of 'legitimate concern to the public'); Restatement (Second) of Torts § 652D cmt d (a newsworthiness bar to a private facts claim 'has now become a rule not just of the common law of torts, but of the Federal Constitution as well') (citing *Cox*); *Prince v Out Publishing, Inc.*, No. B140475, 2002 WL 7999 at *8 (Cal Ct App Div 4, Jan 3, 2002) ('newsworthiness is a constitutional defense to, or privilege against, liability for publication of truthful [private] information'); *Virgil v Time, Inc.*, 527 F2d 1122, 1129 (9th Cir 1975) (newsworthiness defence 'is one of constitutional dimension delimiting the scope of the tort'), *cert. denied*, 425 US 998 (1976). See generally *Florida Star v BJF*, 491 US 524, 533 (1989) ('if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need … of the highest order') (citation omitted).

11 *Cooley on Torts* (2nd edn, 1888), 29.

12 *See* Restatement (Second) of Torts § 652B cmt b; *Schulman*, 18 Cal 4th at 230–32.

establish that he or she had an 'objectively reasonable expectation of privacy' in the place, conversation or data source, and that the intrusion would be 'highly offensive' to a reasonable person.[13]

Importantly, in stark contrast to developing English and European privacy principles, US law imposes a spatial limitation on the 'zone of privacy' protected by the intrusion tort. Thus, US courts have frequently held that merely photographing a person (whether a public or private figure) in a public place is not an actionable intrusion, 'since he is not then in seclusion, and his appearance is public and open to the public eye'.[14] And this 'public space' limitation on the intrusion tort is applied even if the person's presence or activities in public might otherwise be embarrassing. For example, in *United States v Vasquez*,[15] the court held that videos of women patients entering and leaving an abortion centre were not actionable since they were taken on a public street, and 'no one walking in this area could have a legitimate expectation of privacy'.

On the flip side, however, if the press invades a truly secluded conversation or space (such as filming in an emergency ward without consent or peeping through bedroom windows), intrusion liability typically follows. Unlike the publication of private facts tort (where newsworthiness serves as a complete bar under First Amendment principles), the fact that a reporter secures 'newsworthy material' through commission of an intrusion tort does not generally serve as a defense to intrusion claims. As one court has explained, '[t]he reason for the difference is simple: the intrusion tort, unlike that for publication of private facts, does not subject the press to liability for the contents of its publication'.[16] As a general rule, the press in its newsgathering activities receives no special First Amendment immunity or exemption from generally applicable laws that govern conduct – such as trespass or wiretap laws for example.[17] ('The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the

13 *Ibid*.

14 Restatement (Second) of Torts § 652B cmt b (Illustrations); see also J McCarthy, *The Rights of Publicity and Privacy*, § 5:88 (citing cases); *Stonum v US Airways, Inc.*, 83 F Supp2d 894, 906 (SD Ohio 1999) ('Photographing an individual in plain view of the public eye does not constitute an invasion of privacy …').

15 31 F Supp2d 85 (D Conn 1998)

16 *Schulman*, 18 Cal 4th at 240. *See also* Nimmer, Melville B, 'The Right to Speak from *Times* to *Time*', 56 Cal L Rev 935, 957 (1968) (asserting that '[i]ntrusion does not raise first amendment difficulties since its perpetration does not involve speech or other expression').

17 *Cohen v Cowles Media Co.*, 501 US 663, 669 (1991); *Deitman v Time, Inc.*, 449 F2d 245, 249 (9th Cir 1971).

precincts of another's home or office.'[18]). Nonetheless, the US Supreme Court has also observed that 'without some protection for seeking out the news, freedom of the press could be eviscerated'.[19] Accordingly, even though newsworthiness does not of itself bar intrusion claims, some courts – in deciding whether a reporter's alleged intrusion was 'highly offensive' (a required element of the tort) – will take into consideration 'the extent to which the intrusion was, under the circumstances, justified by the legitimate motive of gathering the news'[20] (noting that, in considering 'offensiveness' of the intrusion, 'routine … reporting techniques, such as asking questions of people with information (including those with confidential or restricted information) could rarely, if ever, be deemed an actionable intrusion', whereas 'trespass into the home or tapping a personal telephone line … could rarely, if ever, be justified by a reporter's need to get the story') (citations omitted).

At bottom, American privacy law, built up over decades, recognises that 'in this sphere of collision between claims of privacy and those of the free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society'.[21] Nonetheless, given the central constitutional role that public discourse plays in the US, even the very court that first adopted the common law privacy right more than a century ago recognised that '[t]he right to privacy is unquestionably limited by the right to speak and print' on 'every matter in which the public may be legitimately interested'.[22] That principle has remained a polestar of American privacy jurisprudence ever since.

The English experience

Privacy law in England and Wales has had a chequered past. In contrast to privacy's longstanding jurisprudential foundations in the US, a free-standing right to privacy was not recognised in English law until October 2000, with the entry into force of the Human Rights Act 1998 (HRA 1998).

Prior to that, there were one-off cases showing how the courts imperfectly sought to use existing causes of action to engineer some protection for privacy in clear cases of injustice. This approach is epitomised by the case of *Kaye v Robertson*[23] – which law school professors and lecturers in England cite to illustrate privacy's troubled past. In that case, the claimant

18 *Dietman v Time, Inc.*, 449 F2d 245.
19 *Branzburg v Hayes*, 408 US 665, 681 (1972).
20 *Schulman*, 18 Cal 4th at 237.
21 *Cox Broadcasting*, 420 US at 491.
22 *Pavesich*, 50 SE at 74.
23 [1991] FSR 62.

was a well-known actor recovering in hospital from serious head and brain injuries after a piece of wood had pierced his car windscreen during a gale. Ignoring numerous notices in the ward, two journalists from the *Sunday Sport* gained access to his private room, took photographs and conducted an 'interview'. Medical evidence showed Mr Kaye was in no fit condition to be interviewed or to give informed consent – amply evidenced by the fact that a quarter of an hour after the journalists had left, Mr Kaye had no recollection of the incident. In its judgment, the Court of Appeal had to accept, reluctantly, that it was powerless to protect Mr Kaye's privacy as there was no basis on which to do so in English law. It had to find instead that the publication would amount to a malicious falsehood insofar as it implied that Mr Kaye had consented to an interview; but this only meant the *Sunday Sport* was free to publish the article simply by omitting that implication. Glidewell LJ stated: 'It is well-known that in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy.'[24] This one sentence is said to have stultified the development of privacy law in England for many years to come.

Following a long period of patchy attempts to piece together protection through other causes of action, the HRA 1998 marked a watershed in English law. The Act incorporated the rights enshrined in the European Convention on Human Rights (ECHR) by providing a mechanism for enforcing them in the English courts and for obtaining remedies for their violation. Among those rights is the right to respect for private and family life (Article 8). The ECHR also recognises the right to freedom of expression (Article 10), and the European Court of Human Rights has frequently recognised the 'essential' role that freedom of expression plays in democratic society.[25] It is the tension between these two contrasting rights which has formed the basis of privacy cases in England and Wales ever since.

However, it was not the case that the HRA 1998 immediately brought clarity to English law. Following the coming into force of the Act in October 2000, the state of privacy law continued to be the subject of uncertainty and serious controversy. First, there was a 'teething period' of several years in which it was not even clear whether invasions of privacy were actually actionable between private parties and, if so, how. This somewhat fundamental issue was not wholly clarified until *Campbell v MGN Ltd*[26] in which the House of Lords confirmed the 'horizontal effect' of the HRA 1998.[27] It

24 *Ibid*. p. 66.
25 See e.g. *Axel Springer AG v Germany* [2012] ECHR 227, [78].
26 [2004] 2 AC 457.
27 See, e.g., *Rio Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB) at 39 ('Although at first sight, Article 8 [of the ECHR] appears to be directed at interference by the State in a person's private life, it is now beyond argument that it also encompasses a positive

further outlined the new action for 'misuse of private information' and interpreted it as an extension (and renaming) of the old cause of action for breach of confidence.

Even after *Campbell,* legal certainty did not follow suit. A flood of litigation followed, in which the essential principles emerged and the battle lines of Articles 8 and 10 were argued, and reargued, drawn and redrawn. From this welter of lawsuits has emerged an impressive compendium of English privacy decisions.

As to the controversy this area of law has generated, there are few areas of English law that have been the subject of greater scandalisation and public debate. Many in the UK will recall the spring of 2011 in which the British press became absolutely consumed by the issue of the rich and famous using interim injunctions to suppress publication of information about their personal lives. The issue was brought into sharp focus when an anonymous Twitter user claimed to reveal details of a number of injunctions and 'super-injunctions' sought by celebrities, including footballers and actors, which the UK press was absolutely prohibited from disclosing. A super-injunction is a type of injunction that prohibits the press and others from revealing, not only the facts of the case, but even that an injunction has been issued. Editorials in UK newspapers decried privacy injunctions as an oppressive restraint on freedom of expression and denounced the creation of privacy law by judicial precedent. Politicians also got involved. Prime Minister David Cameron said publicly that he felt 'uneasy' about judges granting injunctions to protect the privacy of powerful individuals.

A report by a judicial committee led by the Master of the Rolls, Lord Neuberger, on the issue of super-injunctions reported in May 2011, concluding that really very few actual super-injunctions had probably ever been granted. Yet the report did not get the public coverage it merited considering the furore that had preceded it.

Since the 'super-injunction spring' of 2011, the unrest has not abated and the issue of privacy continues to be ever-present. In the summer of 2012 it was the turn of the press to come into the firing line, with the closure of the *News of the World* following the scandal over voicemail interceptions by its reporters (or, as more colloquially etched in the public mind, the 'phone-hacking scandal'). The Leveson Inquiry ensued, the terms of reference of which were to scrutinise the culture and ethics of the press as a whole, but Leveson LJ in his Part 1 Report raised clear concerns about the attitude of the press toward celebrities, observing, for example, that, 'Where

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obligation [by the State] to put in place a system to protect an individual's private life from interference by non-state entities such as the media …').

there is a genuine public interest in what they are doing, that is one thing; too often, there is not.' He recommended a further tightening of the Data Protection Act 1998 and a review of the damages available in data protection, privacy and breach of confidence cases.

So where does this leave the development of privacy law in England and Wales? In some ways it can be said that the law of privacy is in fairly stable condition considering the quite radical changes it has endured in its relatively short lifetime. There has tended to be a 'wait and see' attitude by English lawyers to privacy law, but the law is in fact relatively well established now and unlikely to see dramatic change. The key tests and legal principles to be applied are very settled. As has been the case for some time in the US, English privacy law may finally have grown up.

Never the twain shall meet?

As Oscar Wilde once observed of the former colonies, 'we really have everything in common with America nowadays except, of course, language.'[28] When it comes to privacy law, however, it may be just the opposite. While the courts of both countries use virtually identical terminology in adjudicating privacy claims – a 'reasonable expectation of privacy' versus a legitimate 'public interest' in disclosure – this similarity in legal lexicon masks a real divide in philosophical approach. Some of these differences are obvious, others less so. But they are ultimately outcome determinative in many cases.

Notions of privacy

Even at the starting point, the US and the UK do not set off from the same foot. Notions of what is considered 'private' are considerably broader in England and Europe than in the United States. Several cases exemplify this. Notably, in *Von Hannover v Germany (No. 1)*,[29] the European Court of Human Rights held that the Article 8 privacy rights of Monaco's Princess Caroline (a darling of European gossip magazines) had been breached by the failure of the German courts to prohibit publication of photographs showing her engaged in quite ordinary activities in public and 'semi-public' places (shopping, in a restaurant, playing sports, visiting a horse show). Rejecting the German courts' view that privacy rights do not ordinarily extend beyond 'secluded places', the European Court of Human Rights held that, 'anyone, even if they are known to the general public, must be able to

28 Oscar Wilde, *The Canterville Ghost* (1882).
29 (2005) 40 EHRR 1.

enjoy a "legitimate expectation" of protection of and respect for their private life'.[30] Underlying the Court's ruling was the expressed concern that 'photos taken in the tabloid press are often taken in a climate of continual harassment which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution'.[31] So too, in England, the Court of Appeal in *Murray v Big Pictures (UK) Ltd*[32] held that it was at least arguable that JK's Rowling's infant son had a reasonable expectation of privacy in respect of photographs of him being pushed down a public street in a pram, noting that:

> the law should indeed protect children from intrusive media attention, at any rate to the extent of holding that a child has a reasonable expectation that he or she will not be targeted in order to obtain photographs in a public place for publication.[33]

These and other decisions reflect the prevailing view in England and Europe that privacy law protects not only intimate facts and activity in secluded places, but a broader right 'to control the dissemination of information about one's private life' as an inherent aspect of 'human autonomy and dignity'.[34]

In English law, the preliminary question of whether the claimant has a 'reasonable expectation of privacy' (the 'first-stage test') is essentially fact-sensitive. Although there is a notional 'threshold of seriousness' (see for example *Wood v Commissioner of Police for the Metropolis*[35]), it has not been applied consistently by the courts. For instance, in *Trimingham v Associated Newspapers Ltd*,[36] which involved news reports about Cabinet Minister Chris Huhne's extramarital affair with Carina Trimingham (his election campaign press officer), Ms Trimingham – who had herself been in a civil partnership with a woman and had deceived her civil partner – complained about press disclosures of her sexual orientation and publication of photographs from her civil partnership ceremony. The court, however, held that she had no reasonable expectation of privacy with respect to her sexual orientation, given her public civil partnership and her affair with Mr Huhne, and that the photos likewise disclosed no private information. By

30 *Ibid*. at [69].
31 *Ibid*. at [59].
32 [2008] 3 WLR 1360.
33 *Ibid*. at [57].
34 *Campbell v MGN Ltd* [2004] 2 AC 457 at [51] (per Lord Hoffman). *See also ibid. a*t [124] (publication of a photograph showing Naomi Campbell on a public street outside a drug addiction therapy clinic constituted a 'gross interference with her right to respect for her private life') (per Lord Hope).
35 [2010] 1 WLR 123 at [22]–[23].
36 [2012] EWHC 1296 (QB).

contrast, in *AAA v Associated Newspapers Ltd*,[37] the court found that even though there was, on balance, a public interest in allegations that a well-known politician had fathered a child out of wedlock, press publication of photos of the child infringed the child's Article 8 privacy rights and damages of £15,000 were ordered against the defendant. The *AAA* decision echoes an earlier ruling by the European Court of Human Rights that, even where an infant's photo reveals no private information, nor anything potentially embarrassing, that does not prevent there being an infringement of the child's Article 8 right of privacy.[38]

It is clear that a great deal of information which would pass the threshold of Article 8 in European and English law would simply not be deemed private under US law. An example of these contrasting approaches can be seen in the factually similar cases of *RocknRoll v News Group Newspapers*[39] and *Prince v Out Publishing, Inc*.[40] In the former English case, the claimant, who was married to the actress Kate Winslet, brought a privacy claim over photographs taken at a private party, some of which showed him partially naked. The photographs could be viewed by his approximately 1,500 'friends' on Facebook. The English courts nonetheless held that the claimant had a reasonable expectation of privacy in respect of the photographs and that his Article 8 rights were 'plainly engaged'. In the US case, the plaintiff brought an intrusion upon seclusion claim based on publication of photographs showing him dancing naked from the waist up at a private dance club in Los Angeles, which was attended by at least 1,000 people. Affirming the lower court's dismissal of the suit, the California appeals court ruled that Mr Prince simply could not establish an 'objectively reasonable expectation of seclusion or solitude in the place' necessary for an intrusion claim.[41]

In the United States, as in England, 'seclusion' and the expectation of privacy are relative, not absolute concepts. This notion of 'limited privacy recognizes that although an individual may be visible or audible to some limited group of persons, the individual may nonetheless expect to remain secluded from other persons and particularly from the world at large'.[42] Thus, for example in *Sanders v American Broadcasting Co.*,[43] the California Supreme Court ruled that an employee could have a reasonable expectation

37 [2013] EMLR 2 (upheld by the Court of Appeal [2013] EWCA Civ 554).
38 *Reklos and Davourlis v Greece* [2009] ECHR 200. On the issue of infant photographs, see also *Murray v Express Newspapers* [2009] Ch 481.
39 [2013] EWHC 24 (Ch).
40 2002 WL 7999.
41 *Ibid*. at [59].
42 *Medical Laboratory Management Consultants v American Broadcasting Companies, Inc*., 306 F3d 806, 815 (9th Cir 2002).
43 20 Cal 4th 907 (Cal 1999).

of privacy from undercover news filming of his conversations at his private workplace even though he could be overheard by others in the vicinity. Yet, unlike the much broader Article 8 principles that extend an individual's expectations of privacy into *public* settings, American courts have consistently held that the press 'is subject to no liability for giving further publicity to that which plaintiff leaves open to the public eye'.[44]

It is clear that, in both England and the United States, the law seeks to protect individuals from 'the invasion of some "zone of privacy" which is entitled to be immune from the prying of others'.[45] It is equally clear that the two jurisdictions define that 'zone of privacy' very differently.

Legitimate public interest

Both English law and the American private facts tort also compel consideration of whether disclosure of private information furthers a 'legitimate public interest'. But it is particularly here where the two legal systems are separated by a common language.

To balance or not to balance? That is the question

Perhaps the most fundamental distinction between the English and American approach is the relative weight courts in the two nations accord to free expression rights in privacy litigation – a difference that flows in part from their different constitutional charters.

Under the European Convention of Human Rights (ECHR), *both* privacy (Article 8) and free expression (Article 10) are recognised as fundamental rights. Neither right has priority over the other. In English privacy actions, once the claimant has established that he or she has a 'reasonable expectation of privacy' in the material at issue (thereby engaging Article 8), the media may raise as a defence that publication of that private material is nonetheless 'in the public interest', thereby engaging their Article 10 freedom of expression rights (what English courts call the 'second stage'). But even if the defendant shows that publication is in the public interest, that does not end the inquiry. Instead, the court must then balance these two conflicting rights, with an 'intense focus' on the facts of the particular case, to determine which right should prevail in that case.[46]

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44 *Machleder v Diaz*, 801 F2d 46, 59 (2d Cir 1986) (citation omitted); *see also Wilkins v National Broadcasting Co.*, 71 Cal App 4th 1066 (1999) (the plaintiff had no reasonable expectation of privacy where undercover reporters videotaped him on the open patio of public restaurant).

45 J McCarthy, *The Rights of Publicity and Privacy*, § 5:88 at 5-192.

46 *In re S (A Child)* [2004] UKHL 47, [17]; *Ferdinand v MGN Ltd* [2011] EWHC 2454 at [61]; *McKennitt v Ash* [2008] QB 73 at [46].

Unlike Article 8 of the ECHR, the US Constitution does not set forth a 'privacy' right that may be invoked by privacy claimants in civil tort litigation.[47] While long protected under American common law, privacy simply does not have the same constitutional pedigree as free speech does under the First Amendment. Thus, if a US court finds that publication of private facts relates to a matter of legitimate public concern (i.e. is newsworthy), that serves as a First Amendment (as well as common law) privilege mandating dismissal of the privacy claim.[48] In other words, in contrast to the approach taken in Europe and England, 'under the federal Constitution [in the US] newsworthiness is a complete bar to liability, *rather than merely an interest to be balanced against private … interests*'.[49]

Nonetheless, as one US court has noted, 'a certain amount of interest-balancing *does* occur in deciding whether material is of legitimate public concern'.[50] For example, in determining whether truthful private facts are newsworthy (thus privileging their publication), California courts have traditionally considered 'a variety of factors, including the social value of

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47 The US Supreme Court has in a few cases applied the term 'privacy' as a short-hand reference for a cluster of various constitutional rights of citizens against unwarranted *governmental* intrusion – for example, government intrusion into a woman's reproductive and contraceptive decisions, or unreasonable searches and seizures in the home. See, e.g., *Griswold v Connecticut*, 381 US 479, 484 (1965) (Douglas, J). But courts have consistently observed that this constitutional right of privacy applies only against government intrusion, and may not be invoked by tort claimants in invasion of privacy litigation against the press or other private-party defendants. See, e.g., *Rosenberg v Martin*, 478 F2d 520, 524 (2d Cir 1973) (Friendly, J); *Polin v Dun* & Bradstreet, *Inc.*, 768 F2d 1204, 1207 (10th Cir 1985); *Hall v Post*, 323 NC 259, 372 SE2d 711, 713 (NC 1988); *Delan by Delan v CBS, Inc.*, 91 AD2d 255, 260, 458 NYS2d 608, 614 (2d Dept 1983); *see also* J McCarthy, *The Rights of Publicity and Privacy*, § 5:54; Felcher and Rubin, 'Privacy, Publicity and the Portrayal of Real People by the Media', 88 Yale LJ 1577, 1584, n. 42 (1979).

Unlike the federal constitution, some *state* constitutions have been held to create a civil invasion of privacy claim between private parties. *See* J McCarthy, *The Rights of Publicity and Privacy*, § 5:54 at 5-96 (citing cases). But, because the national Constitution is supreme under principles of American federalism, a finding that speech is newsworthy and, hence, protected under the First Amendment trumps private facts claims *regardless* of whether those privacy claims arise under state common law, the state constitution or both. See, e.g., *Schulman*, 18 Cal 4th at 227.

48 See, e.g., *Nobels v Cartwright,* 659 NE2d 1064, 1075 (Ind App 1995) ('If a matter is determined to be of legitimate public interest, the disclosure or publication of information about that matter is said to be privileged under the First Amendment. … [T]he public's legitimate interest in the individual to some reasonable extent includes publicity given to facts about the individual that would otherwise be purely private.'); *Schulman*, 18 Cal 4th at 227 ('the publication of truthful, lawfully obtained material of legitimate public concern is constitutionally privileged and does not create liability under the private facts tort'); *Campbell v Seabury* Press, 614 F2d 395, 397 (5th Cir 1980) ('[t]he First Amendment mandates a constitutional privilege'); *Prince,* 2002 WL 7999 at *9 ('[t]he newsworthiness defense applies to bar a plaintiff's cause of action for invasion of privacy based on publication of private facts'); see also cases cited in notes 10 and 11 above.

49 *Schulman*, 18 Cal 4th at 227.

50 *Ibid.* (emphasis in original).

the facts published, the depth of the article's intrusion into ostensibly private affairs, and the extent to which the [claimant] voluntarily acceded to a position of public notoriety [i.e. is a public figure]'.[51]

It could be argued that the *same* balancing of privacy and speech interests takes place in the UK and US, merely at a different level of abstraction. But we believe that would be a mistaken view. The very formulation of competing first principles indicates that, from the outset, the two jurisdictions assign *different* weight to freedom of expression. Thus, in England and Wales, 'it has to be accepted that any rights of free expression, as protected by Article 10, … must no longer be regarded as simply "trumping" any privacy rights that may be established';[52] while, in the US, '[w]hen the subject matter of the publicity is of legitimate public concern, there is no invasion of privacy'.[53] Freedom of expression is thus accorded greater weight in the US than in the UK. Indeed, this fundamental difference of approach is highlighted by the fact that, in privacy actions in the UK, publication on a matter of public interest is a 'defence' (with the burden of proof on defendant), whereas, in the US, it is typically referred to as a First Amendment 'privilege' (with the burden on the claimant, as an element of the private facts tort, to establish lack of newsworthiness).[54]

In short, under the English approach, even disclosures on matters of great public importance may not necessarily prevail over privacy rights if those privacy interests are particularly weighty. In the US, by contrast, '[n]ewsworthiness is the rock on which most privacy claims founder'.[55]

Defining 'legitimate public interest': Of vapid tittle-tattle and deference to editorial judgement

In addition to taking different approaches to the fundamental question of how to strike the balance between privacy and free expression interests, English and US courts also differ in how they define and determine matters of 'legitimate public interest' – though there are surely similarities as well.

How to assess whether publication of intimate private facts is in the 'public interest' (or, in American lexicon, is 'newsworthy') is a notoriously

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51 *Kapellas v Kofman*, 1 Cal 3d 20, 36 (1969); *see also Schulman*, 18 Cal 4th at 215–16 ('It is in the determination of newsworthiness—in deciding whether published or broadcast material is of legitimate public concern—that courts must struggle most directly to accommodate the conflicting interests of privacy and press freedom.').

52 *Mosley v News Group Newspapers Ltd* [2008] EMLR 20, [10].

53 Restatement (Second) of Torts § 652D cmt d.

54 See, e.g., *Diaz v Oakland Tribune, Inc.*, 139 Cal App 3d 118, 126 (Cal Ct App 1983); *White v Fraternal Order of Police*, 707 F Supp 579, 587 (D DC 1989), *aff'd*, 909 F2d 512 (DC Cir 1990).

55 Zimmerman, Diane L, 'Book Review: Secrets and Secretiveness: Patterns in the Fabric of the Law?', 78 Cal L Rev 515, 533, n. 51 (1990).

difficult question that has bedevilled courts around the world. As one court has noted, if newsworthiness is completely 'descriptive' – if all coverage that sells papers or boosts ratings is deemed newsworthy – then 'it would seem to swallow the publication of private facts tort' since 'it would be difficult to suppose that publishers were in the habit of reporting occurrences of little interest'.[56] At the other extreme, if newsworthiness is viewed as a purely normative concept (with courts picking and choosing what is and is not meritorious reporting), 'the courts could become to an unacceptable degree editors of the news and self-appointed guardians of public taste'.[57]

Inevitably, the very task of determining whether publication of private facts furthers a legitimate public interest 'does involve courts to some degree in a normative assessment'.[58] Yet, in the US, two important principles apply to limit the risk that assessments of newsworthiness will be dictated by the individual tastes of judges or jurors. First, 'newsworthiness' is not limited to 'news' in the narrow sense of just reports of current events involving issues of public debate. 'It also extends to the use of names, likenesses or facts in giving information to the public for purposes of education, amusement, or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published.'[59] Thus, in American invasion of privacy litigation, 'the constitutional guarantees of freedom of expression apply with equal force to the publication whether it be a news report or an entertainment feature'.[60] Articulating the American approach, former Supreme Court Justice Sandra Day O'Connor has noted that '[c]ourts should be chary of deciding what is and what is not news'.[61]

In addition to broadly defining the types of uses deemed 'newsworthy', US courts also typically give 'considerable deference' to the editorial judgements of reporters and editors.[62] United States courts require that, for the newsworthiness privilege to apply, there must be a 'logical nexus' between publication of the private facts at issue and a matter of legitimate public concern (what English courts call 'proportionality').[63] But sensitive to the

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56 *Shulman*, 18 Cal 4th, at 218 (quoting, in part, Comment, 'The Right of Privacy: Normative-Descriptive Confusion in the Defense of Newsworthiness', 30 U Chi L Rev 722, 734 (1963)).
57 *Shulman*, 18 Cal 4th at 219.
58 *Ibid*. at 222.
59 Restatement (Second) of Torts § 652D cmt j.
60 *Gill v Hearst Publishing Co*, 40 Cal 2d 224, 229 (Cal 1953) (no invasion of privacy from publication in a magazine showing a couple embracing at the Los Angeles Farmers' Market).
61 *Harper & Row Publishers v Nation Enterprises*, 471 US 539, 561 (1985) (quoting Judge Meskill).
62 *Shulman*, 18 Cal 4th at 224.
63 See, e.g., *Shulman*, 18 Cal 4th at 224; *Campbell*, 614 F2d at 397; *Cinel v Connick*, 15 F3d

need to avoid unconstitutional interference with editorial judgment, US courts have consistently stated that '[t]he constitutional privilege to publish truthful material "ceases to operate only when an editor abuses his broad discretion to publish matters that are of legitimate public interest"'.[64] Or, as one jurist more succinctly put it, except for extreme cases involving morbid prying for its own sake, 'it is not for a court or jury to say how a particular story is best covered'.[65]

These limiting principles in the United States stand in stark contrast to the English approach. Unlike the deference given to editorial judgment in the US, in England and Wales the assessment of whether publication of private information constitutes a matter of public interest is very much an issue solely in the hands of the judge – with English jurists taking a decidedly more sceptical view of the press. The concept of 'proportionality' is key under the European Convention on Human Rights, and it is not uncommon for an English judge to dissect an article post-publication to determine which parts of it 'overstepped' the mark. Yet this can lead to unpredictability and a divergence in opinion between judges as to where the precise line should be drawn. This is best exemplified by the *Campbell* case, in which a majority of the House of Lords held that the defendant newspaper was entitled to publish the *fact* of Naomi Campbell's drug addiction and treatment as a matter of public interest, but that the newspaper had overstepped the bounds of what could legitimately be published by disclosing additional details about her treatment and publishing a photograph of her coming out of a Narcotics Anonymous meeting. Lord Nicholls and Lord Hoffmann (dissenting), however, found that these additional details were 'peripheral' and did not materially add to the level of intrusion. Lord Nicholls also thought that the details added important colour and conviction to the story and were well within the bounds of editorial discretion – a position not shared by the majority.

1338, 1346 (5th Cir 1994) ('substantially related'); *Ross v Midwest Communications, Inc.*, 870 F2d 271, 274 (5th Cir 1989) ('logical nexus'); *Gilbert,* 665 F2d at 308 ('substantial relevance'); *Haynes v Alfred A Knopf, Inc.*, 8 F3d 1222, 1233 (7th Cir 1993) (facts 'germane' to story); *Vassiliades v Garfinckel's Brooks Bros, Inc.*, 492 A2d 580, 590 (DC Ct App 1985) ('logical nexus').

64 *Shulman*, 18 Cal 4th at 225 (quoting, in part, *Gilbert v Medical Economics Co.*, 665 F2d 305, 308 (10th Cir 1981).

65 *Ibid.* at 225; see also *Howard v Des Moines Register & Tribune Co.*, 283 NW2d 289, 302 (Iowa 1979) ('In determining whether an item is newsworthy, courts cannot impose their own views about what should interest the community.'); *Heath v Playboy Enterprises*, 732 F Supp 1145, 1149, n. 9 (SD Fla 1990) ('[T]he judgment of what is newsworthy is primarily a function of the publisher, not the courts.'); *Glickman v Stern*, 19 Media L Rep. 1769, 1776 (Sup Ct NY Co 1991) ('It is well-settled that the courts will not endeavour to supplant the editorial judgment of the media in determining what is "newsworthy" or of "public interest".').

The close scrutiny which English courts pay to issues of proportionality can also be seen in *Browne v Associated Newspapers Ltd*,[66] a case in which the ex-partner of Lord Browne of Madingley, the then Group Chief Executive of BP, sought to sell his story to the *Mail on Sunday*. In considering whether an injunction should be granted, the Court of Appeal separated out and carefully examined each category of information to be published by the newspaper. The Court made a distinction between reporting the 'bare fact' of a sexual relationship and information as to the contents and detail of that relationship.[67] The result was that the Court of Appeal upheld an injunction which closely dictated which categories of information could and could not be published. This type of 'blue-pencilling' of news articles by judges is quite different from the US approach, under which 'courts do not, and constitutionally could not, sit as superior editors of the press'.[68]

So too, in contrast to the broad First Amendment definition of 'newsworthiness' in the United States (encompassing, as it does, entertainment features as well as political news), English and European courts take a decidedly narrower view of when publication of private information is 'in the public interest'. Under the European approach – laid down by the European Court of Human Rights in *Von Hannover (No. 1)* and adopted by the UK Court of Appeal in *Ntuli v Donald*[69] – the 'decisive factor' is 'the contribution that the published photos and articles make to a debate of general interest'. Following the *Von Hannover (No. 1)* decision, there was concern among many that the 'debate of general interest' standard would preclude assertion of a public interest defence in all but a small class of privacy cases involving information mainly about crimes or about politicians in the exercise of their official functions. However, in more recent decisions, such as *Von Hannover v Germany (No. 2)*,[70] the European Court of Human Rights has indicated that, depending on the circumstances of the case, a debate of general interest may also be found where publication of private information concerns 'sporting issues or performing artists'.[71] In *Von Hannover (No. 2)* – Princess Caroline's second outing at the Court over gossip magazine photos – the Court held that photos of Princess Caroline on holiday, which were accompanied by an article reporting that her father Prince Rainier III was severely ill at home, contributed 'to some degree' to a 'debate of general

66 [2008] QB 103.
67 *Ibid*. at [67].
68 *Shulman*, 18 Cal 4th at 229*;* see also *Ross,* 870 F2d at 275 ('Exuberant judicial blue-pencilling after-the-fact would blunt the quills of even the most honourable journalists.').
69 [2011] 1 WLR 294 at [20].
70 [2012] ECHR 228.
71 *Ibid*. at [109].

interest' involving her father's illness and her reaction to, and conduct during, that illness. At the same time, however, the Court commented favourably that '[i]t is worth mentioning' that the German courts had upheld an injunction forbidding publication of two other photos of Caroline 'precisely on the ground that they were being published for entertainment purposes alone'.[72] Thus, while the *Von Hannover (No. 2)* decision does indicate that the European Court of Human Rights may be willing to grant a bit more latitude for entertainment reporting than originally thought, it does not mark a fundamental shift away from the 'debate of general interest' requirement that the Court has required for reporting on private matters.

In the English courts as well, there has long been a judicial distaste towards celebrity gossip which is perceived to serve no public interest purpose. For example, Baroness Hale in *Jameel v Wall Street Journal Europe Sprl*[73] distinguished between a 'real public interest' and information which merely interests the public, stating that 'the most vapid tittle-tattle about the activities of footballers' wives and girlfriends interests large sections of the public but no one could claim any real public interest in our being told all about it'. So too, in *Campbell v MGN*, Lord Hope made clear that 'newsworthiness' – the touchstone of US law – was not a criterion that was applicable in English law, stating that it was 'not enough to deprive Miss Campbell of her right to privacy that she is a celebrity and that her private life is newsworthy'.[74]

In sum, in assessing 'public interest' in privacy litigation, English and US courts follow very different rules of the road.

Injunctions and damages

The differences in the US/UK approach to privacy also carry over into the remedies available for alleged privacy violations. Pre-publication injunctions are almost never granted in the US. Under First Amendment principles,

72 *Ibid*. at [118].
73 [2007] 1 AC 359 at [147].
74 [2004] 2 AC 457 at [120]. Notwithstanding these general pronouncements, English courts have extended the boundaries of 'public interest' in a few sporting figure and celebrity cases. For example, in *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB), Nicol J found after a full trial that a 'kiss and tell' story published in the *Sunday Mirror* was justified in the public interest because it showed that the wholesome image the claimant footballer had projected to the public about himself was false and that there was an ongoing public interest in his suitability for the role of England captain. In *McClaren v News Group Newspapers Ltd* [2012] EWHC 2466 (QB) – a controversial decision – the judge found that there was a legitimate interest in publishing information about the extramarital affair of the claimant, a manager for a Dutch football team and a former England manager, as he was a public figure from whom higher standards of conduct could reasonably be expected.

'[p]rohibiting the publication of a news story … is the essence of censorship', is presumptively unconstitutional and is theoretically permissible only under the most extraordinary circumstances involving irreparable injury to national security (such as reporting troop movements in time of war) or other interest of similar magnitude.[75] As a result, the remedy of a claimant alleging publication of private facts is invariably confined to post-publication damages.[76]

In contrast, pre-publication injunctions are more commonly granted in England and Wales to provide protection for privacy rights. The availability of this remedy is considered by English claimants to be a key advantage of privacy claims over libel, where it is far more difficult to obtain interim injunctions due to the age-old hurdles in *Bonnard v Perryman*,[77] by which an injunction will not be granted unless the court is satisfied that a defence of justification (or other defence) cannot succeed. This advantage has been exploited in several cases where complaints that were plainly about damage to reputation have been 'squeezed' into actions for breach of privacy/confidence in an attempt to circumvent the *Bonnard v Perryman* roadblocks. English courts, however, have become more astute to this tactic and in some cases have refused injunctions partly for this reason.[78]

Damages in the UK for breaches of privacy are fairly modest, especially when compared to the awards granted to successful privacy claimants in the US. The highest recorded award was £60,000 in *Mosley*,[79] a case in which the trial judge, Eady J, stated that the scale of the claimant's distress and indignity was 'difficult to comprehend' and 'probably unprecedented', after the *News of the World* famously published photographs and video footage of the claimant engaging in sexual acts with five prostitutes. Other privacy awards have not come nearly as high, with most remaining in the £2,000–£15,000 bracket.

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75 *Procter & Gamble Co. v Bankers Trust Co.*, 78 F3d 219, 225 (6th Cir 1996) (citation omitted). *See also New York Times Co. v United States*, 403 US 713, 726 (1971) (Brennan, J, concurring) ('Pentagon Papers case'); *Nebraska Press Ass'n v Stuart*, 427 US 539, 559 (1976) (prior restraints against the media constitute 'the most serious and the least tolerable infringement on First Amendment rights'); *In re Providence Journal Co.*, 820 F2d 1342, 1348 (1st Cir 1986) ('In its nearly two centuries of existence, the Supreme Court has never upheld a prior restraint on pure speech'), *modified on reh'g en banc*, 820 F2d 1354 (1st Cir 1987), *cert. dismissed on other grounds*, 485 US 693 (1988).

76 In a handful of cases where the claimant was seeking to stop harassing intrusion *conduct*, and not seeking to enjoin publication, US courts have on occasion granted injunctions against harassing, paparazzi-type behaviour. *See Galella v Onassis*, 487 F2d 986 (2d Cir 1973) (injunction against intrusion and harassment of Jackie Onassis by photographer); *Wolfson v Lewis*, 924 F Supp 1413 (ED Pa 1996) (preliminary injunction issued against the intrusive behaviour of TV investigative reporters).

77 [1891] 2 Ch 269.

78 See, e.g., *Viagogo v Myles & Others* [2012] EWHC 433 (Ch); *Terry v Persons Unknown* [2010] Fam Law 453.

79 [2008] EMLR 20.

A final word on the different rules on costs in the two jurisdictions – a topic worthy of a paper itself. The English rule that costs are paid by the losing party does not apply in the United States, where the governing rule is that each party is responsible for its own attorneys' fees. This has a significant impact on the way that litigation is played out in the respective jurisdictions. Legal fees in English cases in most cases dwarf damages, and the prospect of having to pay hefty fee awards on top of damages is likely to form the key incentive for many media defendants in the UK to settle privacy claims (rather than defend them), especially if the defendant has few assets.

Conclusion

English and US courts, influenced by non-identical history, legal tradition and values, surely differ in where they draw the line between the right to privacy and the right to freedom of expression. The First Amendment gives the press in the United States more latitude to publish (and the public more scope to receive) truthful newsworthy information that the rich and powerful would prefer remain private. On the other side of the Atlantic, the enshrinement of a constitutional privacy right in Article 8 provides individuals in England and Europe – even celebrities and politicians – with a greater ability to control public discussion of their private lives. Each system carries its own virtues and shortcomings, its own quirks and preconceptions, its own imperfect balance of inherently conflicting rights. As an American lawyer and an English barrister, we unquestionably have our own views on which country's laws more appropriately strike the right balance. But, as Judge Cardozo succinctly put it almost a century ago, 'We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.'[80]

80 *Loucks v Standard Oil Co.*, 224 NY 99, 110–11 (1918).

PART III
Confronting Current and Future Challenges

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8

Privacy and Free Expression: Competing or Complementary Rights?

Michael Harris and Kirsty Hughes

Introduction

The right to a private life and the right to freedom of expression are not only both fundamental, universal rights; they are also self-evidently important to almost all people in their daily lives – whether through their presence or their absence. They are strongly related rights. If state authorities, or other actors, are monitoring, recording, putting under surveillance, bugging or otherwise intruding into people's lives, then freedom of expression is compromised. We behave differently when we know that a third party is recording, bugging or monitoring us. Surveillance is intended to intimidate and encourage self-censorship as well as control and inform those doing the monitoring.

Authoritarian and totalitarian states, such as Russia, China, Azerbaijan and Iran, are most often the source of intrusive direct surveillance that breaches the right to privacy – just as they are the most active states in implementing direct and intrusive censorship in direct violation of the right to freedom of expression. But breaches of the rights to privacy and to free expression happen in democracies too. Sometimes that is driven by government and sometimes by the judiciary – in the UK, the Public Order Act 1986 has been used to criminalise speech, 'super-injunctions' have arisen from a narrow judicial interpretation of the right to privacy, and the Communications Data Bill threatened to create an extraordinary degree of web surveillance – unprecedented in a democracy.[1]

At other times, private companies have been involved in breaches of these rights. In the digital world, privacy can often be compromised more

1 However, the Bill looks unlikely to become law, at least in its current state, since the Liberal Democrat partners in the Coalition Government withdrew their support for it in April 2013. It was not included in the Queen's Speech outlining proposed legislation for the 2013–2014 parliamentary session.

J. Lewis et al. (eds.), *Media Law and Ethics in the 21st Century*

extensively and easily than offline, and web hosts, Internet service providers and others take decisions about removing content, or set rules for communication and interaction online – effectively the privatisation of censorship. This coincides with the commercial pressure to harvest data that can invade privacy.

Privacy and freedom of expression can and do at times conflict. The desire to comment on, analyse, or write about aspects of people's private lives will always raise questions about where the boundaries should lie between what is public and what is private. These questions are especially relevant to questions of media freedom and media standards – and have been pored over recently during the Leveson Inquiry. At the heart of this debate lies the question of public interest, and whether, when and how invasions of privacy, which go beyond any agreed boundaries, can be justified. A related question is whether politicians or others who hold great power or influence in our societies are less entitled to a private life – or whether, rather, there is a greater public interest justification for investigating and reporting on aspects of their private lives.

The right to privacy is set out in Article 12 of the 1948 Universal Declaration of Human Rights, and the right to freedom of expression in Article 19 – these rights are also incorporated into regional human rights declarations, such as the European Convention on Human Rights (EHCR) (in Articles 8 and 10 respectively), and often into national law, such as in the UK by the Human Rights Act 1998. These twin rights are fundamental rights, not absolute rights – but any limitation on these rights should be necessary, limited and proportionate. Even in democracies, governments can too often reach for pre-set excuses, whether it is national security or public order, to censor or intrude where they should not – and often such behaviour in democracies is then used as a justification by more authoritarian regimes.

In this chapter, we set out some of the key challenges in defending and promoting the twin rights to freedom of expression and to privacy. We outline where they are most clearly under joint threat and attack, and where they compete with or complement each other. We look first at the twin rights in the context of press freedom, then at challenges to those rights in the digital world.

Press freedom

The British press often views privacy and free expression as competing rights. This debate is certainly not new, but has been brought into sharp relief by the *News of the World* phone-hacking scandal, which broke in 2011. Such was the public outrage at the serial breaches of privacy by journalists

that the Prime Minister announced a far-reaching Inquiry into the role of the press and the police on 13 July 2011, chaired by Lord Justice Leveson. For the press, this Inquiry may well redefine the relationship between privacy and free expression for decades to come.

Index on Censorship has been involved in the debate, which has become increasingly sharp, since the introduction of the Human Rights Act in 1998 which enshrined the right to privacy in domestic UK law for the first time. The introduction of Strasbourg jurisprudence on privacy has come as a shock to parts of the British media not used to restraints on invasions of privacy. It also reflects in part a different culture on privacy which has emerged from differing historical circumstances between Britain and mainland Europe. Article 8 of the European Convention on Human Rights was created in the aftermath of the Second World War with the principle of protecting individuals and families from state intrusion. Formed to protect citizens from the totalitarian state, in light of both Hitler's atrocities and Stalin's increasing influence in Soviet-dominated Eastern Europe, the Article emphasised the importance of the personal sphere.

Prior to the enactment of the Human Rights Act 1998, English law recognised rights related to privacy such as freedom from trespass, harassment, breach of confidence and defamation, but not a discrete tort of privacy. This is perhaps illustrated most profoundly in the case of *Kaye v Robertson*.[2] In January 1990, television actor Gordon Kaye, star of the situation comedy 'Allo 'Allo, was involved in a serious car accident and required emergency brain surgery. Whilst Kaye was lying semi-conscious in his hospital bed, *Sunday Sport* journalist Roger Ordish entered his room without permission and took unauthorised pictures of the star. At trial, the court ruled that such photographs were legal provided that the paper did not claim that they were authorised. Significantly, Glidewell LJ famously remarked that 'it is well-known that in English law there is no right to privacy',[3] whilst Leggatt LJ concurred,[4] adding that 'the right to privacy has so long been disregarded here that it can be recognised only by the legislature'. Nowhere is this clearer than in *R v Central Independent Television PLC*,[5] where an unsuccessful attempt was made to prevent the television company revealing that R's child's father was a paedophile. In his judgment, Lord Hoffman highlighted that free speech was 'a trump card, which always wins' and emphasised that:

2 [1991] FSR 62.
3 *Ibid.* p. 66.
4 *Ibid.* p. 71.
5 [1994] Fam 192 at 203.

> publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom … the principle that the press is free from both governmental and judicial control is more important than the particular case.

Since the Human Rights Act 1998, this behaviour is unthinkable. As the Court of Appeal noted in *Douglas v Hello!*,[6] it is 'unlikely that *Kaye v Robertson* … would be decided in the same way today'. We have in fact come a long way since the Human Rights Act 1998, with free speech no longer dominant over individual privacy.

For Index on Censorship, the starting point in any general discussion on the development of privacy is that English privacy case law has had a difficult start, swinging too far in favour of Article 8 rights but now beginning to acknowledge the balance between the public interest and privacy. A number of important cases, including *Theakston v MGN Ltd*,[7] *A v B and C*,[8] *Campbell v MGN Ltd*[9] and, in the European Court of Human Rights, *Von Hannover v Germany* (*No. 2*),[10] have attempted to balance freedom of expression with privacy, with varying degrees of success. In *Von Hannover (No. 2),* the Grand Chamber set out relevant criteria which national courts should consider: whether the information contributes to a debate of general interest; how well known the person concerned is and the subject matter of the report; the prior conduct of the individual concerned; and the content, form and consequences of the publication. Whereas rulings of the European Court of Human Rights on privacy (in particular in the first *Von Hannover* case[11]) have been too restrictive against free expression, in *Von Hannover (No. 2)* the Court emphasised the margin of appreciation applicable to national courts in overseeing these cases. This margin should be used by UK judges to arrive at a different balance between free expression and privacy compared to that, for example, found in France. Judgments in the European Court of Human Rights in favour of privacy have also benefited journalists, such as in *Financial Times v United Kingdom*,[12] which protected the anonymity of journalists' sources.

It is also clear that judicial attitudes in the UK towards privacy are markedly different from other neighbouring Council of Europe jurisdic-

6 [2001] QB 967 at [167].
7 [2002] EMLR 22.
8 [2003] QB 195.
9 [2004] 2 AC 457.
10 App. Nos 40660/08, 60641/08, 7 February 2012.
11 *Von Hannover v Germany (No. 1)* (2004) 40 EHRR 1.
12 [2010] EMLR 21.

tions, in particular from those in France. France's privacy laws date from the 19th century when personality rights began to develop. The French approach to privacy has been to allow individuals to take control of their individual image to an extent unimaginable in the UK. Protection of privacy covers not only the disclosure of details of an individual's private life, but also the taking and publication of photographs of an individual without prior consent. In the case of an interview, an individual's photograph may not be published for a purpose or in a manner which differs from the one which was originally agreed, or in order to distort the manner in which the interviewee has elected to project his of her image or express his of her opinion.[13]

France's privacy law has allowed the rich and powerful to manage their image in a manner that has been damaging to freedom of expression. The most infamous example of this came in 1996, with the publication of *Le Grand Secret*. The book, by François Mitterrand's doctor, gave a detailed account of the then President's cancer whilst he was still in office. Mitterrand's family alleged that even though he was a public figure (the Head of State), the account was a breach of medical confidentiality and the President's right to privacy. The family obtained an injunction for the immediate suspension of the distribution of the book. In his appeal, the book's author did not rely on arguments of public interest but instead on his right to freedom of expression. The court refused the author's appeal against the injunction, arguing that details of the President's illness involved the most 'intimate' aspect of privacy. Yet, prior to his death and during his election campaign, the President himself issued reports on his health which airbrushed out the cancer that killed him. The legal expert Etienne Picard observed that what prevailed was 'the right of the subject of the invasion [of privacy] to reveal what he wishes about himself even if, as in this case, it was not the truth'.

This heady mixture of a popular press that has failed to acknowledge its new obligation to protect privacy under the Human Rights Act 1998, readily available examples from overseas of a privacy culture that has stifled free expression, and new online media that allow breaches of privacy to be disseminated quickly has led us to our current impasse.

The Leveson Inquiry has brought some of these issues into focus. The Inquiry is attempting to address the most egregious, and in some cases corrupt or criminal examples of the invasion of privacy, while, we hope, defending strong public interest journalism. At the Leveson Inquiry, critics

13 Submission to the Leveson Inquiry: Culture, Practice and Ethics of the Press, January 2012: http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Submission-by-Index-of-Censorship.pdf.

of the current privacy status quo argue that it is not adequate and then jump from that to conclude that a form of statutory regulation is needed to stop breaches of privacy:

> Witnesses have argued that the current crisis in the press results not from a failure of regulation but from failures to enforce the law. Again this is untrue.[14]

Yet, it is unclear why the leap to statutory regulation is needed. Stronger, sharp-toothed independent self-regulation, as well as the better application of existing laws, will avoid the need for state intervention. The most notorious case, in which murdered schoolgirl Milly Dowler's mobile phone was hacked by a *News of the World* reporter, involved a crime under the Regulation of Investigatory Powers Act 2000. It is important that any new regulator takes crime seriously. It is also clear that, as with our libel laws, one of the key factors in preventing legal action by claimants whose privacy has been seriously breached (or defendants fighting cases) is the high cost of privacy actions, as recognised by the European Court of Human Rights in *MGN Ltd v United Kingdom*.[15]

While the direction of travel in privacy case law has been positive, the laws governing the press still do too little to protect public interest reporting. It is crucial to get the balance right between genuine public interest defences for what would otherwise be intrusive journalism, and journalism invading privacy against legal and self-regulatory restraints for no adequate reason. Index on Censorship has campaigned for three years with English PEN and Sense About Science for reform of England and Wales' archaic defamation law, which fails to protect those speaking out in the public interest.[16] As pointed out by Index in our submission to the House of Lords' Communications Committee report into investigative journalism, important bodies of law still have no public interest defence, including: the Official Secrets Act 1989, the Regulation of Investigatory Powers Act 2000 and the Computer Misuse Act 1990. This creates risks for journalists handling private data, including the possibility of imprisonment. In the public interest, it should also be recognised that, occasionally, journalists will transgress the law as it stands.[17] Furthermore, while the law develops

14 Hacked Off campaign submission to module 4 of the Leveson Inquiry (June 2012): http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Hacked-off-campaign-submission-dated-12.06.121.pdf.
15 [2011] ECHR 66.
16 See libelreform.org.
17 House of Lords' Communications Committee Investigative Journalism report evidence base (p. 226): http://www.parliament.uk/documents/lords-committees/communications/Investigativejournalism/IJev.pdf.

on privacy, it must better recognise the public interest in the occasional breach of privacy. However, public interest cannot be the only defence available. As in libel, where Index has argued for a threshold that takes into account whether a defamatory statement is both 'serious' (that is highly damaging to reputation rather than trivial) and 'substantial' (published to a large enough audience to cause significant harm), privacy case law must take into account the content and context of privacy breaches.

Much tougher self-regulation, with clear guidelines on journalistic standards and ethics, is needed in the UK to create an environment where press freedom is upheld but clear codes and standards exist and are used. This will help guide a better balance between free expression and privacy. Statutory regulation is unnecessary and unacceptable; often in countries that rush to such legislation it is the beginning of a move towards state intrusion of a free press, Hungary being a recent example.[18] A stronger regulator should be in a position to mediate privacy intrusions on behalf of claimants (reducing the cost of such actions and opening up access to justice), taking into account public interest factors to prevent a chill to free expression.

Some parts of the British press may see privacy and free expression as competing rights. But as we have argued in this chapter, they often go together, and even where there are conflicts between privacy and journalism in the public interest, there are ways, through tougher self-regulation – together with proper application of existing laws and their improvement – to manage such conflicts.

What rights in the digital world?

Human rights apply online as well as offline – universal rights transcend digital boundaries just as they transcend geographical ones. The digital world, with its wide reach and rapidly changing technologies and products, opens up new ways to promote and defend rights but also new ways to attack or undermine those rights (whether deliberately or inadvertently). While some have argued that the digital revolution has undermined privacy but promoted freedom of expression, the real picture is much more complex, with these rights often being both mutual and complementary.

The ability, through the World Wide Web, mobile phones and social media, of individuals to self-publish and to communicate and interact across borders, and the rise of citizen journalism, all extend and promote the ability to practise our right to freedom of expression. But new technologies also

18 http://www.indexoncensorship.org/2011/11/hungary-a-lesson-on-how-not-to-regulate-the-press/.

allow governments to monitor and record conversations and communication, to gather information and even to track individuals' movements and locations offline.

China's 'Great Firewall' is one of the best-known and most extensive efforts to censor through the Web and to monitor and undertake surveillance – violating the right to privacy and the right to free expression simultaneously. As Index's China correspondent, Dinah Gardner, notes:

> The key to their control is the fact that unlike many other countries, China is only connected to the outside internet through three links (or choke points as Fallows calls them) — one via Japan in the Beijing-Tianjin-Qingdao area, one also via Japan in Shanghai and one in Guangzhou via Hong Kong. At each one of these choke points there is something called a 'tapper' which copies each website request and incoming web page and sends it to a surveillance computer for checking.[19]

Iran is currently attempting to build a national 'halal' internet, so that it can cut its citizens off entirely from the World Wide Web, which will curtail the right to online free expression but also embed surveillance technology used to invade the right to privacy.[20] The uprisings of the Arab Spring, driven by a demand for freedom and for respect for human rights (as well as for economic freedoms), made extensive use of social media. States and governments threatened by uprisings and domestic protests have targeted and are targeting social media, whether by shutting it down (as in pre-revolutionary Egypt) or by monitoring Facebook, Twitter and other social media to track and target activists (as Iran among others has done extensively). Nor are such tendencies limited to authoritarian regimes. In the UK, Prime Minister David Cameron suggested during the 2011 London riots that social media could be shut down as part of an attempt to counter the disturbances, telling the House of Commons:

> Everyone watching these horrific actions will be struck by how they were organised via social media. Free flow of information can be used for good, but it can also be used for ill, so we are working with the police, the intelligence services and industry to look at whether it would be right to stop people communicating via these websites and services when we know they are plotting violence, disorder and criminality.[21]

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19 http://uncut.indexoncensorship.org/2012/08/china-internet-censorship/.
20 http://www.indexoncensorship.org/2012/02/iran-internet-censorship-increases/.
21 House of Commons debate, 'Public Disorder', 11 August 2011: http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110811/debtext/110811-0001.htm.

Some countries attempt to censor or intrude on digital freedoms through rather traditional offline means of harassment and intimidation. In both Russia and Azerbaijan, for example, the Internet is freer than in China, but the authorities monitor journalists, activists and civil society both online and offline. In one notorious case, Azerbaijan resorted to the secret filming of Radio Liberty journalist Khadija Ismayilova's private life in an attempt to blackmail her into stopping her critical online blogging – a deliberate invasion of privacy used to attempt to censor her online free expression.[22] Meanwhile, in the UK, the Public Order Act 1986 and the Communications Act 2003 have been used to prosecute individuals for remarks on Twitter and Facebook, including jokes. These issues are complex, with the courts throwing out some of these cases. To understand the issues better, the Crown Prosecution Service launched a consultation on social media in 2012, and subsequently introduced new guidelines which came into effect in June 2013.[23]

One of the most serious current threats in any democracy to online privacy and freedom of expression is the UK's Communications Data Bill. Aptly labelled by the media a 'snooper's charter', the Bill would give the authorities unprecedented powers to force population-wide collection and filtering of data across all forms of digital, and offline, communication. This would constitute both a major invasion of privacy and would lead to a deep chill on freedom of expression in the broadest possible way. It would also be used, with alacrity, by governments in authoritarian regimes to justify their own digital surveillance – and even quite possibly to imitate the UK's law. It is somewhat ironic, and suggests confusion in the British Government's approach, that at the same time as it is promoting such a deeply illiberal bill, the Government is also one of the leaders in developing proposals for export controls on digital surveillance technology to unsavoury regimes.

Anonymity online is another area where privacy and freedom of expression go together. While the need for anonymity is most obvious in authoritarian countries where dissidents, activists, journalists and others simply cannot be open about their activities as they face the threat of violence or legal sanctions, anonymity is important in democracies too – whether for whistle-blowers, or for a wide range of people who might self-censor online if they were not able to discuss sensitive (for them) issues without using their real identity.

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22 http://www.indexoncensorship.org/2012/04/azerbaijan-journalists-under-attack/.
23 Available at http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/.

Anonymity and the explosion of debate and comment online has also led to concerns over online 'trolls' and Twitter 'storms', leading politicians to question whether free speech online has gone too far. The rise of social media sites such as Facebook has also meant that a wide range of information about individuals that would once have been deemed private has been put in the public domain. Postings on social media can breach the right to privacy in cases where there is no public interest and where the breach will cause actual harm. After Welsh international footballer Ched Evans was convicted of rape in a case where the victim remained anonymous, Twitter users identified and abused the victim within hours of his sentence. Her name was so widely circulated that it became one of the top trending phrases on the site, leading other users to discover that she was the victim of the attack. The victim's mother told the *Daily Mail*: 'Putting her name on Twitter is just another horrendous ordeal for her'.[24] The use of social media can also breach the privacy of important constitutional functions. Amy J St Eve, a US District Court Judge for the Northern District of Illinois, has conducted an interesting survey, 'Ensuring an Impartial Jury in the Age of Social Media', concluding that judges need to give strong instructions to juries to stop them using social media that may prejudice cases.[25]

Some of this may reflect technology driving genuine social change. How attitudes to privacy will change as a result of online communities, social media and other communication tools is an open question. But Web companies are increasingly providing, often in response to users' demands and criticisms, a wider range of tools and filters that can ensure greater privacy, and users are showing more awareness and sophistication in using such tools. Many users are becoming much more alert to how to set privacy filters, or how to self-manage online debate forums and online communities.

In finding ways to manage their individual or community online settings, people are becoming their own editors. Just as editorial decisions in offline publishing are rightly separate from any legal regulation of free speech and privacy, we are now seeing a range of new means of editorial control online. Much of this is entirely positive. Just as there is a wide range of publications, clubs, societies and so on in the offline world, the online world has the same and more. But there also remain challenges in finding the best ways with some new tools, such as Twitter, to have an open debate while dealing with Twitter 'storms' and what can sometimes be chilling forms of online abusive comments.

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24 http://www.dailymail.co.uk/news/article-2133792/Ched-Evans-rape-victim-named-abused-Twitter-girlfriend-stands-Wales-footballer.html#ixzz2960CFdaJ.

25 Hon. Amy J St Eve and Michael A Zuckerman, 'Ensuring An Impartial Jury In The Age Of Social Media', Duke Law & Technology Review, 11(2) (2012), 1.

There are also risks that the digital world may fragment too much. The fact that individuals can set their own privacy filters, set their own individual feeds and filters on types of content they want to receive or not receive, set who they do and do not want to interact with, is a central part of both privacy and free expression. But as governments and corporations control, block, monitor, set filters, take down content and fragment the digital world in a range of means that limits free expression and invades privacy, then these actions and decisions need to be challenged.

Setting of editorial rules, or membership rules, online can raise issues that have no exact counterpart offline. An individual newspaper can exercise editorial control on, for example, the nature of letters from the public they will publish (in print and online too). But when a company like Facebook provides a space for discussion and free expression used by one billion people, and sets rules for that discussion, then the digital world is posing a whole new set of questions and challenges about government and corporate roles in promoting and censoring free expression. Some of the large Web companies are aiming to deal with such challenges in a consistent way – a number of them, including Google, Yahoo and Microsoft, have come together in the Global Network Initiative, a multi-stakeholder group (of which Index on Censorship is also a member) to set and discuss clear practices for respecting human rights online, aiming, for example, only to take down content either on a court-backed request from a government or where it clearly violates their own terms of use. Google and Twitter are now both also publishing so-called transparency reports on the number of takedown requests they receive, by country, and how many they accede to.

The Internet has become a place both for exercising rights and for considerable challenges to rights, with privacy and freedom of expression at the heart of many of these challenges. It is no coincidence that the countries most active in lobbying for top-down regulation of the Web are authoritarian ones, with China and Russia amongst others pushing for the International Telecommunication Union to be used as a vehicle for that. The EU and US have so far resisted these pressures, pushing for an open, multi-stakeholder approach and emphasising freedom of expression. But, as in the case of the UK Government's proposed Communications Data Bill (now unlikely to become law[26]), democratic governments can easily undermine or contradict their own positions supportive of human rights in the digital world. And, as we have discussed, the increasing role and power that Web companies and inter-

26 See n. 1 above.

mediaries have – in either respecting, defending or infringing rights to privacy and to freedom of expression – means that to defend rights in the digital world, both governments and companies must fully respect those rights and must be held to account for those obligations and commitments.

Total privacy – the Internet and the rise and fall of the 'super-injunction'

Closer to home, the Internet has provided a challenge to privacy that has bolstered free expression. In recent years, there has been concern over the granting of so-called 'super-injunctions', which not only prevent the publication of private or sensitive material but also disallow the defendant from revealing even the existence of the injunction. Human rights organisations, including Index on Censorship, have raised concerns that the extension of Article 8 rights to corporations, combined with these secretive injunctions, have allowed them to cover up information that it is in the public interest to publish.

'Super-injunctions' may cover up a variety of private activities: examples range from a public figure who has beaten up his girlfriend to someone who has privately sold arms in breach of UN sanctions.[27] Judges will often be inclined to grant these injunctions to protect privacy as once a story is out it cannot be retracted. Media commentator Joshua Rozenberg suggests that judges will 'grant an injunction first and ask questions later, it being obviously safer to maintain the status quo while deciding what to do'.[28] Yet, because of the high costs of English law, few of these injunctions are challenged. The cost to challenge, around £60,000 a day (with the possibility of lengthy proceedings), combined with an unreliable public interest defence, makes supposedly temporary injunctions likely to be permanent. It is difficult to run the 'Reynolds' responsible journalism defence in libel, without putting your allegations to the other party first.[29] But this gives the other party the opportunity to seek an injunction. The expense of challenging any injunction on privacy grounds makes media outlets less inclined to undertake investigative journalism in the first place – a significant chill on free expression. As Ian Hislop, editor of satirical magazine *Private Eye*, told the Culture, Media and Sport Select Committee:

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27 United Kingdom Government submission, p. 7.
28 J Rozenberg, 'Private Lives' in J Glanville (ed), Index on Censorship, 'The Big Chill', vol. 38(2) (London: Routledge, 2009), p. 105.
29 The Reynolds defence can be raised where it is clear that a journalist had a duty to publish an allegation even if it turns out to be wrong.

> We attempted to run a story in January [2009] and we still have not been able to run it. The journalist involved put it to the person involved, which was an error; there was an immediate injunction; we won the case; they have appealed; we are still in the Appeal Court. Essentially it is censorship by judicial process because it takes so long and it costs so much.[30]

In 2009, at what is considered to be the high-point of this phenomenon, Index on Censorship trustee Mark Stephens estimated there to be between 200–300 'super-injunctions' in place at any one time.[31] The most striking example of how these 'super-injunctions' placed Article 8 rights above those of Article 10 arose when international corporation Trafigura attempted to place a 'super-injunction' on an internal report (the Minton report) which explored the dumping of toxic waste outside Abidjan, the capital of the Côte d'Ivoire. On 13 February 2007, Trafigura paid the government of Ivory Coast an out-of-court settlement of $200 million, but accepted no liability for the dumping of the waste. The *Guardian* obtained a leaked copy of this report and attempted to publish it, but Carter-Ruck solicitors obtained a 'super-injunction' on 11 September 2009 in the High Court on behalf of Trafigura to prevent the *Guardian* from publishing the report, or even publishing that the injunction existed. Five days later, the *Guardian* and the BBC published internal emails between Trafigura employees about the waste. Libel threats were issued by Carter-Ruck against both the BBC and the *Guardian*. A key moment came when the *Guardian* on 1 October 2009, unable to report that an injunction existed against it publishing the Minton report, told Carter-Ruck that it intended to publish a copy of Paul Farrelly MP's question to Parliament on the use of injunctions, which read:

> Mr Paul Farrelly (Newcastle-under-Lyme): To ask the Secretary of State for Justice, what assessment he has made of the effectiveness of legislation to protect (a) whistleblowers and (b) press freedom following the injunctions obtained in the High Court by (i) Barclays and Freshfields solicitors on 19 March 2009 on the publication of internal Barclays reports documenting alleged tax avoidance schemes and (ii) Trafigura and Carter-Ruck

30 Press standards, privacy and libel – Culture, Media and Sport Committee: http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/362/ 36205.htm, note 32.

31 'Press freedom and the internet: Barbra Streisand strikes again', *The Economist,* 15 October 2009.

> solicitors on 11 September 2009 on the publication of the Minton report on the alleged dumping of toxic waste in Ivory Coast, commissioned by Trafigura.[32]

Carter-Ruck responded the same day. Guardian editor Alan Rusbridger recalled the events, once the injunction had been lifted:

> [T]heir letter unequivocally asserted that the Guardian would be in contempt of Court and sought an immediate undertaking that we would not publish. The letter also stated that Carter-Ruck did not even accept that the publication by Parliament of Mr Farrelly's question placed the existence of the injunction in the public domain! We took leading counsel's advice on this letter. She advised us not to publish, but to return to court to seek a variation in the order.[33]

The Guardian challenged the injunction alongside Index on Censorship (who due to the injunction did not know the party who served it, or its function). However, the issue quickly became extra-judicial and increasingly a matter of constitutional importance as MPs challenged this attempt to override Parliamentary privilege, with Carter-Ruck writing to the Speaker of the House to suggest the issue may be out of bounds for debate. What broke the injunction was not the intervention of Parliament, that merely revealed its existence, but the fact that the Minton report appeared on whistle-blower website WikiLeaks three days after the injunction was served and social media allowed this to be disseminated.

No newspaper or individual journalist could even mention the words 'Minton report' without falling foul of the law of contempt of court, which potentially carried a long jail sentence. Yet Twitter allowed citizens to piece together the story and eventually find the embargoed report on WikiLeaks. The *Guardian* ran a teaser article that it could not report on a Parliamentary question, followed by a tweet from the editor Alan Rusbridger. In addition, Wikipedia, with its servers based in the US and thus protected by the First Amendment, freely linked to WikiLeaks, giving comprehensive coverage that gave the game away. Suddenly the terms 'Trafigura' and 'Carter-Ruck' began trending on Twitter as the first and second most popular hashtags in the UK. By then, the game was over and the injunction all but obsolete. New technology breached an injunction that valued a corporation's Article 8

32 http://blog.indexoncensorship.org/2009/10/14/trafigura-mp-farrellys-censored-questions/.
33 http://www.libelreform.org/news/1-briefing-paper-free-speech-libel-law-and-super-injunctions.

rights over the Article 10 rights of journalists, Parliamentary privilege, as well as the public's right to know.

Since social media has challenged 'super-injunctions' in such a public manner, they have become a less popular tool for reputation management lawyers, with the Ministry of Justice (now compiling official statistics) finding a total of 18 applications or continuations of such private injunctions in the first half of 2012,[34] with only two relating to the media (one of which was unsuccessful).[35] Without this technology we would not have seen the fall of the 'super-injunction'. Social media brought these two rights into direct conflict, but a conflict which rebalanced the inequality between the right to privacy over the right to freedom of expression.

Conclusion

Freedom of expression and privacy are in many fundamental ways complementary rights. This is particularly obvious in totalitarian states where breaches of privacy are used to suppress freedom of expression both online and offline, but it is the case too in democracies where key elements of the right to free speech, such as anonymity for whistle-blowers, the right to associate in private, protection of sources and the ability to maintain confidential contracts, all pivot on the right to privacy.

However, privacy and freedom of expression can sometimes appear to be more conflicting than complementary. This is especially the case when there are either over-restrictive privacy laws (such as in France) or where the boundary between privacy and public interest is blurred or unclear. In the UK, there is a need both for incorporation of public interest tests into a range of laws, but at the same time for the media to respect better its commitment to privacy under the Human Rights Act 1998. As the Government considers how to respond to the Leveson Inquiry, it will need to strike a better balance between free expression and privacy, responding to widespread criminality and breaches of privacy, while developing the framework for a sharp-toothed press body without opting for chilling statutory regulation. The debate over super-injunctions has shown where the Internet can force the hand of judges who have been too willing to grant punitive injunctions to respect the privacy of corporations over that of freedom of expression. This is a clear example of where the Internet has

34 http://www.justice.gov.uk/downloads/statistics/civiljustice/privacy-injunctions-stats-jan-jun2012.pdf.

35 http://inforrm.wordpress.com/2011/04/12/anonymised-privacy-injunction-hearings-january-to-march-2011/

challenged privacy to the benefit of freedom of expression, but in general the relationship between these rights is more complementary.

Privacy and free expression in the digital world are mostly complementary – and often under threat at the same time. Surveillance and censorship often go hand in hand in the online world, and the threat – and ease – of widespread surveillance is very chilling to free speech. China's state surveillance, Azerbaijan's breach of the privacy of activists, the lack of clear corporate rules over the use of private data and the UK's Communications Data Bill[36] proposal all present or have presented major new challenges for freedom of expression. Those who care about free speech must also care about the right to privacy. As more of our personal sphere is placed online, the relationship between these rights will grow increasingly complex as individuals will expect privacy, while at the same time demanding ever more access to information and the right to speak out freely. This debate will continue to evolve, as technologies develop, but with millions of new users accessing the Internet for the first time every month, pressure from civil society is needed to ensure corporations take responsibility, and states do not undermine these rights.

36 See n.1.

9

The Internet as a Lens: Concepts of Privacy in Online Spaces

Jeffrey Hermes

While most societies grant legal protection to expectations of privacy, such protection is rarely if ever absolute; privacy rights are generally limited both by the consent of the individual and by a range of competing values such as national security, effective law enforcement, and access to government records or information relevant to public issues. These values, and the way they limit privacy rights, are in many senses the 'fingerprint' of a given nation, reflecting a country's particular balance between personal autonomy and public authority.

Every medium of communication presents a landscape in which these competing rights and values are made manifest and a balance is struck. To be sure, each method of communicating has its own unique character, raising privacy issues in different ways. A bullhorn outside one's window is typically more intrusive than a newspaper on one's doorstep, regardless of the content of the communication; but if the content includes sensitive private information, the bullhorn might reach dozens while the newspaper reaches thousands (if not tens or hundreds of thousands). To that extent, each new medium not only calls for different forms of regulation, but illuminates different aspects of the concept of 'privacy'.

The Internet, however, is not a single medium of communication, but a platform allowing a wide variety of different modes of interaction. It represents an unprecedented laboratory for exploring concepts of privacy, and a continuously evolving challenge with respect to protecting privacy rights while preserving the benefits of open communication and ready access to information. This chapter explores several ways in which communication via the Internet has challenged traditional legal concepts of privacy.[1]

1 This chapter is primarily based upon United States case law and statutes, as a convenient vehicle to identify more universal trends and tensions in the application of privacy concepts to the Internet. I do not, however, intend to suggest that specific articulations of law discussed in this chapter are generally applicable.

J. Lewis et al. (eds.), *Media Law and Ethics in the 21st Century*

Disclosure of private facts by electronic communication

The thoughtless or malicious distribution of private information is, of course, not a new phenomenon. Personal relationships and sensitive situations routinely involve the sharing of such information within a trusted group, and trust can easily be breached due to negligence or acrimony. However, the ease of electronic communication makes it possible for someone stung by a failed relationship to lash out in the heat of the moment, or for an accidental disclosure of personal data to have lasting repercussions.

The US District Court for the District of Kansas faced one such situation in 2009 in *Peterson v Moldofsky*, a case involving the retaliatory disclosure of private photographs.[2] Piper Peterson and Michael Moldofsky had an intimate relationship for approximately two years; during that time, Moldofsky took photographs of Peterson in certain sexual situations. The relationship ended bitterly, and Moldofsky sent a selection of those photographs by electronic mail to a small group of Peterson's relatives, friends, and coworkers. Peterson filed suit, claiming among other things that the distribution of the photographs was actionable in the state of Kansas as the unauthorised publicity of matters concerning her private life.

The difficult issue in this case was the scope of Moldofsky's publication of the photographs. There is a rough consensus in the United States that a legal remedy for publication of private facts should only exist where the defendant's disclosure of information transcends the boundaries of private knowledge and makes that information truly public. Thus, under Kansas law, the dissemination of private information becomes actionable when it is communicated to 'the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge'. The Restatement (Second) of Torts further states that 'it is not an invasion of the right to privacy … to communicate a fact … to a single person, or even to a small group of people'.[3] Moldofsky, relying on the Restatement, argued that Peterson's privacy claim failed as a matter of law because the distribution of the photographs was limited to five people.

The district court rejected Moldofsky's argument, finding that it was unlikely that Kansas would adopt the Restatement's interpretation of the

2 2009 WL 3126229 (D Kan, Sept 29, 2009).

3 Restatement (Second) of Torts § 652D cmt a (1977). The Restatements of the Law are published by the American Law Institute, and attempt to reflect a general consensus among the 50 United States as to the elements of the law 'as it presently stands or might plausibly be stated by a court'. See http://www.ali.org/index.cfm?fuseaction=publications.faq. While the Restatements are often favourably cited by United States courts as helpful and persuasive, they are not binding authority and state laws can differ in whole or in part from the law as set forth in a Restatement.

law in circumstances 'involving the transmission of sexually explicit material over the Internet':

> To begin with … this case does not involve a traditional form of communication, such as paper mail or an oral conversation. This distinction is significant because the Internet enables its users to quickly and inexpensively surmount the barriers to generating publicity that were inherent in the traditional forms of communication. Furthermore, the Court finds significant the fact that [the Restatement] was published at a time when few, if any, contemplated the fact that a single, noncommercial, individual could distribute information, including personal information, to anyone, anywhere in the world in just a matter of seconds. Today, unlike 1977, … due to the advent of the Internet, the barriers of creating publicity are slight.[4]

The court went on to acknowledge the role of third parties in the distribution of information on the Internet, and the ease with which material shared via electronic mail could be republished:

> Here, Defendant emailed sexually explicit material to a handful of Plaintiff Piper's family and friends. While the Court agrees that it is unlikely that Piper's mother will distribute the incriminating photos to the public, the Court cannot, as a matter of law, say that her ex-husband, or any of the other recipients for that matter, will not. With one simple keystroke, a recipient of the email could, at least theoretically, disclose the pictures to over a billion people. Therefore, … the Court finds that a genuine issue of fact exists as to whether the contents of the email are substantially certain to become public knowledge.[5]

Accordingly, the court allowed Peterson's claim to proceed to trial.

The district court's opinion in this case is interesting because it considered a general statement of traditional privacy law that, on its face, was neutral as to medium of publication, and found that it nevertheless rested on unspoken assumptions as to the technological capabilities of those who transmit and receive private information. As such, the court determined that it needed to investigate those assumptions further in order to reach a just result. The district court's opinion is also markedly hyperbolic. Although electronic republication is a straightforward matter, it is unlikely that the recipients of the photographs were equipped to republish electronic mail to

4 2009 WL 3126229, at *4 (internal quotation marks deleted).
5 *Ibid*. at *5.

the Internet with 'one simple keystroke', and highly unlikely that the photographs would reach an audience of a billion. (By way of comparison, at the time of writing only a single YouTube video has received more than a billion views.[6])

This is not to say that the reach of a forwarded email would be insufficient to render the contents public knowledge, but it is important to note that the impact of electronic distribution is dependent upon both the technical architecture of the medium and the manner in which both the source and recipient of information use the medium. In *Catsouras v Dep't of California Highway Patrol*,[7] the Court of Appeals of California considered a privacy claim arising out of police officers' unauthorised use of email to forward gruesome images of a road accident victim to their friends and family members, which subsequently led to the photographs 'going viral'. Although the court's majority opinion assumed without discussion that publication by email was sufficient to support liability, Justice Aronson analysed that issue in a concurring opinion and found that the susceptibility of email to 'easy and thoughtless forwarding to a larger audience' was sufficient to satisfy this requirement:

> Given the medium the officers selected and the likelihood acquaintances they chose would, like the officers, prove unable to resist an impulse to forward the photographs, plaintiffs' allegation that defendants publicized the photographs to 'members of the general public' is sufficient to survive …, even under a standard requiring disclosure substantially certain to become public knowledge.[8]

There is, of course, an assumption about user behaviour implicit in this statement – namely, that use of electronic mail itself begets republication, at least when the information is reasonably calculated to tickle one's prurient interest. Whether this statement is valid is another, more complicated question (particularly in the context of services like Twitter where a republication function is built into the service), but it is notable that Justice Aronson at least recognised user behaviour as relevant and integrated it into his analysis.

User behaviour was also the critical factor in a series of cases involving personal information uploaded to publicly accessible US Bankruptcy Court databases. The bankruptcy courts are part of the US federal court system, and utilise a standardised Electronic Case Filing (ECF) system for the filing

6 http://www.youtube.com/watch?v=9bZkp7q19f0.
7 181 Cal App 4th 856 (2010).
8 *Ibid.* at 904.

of pleadings and other materials. Materials filed through the ECF system are stored in separate databases for each federal court, and are in most instances available over the Internet to attorneys and other registered users of the federal courts' Public Access to Court Electronic Records (PACER) system.

By their nature, judicial proceedings (and bankruptcy proceedings in particular) often involve substantial amounts of private data and sensitive financial information, leading to significant concerns about the filing of materials containing that information in a publicly available database. In response to these concerns, the US Congress passed the E-Government Act of 2002, which mandated that the Supreme Court of the United States prescribe rules to 'protect privacy and security concerns relating to electronic filing of documents and the public availability … of documents filed electronically'.[9] The Supreme Court carried out this mandate with respect to the bankruptcy courts through Rule 9037 of the Federal Rules of Bankruptcy Procedure, which directs anyone filing a document with a bankruptcy court to redact certain personal identifiers and private information before filing, and gives the bankruptcy courts the authority to order the redaction of additional information where necessary.

Unsurprisingly, compliance with Rule 9037 has not been perfect. There have been many instances where personal identifiers such as debtors' social security numbers have made their way into PACER databases, leading debtors to seek relief from the court for invasion of privacy. But while the E-Government Act and Rule 9037 explicitly recognise the privacy risks of the disclosure of information in public databases, and the bankruptcy courts are granted authority to enforce compliance with their rules, the bankruptcy courts have almost uniformly rejected the concept that uploading a document containing private information to a PACER database gives rise to a common law cause of action for invasion of privacy.

As with the photograph cases discussed above, these courts have focused on whether material uploaded to a PACER database is sufficiently 'publicized' to create liability for disclosure of private facts. Notwithstanding the public accessibility of these databases and the legal status of filed documents as public records, the bankruptcy courts have been reluctant to find that the filing of an unredacted document should give rise to a civil cause of action – particularly where the offending document is only available for a matter of days until it is called to the court's attention. But rather than explicitly balance the interest in improved public access to government through online databases and the threat to

9 Public Law 107–347, Title II § 205(c)(3), 2002 HR Rep 2458, 2914 (Dec 17, 2002).

personal privacy, several bankruptcy courts have gone to great lengths to find that these public records on searchable public databases were not in fact public.

For example, in a case involving the disclosure of a debtor's date of birth and health information in a creditor's proof of claim, the US Bankruptcy Court for the Eastern District of Arkansas wrote:

> There are three ways a person may gain access to a document filed on the Court's CM/ECF system: (1) having a CM/ECF password which is given to attorneys licensed to practice law and registered with the Court …; (2) through the PACER system which requires a subscription and charges a user fee for access to most documents; and (3) by walking into the Bankruptcy Court during regular business hours and using the computers there made available to the public at no charge. … [P]roofs of claim are only available to parties who take affirmative actions to seek out the information. … [I]n order to access a proof of claim in a debtor's case, an individual would have to access the Debtor's claims register rather than the docket sheet for the Debtor's case, and then access the individual proof of claim itself. This process requires a certain working knowledge of how to maneuver within the Bankruptcy Court's CM/ECF system. [T]he simple fact that all documents filed in a bankruptcy case file are technically deemed 'public records' does not satisfy the 'publicity' element necessary to state a claim for invasion of privacy … .
>
> [T]he Plaintiff does not allege that a member of the public has actually accessed and seen the unredacted proof of claim filed in her case. Additionally, given that the unredacted proof of claim was available on the CM/ECF docket for only three days, the Court finds it highly unlikely any member of the public would have accessed or seen the proof of claim. Accordingly, the Plaintiff has failed to allege facts sufficient to establish that the information in the unredacted proof of claim 'reached or was sure to reach' the public at large …[10]

Virtually identical reasoning has been followed by at least five other US Bankruptcy Courts.[11]

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10 *Dunbar v Cox Health Alliance, LLC (In re Dunbar)*, 446 BR 306, 315 (Bkrtcy ED Ark 2011) (internal quotation marks omitted).

11 See, e.g., *Southhall v Check Depot, Inc. (In re Southhall)*, 2008 WL 5330001, at *3 (Bkrtcy ND Ala, Dec 19, 2008); *French v Am. Gen. Fin. Serv's (In re French)*, 401 BR 295, 318–19 (Bkrtcy ED Tenn 2009); *Cordier v Plains Commerce Bank (In re Cordier)*, 2009 WL 890604,

As in *Peterson* and *Catsouras*, the courts in the PACER cases focused on both the architecture of the electronic communication at issue and how people actually use the technology. However, the decisions in the PACER cases reverse the emphasis of the legal analysis. In *Peterson* and *Catsouras*, the courts acknowledged that the photographs had reached only a small number of people, but found determinative the fact that they had the potential to reach many more. In contrast, the courts in the PACER cases acknowledged that the information was available to anyone who cared to jump through the necessary hoops, but found determinative the fact that as a practical matter the information was seen by only a limited number of people. In other words, these cases are all grappling with – but coming out in different ways on – the question of what it means that any given communication on the Internet is potentially available to many but usually seen by few.

It is not clear that any court has identified a principled balance between concern for the potential reach of an electronic communication and its actual reach when evaluating privacy claims. Although it is tempting to view concerns about potential reach as 'alarmist' and consideration of actual reach as 'realist', it is not necessarily the case that courts focusing on actual reach are more principled. Indeed, the PACER cases – which conspicuously downplay the potential audience for court records – convey a sense of end-oriented decision making, suggesting that these courts were simply unwilling to allow state privacy law to complicate the courts' transition to electronic filing.

New kinds of 'private' data

It is important to recognise that the scope of 'private' information is neither clearly defined, nor limited to a single category of information. A full discussion of the numerous definitions of privacy under law is beyond the scope of this book, and has been written about at length elsewhere. For the purposes of this chapter, it is sufficient to recognise that when we discuss privacy online, we might be referring to any number of types of information, including: information about our private lives that we try to restrict to family and friends; financial information that we disclose to third parties in secure transactional settings but otherwise treat as confidential; and

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at *6 (Bkrtcy D Conn, Mar 27, 2009); *Carter v Flagler Hosp., Inc. (In re Carter)*, 411 BR 730, 742 (Bkrtcy MD Fla 2009); *Matthys v Green Tree Servicing, LLC (In re Matthys)*, 2010 WL 2176086, at *3 (Bkrtcy SD Ind, May 26, 2010). Contrast *McKenzie v Biloxi Internal Medicine Clinic, PA (In re McKenzie)*, 2010 WL 917262, at *5-6 (Bkrtcy SD Miss, Mar 10, 2010) (holding that submission of materials to a PACER website might constitute support for an invasion of privacy claim under Mississippi law).

automatically generated data about websites visited and other online activity that we typically consider no one's business but our own.

The gathering and use of online behavioural data for marketing purposes has generated much controversy, with courts struggling to determine whether there is a cognisable privacy interest in such information. For example, the US District Court for the Northern District of California[12] has twice rejected claims for invasion of privacy based upon disclosure of behavioural information. In the case of *In re iPhone Application Litigation*, the district court considered allegations that Apple violated user privacy by enabling its various 'iDevices' to be used by third parties to gather personal information (such as a unique device identifier number, personal data, and geolocation information) through applications downloaded from Apple's App Store. Applying California law, the court held that 'even assuming this information was transmitted without Plaintiffs' knowledge and consent, a fact disputed by Defendants, such disclosure does not constitute an egregious breach of social norms'. The court compared the gathering of information through mobile apps to the gathering of street addresses by marketers for the purpose of direct postal mailings, noting that the state courts of California had treated the latter activity as 'routine commercial behavior'.[13]

Subsequently, in *Low v LinkedIn Corporation*, the same judge held that LinkedIn, an online service providing professional networking services, did not commit a 'serious invasion' of a protected privacy interest when it disclosed users' de-identified browsing history information gathered using tracking cookies and beacons for advertising and marketing purposes. Although the plaintiffs argued that the nature of the information provided was sufficient for a recipient to reconstruct a user's identity, the court rejected that argument because the plaintiffs neither alleged that any third party had actually attempted to identify specific users nor specified any information thereby obtained.[14]

Courts have also struggled with efforts to measure damages caused by the disclosure of this type of personal data. Several courts have rejected claims for breach of privacy policies or other economic loss based upon an online service's gathering or sale of demographic information or browsing histories. In the case of *In re DoubleClick, Inc. Privacy Litigation*, the US

12 The US District Court for the Northern District of California is of particular interest with respect to online privacy cases, as it has jurisdiction over cities in which many Internet companies and OSPs have their home offices.
13 844 F Supp2d 1040, 1063 (ND Cal 2012).
14 —- F Supp2d ——, 2012 WL 2873847, at *9 (ND Cal 2012).

District Court for the Southern District of New York drew a distinction between the value of user attention and behaviour to advertisers and its value as an asset to the users themselves:

> We do not commonly believe that the economic value of our attention is unjustly taken from us when we choose to watch a television show or read a newspaper with advertisements and we are unaware of any statute or caselaw that holds it is. We see no reason why Web site advertising should be treated any differently. A person who chooses to visit a Web page and is confronted by a targeted advertisement is no more deprived of his attention's economic value than are his off-line peers. Similarly, although demographic information is valued highly …, the value of its collection has never been considered a[n] economic loss to the subject. Demographic information is constantly collected on all consumers by marketers, mail-order catalogues and retailers. However, we are unaware of any court that has held the value of this collected information constitutes damage to consumers or unjust enrichment to collectors.[15]

Similarly, *In re JetBlue Airways Corp. Privacy Litigation* involved JetBlue's disclosure of user information to a third-party data mining company. The US District Court for the Eastern District of New York held that 'there is absolutely no support for the proposition that the personal information of an individual JetBlue passenger had any value for which that passenger could have expected to be compensated'.[16] In contrast, claims based upon the exploitation of the commercial value of an individual's name or likeness, or of sensitive personal information traditionally considered private, have been more successful.[17]

Although one might dispute the results of the cases discussed above, the courts' decisions reflect an attempt to grapple with fundamental issues relating to privacy. What gives rise to a right to control information? Is it enough that the information is personal in nature, or does there need to

15 154 F Supp2d 497, 525 (SDNY 2001).

16 379 F Supp2d 299, 327 (EDNY 2005). See also *Low*, at *12–15 ('unauthorized collection of personal information does not create an economic loss' actionable in breach of contract or conversion).

17 See *Fraley v Facebook, Inc.*, 830 F Supp2d 785, 798–99 (ND Cal 2011) (distinguishing claims based upon exploitation of user names and likenesses for advertising from claims based solely upon alleged value of browsing data); *Doe 1 v AOL LLC*, 719 F Supp2d 1102, 1111–12 (ND Cal 2010) (plaintiff identified cognisable harm through defendant's collection and publication of sensitive financial information and information about private issues such as sexual history, health, and past traumatic events).

be an articulable risk to the individual from the disclosure of that information? If we recognise a privacy interest in certain personal information gathered online, are we creating a distinction between the online and offline contexts? If so, is such a distinction justified? These questions remain challenging, especially with respect to the types of peer-to-peer user behaviour discussed in the last section of this chapter.

Note also that these cases relate to the gathering and disclosure of data by private parties. The United States addressed the gathering and disclosure of information related to particular individuals by federal government agencies in the Privacy Act of 1974.[18] In contrast to the cases above, the Privacy Act reflects concerns about data aggregation and abuse with respect to any information – whether traditionally 'private' or not – that is associated with a particular individual in the records of a federal agency. Under the Act, such information may not be disclosed without the written request or prior written consent of the individual, unless one or more of 12 specified exceptions apply.[19] The European Court of Human Rights has similarly recognised that the collection and disclosure of aggregated public information about a particular individual can violate an individual's right to privacy under Article 8 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms:

> The Court reiterates that the storing of information relating to an individual's private life in a secret register and the release of such information come within the scope of Article 8 § 1 … Moreover, public information can fall within the scope of private life where it is systematically collected and stored in files held by the authorities.[20]

Online services entrusted with personal information

Since 1996, online intermediaries have enjoyed protection against liability in the United States under theories of tort (including privacy torts) that would treat the intermediary as the publisher or speaker of offending content.[21] As a result, cases involving one person's unauthorised online distribution of another's private information typically do not include claims against intermediaries.

The situation is very different when an online service provider (OSP) actively solicits or collects information from its users as part of the bargain

18 5 USC § 552a.
19 5 USC § 552a(b).
20 *Rotaru v Romania*, App. No. 28341/95 (2000) at [43].
21 47 USC § 230(c)(1).

for providing the service. Sometimes this information is essential to providing the service to the user, such as the collection of credit card data to process online transactions or the gathering of medical information by diagnostic websites. In other circumstances, the information gathered is used primarily for the benefit of the OSP, such as behavioural and demographic data used as metrics in business development. It is more common, however, for OSPs to use personal information for multiple reasons, and it is often difficult to determine whether those uses benefit the user, the service, or both. This accumulation of personal information by OSPs, whether operated by private or government entities, creates a substantial risk of abuse by third parties or by the services themselves. These troves of data also represent an irresistible target for law enforcement, private litigants, and others who are empowered to compel disclosures as part of a judicial or regulatory process.

Complicated questions arise with respect to an OSP's obligation to protect users against these kinds of intrusions, due to the nature of the information at issue. Traditional privacy law generally addresses circumstances where an individual's private information is disclosed by one who obtained the information through an unauthorised intrusion or through a relationship of trust. In the case of an individual's disclosure of his or her own information to OSPs, the relationship is generally commercial, and there has been reluctance to treat disclosures in such a relationship as being subject to an expectation of privacy.

This is most clearly reflected in the 'third-party doctrine' under United States law, which arose out of law enforcement efforts to access information that the subject of an investigation had communicated to third parties. The landmark case for the application of the doctrine to communications via a third-party carrier is *Smith v Maryland*, in which the US Supreme Court considered the warrantless use by the Baltimore police of a pen register, a device that tracks the date, time and numbers dialled from a particular telephone number. A pen register does not, however, intercept the content of telephone calls. The Court held that the government's use of the pen register did not violate the defendant's rights:

> Telephone users … typically know that they must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes. Although subjective expectations cannot be scientifically gauged, it is too much to believe that telephone subscribers, under these circumstances, harbor any general expectation that the numbers they dial will

> remain secret. … Although petitioner's conduct may have been calculated to keep the contents of his conversation private, his conduct was not and could not have been calculated to preserve the privacy of the number he dialed. Regardless of his location, petitioner had to convey that number to the telephone company in precisely the same way if he wished to complete his call. … [A] person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.[22]

Critically, the Court found that the disclosure of the information at issue was voluntary despite the fact that the disclosure was essential to use the telephone system; the other option available to the defendant was to avoid use of the phone entirely.

Similar logic has been applied to conveyance of information to OSPs. For example, in the case of *In re Application of the United States of America for an Order Pursuant to 18 USC § 2703(d)*, the US District Court for the Eastern District of Virginia applied the doctrine to find that a government demand for users' IP address information from Twitter did not violate the prohibition against warrantless searches in the Fourth Amendment to the United States Constitution:

> Even if Petitioners had a reasonable expectation of privacy in IP address information collected by Twitter, Petitioners voluntarily relinquished any reasonable expectation of privacy under the third-party doctrine. To access Twitter, Petitioners had to disclose their IP addresses to third parties. This voluntary disclosure – built directly into the architecture of the Internet – has significant Fourth Amendment consequences under the third-party doctrine.[23]

The idea that a waiver of privacy rights is inherent in the very structure of the Internet is understandably disturbing. Analogising IP addresses to phone numbers also disregards the fact that we use the Internet for a much broader range of activity than telephony; disclosure of online contacts can reveal far more information about our private lives than telephone records. The uncertainty about such questions has led the US Supreme Court to express caution about moving too quickly when ruling upon privacy norms relating to online communication, stating: 'The judiciary risks error

22 442 US 735, 743–44 (1979).
23 830 F Supp2d 114, 133 (ED Va 2011).

by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.'[24]

The Supreme Court's caution has nevertheless left lower courts without guidance as to how to evaluate cases involving electronic privacy. In this vacuum, some lower courts have recognised cognisable privacy interests in the *contents* of electronic communications. However, the lack of Supreme Court precedent has led these courts to continue to rely upon analogies with traditional offline modes of communication. For example, in *United States v Warshak*, the US Court of Appeals for the Sixth Circuit held that a defendant had a legitimate expectation of privacy in the contents of electronic mail messages that the government obtained from his Internet Service Provider without a warrant. But while the Sixth Circuit found that 'the Fourth Amendment must keep pace with the inexorable march of technological progress, or its guarantees will wither and perish', it did not rely on advances in technology or evolving understandings of privacy as a basis for its ruling. Rather, it reached its conclusion by comparing privacy in electronic mail to protection recognised for the contents of telephone calls and letters carried by the postal service:

> Given the fundamental similarities between email and traditional forms of communication, it would defy common sense to afford emails lesser Fourth Amendment protection.[25]

Similar analogies have been applied by other courts with respect to faxes sent through an electronic communications service provider and password-protected Facebook messages.[26] While it is not necessarily the case that reliance upon analogies to older technologies will result in an incorrect result, there is at least as much risk of disregarding important aspects of how electronic media are used in the course of such comparisons as when analysing electronic media independently.

Statutory privacy rights

Uncertainties about privacy interests in electronic communications and the obligations of OSPs have led to statutory efforts to bypass these difficult questions by creating new rights to control personal information. Statutory solutions, however, have presented their own complexities and challenges.

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24 *City of Ontario, California v Quon*, 130 SCt 2619, 2629 (2010).
25 631 F3d 266, 285–86 (6th Cir 2010).
26 *In re Applications for Search Warrants*, 2012 WL 4383917 at *4-5 (D Kan, Sept 21, 2012) (discussing emails and faxes); *RS v Minnewaska Area Sch. Dist.*, —- F Supp2d ——, 2012 WL 3870868, at *11 (D Minn, Sept 6, 2012) (discussing Facebook messages).

In the United States, the Stored Communications Act (SCA), enacted as part of the Electronic Communications Privacy Act of 1986, responded to concerns over the third-party doctrine by providing substantive protection against government intrusion comparable to the Fourth Amendment with respect to certain user information held by certain online services.[27] In general, the SCA requires the government to obtain a warrant to access the contents of certain electronic communications in the hands of certain third party service providers (e.g., unopened email less than 180 days old). Other information about a user and his or her communications can be obtained with a lesser showing than is required for a warrant by obtaining a court order pursuant to 18 USC § 2703(d) (known as a '(d) order'), or in some circumstances merely by issuing a subpoena. The Act also prohibits some services from voluntarily disclosing certain categories of user information to the government or to other entities without user consent.

The SCA has in many ways brought more complexity to questions of online privacy than it has resolved. There is significant debate about which standards apply to particular information. For example, federal courts are currently split as to whether the content of opened emails should be protected as communications stored for backup purposes, which cannot be obtained with a subpoena, or as data stored for archival purposes, which can.[28] There is even greater debate about whether the protections assigned to various categories of information are sufficient.

The framework that the SCA applies to the Internet is also outdated. Reflecting an understanding of electronic services that predates the World Wide Web,[29] the SCA recognised two categories of online services: 'electronic communications systems', or ECS, defined as 'any service which provides to users thereof the ability to send or receive wire or electronic communications';[30] and 'remote computing services', or RCS, defined as 'the provision to the public of computer storage or process services by means of an electronic communications information system'.[31]

As a result, the statute does not cover all user information transmitted to online service providers; to the contrary, there are many that fall into

27 18 USC §§ 2701 et seq.

28 Contrast *Theofel v Farey-Jones*, 359 F3d 1066, 1074–77 (9th Cir 2004) (holding that opened emails may be copies retained on an ECS for backup protection) with *US v Weaver*, 636 F Supp2d 769, 772–73 (CD Ill 2009) (holding that services that maintain copies of opened emails are providing storage services for the user as an RCS).

29 But not the Internet itself. Various dates can be ascribed to the launch of the packet-switching computer networks that evolved to become the Internet as we know it today, but the transition of the ARPANET to the Internet Protocol Suite (also known as TCP/IP), which allowed the formation of the interoperable worldwide 'network of networks' known as the Internet, occurred on January 1, 1983.

30 18 USC § 2510(15).

31 18 USC § 2711(2).

neither the ECS nor RCS category. The statute does not apply to private remote computing service providers; the definition of an RCS is limited to those who provide storage or process services 'to the public'. More importantly, a wide range of online service providers that use the Internet to conduct business may also be excluded. In the case of *In re JetBlue Airways Corp. Privacy Litigation*, the US District Court for the Eastern District of New York held that 'companies that provide traditional products and services over the Internet, as opposed to Internet access itself, are not "electronic communication service" providers' under the SCA.[32] Nor was JetBlue, which provided air travel services over its website, an RCS:

> [Remote computing] services exist to provide sophisticated and convenient data processing services to subscribers and customers, such as hospitals and banks, from remote facilities. … By supplying the necessary equipment, remote computing services alleviate the need for users of computer technology to process data in-house. … Although plaintiffs allege that JetBlue operates a website and computer servers …, no facts alleged indicate that JetBlue provides either computer processing services or computer storage to the public.[33]

Even when courts make an effort to squeeze new forms of online service into the ECS and RCS categories, efforts to pursue legal action under the SCA for disclosure of personal information run into difficulty when courts attempt to parse the relationships between the parties in terms of the statute. In the case of *In re Facebook Privacy Litigation*, the Northern District of California considered a claim against Facebook under the non-disclosure provisions of the SCA, based upon Facebook's alleged disclosure of user data to advertisers. Facebook's arrangement with advertisers provided that when a user clicked on an advertisement, information about the user and the page on which the advertisement appeared would be included with other data transmitted to the advertiser as a result of the click. Although the court treated Facebook as an ECS for the purposes of its analysis, it held that the alleged disclosure did not support a claim because the information transmitted as a result of the click was either directed to Facebook itself or to the advertiser:

> If the communications were sent to Defendant, then Defendant was their 'addressee or intended recipient,' and thus was

32 379 F Supp2d 299, 307–08 (EDNY 2005).
33 *Ibid.* at 310. See also *Low*, 2012 WL 2873847, at *7–8 (holding that LinkedIn is not an RCS).

> permitted to divulge the communications to advertisers so long as it had its own 'lawful consent' to do so. 18 U.S.C. § 2702(b)(3). In the alternative, if the communications were sent to advertisers, then the advertisers were their addressees or intended recipients, and Defendant was permitted to divulge the communications to them. Id. § 2702(b)(1).[34]

In other words, even if Facebook were an ECS and even if the user would have preferred that personal data not be included in the transmission that resulted from clicking on an advertisement, the architecture of the transmission was such that the user was technically responsible for initiating that transmission to either Facebook or the advertiser. If the former, Facebook could 'consent' to its own disclosure of the information that it received; if the latter, Facebook was simply facilitating the communication initiated by the user.

It is of course a well-recognised limitation of statutory solutions that they are constrained by the foresight and understanding of legislators at the time they are enacted. The exclusion of a wide array of future online services from the effective reach of the SCA was less a matter of intention than a result of the difficulty of predicting the current form of the Internet in the mid-1980s. However, the problem with creating a comprehensive statutory framework relating to the Internet is exacerbated by the extraordinary rate of innovation and change in the field.

Alternative statutory approaches to privacy have focused on the act of gathering of personal information for specific purposes. Concerns over the gathering and abuse of information relating to minors led to the enactment in 1998 of the Children's Online Privacy Protection Act (COPPA).[35] COPPA imposes strict obligations upon 'any person who operates a website located on the Internet or an online service' directed to children (defined as individuals under the age of 13) or who knowingly collects any of the following personal information about children:

- a first and last name;
- a home or other physical address including street name and name of a city or town;
- an email address;
- a telephone number;
- a social security number;
- any other identifier that the [Federal Trade] Commission determines permits the physical or online contacting of a specific individual; or

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34 791 F Supp 2d 705, 714 (ND Cal 2011).
35 15 USC §§ 6501-6506 (1998).

- information concerning the child or the parents of that child that the website collects online from the child and combines with an identifier described in this paragraph.[36]

Except in limited circumstances, COPPA (through the mechanism of regulations promulgated by the Federal Trade Commission) prohibits operators of online services from knowingly gathering any of the information listed above from children without first (1) providing 'notice on the website of what information is collected from children by the operator, how the operator uses such information, and the operator's disclosure practices for such information', and (2) obtaining 'verifiable parental consent for the collection, use, or disclosure of personal information from children'.[37] 'Verifiable parental consent' is defined as:

> any reasonable effort (taking into consideration available technology), including a request for authorization for future collection, use, and disclosure described in the notice, to ensure that a parent of a child receives notice of the operator's personal information collection, use, and disclosure practices, and authorizes the collection, use, and disclosure, as applicable, of personal information and the subsequent use of that information before that information is collected from that child.[38]

Furthermore, operators are required to provide to a parent, upon request:

- a description of the specific types of personal information collected from the child by that operator;
- the opportunity at any time to refuse to permit the operator's further use or maintenance in retrievable form, or future online collection, of personal information from that child; and
- a means that is reasonable under the circumstances for the parent to obtain any personal information collected from that child.[39]

The statute also requires operators to have procedures in place to protect the 'confidentiality, security, and integrity of personal information collected from children'.[40]

Apart from a prohibition on conditioning a child's participation in an online activity on the disclosure of 'more personal information than is

36 15 USC §§ 6501–6502.
37 15 USC §§ 6502(a)(1), (b)(1).
38 15 USC § 6501(9).
39 15 USC § 6502(b)(1)(B).
40 15 USC § 6502(b)(1)(D).

reasonably necessary to participate in such activity',[41] COPPA does not contain any complete bar to collecting of information about children under 13. Rather, the statute attempts to provide the tools necessary for parents to understand their children's online activity, consent, and terminate that activity if they choose.

A similar approach was undertaken by the state of California with respect to information gathered about its citizens for commercial purposes. The California Online Privacy Protection Act[42] requires that the operator of a commercial website post a privacy policy on its website if it collects 'personally identifiable information' about California residents. The Act defines personally identifiable information in virtually the same terms as COPPA (without, of course, limitations to information about children). The privacy policy must be conspicuously presented, and must describe:

1. the categories of information gathered about consumers;
2. the categories of third parties with whom that information may be shared;
3. any process that the website provides for reviewing or requesting changes to that information;
4. how the site notifies consumers about changes to the privacy policy; and
5. the effective date of the policy.

The California 'Shine the Light' law[43] imposes additional obligations on a commercial website operator that discloses any of 27 enumerated categories of personal information[44] gathered from a California consumer to a third party for direct marketing purposes. Each California consumer whose information is disclosed has the right, once a year, to request a list of the categories of information disclosed and the names and addresses of all third parties who received that information, as well as the products or services marketed by the third parties. A website covered by the statute must provide contact information for making such requests in one of three

41 15 USC § 6502(b)(1)(C).
42 California Bus & Prof Code §§ 22575–79 (2003).
43 California Civ Code § 1798.83 (2003).
44 The 27 categories are: name and address; email address; age or date of birth; names of children; email or other addresses of children; number of children; age or gender of children; height; weight; race; religion; occupation; telephone number; education; political party affiliation; medical condition; drugs, therapies, or medical equipment used; kind of products purchased, leased, or rented by customer; real property purchased, leased, or rented; kind of service provided; social security number; bank account number; credit card number; debit card number; bank or investment account, debit card, or credit card balance; payment history; and information pertaining to the customer's creditworthiness, assets, income, or liabilities. Cal Civ Code § 1798.83(e)(6)(A).

ways: through its employees who have contact with consumers; in its places of business in California (if any); or in a section of its website entitled 'Your Privacy Rights' that is conspicuously linked from the home page (or in a privacy policy accessible from the home page via a link entitled 'Your Privacy Rights'), which also enumerates a consumer's legal rights under the law. A website operator is, however, exempt from the requirements of the law if it has fewer than 20 employees or if it allows consumers to either opt in or opt out of direct marketing through a process specified in its privacy policy.

Although California's laws specify that they apply only to information gathered from California residents, they do not require that a website operator be located in the state. Because a judgment against a website in a California court is likely to be enforced by other jurisdictions in the United States, it is common for online businesses located elsewhere in the United States to comply with these laws. Even if a website operator is based outside of the United States, it might elect to comply with California's laws if it has assets or personnel in the United States against which a judgment might be enforced.

The notice and consent paradigm

The preceding sections have discussed a variety of approaches to privacy, sounding in common law, constitutional law, and statute. However, all of these doctrines share a common principle: the idea that an individual can consent through his or her actions to the disclosure of his or her personal information. This principle derives from concepts of individual autonomy, and the belief that each person should be able to draw the boundary between the public and private aspects of their lives for themselves. In many ways, the debate over the responsibilities of online services with respect to privacy has narrowed to the question of implementing informed consent to disclosure, based upon meaningful notice of the ways in which personal information will be used.

COPPA and the two California laws discussed above resolve this question in particular contexts by legislative fiat. In other contexts, the adequacy of consent has been left to the courts. Decisions analysing notice and consent have primarily focused on two issues: first, whether notice is presented in such a way that it is likely to be seen by the user before the act that constitutes consent to disclosure; and secondly, whether the substance of the notice is such that the user would understand it to authorise the forms of disclosure in which an OSP actually engages.

The first issue, the form in which notice is presented by an online service, is often discussed in terms of a dichotomy between 'clickwrap' and

'browsewrap' terms of service. 'Clickwrap' generally refers to a structure in which the user is required to take an affirmative step to accept the terms of service and privacy policy of a website before being allowed to use the site, often through clicking a button or marking a checkbox as part of a registration process. 'Browsewrap' refers to the posting of the terms of service and privacy policy on the website where they can be accessed by users, but without any affirmative requirement of users to manifest consent other than continuing to use the site.

Unsurprisingly, clickwrap terms of service generally fare better than browsewrap terms of service when challenged in court. Browsewrap terms will be subject to scrutiny as to whether the user receives sufficient notice that continuing to use a website constitutes acceptance of the terms.[45] On the other hand, even where a clickwrap arrangement provides a link to terms of service at the time of acceptance rather than the full terms, courts have usually enforced the user's acceptance of the terms.[46] That said, even a clickwrap agreement might not constitute sufficient notice if the terms of the policy are altered after the 'click', and users are not sufficiently notified about the revised terms.[47]

Few United States cases have addressed the specific level of detail necessary in a privacy disclosure. Perhaps due to the influence of the California Online Privacy Protection Act, a de facto standard has developed that privacy policies are sufficient if they identify categories of information gathered, categories of uses, and categories of third parties with whom information may be shared, but not necessarily specifics in those categories. At least one court has rejected an argument that more detailed information is required. In *Kirch v Embarq Mgt. Co.*, the US District Court

45 See *Sprecht v Netscape Communications Corp.*, 306 F3d 17, 31–32 (2nd Cir 2002) (a link to the terms of service at the bottom of screen allowing the download of software was insufficient notice, given that users might not scroll to the bottom of screen); *Hines v Overstock.com, Inc.*, 668 F Supp2d 362, 367 (EDNY 2009) (browsewrap terms at the bottom of the page did not provide sufficient notice that use of the site constituted acceptance of the terms, where the only notice of that fact was contained inside the terms themselves and the link to the terms was obscure). Compare *Register.com, Inc. v Verio, Inc.*, 356 F3d 393, 401–03 (2nd Cir 2004) (although the user of online services was not given explicit opportunity to accept terms of use relating to marketing use of data, the fact that the user was aware of the terms through multiple uses of the site was sufficient notice for continued use to constitute acceptance).

46 See, e.g., *Swift v Zynga Game Network, Inc.*, 805 F Supp2d 904, 911–12 (ND Cal 2011).

47 See *Fraley v Facebook, Inc.*, 830 F Supp2d 785, 805–06 (ND Cal 2011) (terms of service did not provide a basis to dismiss a claim that Facebook used user information in advertisements without permission, where plaintiffs alleged that notice of such use was added by Facebook after plaintiffs accepted the terms); compare *Kirch v Embarq Mgt. Co.* 2011 WL 3651359 at *8 (D Kan, Aug 19, 2011) (altered terms of service were held binding on users, where a clickwrap version of terms accepted by plaintiffs warned users that terms could be altered at will through posting of revised terms to the website).

for the District of Kansas considered whether the following disclosures in a privacy policy were sufficient to notify subscribers to an Internet service provider that their online communications would be subject to deep packet inspection and cookie tracking by a third party:

> Embarq [the ISP] may use information such as the websites you visit or online searches that you conduct to deliver or facilitate the delivery of targeted advertisements. The delivery of these advertisements will be based on anonymous surfing behavior.
> …
> De-identified data might be purchased by or shared with a third party.

The policy also stated that the websites visited by users would be automatically logged, and that such information could be shared with 'business partners involved in providing EMBARQ service to customers'. The plaintiffs argued that the disclosures were insufficient because they did not specify NebuAd, Inc., as the third party at issue. The court rejected that argument, finding that no authority required such specific disclosures in a privacy policy.[48]

That said, a court will take heed when a website's information practices and privacy policy are actually inconsistent. In *CollegeNET, Inc. v XAP Corp.,* an online college admissions application service sued defendant XAP, its alleged competitor, claiming that XAP engaged in false advertising of its products through misrepresentations in its online privacy policy. Specifically, XAP stated in its privacy policy that: 'Personal data entered by the User will not be released to third parties without the user's express consent and direction.' This was confirmed by other sections of the site stating: 'The information you enter will be kept private in accordance with your express consent and direction.'

But when students using XAP's service were asked whether they wished to receive information about student loans and financial aid, they were not expressly informed that answering 'yes' would authorise XAP to share their personal information with third parties selling such products and services. The US District Court for the District of Oregon held that this discrepancy was sufficient for the plaintiff's false advertising claims to go to trial:

> The Court is not persuaded by Defendant's argument that its privacy-policy statements are merely incidental rather than intrinsic; i.e., fundamental to its products and services. Identity

48 *Kirch*, at *8.

> theft associated with use of the internet to buy products and services is a common occurrence. Promises of confidentiality of information provided over the internet are certainly more than incidental; i.e., 'minor' matters.[49]

Ironically, competitors like CollegeNET might have greater success in asserting an unfair competition claim based upon the alleged false statements in a privacy policy than customers would have claiming damages from a breach of the policy. As discussed earlier in this chapter, the difficulty that courts have had in evaluating the economic damage to an individual of the disclosure of behavioural information makes contract and market-based theories problematic.

The notice and consent paradigm has been subject to significant criticism. COPPA, for example, is dependent on parents' willingness to devote the time necessary to understand their children's online activity and make informed judgments. It is also quite possible for children whose parents have not taken affirmative efforts to restrict their Internet use to evade age restrictions on websites directed at adults. More generally, online terms of service and privacy policies are frequently derided for their length and technicality, leading users to be unlikely to take the time to read through those documents.

However, no reported cases in the United States have considered whether disclosures in a privacy policy may be disregarded solely because they are complex or unusual. Allegations by users that they did not read the terms of use for a site (because of complexity or otherwise) have been ineffective,[50] and indeed can backfire on users. In *Low v LinkedIn*, the court dismissed a claim under California's false advertising law based upon an argument that LinkedIn's privacy policy was deceptive or misleading, because the plaintiffs never alleged that they had read or were even aware of the policy. If the plaintiffs had never read the privacy policy, reasoned the court, they could not have been deceived by it.[51]

It should be stressed that the notice and consent paradigm is not the only model that has been applied to online privacy. As mentioned above, COPPA prohibits the gathering of more personal information than is reasonably necessary for a child to participate in a particular online activity, and Rule 9037 of the Federal Rules of Bankruptcy Procedure prohibits any party from electronically filing any material containing certain personal information in an unredacted format. In addition, new laws

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49 442 F Supp2d 1070, 1077 (D Or 2006).
50 *Ibid.* at *5, 8 (noting that plaintiffs claimed that they did not read privacy policies as a matter of course, but finding consent binding nevertheless).
51 *Low*, at *11.

enacted by four states in 2012 prohibit employers in those states from requesting that current or potential employees disclose user IDs and passwords for their social media accounts.[52] Three states have similar laws prohibiting academic institutions from compelling students to provide such access.[53]

These are flat bans on the gathering or dissemination of information, irrespective of the consent of the individual affected. These are also all special situations: information regarding minors is treated with particular sensitivity; employees and students are in an imbalanced power relationship with employers or schools, such that the voluntariness of consent is always in doubt; court databases are restricted in their use and those who appear before a court are subject to its authority. In more general contexts, completely barring the requesting or dissemination of information notwithstanding consent would create significant tension with principles of freedom of expression.[54]

Network amplification of content

In January 2011, a woman was walking through the Berkshire Mall in Wyomissing, Pennsylvania, while using a cellular device. Focused on the device, she did not see a water fountain in her path; she tripped over the low wall surrounding the fountain, and fell into the water. She was uninjured by the fall and quickly exited the fountain.

Unfortunately for this individual, the incident was captured by at least two security cameras. A composite video made from this footage, with amused commentary from security personnel, was posted to YouTube. It was a perfect seed for a viral video: it had elements of slapstick, with no one seriously hurt (at least physically), and echoed the ongoing debate over a cultural obsession with cellular devices. The recording was reposted on YouTube multiple times, quickly received millions of views, spawned parody videos, and was the subject of international media attention.

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52 Michigan: Mich Pub Act No 478 (2012); California: Cal Labor Code § 980 (2012); Illinois: 820 ILCS 55/10(b)(1) (2012); Maryland: MD Code, Labor and Employment, § 3-712 (2012).

53 California: Cal Educ Code § 99121 (2012); Delaware: 14 Del C § 8103 (2012); New Jersey: 2012 NJ Sess Law Serv Ch 75 (ASSEMBLY 2879).

54 An example of this tension appears in laws in the United States that prohibit voters from displaying images of their own completed ballots, in order to protect the secrecy of the ballot and the integrity of the voting process. For a discussion of whether such laws are consistent with guarantees of freedom of expression, see Jeffrey P. Hermes, 'Ballot Disclosure Laws: A First Amendment Anomaly', Citizen Media Law Project Blog, http://www.citmedialaw.org/blog/2012/ballot-disclosure-laws-first-amendment-anomaly (November 2, 2012).

Perhaps unsurprisingly, the individual later commented to the press that her true injury from the incident came from the transformation of a single, if embarrassing, incident into a persistent meme: 'The humiliation. Ask my husband: I cried for days. … You don't know how many people are laughing at me.'[55] She subsequently threatened legal action against those at the mall involved in producing the video, although it is unclear whether she was considering a claim based on the publication of the video or for the negligence of mall security in failing to check on her safety after the fall.[56]

It is difficult to deny that this individual has endured additional suffering from her widespread exposure, but it is doubtful whether a claim based on such exposure could succeed under existing legal theories under United States law. The incident occurred in a public place, in which the individual would have no reasonable expectation of privacy.[57] Although the commentary on the video is mocking, there has been no suggestion that the video misrepresents what actually occurred, and so it could not be actionable as a defamatory falsehood. At most, the video is embarrassing to the individual in question and of dubious public importance, but expanding rights of privacy to cover such content would make the boundaries of liability vague at best and chill a substantial amount of legitimate speech.

Recognising a new tort based on a theory akin to 'excessive publication' is also problematic. The reach of a particular publication has traditionally been considered to be a factor in evaluating the damage caused by an otherwise actionable statement, not a basis for liability in and of itself. Such a theory would suggest that there is something inherently wrongful in hoping that one's otherwise lawful content is seen by as many people as possible. Furthermore, the determination of whether publication is excessive is necessarily an after-the-fact judgment, making it difficult to identify the right person to punish on such a theory. Should we punish the original poster, who has no way to know how far the content will reach?

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55 'Texting while Walking, Woman Falls into Fountain', CBSNews.com, January 20, 2011, http://www.cbsnews.com/2100-500202_162-7265096.html.

56 'Fountain Lady: 'Nobody Went to My Aid', ABC News, January 20, 2011, http://abcnews.go.com/GMA/video/fountain-lady-cries-nobody-went-to-my-aid-12712703.

57 The fountain incident echoes the *Catsouras* case, in which photographs of a deceased individual taken by the California Highway Patrol were published online and subsequently went viral. However, the court's ruling in *Catsouras* included an extensive analysis of the unique privacy interests held by the family of a deceased person in the circumstances of her death. 181 Cal App 4th 856, 868–74. Finding privacy interests in the case of the fountain video would require an extension of those principles to merely embarrassing information in the hands of privately contracted security personnel.

The intermediate republisher, who has no way to know whether his or her particular contribution is the one that shifts the coverage of the plaintiff from acceptable to excessive? The late-stage republisher, who might reasonably be aware that he or she is 'piling on' by the time he or she joins in, but whose incremental impact on the plaintiff is likely to be trivial? The social media platform, which might not be encouraging (or even aware of) the situation at all?[58]

At some level, the frustration over cases like these is not with any particular individual, but with the networking effects that allow the dramatic amplification of some content that, for whatever reason, strikes the right chord with the public at the right time. This occasionally results in the phenomenon of mass defamation litigation, sometimes termed a 'suit against the Internet' – that is, an effort to counter the network effect and to deter online discussion of an entire topic by filing legal claims against a significant number of people who have written on the topic.[59] These claims usually sound in defamation rather than privacy, but the intent to quell discussion is frequently revealed by the fact that the case is filed without significant consideration of whether the claims stated would be successful against any particular individual.

'Suits against the Internet' are intended as a deterrent and must be sweeping to pose a credible threat; as a result, they often sweep in statements that are nothing more than questions, opinions, ancillary comments that are unquestionably true, or even mere references to the fact that there is an active discussion. For that reason these cases are generally considered to be misguided, as an attempt to leverage judicial process to create a pseudo-legal remedy for the negative impact of network effects where a true legal remedy does not exist. In many of these cases, the plaintiff's attempt to shut down discussion backfires by drawing even more attention to the matter that the plaintiff wishes dropped. Moreover, these lawsuits tend to generate a new round of public criticism of the plaintiff for his or her litigation tactics. In some United States jurisdictions, this type of claim may also constitute a 'strategic lawsuit against public participation', or 'SLAPP', subjecting the plaintiff to special penalties.

That said, the concerns raised by mass defamation lawsuits may be less susceptible to cross-border generalisation than those raised by other

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58 Again, Section 230 of the Communications Decency Act would protect an online platform from liability for user comments in the United States, and might also protect individual users who merely republish others' content. See 47 USC § 230(c)(1) ('No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.').

59 For examples of such lawsuits, see http://www.dmlp.org/threats/rakofsky-v-internet and http://www.dmlp.org/threats/saltsman-v-goddard.

examples discussed in this chapter (such as concerns about easy redistribution and aggregation of personal information, the role of commercial intermediaries, difficulties with legislative solutions, and the effectiveness of notice and consent regimes). In nations that recognise defamation claims based upon opinions or true statements, the line between defamation and privacy becomes blurred and the use of litigation to prevent the discussion of true but embarrassing information may be less controversial. In contrast, within the United States, it is doubtful that a legal remedy could be crafted for Internet overexposure that is consistent with US principles of freedom of speech, leaving solutions to the social, technological and other spheres.[60]

60 For an example of a social solution to the issue of excessive exposure, consider the Wikipedia community's determination not to include the real name of the subject of the well-known 'Star Wars Kid' meme on the relevant entry. See http://en.wikipedia.org/wiki/Talk:Star_Wars_Kid. For a technological approach, consider Twitter's implementation of its native 'retweet' feature, in which an original publisher's deletion of his or her 'tweet' results in the deletion of all 'retweets' created through the built-in feature. See 'The Case of the Disappearing Retweets', PCMag.com, December 16, 2011, http://www.pcmag.com/article2/0,2817,2397757,00.asp.

Index