An Analysis of the Theoretical Underpinnings of Privacy and Reputation, Linked to the Uncertain Relationship Between Defamation and Misuse of Private Information

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Conceptual Background

The Aims of Privacy

In the recent case of *PJS v News Group Newspapers Ltd*,[1] the Supreme Court was accused of adopting the role of King Canute, the sovereign who, according to medieval legend, had his throne placed at the seashore to teach a lesson to his people. While the legend casts the king's acts as a praiseworthy demonstration of both his piety and humility, the comparison drawn by the media was intended to be anything but flattering. Rather, the insinuation was that, unlike the king of legend, the Supreme Court, in entertaining the possibility of reinstating the injunction, thought itself capable of pushing back the metaphorical tide and restraining the inevitable. To most media outlets and, indeed, private individuals, the notion that there could be any real privacy in information which had already been widely disseminated was, at best, fanciful, and at worst, a real threat to freedom of expression. Although the Court, in *PJS*, did an admirable job of illustrating why the analogy with King Canute was far from apposite, the fact remains that many people are ill at ease with the idea that an individual's privacy interest could prevail over that in disclosure under the kinds of circumstances seen in *PJS*. Admittedly, this is understandable. The language of 'private' seems, by its conventional definition and established usage, to imply 'not public.' Indeed, the first requirement under the *Coco v Clark* three-stage test for breach of confidence – which, prior to the development of a novel cause of action in misuse of private information (occasionally abbreviated to 'MPI'), was the closest in substance to a freestanding tort dealing with invasions of privacy – was that the information in question must have the 'necessary quality of confidence.'[2] Essentially, this demanded that the relevant information not be in the public domain or, as Megarry J described it, be 'common knowledge.'[3] To suggest, therefore, that information already present in the public domain could give rise to an actionable claim in privacy (or, to be exact, misuse of private information) seems, at first blush, entirely counter-intuitive. Such an inference, though natural, is an oversimplification of the matter and of the issues at stake. As stated by Tugendhat J in the case of *Goodwin*, 'the right to respect for private life embraces more than one concept.'[4] This is an essential point. Indeed, in

[1] *PJS v News Group Newspapers Ltd* [2016] UKSC 26.
[2] *Coco v AN Clark (Engineers) Ltd* [1968] FSR 415.
[3] Ibid.
[4] *Goodwin v News Group Newspapers Ltd* [2011] EWHC 1437, para. 85.

that same utterance, Tugendhat J, building upon Nicole Moreham's analysis of the nature of the privacy interest, described two of the principal aspects of privacy as 'confidentiality' and 'intrusion.'[5]

The pluralistic nature of privacy was on full display in *PJS*, most prominently, in the Supreme Court's decision to frame the harm in terms of 'intrusion' in lieu of some other, more orthodox head of damage (e.g., publication of private facts). A further example may be found in the cases of *Gulati*[6] and, to a lesser extent, *Vidal-Hall*,[7] in which the Court of Appeal, in a manner reminiscent of the intrusion upon seclusion tort from William Prosser's taxonomy of privacy,[8] held that damages could be awarded to compensate the harm consequent upon the mere intrusion into an individual's privacy independently of any distress or anxiety caused, thereby abrogating the need for publication to a third party (a need traditionally emphasized by the third requirement, that of an actual or threatened unauthorized use, of an action for breach of confidence).[9] Consequently, and returning to the seemingly common sense assertion that there can be no actionable right to privacy in respect of commonly known information, it cannot be reasonably argued that the public domain concept is, in and of itself, a sufficient basis to disavow the Supreme Court's reasoning in *PJS*. Having said this, the above 'oversimplification' was deliberate, and, it is argued, serves a useful purpose in so far as it helps to illustrate the extent to which 'privacy', as a concept in English law, has long been plagued by confusion and misunderstanding. This latter point, that of the high degree of conceptual uncertainty surrounding privacy and its treatment under domestic law, will serve as the core focus of this thesis, with this problem being examined through the prism of the current body of theory on privacy, as well as through a close consideration of various facets of the concept of privacy and related interests (in particular, reputation).

Defamation and Privacy

One such related interest is defamation, which we will adopt as our next example in illustrating the aforementioned issue. Although the tort of defamation is constituted of different

[5] Ibid. (*Goodwin*).
[6] *Gulati v MGN Ltd* [2015] EWCA Civ 1291.
[7] *Vidal-Hall v Google Inc* [2015] EWCA Civ 311.
[8] William Prosser, 'Privacy' (1960) California Law Review, 48(3).
[9] It should be noted, however, that in both *Gulati* and *Vidal-Hall*, as well as in *PJS*, information had actually been obtained. As such, whether there exists a remedy for a pure intrusion case (i.e., where no information is acquired) remains an unresolved issue, see Thomas DC Bennett, 'Triangulating Intrusion in Privacy Law' Oxford Journal of Legal Studies 39(4). This point will be further considered in the latter half of the second chapter.

elements and serves a distinct purpose from that of misuse of private information, both actions will, in a great many cases, be concerned with the protection of reputation, itself a part of the 'respect for private and family life' established by Article 8 of the European Convention on Human Rights. That is clearly not to say, however, that the two are interchangeable, with claimants free to bring an action in either tort of their choosing in respect of the same fact pattern. Rather, defamation is, and always has been, concerned with the publication of *false* information. In other words, the law of defamation seeks to remedy an undeserved reputation. On the contrary, the focus in an action for misuse of private information is the revelation of personal, and presumptively true, information, primarily that in respect of which a claimant has a reasonable expectation of privacy. The distinction is well put by Wolanski and Shore, who state 'if libel is necessary to protect the reputation that a person has in the minds of right-thinking members of society generally, then privacy is necessary to protect the reputation a person has in the minds of wrong-thinking members of society.'[10]

While it would appear, then, that the dichotomy between the two torts rests principally on the distinction between truth and falsity, this is not the case. Although misuse of private information would, by its very name, appear to suggest that the information in question must be true (or, to put it differently, that the situation to which the information refers exists), as, logically, there can be no misuse of, nor intrusion into, information relating to a non-existent sphere of a person's life, the courts have consistently held otherwise. This can be seen in the decision of *McKennitt v Ash*, in which the Court of Appeal departed from (or distinguished, to be precise) the previous position seen in *Interbrew SA v Financial Times*[11] – that the element of falsehood could not form part of the kind of confidence afforded protection under the law – instead holding that the nub of an action for misuse of private information lies in whether the relevant information is private, as opposed to whether it is true or false, with the latter forming 'an irrelevant inquiry in deciding whether the information is entitled to be protected.'[12] This is a position which was recently endorsed by the Supreme Court in the case of *Bloomberg v ZXC* in which it stated that, unlike that of defamation, the central aim of the tort of misuse of private information is to 'protect an individual's private life in accordance with Article 8 of the ECHR, whether the information is true or false.'[13] As with the earlier example of information in the public domain, the courts have given numerous justifications as to why the truth or falsity of a particular statement or publication has now assumed the role of a neutral circumstance in

[10] Sir Michael Tugendhat and Iain Christie, *The Law of Privacy and the Media* (Oxford University Press, 3rd edn, 2016).
[11] *Interbrew SA v Financial Times Ltd* [2002] EWCA Civ 274, para. 28.
[12] *McKennitt v Ash* [2006] EWCA Civ 1714, para. 86.
[13] *Bloomberg LP v ZXC* [2022] UKSC 5, para. 111.

establishing the availability of a claim in misuse of private information. Although many of these reasons are weighty and convincing, there remains a clear conceptual tension in the notion that an individual may bring a claim in misuse of private information in respect of information which is false. As amusingly illustrated by Stanley, it would appear odd, if not impossible, to think that a heterosexual footballer, faced with false allegations that he is a homosexual, would have a reasonable expectation of privacy in respect of his purported homosexuality.[14] A similar view is taken by Barinholtz, who argues that it would be absurd to suggest that a person can intend to keep secret a false fact of which he or she is unaware.[15] Beyond posing issues at a conceptual level, this position also carries worrying practical implications, primarily in connection with the differing rules on prior restraint applied in actions for defamation and misuse of private information (i.e., the rules concerning the grant of an injunction).[16] While this issue will be discussed in greater depth further on, it is helpful to touch on it now if only to further illustrate the lack of conceptual clarity which surrounds privacy in English law – the key concern of this thesis.

Lingering Uncertainty?

Indeed, the courts and legal scholars alike have long struggled to provide a clear definition of privacy and its constituent elements, with privacy often being discussed in terms more befitting the criminal or rogue (e.g., elusive, shadowy, mysterious) than a developing body of law. While numerous theories have been expounded throughout the years, each attempting to set out its own comprehensive account of the nature of the privacy interest, there remains a lack of conceptual consensus within both the academic and judicial communities. Much of this confusion may arise from the fact that, for some academics, privacy cannot be usefully conceptualised as a discrete interest, separate and apart from other values already afforded protection under the law via alternative mechanisms. Viewed through this lens, any time an individual intuits that their right to privacy has been breached, it is, in truth, some other interest or cluster of interests that has been engaged.[17] Indeed, this exercise of fitting the facts of each case into the rubrics of existing torts formed the basis of the prevailing approach in England prior to the enactment of the Human Rights Act 1998 and the recognition of the tort of misuse

[14] Paul Stanley, *The Law of Confidentiality A Restatement* (Hart Publishing, 2008) 15.
[15] Alec Barinholtz, 'False Light Invasion of Privacy: False Tort?' (1987) Southwestern University Law Review 17(1), pp. 135 – 86, p. 146.
[16] See the rule in *Bonnard v Perryman* [1891] 2 Ch. 269.
[17] Ruth Gavison, 'Privacy and the Limits of Law' (1980) The Yale Law Journal 89(3).

of private information in *Campbell*.[18] While certain aspects of privacy could, of course, be afforded protection through breach of confidence, this action had its limitations. By way of example, even so egregious a breach of privacy as seen in *Kaye v Robertson*[19] did not lend itself to the elements and requirements of the confidence action and so the Court was forced to ground the claim on some other right of action, in that case, malicious falsehood. Even after breach of confidence saw substantial development in the cases of *Spycatcher*,[20] *Douglas v Hello!*,[21] and *Wainwright v Home Office*[22] through, among other matters, the elimination of the classic requirement of a relationship of confidentiality between the intruder and victim – an attenuation which went some length in reconciling confidence and privacy at a conceptual level – it remained the case that there was no general tort of invasion of privacy. While Lord Hoffmann, in *Wainwright*, recognised privacy as an underlying value which informed the direction and development of the common law, he steadfastly rejected the existence of a common law tort of invasion of privacy.[23] This, despite the fact, as argued by Phillipson, that the reworking of the aforementioned 'relationship of confidentiality' limb of the confidence action would, in essence, have the effect of collapsing the second stage of the analysis into the first, as it would be understood that information had been acquired under circumstances importing the necessary obligation anytime the nature of the information was such as to be obviously private.[24] Although English law now recognises an action for misuse of private information, its genesis in breach of confidence continues to give rise to a certain degree of confusion, a confusion which is perhaps brought into sharpest relief in the lingering uncertainty as to whether misuse of private information is equitable or tortious in nature.[25] As Hartshorne argues, 'because the action […] was developed out of the English action for breach of confidence, it was initially (and to a certain extent still is) populated with concepts and terminology redolent of that action.'[26]

[18] *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22.
[19] *Kaye v Robertson* [1991] FSR 62.
[20] *The Observer and the Guardian v United Kingdom* [1992] 14 EHRR 153.
[21] *Douglas v Hello! Ltd (No. 1)* [2001] QB 967.
[22] *Wainwright v Home Office* [2003] UKHL 53.
[23] Ibid. (*Wainwright*).
[24] Gavin Phillipson, 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy Under the Human Rights Act' (2003) The Modern Law Review 66(5).
[25] Although there is, in *Vidal-Hall v Google*, strong recent authority for the proposition that misuse of private information is best classified as a tort, the issue appears to remain an alive one; see Thomas DC Bennett, 'Judicial Activism and the Nature of 'Misuse of Private Information'' Communications Law 23(2).
[26] John Hartshorne, 'The Need for an Intrusion Upon Seclusion Privacy Tort Within English Law' (2017) Common Law World Review 46(4), p. 293.

Aims of the Thesis

Having now illustrated some of the areas in which England and Wales' law of privacy has proven less than satisfactory, I will now turn to the purpose of this thesis. Although this thesis will discuss many of the theoretical frameworks of privacy developed throughout the years, its purpose is not to set out a new theory of privacy. Rather, its principal aim is to assess the conceptual coherence surrounding the current privacy regime, with a particular focus on misuse of private information and its relationship to defamation. While its primary goal is, therefore, to highlight problematic areas, it will also suggest strategies for weeding out inconsistencies and enhancing legal soundness on an *ad hoc* basis.

This thesis will, therefore, seek to answer the following research question:

(1) Whether, with a particular focus on misuse of private information and its relationship to defamation (and its underlying interest of reputation), the current privacy regime can be viewed as conceptually coherent?

It will approach this key research question as to conceptual coherence by breaking it down into a series of sub-questions which will be addressed across a number of stages, each of which will be dealt with in a corresponding chapter.

(a) First Chapter

In the first chapter, the thesis will draw on many of the recent theories on privacy and attempt to, first, better circumscribe the true boundaries of the privacy interest and, second, examine the extent to which the current law of privacy facilitates the protection of that interest. Although it will adopt the classic criteria of 'intrusion' and the 'right to be let alone' as essential elements of the privacy interest, it will suggest that 'control over dissemination of personal information' is, in reality, simply a proxy for the right to reputation, and is better framed in those terms. In doing so, it will examine the nature of reputation (with a particular focus on the scope of its social dimension and whether it is an interest that points inward or outward) and further consider many of the points raised earlier in the chapter (e.g., whether reputational harm is, as is often suggested, a temporal harm). Ultimately, the chapter will conclude (albeit controversially) that, to the extent that English law *formally* recognises a right to privacy, any such right is concerned solely with acts (predominantly actual or threatened disclosures) that cause or would cause reputational injury.

In precise terms, the first chapter will ask: (1) what the core elements of the privacy interest are; (2) what *kind* of interest reputation is; and (3) as to the extent to which the right to privacy afforded under English law is concerned with privacy or reputation? It will, therefore, and in relation to the primary research question, lay the foundation for the remainder of the thesis by establishing where the boundary line between privacy and reputation should be drawn (assuming, of course, that a clear separation between the two can be said to exist).

(b) Second Chapter

In outlining the proper limits of the privacy interest, this paper will also draw on foreign perspectives through an examination of the legal frameworks adopted in other common law jurisdictions, namely, the United States. In adopting the development of the American system of privacy law as a comparator to that of the UK, this thesis' focus will be two-fold. First, it will consider how the two jurisdictions differ in their treatment of 'false privacy' cases (i.e., the aforementioned category of case in which there is an apparent overlap between defamation and misuse of private information).[27] It will discuss the development of the 'false light invasion of privacy' tort – itself a part of a larger discussion of Prosser's taxonomy of privacy and its conceptual utility – and propose that, beyond having contributed little of value, the tort has made the position in relation to privacy and defamation all the less clear.[28] The second focus will lie in how the US defines 'intrusion', and the extent to which any such definition represents a departure from the understanding given to the term in England, and whether a pure intrusion style tort – of the kind contemplated by Bennett – exists in the latter jurisdiction. Although the analysis will employ several means, it will seek to accomplish this, primarily, through an examination of damages, with a particular focus on the nature of the harm that the damages in a given case are intended to remedy. It will do this, in part, by testing Descheemaeker's unipolar model of harms in tort law against a series of English cases. The section will conclude by asking whether, in the event that the harm and loss remain distinct, there nonetheless exists a remedy

[27] Although it could be suggested that 'false privacy' is somewhat of a misnomer, as it appears to suggest that the privacy itself is false or non-existent, this paper will nonetheless adopt the term for two reasons. The first is simply for the sake of brevity and the second, to highlight certain aspects of the relationship between MPI, the cause of action to which 'false privacy' is relevant, and the similarly titled tort of 'false light invasion of privacy'; see fn 289 for examples of academic usage of this terminology.

[28] Diane Leenheer Zimmerman, 'False Light Invasion of Privacy: The Light that Failed' (1989) New York University Law Review.

for a pure intrusion style case, or whether declaring such a remedy to exist would, in essence, be to permit the compensation of an unrealised or attempted tort?[29]

Specifically, the second chapter will ask: (1) whether 'false light invasion of privacy' (as a tort concerned with false privacy) is theoretically sound, or if it damages our ability to distinguish between privacy and defamation; and (2) whether English law implicitly recognises liability for intrusion-style violations of privacy and, if so, does this accord with the understanding of the nature of the privacy interest set out in the first chapter? In relation to the primary research question, it will pursue two main aims. First, it will adopt false light as a comparator to misuse of private information, and consider how its approach to 'false privacy' has affected our understanding of the relationship between privacy and reputation. Second, it will examine how the formal absence of liability for intrusion-style violations of privacy affects the conceptual integrity of the domestic privacy regime.

(c) Third Chapter

The third chapter will look to the relationship between the torts of misuse of private information and defamation and analyse the degree to which recent judicial acknowledgements have eroded the historic distinction between the two in England and Wales. In particular, it will consider whether, as a matter of principle, the truth or falsity of a particular statement should, as has been suggested, be relegated to the role of an irrelevant inquiry and, as a practical matter, whether the courts are generally able to succeed in looking beyond the appearances of a claim to determine whether the nub of a particular action lies in privacy or defamation. The chapter will conclude by looking to the availability of 'truth' as an absolute defence to an action for defamation and its relationship to privacy. First, it will consider whether the availability of the defence in circumstances in which the relevant material was held defamatory, not on the basis that it suggested that the claimant had engaged in disreputable conduct, but because it exposed the claimant to 'contempt, shame, and ridicule' or caused them to be 'shunned and avoided', risks rendering permissible the publication of private information without having to show the existence of a countervailing public interest. Second, it will examine the extent to which such an approach may conflict with a state's positive obligations to protect privacy under Article 8.

Specifically, the final chapter will ask: (1) whether it is desirable that the remit of misuse of private information (as a tort said to protect privacy) has been extended to entirely false

[29] Benjamin C. Zipursky and John C. P. Goldberg, 'Unrealized Torts' (2002) Virginia Law Review 88(8).

information (an element traditionally associated with defamation and, by extension, with the protection of reputation) and, as part of this inquiry, what the purported 'nub' is that judges are tasked with identifying in such claims; (2) whether it is, as a normative question, proper that 'truth' should operate as a defence to an action for defamation *in all circumstances*; and (3) whether the positive obligations entailed by Article 8 of the European Convention on Human Rights may require the modification of the defence of 'truth' (e.g., the introduction of a public benefit test), or whether the current approach – if considered by the European Court of Human Rights – falls within the State's margin of appreciation? In relation to the primary research question, it will make two suggestions. First, that although the existence of 'false privacy' (as a distinct category of case in which the 'private' facts at issue are untrue) is unobjectionable (if not desirable), its treatment under domestic law lacks clarity, and has resulted in a lack of cohesion between the theoretical bases of misuse of private information and defamation. Second, that the operation of 'truth' in certain, narrow, circumstances (namely, those in which the complained of statement exposed the claimant to ridicule) cannot, in light of the argument set out in the first chapter, be justified, and risks generating further confusion.

Methodology

The essential method adopted throughout this thesis is library-based. In seeking to establish the unifying or ultimate value behind right to privacy, as well as the extent to which the said value is safeguarded by our current body of laws, the first chapter will adopt an approach similar to that employed by Bennett.[30] This method, which Bennett describes as a form of 'triangulation', will consist of examining some of the more popular theories of privacy in order to determine the value central to each. It will then identify points of commonality between the various theories in order to clearly delineate those interests or values which are seen as undergirding the right to privacy from those which are either unrelated to privacy, or related to it in a predominantly weak sense. A similar approach, albeit one of a smaller scale, will be pursued in relation to the nature of reputation, which will then be compared and contrasted with the right to privacy in an attempt to ascertain the extent to which the two safeguard similar interests.

While this thesis – in particular, the first two chapters – will draw on perspectives from other common law jurisdictions (namely, the United States), its goal is not to engage in a full comparative analysis. Rather, its principal aim is simply to assess, through an examination of legal

[30] Supra (Bennett, n. 9).

regimes which have adopted a more structured approach to privacy, whether certain substantive categories of case (e.g., 'false privacy') are theoretically sound, and to ask whether a study of select foreign actions can shed light on our understanding of privacy as expressed in domestic law. Importantly, however, and as repeated in the second chapter, it is acknowledged that, in light of the stark difference in the theoretical provenance of the privacy interest between the United Kingdom and, for example, the United States, there are real limits to the usefulness of any such comparisons. This matter aside, the second and third chapters will adopt a largely doctrinal approach, closely examining judgments and academic texts to assess the conceptual coherence of the domestic privacy regime.

- Chapter 1 -

The Nature of the Privacy Interest

Introduction

What is privacy, and what does it mean to have a right to it? Although these may, to a reader with only passing knowledge of the area, appear somewhat fatuous questions, this is the precise issue that legal scholars and practitioners have been grappling with for many years, and which remains extremely fertile ground for academic study and debate. As stated by Scheppele, 'privacy' is a term which suffers from 'an embarrassment of meanings.'[31] While we are often, as discussed in the preceding chapter, able to intuit that our right to privacy has, in some sense, been breached, this frequently takes the form of a knee-jerk or highly instinctual reaction, as opposed to the carefully obtained result of some advanced legal calculus.[32] Consequently, although individuals might suspect or, in some cases, be convinced that their privacy has been violated, they may nonetheless struggle to precisely articulate the exact reasons for or grounds upon which the breach occurred. As Hyman Gross, quoting noted legal scholar HLA Hart, once observed of privacy, it is often the case here that 'we can know and yet not understand.'[33] Many

[31] Kim Lane Scheppele, '*Legal Secrets: Equality and Efficiency in the Common Law*' (Chicago University Press, 1988) pp. 184 – 85.
[32] Daniel J. Solove, 'A Taxonomy of Privacy' (2006) University of Pennsylvania Law Review 154(3), pp. 477 – 564.
[33] Hyman Gross, 'The Concept of Privacy' (1967) New York University Law Review 42(1), p. 34.

of the meanings which are routinely given to privacy will be familiar to any reader with a passing knowledge of the area. These include the right to autonomy (or, put differently, freedom from decisional interference) as well as to the control, use, and dissemination of personal information, the right to physical integrity, and – what is, in all probability, most commonly evoked in our minds by the use of the term 'privacy' – the right to or condition of retaining some measure of secrecy.[34] As stated in the introductory chapter, the purpose of this thesis is not to expound a new theory of privacy. Rather, like a renewed attempt to accomplish what Professor Bloustein sought to achieve in the late 20th century, its goal is to discern 'in the welter of cases [and scholarly literature] the interest or social value which is sought to be vindicated in the name of individual privacy.'[35] As such, while this first chapter may deal with questions of definition and meaning, its aim is not to lay down a new framework, but instead to examine and critique the many existing theories of privacy in the hope of better sketching out the true limits of the interest.

A Normative Account of Privacy

Privacy was once famously described as 'the right to be let alone.'[36] Although this definition has received much criticism throughout the years,[37] it nonetheless serves as a useful starting point. First, it illustrates, through its use of the language 'right', that what we are principally concerned with is a normative account of privacy. In other words, we are not concerned with the conditions which are most congenial to privacy, divorced from any ethical or social considerations, but rather, the value of privacy. It might, depending upon the account of privacy being offered, be suggested that by virtue of inviting someone into their home or showing them photographs from their childhood, the homeowner or subject of the photograph has experienced a diminution in their privacy. However, such a claim would, it is argued, appear rather strange, and would invariably fall victim to what Moore termed the 'so what' objection.[38] As Thomson argues, we freely waive our right to privacy, either expressly (as in the case of the person who invites another into their home) or impliedly (by placing others in situations in

[34] For a useful overview of the many theories on privacy, see Bennett (n. 30).
[35] Edward J. Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) New York University Law Review 39(6), pp. 962 – 1007, p. 963.
[36] Warren & Brandeis, 'The Right to Privacy' (1890) Harvard Law Review.
[37] For a brief critique of this definition, see Gavison (n. 17), pp. 437 – 38; for a broader critique of Warren & Brandeis' account of privacy, see Prosser (n. 8).
[38] Adam Moore, 'Defining Privacy' (2008) Journal of Social Philosophy 39(3), pp. 411 – 28.

which they are forced to violate strict conditions of our privacy),[39] or, in some cases, by simply being indifferent to certain aspects of our privacy and their accessibility, and yet, in none of these cases are we dealing with an actionable invasion of privacy.[40] Furthermore, although I adopted Thomson's use of the language 'waiver' in the context of someone freely volunteering intimate aspects of their life to others, this too appears odd, seeming to suggest, like Parent before her,[41] that an exercise of privacy could, in fact, prompt a loss of it. On a purely descriptive account of privacy, this may be true. If privacy is defined as the condition of not being known or exposed to others, and to enjoy perfect privacy is, therefore, to enjoy a state of perfect seclusion or isolation, then it naturally follows that any change in circumstance which breaches the aforementioned conditions would result in a concomitant loss of privacy.

This proposition fails, however, to recognise two essential elements. First, as Solove, quoting Aristotle, observed of human nature, '[s]urely it is strange, too, to make the supremely happy man a solitary; for no one would choose the whole world on condition of being alone, since man is a political creature and one whose nature is to live with others.'[42] If an account of privacy is presented as absent a normative component – and therefore tells us nothing about the circumstances in which privacy is valuable or its loss detrimental – with any intrusion on solitude representing a *prima facie* loss of privacy, the necessary implication is that the wholly sequestered individual, unknown to the world, enjoys the best privacy.[43] Given, however, that any theory of privacy must be set against the backdrop of realising desirable social policies or, in the words of Warren and Brandeis, doing what 'public morality, private justice, and general convenience demand', this conception of privacy seems unfit for purpose.[44] As a brief illustration, while privacy is its own end (i.e., something of value in and of itself in deontological terms), it is also instrumental in nature. In choosing to protect privacy, the law's chief purpose is not to facilitate the individual's ability to live in complete solitude. Rather, the right to privacy is intended to

[39] An example of this might include a couple arguing so loudly that their neighbours cannot help but hear them; see Judith Thomson, 'The Right to Privacy' (1975) Philosophy & Public Affairs 4(4), pp. 295 – 314.

[40] Ibid (Thomson), pp. 301 – 2.
[41] WA Parent, 'Recent Work on the Concept of Privacy' (1983) American Philosophical Quarterly 20(4), pp. 341 - 55.
[42] Supra (Solove, n. 32), p. 554.
[43] The problematic nature of employing purely descriptive terms such as 'isolation' or 'aloneness' as the determinative criteria in assessing the status of one's privacy was recognised by Moreham, and remedied through her introduction of the qualification of 'desirability'; see Nicole Moreham, 'Privacy in the Common Law: A Doctrinal and Theoretical Analysis' (2005) The Law Quarterly Review 121, pp. 628 – 656.
[44] The argument being advanced here is based on a notion akin to Kant's principle of universalizability, according to which the suitability of a particular maxim is assessed based on its capacity to be applied as a universal law. In this case, it is assumed that the promotion of privacy is linked to something of social value, with its maximization sought on that basis.

improve the individual's ability to participate in social life, as it has long been recognised that 'too much envelopment in society can be destructive to social relationships.'[45]

To address, now, the second issue, if we define privacy as a right of control over personal information, any voluntary decision to divulge information falling within that category would constitute an exercise of our right to privacy. Surely, it cannot be the case that exercising a given right could result in the loss of the same value ascribed to that right? As argued by Phillipson, to construe previous disclosures as signalling an abandonment of the right to privacy as opposed to an exercise of it would, to the extent that the said right is interpreted as the ability to reveal parts of ourselves while concealing others, sap it of any value. [46] A largely identical critique is made by Moore – who, like Phillipson, advocates a control-based theory of privacy – of Parent's account of privacy, who argues that the latter wrongly conflated a reduction in privacy with a reduction in control, in particular, that he was mistaken in his belief that a loss over access would necessarily result in a loss of control over use.[47]

Returning now to the definition of privacy as the 'right to be let alone', the second benefit is that it makes it clear, from the outset, that the freedom conferred by the right consists of a significant negative component. In other words, as much as privacy is clearly a positive liberty concerning, among other things, choice and control, it is also a freedom from undue interference or intrusion. As Thomson, using the example of a pornographic picture hidden away in a safe, illustrates, the owner of the picture not only has a right to do what he or she reasonably can to prevent the picture from being examined, but also that the picture *shall not* be looked at.[48] Indeed, this is captured quite clearly in European law in the form of Article 8 of the European Convention on Human Rights (henceforth, 'the Convention'), which affords a right to respect for private and family life and provides that '[t]here 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.'[49] Although this provision clearly concerns vertical relations (i.e., those between the citizen and the state), as does a parallel provision in the form of the fourth amendment to the United States Constitution,[50] the gravamen of the wrong is substantially the same whether the intrusion is committed by a public authority or a private individual. Thus, as Bloustein argues, the conceptions of privacy generated by each of the above

[45] Supra (Solove, n. 42), p. 555.
[46] Supra (Phillipson, n. 24), p. 742.
[47] Supra (Moore, n. 38), p. 415.
[48] Supra (Thomson, n. 40), p. 300.
[49] European Convention on Human Rights.
[50] Constitution of the United States; *Katz v United States*, 389 US 347 (1976).

provisions should be of broad applicability and clearly possess horizontal effect.[51] That the right to privacy established by the Convention does protect against interferences by private persons was confirmed in *Von Hannover* and subsequent cases.[52]

Reductionism vs Essentialism

Having now made clear that, first, we seek to sketch out a normative account of privacy and, second, that the right to privacy should encompass both a positive and negative dimension, we will now begin to examine many of the theories on privacy in greater depth, beginning with the account provided by Warren and Brandeis.[53] Before doing this, however, it will prove useful to briefly describe a kind of fault line in the literature between those commonly referred to as 'reductionists' and those whom I shall, for lack of a better word, term 'essentialists.' As discussed in the preceding chapter, one of the most frequent roadblocks for privacy scholars endeavouring to define privacy has been the suggestion that privacy is not a discrete or distinct interest, but that it is instead a cluster of rights, and one whose individual elements overlap with those of other bundles of rights. To be clear, those who support this proposition are generally termed 'reductionists', and include the likes of Thomson, Parent, and Prosser.[54] Among the more popular rights that privacy is said to frequently intersect with is the right to private property.[55]

At first glance, this appears to make a great deal of sense. After all, in every case involving an invasion of privacy, the nature of the offense concerns a blow to a sense of propriety, of ownership. Indeed, we need look no further than the commonly invoked language of 'intrusion' to bear out this argument, as there can be no intrusion without some form of ownership. As has been repeatedly noted in the literature, property can take many forms, ranging from physical goods like one's home, to intangibles such as ideas, and even one's likeness, as in the case of image appropriation. In some areas, the overlap between a privacy and property right is quite clearly made out, while in others the relationship is less clear. Importantly, however, even if the reductionists were correct in their assertion that the right to privacy is, in reality, no more than a species of a property or, as the case may be, liberty right, this would not mean that privacy is not a distinct interest. As Moore argues, '[t]he cluster of rights that comprise privacy may find

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[51] Supra (Bloustein, n. 35), p. 975; *Silverman v United States*, 365 US 505 (1961); speech of Lady Hale in *Campbell* (n. 18) at para. 132.
[52] *Von Hannover v Germany (No 1)*, Application no. 59320/00 (June 2004); see, in particular, para. 12 of Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the right to privacy.
[53] Supra (Warren & Brandeis, n. 36).
[54] Supra (Thomson, n. 48); (Parent, n. 41); (Prosser, n. 37).
[55] For a property-based account of privacy, see Thomson (ibid).

their roots in property or liberty yet still mark out a distinct kind.'[56] Alternatively, it could be argued that privacy is the higher or antecedent right from which rights such as liberty and property are derived. That is not, however, this author's contention and an in-depth examination of this premise is beyond the scope of this thesis.[57] Finally, it is worth briefly noting that while there is, undoubtedly, some degree of overlap, framing our analysis of privacy entirely in terms of property rights runs a very real risk of drawing attention away from the true harm which the law of privacy seeks to mitigate. As Wragg observes, '[s]uch treatment is both limited and limiting for its failure to recognise that the essence of privacy invasion is objectification and its impact.'[58]

Dignity and Reputation

Returning now to Warren and Brandeis and their seminal article 'The Right to Privacy', despite the all-encompassing nature of the language of 'the right to be let alone', the authors were fundamentally 'essentialist' in their thinking. Although the authors recognised a certain conceptual overlap between property and privacy, they felt that the core principle from which the right to privacy emanates was not that of private property, but rather, that of 'inviolate personality.'[59] They based this argument on the common law right that each individual is capable of determining the extent to which his ideas and sentiments are communicated to others, a right which, importantly, is not contingent on the individual having adopted a particular or, indeed, any mode of expression.[60] While this may appear to bear some resemblance to a copyright law, the authors were careful to distinguish between the two, stating that whereas copyright laws are principally concerned with ensuring that authors receive the entirety of any profits arising from the publication of their work, the common law right affixes to the individual a right to 'control absolutely the act of publication, and in the exercise of his own discretion, determine whether there will be any publication at all.'[61] In other words, while the former requires some form of expression or instantiation before it can come into operation, it being a property right in the

[56] Adam Moore, 'Privacy: Its Meaning and Value' (2003) American Philosophical Quarterly 40(3), pp. 215 – 27, p. 217.
[57] As will become clear, this thesis adopts an intermediate view of privacy suggesting that, although it is not a wholly indistinct right, it is closely aligned with reputation.
[58] Paul Wragg, 'Recognising a Privacy-Invasion Tort: The Conceptual Unity of Informational and Intrusion Claims' (2019 Cambridge Law Journal 78(2), p. 419.
[59] Supra (Warren & Brandeis, n. 53), p. 10.
[60] *Millar v Taylor* [1769] 98 ER 201.
[61] Supra (Warren & Brandeis, n. 59), p. 6.

more traditional sense, the latter does not; indeed, it may serve to prevent publication from ever occurring.

Returning now to what Warren and Brandeis identify as the foundational principle in this area, what is 'inviolate personality'? The language is immediately suggestive of autonomy: of man as a being who is master of his own fate and able to develop his character free from unwanted intrusions. Indeed, there is much support for this interpretation. By way of example, Bloustein posited that the principle of 'inviolate personality' refers primarily to 'the individual's independence, dignity, and integrity; it defines man's essence as a unique and self-determining being.'[62] Likewise, Benn perceived privacy as protecting 'respect for [a person] as one engaged on a kind of self-creative enterprise.'[63] In a similar vein, language reminiscent of that used by Warren and Brandeis can be found in articles 1 § 1 and 2 § 1 of the German Basic Law,[64] which provide that 'the dignity of human beings is inviolable [and that] everyone shall have the right to the free development of their personality provided that they do not interfere with the rights of others.'

It would seem, then, that like Bloustein, who conceptualised the harm in invasion of privacy cases as concerning affronts to human dignity, and, to a lesser extent, Solove,[65] Warren and Brandeis were, in providing their account of privacy, chiefly concerned with dignitary harms. This is substantiated quite clearly by the authors' attempt to distinguish the harm sought to be remedied by defamation (i.e., reputational harm) from that which is inflicted by way of an invasion of privacy. The basis upon which the two were distinguished is that the wrongs serving as the domain of defamation are more 'material' than 'spiritual' in nature, as the cause of action only requires that the claimant's estimation suffer in the eyes of the 'right thinking community.'[66] In other words, whether the claimant's perception of him or herself is affected is, for the purposes of making out the cause of action, immaterial. This approach was more than likely inherited from or inspired by Roman law, under which reputation and self-worth were treated as interrelated but distinct interests.[67] While reputation was seen as a 'valuable commodity [and one

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[62] Supra (Bloustein, n. 51), p. 971.

[63] Stanley Benn, 'Privacy, Freedom, and Respect for Persons', in *Philosophical Dimensions of Privacy: An Anthology*, ed. by Ferdinand David Schoeman (Cambridge University Press, 1984), pp. 223 – 44, p. 242.

[64] Basic Law for the Federal Republic of Germany.

[65] Supra (Solove, n. 45). In his taxonomy of privacy, Solove establishes two categories of harm, these being, 'dignitary harms' and 'architectural harms.' The former category is described as encompassing harms of 'incivility, lack of respect, and [those] causing emotional angst', whereas the latter category is described as involving risks which increase the likelihood that someone will be harmed in the future.

[66] Although Warren and Brandeis fail to elaborate on what precise meaning they had intended to convey through the language of 'spiritual' and 'material', the likely basis of distinction between the two is that 'spiritual' losses cannot be assessed in monetary terms (i.e., are non-pecuniary), whereas 'material' or 'temporal' losses can; see Thomas Starkie, *A Treatise on the Law of Slander and Libel and Incidentally of Malicious Prosecutions* (Hartford Conn., 1838).

[67] Jonathan Burchell and Kenneth McK. Norrie, 'Impairment of Reputation, Dignity, and Privacy', in *Mixed Legal Systems in Comparative Perspective* (Oxford University Press, 2005), pp. 545 – 75.

whose infringement could give rise to] sentimental loss', self-worth was perceived as forming an essential part of an individual's human dignity.[68] It is, one could argue, implicit in this argument that, first, Warren and Brandeis believe that the harm consequent upon an invasion of privacy tends to affect one's opinion of oneself (i.e., one's sense of self-worth) more strongly than how one is perceived within a particular community and, second, that the authors conceive of dignitary and reputational harms as belonging to disparate, if related, categories and, as a logical corollary, that they believe that a blow to one's reputation is not a blow to one's dignity. It will be argued that both of these propositions are wrong, each of which will now be addressed in turn.

Beginning with the first proposition, while the exposure of more primal or animalistic aspects of our personality (e.g., photographs displaying us nude or engaged in sexual acts) may well be liable to wound our pride or sense of self-worth more than our estimation within the community, and to therefore constitute 'spiritual' harms, there are two problems with this line of argument. First, despite the fact that, as illustrated by Solove, this kind of exposure seldom 'reveals any significant new information that can be used in the [legitimate] assessment of a person's character or personality', privacy is necessary precisely because it protects the individual's reputation or dignity against members of the wrong-thinking population.[69] As an illustration of this point, while there is nothing remotely unusual about using the bathroom (on the contrary, it is a universal behaviour), few would argue that privacy should not operate as a shield to restrain the publication of photos depicting us relieving ourselves.[70] Second, there is little, if anything, to suggest that the preponderance of harm arising from disclosures relating to other spheres, for example, and to briefly borrow Prosser's terminology, disclosure of private and embarrassing facts,[71] lies in one's estimation of him or herself.

To address, now, the second of Warren and Brandeis' seeming propositions, it seems clear that reputational harm is, in fact, a species of dignitary harm. Many scholars take this exact view, with Solove describing injury to reputation as 'the classic example' of a dignitary harm.[72]

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[68] Ibid. (Burchell and Norrie). A similar distinction was once underscored by Kant, who argued that while both esteem and dignity have value, the latter has no price (this being a consequence of Kant's view that individuals ought to be treated as ends in themselves); see Jan Oster, 'Theories of Reputation', in *Comparative Privacy and Defamation*, ed. by Andras Koltay and Paul Wragg, (Edward Elgar Publishing, 2020), pp. 48 – 64.

[69] Supra (Solove, n. 65), p. 536.

[70] A further and useful example can be seen in that given by Schwartz of the degree to which the 'nonrational instincts [of] some portion of the population stigmatizes the woman who has been raped and the person who is undergoing the agonies of cancer'; see Gary Schwartz, 'Explaining and Justifying a Limited Tort of False Light Invasion of Privacy' (1991) Case Western Reserve Law Review 41(3), p. 900.

[71] Supra (Prosser, n. 54), p. 392.

[72] Supra (Solove, n. 69), p. 487.

Moreover, if we define dignity in terms of self-development, or to sketch out the negative, see a blow to dignity as inhibiting someone's ability to freely develop their personality, it becomes eminently clear that reputational damage is, in fact, a dignitary harm. This can be seen clearly in the nature of reputation. As has long been understood, reputation is a kind of social currency. It is, in no small part, what allows us to participate in public life. After all, we rely on others to 'engage in transactions with us, to employ us, to befriend us, and to listen to us.'[73] Without a good reputation, our ability to enjoy these things is severely diminished. If, then, the standard which is adopted in assessing whether a particular injury should be classed as a dignitary harm is whether it significantly impedes our ability to engage in a process of self-determination, it would seem that we arrive inescapably at the conclusion that reputational damage is such a harm. This position is also reflected in the caselaw. As stated by Lord Hoffmann in the case of *Cambell v MGN Ltd*, the newly identified cause of action in that case was based upon 'the protection of human autonomy and dignity.'[74] In the majority of cases dealing with misuse of private information, compensation is issued by way of damages for 'mental distress.'[75] There have been a number of cases, however, in which damages were also awarded for reputational harm, suggesting that this has become a recognised base of recovery in privacy cases.[76] Even were this not the case, however, it would not be because invading a person's privacy does not negatively impact on their reputation. Rather, and as argued by Hariharan, it would be because reputational damages are a special species of damages which should be confined to actions for defamation.[77]

Control, Desire, and Choice

So far, and based primarily on an analysis of Warren and Brandeis' account of the right to privacy, it would seem that dignity is of central importance. This much is accepted, although the authors' treatment of reputational damage as belonging to a different class than dignitary harms is, as seen above, rejected. While this takes us some distance in sculpting a better understanding of the nature of privacy, it is insufficient. As Thomson argues, 'there are too many acts […] in the course of which we give affront to dignity, but in the performing of which we do

[73] D.J. Solove, '*The Future of Reputation*' (New Haven CN, 2007), pp. 30 – 31.
[74] Supra (*Campbell*, n. 51), para. 51.
[75] Jeevan Hariharan, 'Damages for Reputational Harm: Can Privacy Actions Tread on Defamation's Turf?' (2021) Journal of Media Law 13(2), pp. 186 – 210.

[76] Ibid., p. 191.
[77] Ibid., p. 188; see Chapter 3 for further discussion of this point.

not violate anyone's right to privacy.'[78] It could be, however, that this is due to the simple fact that 'privacy harms' is a much smaller category than 'affronts to dignity', and one which sits comfortably within the bounds of the latter. Thus, while any violation of privacy would constitute an affront to dignity, not all affronts to dignity would constitute violations of privacy. Though plausible, it is submitted that the better, albeit similar, position is put forward by Gavison, who argues, 'there are ways to offend dignity and personality which have nothing to do with privacy.'[79] This would suggest that, despite dignity's obvious importance, it is not the first or foundational principle in this area. The right to privacy must, then, consist of some other element. As mentioned in the introduction and, indeed, alluded to throughout this first chapter, it has often been suggested that this element could be 'control', more specifically, control over personal information.

Control-based definitions of privacy have been strongly advocated by a number of scholars. Fried, for example, described privacy as concerning the 'control we have over information about ourselves.'[80] Although such theories pose certain advantages – as argued by Bennett, they represent a point of intersection between the ability to maintain a certain degree of secrecy about one's life and a more abstract value such as dignity – they ultimately prove deficient.[81] A particularly convincing critique of control-based definitions is made by Moreham, who observes that if the concept of privacy is seen as resting on the ability to exercise control, the right to privacy is put in equal jeopardy by a *threatened* unauthorized breach as it is an *actual* breach. As Moreham writes, '[such definitions] fail to distinguish between those situations in which there is a risk of unwanted access and those where unwanted access has actually been obtained.'[82] This critique is not, however, shared by everyone. Notably, Thomson believes that a loss of control would not inevitably result in a loss of privacy.[83] Using the example of someone who had invented an x-ray device enabling them to peer through walls and other, similar, objects, Thomson suggests that though control has been lost, a violation of the right to privacy only takes place if and when the individual in question exercises their ability to look through solid objects.

It is submitted that this argument lacks force. While the mere existence of the x-ray device and the attendant fact that it can be deployed at any time do not violate the condition of

[78] Supra (Thomson, n. 55), p. 313.
[79] Supra (Gavison, n. 37), p. 438.
[80] Charles Fried, 'Privacy' (1968) The Yale Law Journal 77, pp. 475 – 93, p. 482.
[81] Supra (Bennett, n. 34), p. 758.
[82] Supra (Moreham, n. 43), p. 638.
[83] Supra (Thomson, n. 78).

privacy (here, condition is being used in a purely descriptive sense), the right, if it is based on 'control', is violated from the moment of the device's creation. Although Thomson might, at first glance, be given the benefit of the doubt, and thought to have accidentally shifted from a normative to a descriptive account, she explicitly describes the use of the device as contravening a *right*, as opposed to a *condition*. A similar critique is made by Moore, although he suggests that despite the loss of a control-based condition, the right to privacy has not been lost.[84] This contention is rejected for the reasons described above. While the fact that a given right, in this case privacy, *could* be violated at any given time (we might, for example, be abruptly imprisoned without cause, killed, or stripped of some other essential liberty) is generally not a relevant consideration – you have, after all, a *right* that these things shall not happen to you – this is, unfortunately, fatal to a conception of privacy based on the element of 'control.'[85] Although one could argue that this alone provides sufficient cause to abandon 'control' as the defining element of privacy, Moreham makes a second critique: that in choosing to disclose information to a particular individual you relinquish control over any further disclosures. While Moore suggests that this is not necessarily the case – indeed, and as mentioned earlier in this chapter, he criticised Parent for making this very argument – it is suggested that this argument is largely anaemic.[86] Although there may be very narrow contexts in which, to borrow Moore's language, 'yielding control over access does not automatically yield control over use',[87] it would seem inapplicable to any scenario involving the acquisition of sensitive information.

If, as appears to be the case, a control-based definition is bound up with certain intractable problems, what would prove the most suitable substitute? While Moreham suggests that this might be the criterion of 'desirability',[88] we will first consider that of 'choice.' Although 'choice' may, like 'control', appear to imply a certain level of control over what among our personal details is kept private, a level of control which is, importantly, often illusory, this is not necessarily the case. To borrow Moreham's example of the omnipotent hacker,[89] while the hacker's ability to release our personal information at any given time clearly bears on our ability to exert control, can the same be said of its effect on our ability to choose? While it is true that the moment the hacker releases our information we are deprived of any meaningful choice – the

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[84] Supra (Moore, n. 47), p. 417.

[85] To be clear, the argument being made here is that a control-based definition of privacy is qualitatively different from other rights which do not presuppose any real degree of control and are not, consequently, destroyed by a threatened (as opposed to executed) breach.

[86] Supra (Moore, n. 84), p. 415.

[87] Ibid.

[88] Supra (Moreham, n. 82), p. 636.

[89] Ibid. As a thought experiment, Moreham posits the existence of an all-powerful hacker who can access and disclose intimate details of one's life at will.

choice has been made for us – that is not the issue. Instead, it is, as Moreham notes in her discussion of 'control', the threatened disclosure that is of concern. In other words, we are focused on the position prior to use, not post-use. Until the hacker releases our information, we are still free to make a choice; we have control. To be clear, that 'control' does not refer to an ability to affect the decision-making of the hacker. That much clearly lies entirely outside of our control. No, the aforementioned 'control' refers simply to a capacity to engage in our own decision-making process, to decide for ourselves whether we will disclose intimate details of our lives. Although much of this is effectively captured by the element or qualification of 'desirability', it is submitted that 'choice' is the better option for the simple reason that it better reflects the paramount importance of dignity, and of man's nature as an autonomous being, to any definition of privacy. There is, however, one more reason why 'choice' is preferred to 'desirability.' Whereas 'desirability' merely describes a quality of, or, to be precise, a required condition of a state of inaccessibility,[90] 'choice' describes an action, namely, an exercise of autonomy. While 'choice' is capable, therefore, of standing on its own, 'desirability' is not.

A Proxy for Reputation?

To summarise the position thus far, the right to privacy seems to comprise two key elements: dignity and choice. Importantly, for present purposes, reputation is seen as forming an essential part of one's dignity.[91] Might it be the case, however, that the relationship between reputation and privacy extends further than the former's central role in affording the individual a sense of dignity? If, as has been suggested, the right to privacy is largely one of presentation, could it be that privacy is, in fact, simply a proxy for reputation? While this thesis will reject parts of Prosser's taxonomy of privacy and – to the extent that his work shaped the development of the law in the US – the American jurisprudence on privacy,[92] it will adopt his framing of 'reputation' as the principal interest affected by torts such as the 'public disclosure of private facts' and 'false light invasion of privacy.'[93] This alone, however, is insufficient to draw the desired conclusion. As illustrated by Park, while disclosure of the fact that an individual had achieved a high score on a national exam could hardly be said to adversely impact that person's

[90] Ibid (Moreham).
[91] Supra (Bloustein, n. 62).
[92] See analysis of 'false light invasion of privacy' in Chapter 3.
[93] Prosser was one of the chief architects of the privacy sections of the Restatement (Second) of Torts; see, in particular, the tort of 'Publicity Given to Private Life', s. 652D. As of the time of writing of this thesis, these sections remain in effect.

reputation, the same cannot necessarily be said of its effect on their privacy.[94] Moreover, as has long been understood, the right to privacy consists of two distinct dimensions: informational privacy and physical privacy.[95] Indeed, it was with these two aspects of privacy in mind that Tugendhat J, in *Goodwin*, proposed the elements of 'confidentiality' and 'intrusion.'[96] While this too would seem to strongly militate against a finding that the right to privacy is, in its purest form, simply a proxy for the right to reputation, neither observation is as damning of the proposition as might initially appear to be the case.

To address, first, the comment made by Park, though it is undoubtedly true that, to borrow his example, the public revelation of personal test scores represents a breach of a person's privacy – all the more so if, as we have done, we define 'privacy' as revolving around the concept of 'choice' – the key question is not whether this constitutes a *prima facie* breach of privacy, but rather, an actionable one. By way of illustration, though the name given by Prosser to the second of the four torts forming his composite privacy interest is, as mentioned above, 'public disclosure of private facts', the tort is later described in slightly different terms, in those of 'the disclosure of private *and embarrassing* facts.'[97] For Prosser, it is not, therefore, enough that the information is private. Instead, it must also subject the concerned individual to feelings of embarrassment or shame.[98] That the embarrassing nature of the disclosed facts is an essential element of the proposed tort was confirmed by Prosser himself, who states 'the matter made public must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities […] The law of privacy is not intended for the protection of any shrinking soul who is abnormally sensitive.'[99] Indeed, this was later made a general principle of US tort law, as the tort of 'publicity given to private life' – the successor to Prosser's disclosure tort – requires that the impugned publication be of a kind that would be 'highly offensive to a reasonable person.'[100] The existence of an objective check on the right to privacy is similarly reflected in the current formulation of the domestic tort of misuse of private information which, at its first stage,

[94] Kyung Sin Park, 'Do We Need to Separate Privacy and Reputation', in *Comparative Privacy and Defamation*, ed. by Andras Koltay and Paul Wragg, (Edward Elgar Publishing, 2020), pp. 130 – 146.
[95] Nicole Moreham, 'Beyond Information: Physical Privacy in English Law' (2014) Cambridge Law Journal 73(2), pp. 350 – 77.
[96] Supra (*Goodwin*, n. 5), para. 85.
[97] Supra (Prosser, n. 71), p. 392.
[98] A comparison may be drawn to the requirement in defamation that the statement reduce your social apprehension in the estimation of the 'right-thinking population'; see *Byrne v Dean*e [1937] 1 KB 818.
[99] Supra (Prosser, n. 97), pp. 392 – 93.
[100] Supra (Restatement (Second) of Torts, n. 85).

requires that the claimant demonstrate that the information in question was of such a nature as to engender in them a *reasonable* expectation of privacy.[101]

It is important to remember, however, that despite the obvious importance and influence of Prosser's work, English law rests on a different foundation. Indeed, the development of privacy law in England is based firmly on a system of narrow incrementalism, with the current action of misuse of private information having grown organically out of the doctrine of equitable confidentiality, and was galvanised by the Convention. It is, therefore, inappropriate to import requirements from foreign privacy actions into domestic ones. This was made quite clear in *Campbell*, in which Lord Nicholls emphasized the importance of avoiding the use of language such as 'highly offensive', as this would result in a higher standard of liability than that established through the concept of a 'reasonable expectation of privacy.'[102] Of equal importance is the fact, observed by Hartshorne, that whereas US law – specifically, Prosser's systemisation – has exerted enormous influence on other common law jurisdictions (e.g., Canada and New Zealand), it has not had quite the same effect on the development of our law.[103] Consequently, we must examine the standard of liability for such claims under English law.

An unresolved issue on this point, and one which clearly bears on our current discussion, is whether misuse of private information is a tort actionable which is *per se*.[104] In other words, is the bringing of such a claim contingent upon proof of actual damage, or is such harm simply presumed to have occurred based on the inherently injurious nature of the intrusion? Although some academics treat *Gulati* as evidence of the fact that misuse of private information is actionable *per se*,[105] it is clear that English privacy law is, like the law of defamation before it,[106] beginning to develop a threshold of seriousness. As Lord Neuberger observed in *Ambrosiadou v Coward*, '[j]ust because information relates to a person's family and private life, it will not automatically be protected by the court: for instance, the information may be of slight significance, generally expressed, or anodyne in nature.'[107] A further example can be found in the case of *Rolfe v Veale Wasbrough Vizards LLP*, in which it was suggested that the tort of misuse of

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[101] Supra (*Campbell*, n. 74).
[102] Ibid., para. 22.
[103] Supra (Hartshorne, n. 26), p. 293. This point is subject to an important proviso, namely, that there are important and useful comparisons to be drawn between parts of Prosser's privacy interest (specifically, 'false light invasion of privacy' and 'intrusion upon seclusion') and the domestic privacy regime; see analysis in Chapter 2.
[104] John Hartshorne, 'The Standard of Liability in Claims for Misuse of Private Information' (2021) Journal of Media Law 13(2), pp. 211 – 37.
[105] It should be remembered, however, that liability was uncontested in *Gulati*. As such, any arguments, on this point, premised wholly on the decision in *Gulati* should be treated with a degree of caution; see Hartshorne (ibid) and Bennett (n. 76); see also analysis in Chapter 2.
[106] See *Jameel (Yousef) v Dow Jones & Co* [2005] EWCA Civ 75.
[107] [2011] EWCA Civ 409, para. 30.

private information is not actionable *per se*, and that the bringing of a claim is instead conditional upon proof of serious harm. As Master McCloud noted, 'there does need to be damage, one cannot succeed in a claim where any possible loss or distress is not made out or is trivial.'[108] A final and particularly apropos example is that given by Baroness Hale in *Campbell*, who, in describing the potential interest in seeing Ms Campbell purchasing a bottle of milk, said 'there is nothing essentially private about that information […] It may not be a high order of freedom of speech but there is nothing to justify interfering with it.'[109]

Returning, now, to Park's illustration, while the disclosure of such information may represent a breach of privacy in a very strict sense (or, to use familiar terminology, a highly descriptive sense), it fails to recognise the central role that social norms play in defining private situations.[110]As Hughes notes, 'the normative element is an essential part of the privacy experience, and we rely upon many normative rules about privacy on a daily basis.'[111] To quote Lord Neuberger, 'the courts should, in the absence of special facts, generally expect people to adopt a reasonably robust and realistic approach to living in the 21st century.'[112] Even if the information in question fell within the scope of material that we would view as being paradigmatically private (i.e., information relating to health, sexual orientation, etc.), this alone would not be enough to establish the existence of a 'reasonable expectation of privacy.' Rather, the courts take a holistic approach to assessing claims which involves consideration of all the relevant factors. As stated in *Murray*, these include 'the attributes of the claimant, *the nature of the activity in which the claimant was engaged*, the place at which it was happening, the nature and purpose of the intrusion […] the effect on the claimant [etc.].'[113] As we can see from this dictum, the nature of the disclosed activity is but one of several important elements considered by the courts. While one could attempt to vindicate Park's argument by focusing on the level of unwanted attention paid to a particular individual as a result of a given disclosure, or by relying on the intrusion jurisprudence, there are two problems with this approach. First, if we conceptualise this interference as concerning informational privacy then, in keeping with the approach outlined above, it is submitted that the cause of action is not made out due to the absence of a sufficiently high level of harm (at least, on an objective assessment of the facts); indeed, the disclosure casts

[108] [2021] EWHC 2809 (QB), para. 5.
[109] Supra (*Campbell*, n. 102), para. 154.
[110] Supra (Gavison, n. 79).
[111] Kirsty Hughes, 'A Behavioural Understanding of Privacy and its Implications for Privacy Law' (2012) The Modern Law Review 75(5), pp. 806 – 36, p. 813.
[112] Supra (*Ambrosiadou*, n. 107), para. 30.
[113] *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446, para. 36.

the individual in a complimentary or laudatory light.[114] Conversely, if we were to take a different view and categorise this as an intrusion-style violation, we would be forced to deal with the requirement of some form of sustained and unwanted sensory access of the kind seen in cases such as *Von Hannover* and *Onassis*.[115] As Gavison writes, '[d]iscussing, imagining, or thinking about another person is related to privacy in a more indirect way, if at all.'[116]

To address, now, the second observation – that made in relation to physical privacy[117] – it seems clear that any claim asserting that the principal interest in 'intrusion' cases is reputation is likely to be met with a high degree of scepticism. After all, despite the numerous instances of disagreement on how to best conceptualise the right to privacy, there appears to be a general consensus within the academic community that the gravamen of the wrong in intrusion-style offences is not reputational harm (although this may occur in an incidental sense). Instead, the harm is predominantly seen as relating to the infliction of mental distress.[118] It should be stated, however, that while the two categories – informational and physical privacy – are analytically distinct, they have a tendency to overlap in practice. To the extent that interferences with informational privacy involve discovering things about a person that they had wished to keep hidden, it is clear that many of the actions which we would see as belonging to the sphere of intrusion will frequently entail a comparable degree of discovery. For example, by installing a hidden camera in someone's bathroom I may discover how they appear naked. Similarly, by bugging someone's phone I may discover a wide assortment of details about their life, ranging from the fairly innocuous to the highly damaging. While discovery is, however, very much the focus in a case dealing with an interference with informational privacy, it is not the principal concern in an intrusion-style case revolving around unwanted sensory access. As argued by Wacks:

'What is essentially in issue in cases of intrusion is the frustration of the legitimate expectations of the individual that he should not be seen or heard in circumstances where he has not consented to or is unaware of such surveillance. The quality of information thereby obtained, though it will often be of an intimate nature, is not the major objection.'[119]

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114 It is submitted that so far as informational-privacy cases are concerned, serious harm is bound to coincide with or consist of injury to reputation.

115 Supra (*Von Hannover*, n. 52); *Galella v Onassis* 487 F.2d 986 (2d Cir. 1973).

116 Supra (Gavison, n. 110), p. 432.

117 The language of 'physical' may be seen as slightly misleading, as it seems to imply that the physical presence of the voyeur is a necessary ingredient of the offence. This is not so. Instead, it refers to the apprehension of parts of our being through any one of the senses: sight, smell, touch, etc. Consequently, an action such as 'phone bugging' is commonly accepted to constitute an intrusion-style (i.e., 'physical') violation of privacy.

118 Supra (Solove, n. 72), p. 556; (Prosser, n. 99), p. 392.

119 Raymond Wacks, *Personal Information: Privacy and the Law* (Oxford University Press, 1989).

Instead, and as mentioned above, the harm concerns the infliction of mental distress. The mental distress in question is defined in varying terms by different academics. Gavison discusses it in terms of a diminution of our 'spatial aloneness.'[120] Solove, meanwhile, places greater emphasis on the loss of trust that might result from such an invasion of the privacy, and the degree to which such a breach might inhibit behaviour and, by extension, promote conformity.[121] Whatever the case or precise meaning given to 'mental distress', it would seem that reputational harm is not the issue of primary concern. How then can we bear out the argument that privacy is a proxy for reputation? It is important to remember that although England now recognises a tort for misuse of private information, the cause of action is chiefly concerned with the redress of interferences with *informational privacy*. This was made clear in *Campbell* through Baroness Hale's description of the cause of action as embracing 'the protection of the individual's informational autonomy' while excluding from its remit 'the sort of intrusion into what ought to be private which took place in *Wainwright*.'[122]

While the current trajectory of the law suggests that England is gradually inching towards the recognition of an American 'intrusion upon seclusion' - style tort[123] – indeed, there is a strong argument to be made that the effect of *PJS* was such that intrusion has now been partially subsumed into the tort of misuse of private information[124] – it remains the case that, as a *formal* matter of law, some information must be acquired, and that the law will not respond 'in the absence of some information-based wrongdoing.'[125] As Wragg observes, '[a] two tier system now exists between claimants whose information is misused, leading to intrusion, and their impoverished comparator, who suffers distress and intrusion, but [where] no information is misused.'[126] The effect of this, is that, rather than being covered by misuse of private information, non-informational privacy interests are instead afforded protection through a selection of other common law actions and statutory provisions. On this basis, one might reasonably conclude that, to the extent that English law now formally recognises a right to privacy, any such right is concerned solely with interferences with informational autonomy. In

[120] Supra (Gavison, n. 116), p. 433.
[121] Supra (Solove, n. 118), p. 553.
[122] Supra (*Campbell*, n. 109), para. 134.
[123] On this point, *PJS* and *Gulati* are of particular importance; see, in particular, the statement in *PJS* (n. 1) that 'a quantitative approach […] overlooks the invasiveness and distress involved, even in repetition of private material', para. 26.
[124] Supra (Wragg, n. 58), p. 410.
[125] Thomas DC Bennett, 'Privacy and Incrementalism' in *Comparative Privacy and Defamation*, ed. by Andras Koltay and Paul Wragg (Edward Elgar Publishing, 2020), pp. 24 – 47.
[126] Paul Wragg, 'Privacy and the Emergent Intrusion Doctrine' (2017) Journal of Media Law 9(1), pp. 14 – 27.

keeping with the above outlined analysis, it is argued that the harm occasioned by such interferences is generally injury sustained to reputation. From this, one might infer that, if only at a purely formal level, actionable interferences with the right to privacy are primarily concerned with reputational harm and, thus, that the right to privacy coincides perfectly with the right to reputation. Alternatively, and in light of the emergent intrusion doctrine, one could argue that the desired conclusion – that the right to privacy is a proxy for the right to reputation – is applicable to informational privacy only. As Prosser said of the public disclosure tort (a close analogue of misuse of private information) in his now famous article: 'the interest protected is that of reputation, with the same overtones of mental distress that are present in libel and slander. It is in reality, an extension of defamation.'[127]

Having now dealt with the two obstacles, we will now re-examine the relationship between privacy and reputation (previously discussed in the context of Warren and Brandeis' account of privacy) in order to further advance the argument that informational privacy is, in its barest form, simply a proxy for reputation. Before we can do this, however, we must first examine the various possible theoretical foundations of reputation. As has already been stated, domestic authorities have repeatedly cautioned that reputation and privacy should be treated as distinct rights, and that the interest that the law intended to afford protection through misuse of private information is not reputation. As stated by Justice Eady in *Mosley v News Group Newspapers*:

'Because both libel and breach of privacy are concerned with compensation for infringements of Article 8, there is clearly some scope for analogy. On the other hand, it is important to remember that this case is not directly concerned with compensation [of] […] injury to reputation […] the distinctive functions of a defamation claim do not arise. The purpose of damages, therefore, must be to address the specific public policy factors in play when there has been an 'old fashioned breach of confidence' and/or an unauthorised revelation of personal information. *It would seem that the law [of privacy] is concerned to protect such matters as personal dignity, autonomy, and integrity*.'[128]

Although this position has been articulated elsewhere (*Bloomberg*, for instance),[129] it will be suggested that the above drawn distinction is somewhat artificial in nature, and may stem from an overly restrictive conceptualisation of reputation. Many different concepts of reputation have been enunciated throughout the privacy scholarship. Post, for example, famously offered three

[127] Supra (Prosser, n. 118) p. 398.
[128] [2008] EWHC 1777 (QB), para. 214.
[129] Supra (*ZXC*, n. 13), para. 111.

possible concepts of reputation: reputation as property, as honour, and as dignity.[130] A useful starting point is that there is a broad consensus that reputation is something distinct from character.[131] This makes perfect sense if reputation is conceived of as something external to ourselves, something which 'inheres in the social apprehension that we have of each other.'[132] As Post writes, 'individuals […] are understood to possess personal identities that are distinct from and anterior to their social identities.'[133] Post's view that reputation is attributed rather than intrinsic is, however, difficult to reconcile with a conception of reputation as a kind of property, as something which is meticulously developed over time through our own efforts and which is afforded legal protection on that basis. This conceptualisation has, however, attracted little support, and it remains the case that reputation is generally seen as something public; something external to the individual. As Mullis and Scott write, '[y]et reputation – by dint of being determined by aggregating the appraisals made of an individual by other people – is quintessentially public in nature.'[134]

A similar view has been adopted by the European Court of Human Rights (henceforth, 'Strasbourg Court'). This can be seen clearly in the judgment of *Karako v Hungary*,[135] in which the court took reputation to refer to the external evaluation of the individual. This was in stark contrast to its treatment of personal integrity, which the Court described as 'inalienable' and as forming the substance of the Article 8 right to privacy. Interestingly, while the Strasbourg Court appeared to distinguish quite clearly between reputation on the one hand, and personal integrity on the other, it held that whether reputation falls within the ambit of Article 8 was to be determined by reference to the seriousness of the harm in question. As stated in the judgment, 'reputation has only been deemed to be an independent right sporadically […] and mostly when the factual allegations were of such a seriously offensive nature that their publication had an

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[130] Robert C. Post, 'The Social Foundation of Defamation Law: Reputation and the Constitution' (1986) California Law Review 74(3), pp. 691 – 742.

[131] For a useful overview of theories on reputation, see Tanya Asplin and Jason Bosland, 'The Uncertain Landscape of Article 8 of the ECHR' in *Comparative Defamation and Privacy Law*, ed. by Andrew T. Kenyon (Cambridge University Press, 2016), pp. 265 – 90. See also Lord Denning's comments on the distinction between character and reputation in *Plato Films Ltd v Speidel* [1961] AC 1090.

[132] Supra (Post, n. 130), p. 692.

[133] Ibid. (Post), p. 696. Although this comment was made in the context of discussing the notion of reputation as property, it appears to be equally true of the other concepts. For example, under an honour-based conception of reputation, reputation merely reflects the importance assigned to certain, long-established social roles, as opposed to one's character. Similarly, under a dignity-based conception, reputation is viewed as contingent upon the observance of rules of 'deference and demeanour', otherwise described as 'rules of civility.' Put differently, reputation is understood as inhering in the observance of the traditional rules governing social conduct. With respect to this latter point, a comparison may be made to the Roman *actio iniuriarum*, which, in compensating injury to reputation, required a breach of the 'boni mores.'

[134] Alastair Mullis and Andrew Scott, 'Reframing Libel: Taking (All) Rights Seriously and Where it Leads' (2012) Northern Ireland Legal Quarterly 63(1), pp. 5 – 25, p. 9.

[135] Application no. 39311/05 (April 2009), paras. 22 -23.

inevitable direct effect on the applicant's private life.'[136] While the Court, in *Karako*, did not necessarily depart from its previous jurisprudence – namely, *Pfeifer*, in which the Court held that 'a person's reputation […] forms part of his or her personal identity and psychological integrity'[137] – it does seem to qualify its previous admission through the introduction of the requirement that the harm attain a certain level of seriousness before reputation receives the benefit of Article 8's coverage.[138] While this approach is favoured by Mullis and Scott, who speak of '[its] merit [in] clearly differentiating two different aspects of reputation [these being] reputation as it affects personal dignity or psychological integrity, and reputation as property or quasi-property', it seems to slightly muddy the theoretical waters. [139]

To what extent does reputation bear on personal integrity and how can the former's apparently public nature be reconciled with the latter's description as an inalienable property of the soul? What seems relatively clear on a review of the authorities, is that reputation is an interest which points both inward and outward;[140] it possesses an essential reality (i.e., has an innate value) while at the same time constituting a publicly traded good whose value is ultimately subject to what Post would describe as 'market conditions.' As Kolb writes, 'reputation at once [represents] society's judgement of an individual's worth, and [refers] to *internalized*, personal, integrity.'[141] The dialectical nature of reputation can be seen quite clearly in the fact that it does not arise in a vacuum; it does not come from nothing. Though reputation is often a distorting mirror, it nonetheless depends on having a subject to reflect. This reflection is not arbitrary but is, to a considerable extent, conditioned by the particular characteristics of the subject. It is argued, therefore, that reputation resides first in the individual, before emanating out into the public sphere.[142]

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[136] Ibid. (*Karako*), para. 23.
[137] *Pfeifer v Austria*, Application no. 12556/03 (November 2007), para. 35.
[138] This, itself, was a development of the test established in *A v Norway*, Application no. 28070/06 (April 2009).
[139] Alastair Mullis and Andrew Scott, 'The Swing of the Pendulum: Reputation, Expression, and the Re-Centring of English Libel Law' (2012) Northern Ireland Legal Quarterly 63(1), pp. 27 – 58, p. 40.
[140] If this is correct, the validity of the orthodox understanding of defamation as being an outward-looking tort, concerning injury caused to the individual in his external relationships to the community, must be called into question.
[141] Laura Kolb, 'Jewel, Purse, Trash: Reckoning and Reputation in Othello' (2016) CUNY Academic Works, p. 246.
[142] Though some might suggest that this argument is premised on a false distinction between reputation and character, that is not so. Can we not hold ourselves in high/low repute (does not self-reputation exist)? As Goffman argues, 'a performer may be taken in by his own act, convinced at the moment that the impression of reality which he fosters is the one and only reality. In such cases, the performer comes to be his own audience; *he comes to be the performer and observer of the same show*'; see Erving Goffman, *The Presentation of Self in Everyday Life* (Penguin, United States, 1959). Furthermore, the fact that defamation requires both a defamatory statement as well as publication reinforces this position. Were this not the case, and reputation a wholly external element, the requirement of publication would contribute nothing above and beyond that of a defamatory statement (i.e., one which exhibits a tendency to injure reputation – supposedly, an external element).

The language of 'internalized' in the above quote is also key, as it places emphasis on the fact that the esteem in which we are *held by others* invariably plays a large role in determining the esteem in which we *hold ourselves*, and that this marks yet another way in which we are able to bridge the public/private divide. Indeed, there are many individuals whose entire sense of self-worth is predicated on their public perception. Why the Strasbourg Court, in *Karako*, felt that this process is only activated beyond a certain threshold is unclear. Rather, it would seem that our self-perception is constantly being moulded by our reputation (i.e., that this process is largely automatic), with the magnitude of its effect being more or less subtle depending on the particular circumstances at play. This is the view adopted by Mullis and Scott, who find little difficulty in placing reputation under the umbrella of Article 8.[143] Similarly, the partly concurring opinion of Judge Jociene, in *Karako*, found the question of whether reputation forms part of the right to respect for private and family life unnecessary, as many previous judgments of the Court had already highlighted the close proximity of reputation and dignity.[144] Furthermore, it would seem that, at a conceptual level, the degree of harm should speak to the question of where the balance most appropriately falls between Articles 8 and 10, as opposed to whether reputation forms part of the former right. As argued by Bosland and Asplin, 'this interpretation […] involves the doctrinally unsound conflation of the question of interference (i.e., whether the right is engaged) with the subsequent issue of the weight to be accorded such interference (i.e., at the balancing stage).'[145] Finally, and to the extent that, as stated by the Court, Article 8 is intended to promote 'the development […] of the personality of each individual in his relationships with other human beings',[146] it seems difficult to defend the strict separation of reputation and privacy, at least on a sociality justification of the former, which sees the importance of reputation as lying in its ability to facilitate the formation and maintenance of social relationships.[147]

To attempt, now, to synthesise the disparate strands of the argument, while the Strasbourg Court still appears to view injury dealt to reputation as, to borrow the language of Warren and Brandeis, primarily encompassing 'material harms', it is argued that dignity, personal/psychological integrity, and reputation frequently occupy a similar, if not the same, conceptual space. As the former two values – dignity and personal/psychological integrity – are often portrayed as the underlying interests of the Article 8 right to privacy, we might treat them as being synonymous with privacy. To finalise the argument, we will now attempt to link what

[143] Supra (Mullis and Scott, n. 134), p. 11.
[144] See concurring opinion of Judge Loucaides in *Lindon v France*, Application no. 21279/02 (October 2007).
[145] Supra (Bosland and Asplin, n. 131), p. 282.
[146] Supra (*Pfeifer*, n. 137), para. 33.
[147] David Howarth, 'Libel: Its Purpose and Reform' (2011) The Modern Law Review 74(6), pp. 845 – 77.

we previously identified as the foundational elements of privacy – dignity and choice – to the interest in reputation. While the relationship between reputation and dignity has already been made clear, that between reputation and control (which, in this instance, will be seen as serving as a proxy for 'choice') is less obvious. The basis of connection between the two interests is, however, well put by Gibbons who states: '[t]he wish to protect reputation actually derives from a broader interest in exerting control over personal information. Such control may be desirable, either because the information is considered private or because it may be used to form the basis of other people's judgements about the person concerned.'[148] A similar line of reasoning is adopted by Oster, who, employing a bottom-up, inductive approach, found that 'reputation can be understood as a right to control information about oneself.'[149] While Oster attempts to distinguish between reputation and privacy on the suggested basis that the latter is concerned with factual matters, as opposed to matters which are either untrue or which reflect mere statements of opinion,[150] this is not an accurate statement of the law. Rather, and as seen in cases such as *McKennitt* and *Bloomberg*,[151] untrue statements can interfere with a person's informational privacy, as the courts have repeatedly described the truth or falsity of a particular statement as a neutral circumstance in the assessment of MPI claims. Whether this should be the case is a separate issue, and one which will be discussed in subsequent chapters.[152]

Conclusion

In conclusion, though privacy retains some of its ineffable character, with different scholars expounding, at times, wildly different views of the interest, there are a number of readily observed points of intersection between the various theories. This, in turn, leads to the identification of a reasonably clear set of values forming the basis of the privacy interest. What is, perhaps, most apparent, is the paramount importance of dignity, which appears, on any theoretical account, to form at least part of the bedrock of the right to privacy. Although this recognition only takes us so far – as Mullis and Scott rightly observe, dignity is simultaneously 'everything and nothing'[153] – it nonetheless serves as a useful starting point. Importantly, it highlights the centrality of both autonomy and self-determination, both of which may be seen as

[148] Thomas Gibbons, 'Defamation Reconsidered' (1996) Oxford Journal of Legal Studies 16(4), pp. 587 – 616, p. 589.
[149] Supra (Oster, n. 68), p. 61.
[150] Ibid.
[151] Supra (*ZXC*, n. 129); (*McKennitt*, n. 12).
[152] See analysis in Chapter 3.
[153] Supra (Mullis and Scott, n. 139), p. 38.

aspects of dignity, as well as choice. The latter is of particular note, as it has been argued that the right to privacy is largely one of presentation; a right to choose the extent to which parts of, or information about, us is apprehended by others. This is, of course, subject to certain limits, as the question of under what circumstances we enjoy a right to privacy is, ultimately, a normative inquiry. What has also come into sharp relief, is the close relationship between privacy and reputation. While this thesis has gone further than most, arguing that the two are largely coterminous rights – something which was destined to prove a highly contentious proposition – what is clear is that there is scope for further debate. While the precise borderline between the two rights remains unclear, this first chapter has, it is hoped, succeeded in its goal of suggesting that the right to privacy may be more concerned with the vindication of reputation than the current scholarship would suggest. Whatever the case, it is essential that the law be able to clearly articulate the values which underpin legal rights. Otherwise, we risk building a house of cards. Although there is, as stated above, a growing sense as to what elements are central to the privacy interest, it is argued that this sense can be further refined, and that there are as yet inconsistencies and gaps in how and when these supposed elements are given expression in domestic privacy law. These issues must be addressed if the domestic privacy regime is to achieve the desired degree of coherence (again, the cornerstone of this thesis), and will form the focus of the remaining two chapters.

- Chapter 2 -

False Light and Intrusion on Seclusion

Introduction

Much of the preceding chapter focused on the relationship between privacy and reputation. In doing so, it closely examined the precise kinds of harm that each of the above rights is concerned with. While this chapter will continue along that same line of analysis, it will do so through a different lens. Instead of adopting a theoretical perspective, inspecting the conceptual overtones of the rights to privacy and reputation, this chapter will pursue a narrower, slightly more doctrinal, focus. While this chapter will continue to inspect the nature of the

privacy interest, it is less interested in setting out a grand theory of privacy and engaging in the same level of philosophical abstraction seen throughout the first chapter. As discussed in the introductory chapter, its principal goal is, ultimately, two-fold.

First, it will analyse the US tort of 'false light' as a cause of action centring on false privacy, with particular focus being placed on the extent to which the tort overlaps with that of defamation and whether there remains a sound theoretical basis for its existence. It will consider whether, as suggested by its creator, William Prosser, the tort is truly intended to protect the right to reputation and, if so, how this can be reconciled with the tort's traditional categorisation as part of the privacy *genus*. In this regard, the thesis will adopt the orthodox understanding of privacy and reputation as connoting distinct, if related, interests. In examining these issues, it will ask whether our understanding of the relationship between privacy and reputation has benefited from the introduction of false light, or if it has been further occluded.

Second, it will further examine the tort of 'intrusion upon seclusion.' In particular, it will resume the discussion of the degree to which English law currently provides a remedy for intrusion-style offences (i.e., 'physical' privacy cases) as well as inquire into the nature of the harm that such claims are intended to redress. Specifically, it will, through an examination of several key cases, further analyse whether English and Welsh law has established liability for intrusions upon solitude through the back door – namely, through an incremental development of the law surrounding misuse of private information – and, assuming that it has, seek to establish how domestic law characterises the harm in such cases. It will achieve this by considering two different juridical bases for liability in cases centring on intrusion, one which focuses on the infringement of the right *per se* and suggests that this constitutes a distinct harm in and of itself, and the other, a consequence-based approach which focuses on the degree to which injury was sustained as a result of the initial breach. In other words, it will seek to ascertain whether the harm flows from the intrusion or is part and parcel of the intrusion. Here, reference will be made to caselaw as well as academic commentary, most notably, Moreham and Descheemaeker. In engaging in this analysis, it will consider how these differing characterisations reflect the nature of the privacy interest itself and, in turn, whether any novel features of privacy revealed through this process bear on our previous assessment of the relationship between privacy and reputation.

As a brief disclaimer, neither false light invasion of privacy nor intrusion upon seclusion has been afforded recognition in the United Kingdom (formal recognition, in the latter case; indeed, and as mentioned above, the question of whether the common law recognises liability

for intrusion-style violations of privacy forms the essence of much of the subsequent analysis). While the principle of selection, in choosing to focus on these two torts, might simply appear to be that they both form part of Prosser's privacy matrix – admittedly, a fact which formed part of the rationale – the decision was informed by further, more salient considerations. So far as false light invasion of privacy is concerned, it was thought that, in light of its similarities to misuse of private information (in particular, when it is viewed alongside what it frequently contended to be its logical adjunct: the disclosure of private facts tort), an analysis of the theoretical underpinnings of the tort might prove illuminating. As for intrusion upon seclusion, in view of the historic and infamous void in domestic privacy law as to violations of 'physical' privacy, alongside relevant judgments in several recent English cases, it was thought that this would prove a similarly fruitful area of discussion. In particular, it was thought that the question of whether, through the purported absence of liability for violations of physical privacy, English and Welsh law fails to afford effective protection to the elements of 'dignity' and 'choice', would speak directly to the issue of whether the domestic privacy regime possesses an appropriate degree of internal-consistency. Ultimately, while it is readily conceded that domestic privacy law has developed in a manner entirely distinct from that of the US and, importantly, under very different historical circumstances, it is argued that the two bodies of privacy law rest on sufficiently similar theoretical foundations that an analysis of torts under one might disclose something of true significance about the other. It is, therefore, suggested that a close analysis of these two torts, and the legal interests which they represent, is useful in answering the question of whether the domestic privacy regime is conceptually coherent.

False Light

So far, much, if not all, of the discussion of Prosser's taxonomy of privacy has centred on two torts in particular: 'disclosure of private facts' and 'intrusion upon the claimant's seclusion.' Little, if anything, has been said, however, of the third of the four torts: 'false light in the public eye.'[154] What exactly does this form of invasion of privacy involve? The very language of 'false light' seems to imply that, like defamation, the 'false light' tort is concerned with misrepresentations of one's character. Indeed, this much is true. One of the first examples provided by Prosser of the forms the action may take is that of false attributions of statements or opinions. A further form, and one which seems to bear a startling resemblance to the tort of

[154] Supra (Prosser, n. 127), p. 398.

'appropriation of one's likeness', is the use of an individual's image in connection with an item, company, or campaign that they have not previously endorsed. The final form described by Prosser concerns false claims or suggestions that a person is guilty of having engaged in criminal conduct.

What will be immediately apparent to anyone with even a rudimentary understanding of the relevant law is that all of the above examples concern actions which *could* form the basis of a claim in defamation. This overlap is not, however, limited to false light and defamation, although it is with respect to this relationship that it is felt most keenly. As alluded to above, if, in the process of attributing to the claimant some false opinion or utterance, the tortfeasor also appropriates his or her image, they will have also committed 'appropriation of name or likeness.'[155] Consequently, it would appear that none of the aforementioned cases provided by Prosser offers an example of a judicial lacuna solely capable of being filled by the tort of false light. In other words, none of the listed examples describes a scenario in which a hypothetical claimant could only recover on the basis of the proposed cause of action, that of false light. As Kelso writes, '[not one] of the cases Prosser cited in support of false light privacy come close to recognising such a tort.'[156]

This much is, seemingly, acknowledged by Prosser himself, who states '[t]here has been a good deal of overlapping of defamation in the false light cases, and apparently either action or both, will very often lie.'[157] He does note, however, that while the innuendo meaning will often be a defamatory one, this is not a necessary ingredient of the wrong, with the central question instead being 'whether the published material would be objectionable to a reasonable person of ordinary sensibilities.'[158] In this respect, the tort bears a slight resemblance to the English action of malicious falsehood, which does not require proof of reputational harm. What, then, are the precise elements of the tort? Per s. 652E of the *Restatement (Second) of Torts*, the false light action appears to consist of publicity, given to a false matter, which would be highly offensive to the ordinary person. There is also a further, mental, requirement that the publisher had actual knowledge of the publicized matter's falsity and its likely effect on the affected individual, or that they acted with reckless disregard to these elements. [159]

[155] Andrew Osorio, 'Twilight: The Fading of False Light Invasion of Privacy' (2010) New York University Annual Survey of American Law 66(1), pp. 173 – 210, p. 183.
[156] J. Clark Kelso, 'False Light Privacy: A Requiem' (1992) Santa Clara Law Review 32(3), pp. 783 – 888, p. 787.
[157] Supra (Prosser, n. 154), p. 400.
[158] William Prosser, *Handbook of the Law of Torts* 813 (West Publishing Company, St. Paul, 4th edn, 1971).
[159] Supra (Restatement, n. 100).

Of the aforementioned elements, the one most likely to immediately stand out is that of 'falsity.' This is because it represents a somewhat radical departure from the conceptualisation of privacy set out by Warren and Brandeis. As stated by Barinholtz, 'Warren and Brandeis were concerned with the injury to the 'right of privacy' that flows from the unconsented disclosure of private facts and not the truth or falsity of those disclosures.'[160] A similar point is made by Zimmerman, who argues that far from seeking to cast the publication of false information as a novel wrong requiring the introduction of a new remedy, the above authors' principal concern, in writing their article, was 'the exposure of accurate but personal information.'[161] Accordingly, heavy emphasis was placed on the element of secrecy; on the private nature of the information in question. Although Wigmore, by focusing on the interest which is interfered with – in this case, injury to feelings of self-respect – describes a kind of false attribution (albeit, one which he is careful to distinguish from false light) in terms which help to partially link it with Warren and Brandeis' account of privacy, it remains the case that secrecy or, conversely, discovery, is not a vital element of the action. Rather, 'the key to a false light privacy claim is the presence of *falsehood*, not any element of secrecy.'[162] In this respect, the position is almost the reverse of that seen in the United Kingdom as regards misuse of private information, under which it is the private nature of the information that is of central importance.[163] Despite this, many of those who support the existence of false light do so by attempting to relate it to a misuse of private information-like cause of action whose primary purpose is to facilitate the individual's ability to '[define their] sense of self within society.'[164]

What should now be clear, is that much of the current criticism of false light invasion of privacy focuses on the degree to which the action is duplicative of other torts, namely, defamation. It is, therefore, worthwhile to delve further into this particular issue. As previously mentioned, while false light invasion of privacy and defamation appear to share much in common, there are important (if largely formal) differences between the two causes of action. One of these differences can be seen in the kinds of injuries that each of the torts is intended to remedy. While the law of defamation was engineered to safeguard against injuries to reputation, false light is concerned with the infliction of emotional distress. This can be seen clearly in comment (b) to section 652E of the Restatement which reads: 'it is not, however, necessary to the action for invasion of privacy that the plaintiff be defamed. It is enough that he is given

[160] Supra (Barinholtz, n. 15), p. 145.
[161] Supra (Zimmerman, n 28), p. 14.
[162] *Rinsley v Brandt*, 446 F. Supp. 850.
[163] In broad terms, this is an accurate statement of the law. See, however, the analysis in Chapter 3.
[164] Supra (Schwartz, n. 70), p. 897.

unreasonable and highly objectionable publicity that attributes to him characteristics, conduct, or beliefs that are false, and so is placed before the public in a false position.'[165] The position is put slightly differently by Osorio, who, citing a case from the Ohio Supreme Court, argues, '[the interest protected by false light] is the *subjective* one of injury to the [inner] person, as compared to the *objective* one of reputation [which is protected by defamation].'[166] Whether this proves a useful or, indeed, accurate distinction will, of course, depend on how we interpret the language of 'reputation'. Specifically, it will depend on whether we take 'reputation' to refer to something internal, which refers to the individual's self-regard, or something external, which is generated by and resides in the public eye.

The previous chapter has, as seen, cut against the academic grain and suggested that 'reputation' be given a less restrictive meaning, and one which is capable of embracing subjective, 'spiritual' harms. While there is, currently, limited support for this position, the US Supreme Court suggested that, in providing remedies in claims for defamation, 'States could base awards on elements other than injury to reputation, specifically […] humiliation, mental anguish, and suffering.'[167] A not dissimilar position was once articulated by the New York Supreme Court in the case of *Kimmerle v NY Evening Journal.*[168] While the Court defined defamatory statements (i.e., those injurious to reputation) as those which possess the familiar characteristics of 'tending to expose one to *public* hatred, shame […] and ridicule', it added that words tending to 'deprive one of their confidence' were equally capable of being described as defamatory.[169] Unlike the former criteria, which, one might argue, take place in how others think of you, a diminution of confidence can only take place in the affected individual; it is wholly internal. Based on the above two statements of the law, it is argued that two, alternative inferences may be drawn. The first, as suggested by Osorio, is that defamation may, at a practical level, be said to apply to non-disparaging statements.[170] The second, meanwhile, is that injury to reputation can be interpreted in such a way as to allow recovery, in claims for defamation, of emotional distress and mental anguish. While the two may, at first glance, appear to represent opposite sides of the same position, it is argued that the latter inference is the better of the two, as to suggest that defamation does not require a disparaging statement would, it is submitted, represent far too great a departure from the orthodox understanding of the tort. Although certain academics, among them Prosser, have argued that false light and defamation can be distinguished on the

[165] Supra (Restatement, n. 159).
[166] Supra (Osorio, n. 155), p. 192.
[167] *Time, Inc. v Firestone* 424 US 448 (1976).
[168] *Kimmerle v NY Evening Journal, Inc* 186 NE 217 (NY 1933).
[169] Ibid. English law has, at times, adopted a similar position; see the analysis in Chapter 3 below.
[170] Supra (Osorio, n. 166).

basis that whereas the former is concerned with the protection of one's reputation, the latter aims to safeguard the right to be let alone,[171] a right which, as seen in the previous chapter, encompasses violations of both informational and physical privacy, this is susceptible of the same criticism.

Despite these statements, throughout much of its infancy, false light was treated as protecting substantially the same interest as defamation. This can be seen quite clearly in the fact that, where a claim was capable of sounding in both false light invasion of privacy and defamation, plaintiffs would often sue for both instead of solely for invasion of privacy. This is reflected in comment (b) to section 652E of the Restatement which states, 'the action of invasion of privacy will afford an alternative or additional remedy [to that of defamation], and the plaintiff can proceed upon either theory, or both, although he can have but one recovery for a single instance of publicity.'[172] This point is further illustrated by the US Supreme Court's treatment of false light. On both occasions that the Supreme Court was asked to reckon with false light invasion of privacy,[173] it imported many of the requirements and rules from defamation into the false light tort: most prominently, the standard of actual malice, which stipulates that it must be shown that the defendant acted with either actual knowledge of the impugned statement's falsity or reckless disregard to its falsity before liability can be established.[174] In this sense, and as noted by Zimmerman, the Court treated the two torts as 'roughly equivalent.'[175] This is problematic for reasons that will become apparent upon an examination of the facts of the two cases heard by the Court: *Time, Inc. v Hill* and *Cantrell v Forest City Publishing Co.*[176] In both cases, the falsehoods complained of were not defamatory. While the false information in the latter case was of a neutral quality – offering little, if anything, that would have an impact on the assessment of the claimant or her family – the falsehoods in the former case were, far from being defamatory, complimentary – suggesting that the subjects of the publication had responded bravely in the face of danger. Despite the absence of reputational harm in *Hill* and *Cantrell*, it seemed implicit, in both judgments, that the claimants could recover on the basis of some benign or technical inaccuracy. While it is clear, therefore, that false light invasion of privacy encompasses a broader class of speech than defamation, it would appear that

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171 Ruth Walden and Emile Netzhammer, 'False Light Invasion of Privacy: Untangling the Web of Uncertainty' (1986) Hastings Journal of Communications and Entertainment Law 9(3), pp. 347 – 82.
172 Supra (Restatement, n. 165).
173 See *Tim, Inc. v Hill*, 385 US 374 (1967) and *Cantrell v Forest City Publishing Co.*, 419 US 245 (1974).
174 As observed by Osorio (n. 170), while the formulation of false light originally envisioned by The American Law Institute clearly did not stipulate such a requirement, the decision in *Hill* had the effect of causing the version of the tort incorporated into the Restatement to require proof of the defendant's mental state.
175 Supra (Zimmerman, n. 161), p. 385.
176 Supra (*Hill*, n. 173); (*Cantrell*, n. 173).

the only statements for which false light offers a remedy not already provided by defamation are those containing either complimentary or entirely innocuous falsehoods.

While Shwartz has advocated for the recognition of a limited doctrine of false light invasion of privacy applying to non-disparaging statements,[177] this, too, presents a number of conceptual hurdles. As mentioned above, under s.652E of the Restatement, for a statement to be actionable as a false light invasion of privacy it must be one that would prove 'highly offensive' to the reasonable person. On this point, there are two issues that merit brief discussion. First, in what circumstances will a false, but non-defamatory statement prove 'highly offensive' to the reasonable person? While the Court, in *Cantrell*, suggested that this standard, alongside that of 'material and substantial falsification', was satisfied, it is argued that this should not be held up as proof that the above elements can be reconciled. Rather, it should signify that that the above standard lacks objective content and is easily satisfied.[178] This question was similarly dealt with in the case of *Jews for Jesus, Inc. v Rapp*. In this case, the Florida Supreme Court, in attempting to answer the question of whether false light was sufficiently distinct to merit recognition as an independent tort, suggested that 'conduct which defames will often be highly offensive to a reasonable person, just as conduct that is highly offensive will often result in injury to one's reputation.'[179]

It would seem, therefore, that the courts tend to equate the test under defamation with that relevant to the assessment of false light. This belief is echoed in academic writings. Barinholtz, for example, believed that the requirement of 'highly offensive to a reasonable person' amounted to no more than a 'watered-down version of defamation law's requirement that the statement be defamatory [and liable to cause serious harm to the claimant].'[180] Indeed, these assessments of the standard of liability under false light invasion of privacy – specifically, its similarity to that of defamation – are supported by Prosser himself, who famously worried that, in giving name and form to false light, he had birthed a legal behemoth capable of 'swallowing up and engulfing the whole law of public defamation.'[181] Second, even if it were accepted that there existed narrow circumstances in which a non-defamatory statement could be said to cause a certain degree of offense, is it socially desirable that the publication of such statements gives rise to liability? As argued by Barinholtz, '[t]hese statements […] should be determined inoffensive as a matter of [principle, as the law] is designed to protect the average

[177] Supra (Schwartz, n. 164), p. 893.
[178] Supra (Zimmerman, n. 175), p. 391.
[179] 997 So. 2d 1098, 1103 (Fla. 2008).
[180] Supra (Barinholtz, n. 160) p. 157
[181] Supra (Prosser, n. 157), p. 401.

person of ordinary sensibilities, not the hypersensitive individual who would be offended by being the subject of a laudatory falsehood.'[182]

While it is possible that the recognition of liability for such a category of statements – those of non-defamatory untruths – could be justified on the basis of the inherently injurious character of falsehoods, this too can be made subject to criticism. As discussed in chapter 1 in relation to moral and legal arguments about the normative value that recognition of the right to privacy serves, the worth of something as value-laden as truth cannot be assessed in a vacuum. Consequently, it is impossible to describe elements such as 'truth' and 'falsity' as desirable or not in the abstract.[183] Instead, any assessment of their value must be made by reference to the context in which they occur. Although it could be argued that, as a matter of social policy, falsehoods should be treated as inherently harmful due to their common tendency to undermine trust and damage our ability to engage in communal life,[184] this does not mean that individuals should be entitled to bring a claim for false light invasion of privacy in respect of any bare falsehood. To hold otherwise would, it is argued, be to allow individuals to recover for the most insignificant and trifling harms, and would be entirely at odds with the now common refusal, between the US and UK, to recognise presumed damages in actions for privacy and defamation.[185]

Furthermore, and depending on the nature of the publication, such an approach would risk establishing a false equivalence between higher and lower order falsehoods, in that claimants would be equally well positioned to bring a false light action in respect of a laudatory falsehood as they would one alleging criminal conduct.[186] As argued by Osorio, 'the law […] must differentiate and make allowances for offenses that are inherently dissimilar.'[187] A better justification, and one which would help to shift false light invasion of privacy away from defamation and closer to what it purports to be – a privacy tort – would, it is argued, be to suggest that being portrayed in a false, albeit positive, light constitutes an affront to dignity.[188] While it may, at first blush, appear strange to describe a flattering untruth as capable of causing injury to a person's dignity, the rationale becomes clearer if we view dignity in the terms outlined

[182] Supra (Barinholtz, n. 180), p. 148.
[183] Supra (Solove, n. 121).
[184] Once could, however, also make the argument that the gears of social cooperation are greased by falsehoods, and that, in assessing their effect, due regard must be had to the intention behind them (e.g., charitable lies).
[185] See s. 1 of the Defamation Act 2013; *Gertz v Robert Welch, Inc.* 418 U.S. 323 (1974).
[186] Supra (Osorio, n. 174), p. 200.
[187] Ibid.
[188] One basis on which this argument has been advanced is that, for a person of integrity, receiving undue praise causes as much discomfort and embarrassment as being the subject of a derogatory falsehood; see Nathan Ray, 'Let There be False Light: Resisting the Trend Against a Growing Tort' (2000) Minnesota Law Review.

in the previous chapter. To the extent that a falsehood denies a person their right to choose if and how aspects of their lives are presented to the wider world – a key criterion under the revised taxonomy of privacy set out in the first chapter – its publication may well result in a diminution of that person's dignity. While Goldberg and Zipursky frame their analysis around the element of 'control', as opposed to 'choice', it is on a substantially similar theoretical basis that they advance the claim that false light is best construed as a species of privacy tort.[189]

There are, however, several problems with this line of argument. For example, how can this observation be reconciled with the requirement of 'publicity' under s.652E of the Restatement. Unlike defamation, whose requirement of 'publication' can be satisfied by disclosure to a single person,[190] the equivalent requirement under false light invasion of privacy demands that the communication be disseminated to a sufficiently large audience so as to constitute widespread publicity.[191] If, as is commonly accepted throughout the relevant scholarship, breaches of privacy are generally seen as impacting on one's sense of self-worth (i.e., as constituting 'spiritual harms'), as opposed to one's standing within a particular community, why would a supposed privacy tort specify such a requirement?[192] This, alongside the startling omission, under s.652E, of a requirement that the matters given publicity not be of legitimate public concern, seems to suggest that what we are truly contending with is a reputational-injury style tort, as opposed to one concerned with invasions of privacy (i.e., that false light is not necessarily concerned with facts concerning the private lives of those affected).[193] This is supported by the fact that, as mentioned above, the key focus under false light invasion of privacy is, appropriately, falsity, as opposed to whether the subject matter of the impugned publication touches upon an area of life that would be fairly characterised as substantively private. In this respect, the title given to the tort is a slight misnomer as, due to the absence of any subject matter restrictions on the application of false light invasion of privacy, the only sense in which the tort necessarily bears on an individual's private life would be if we were to proceed along the line of analysis outlined above, and suggest that any misrepresentation disentitles a person to their right to presentation and causes a 'mismatch between the plaintiff's actual identity and his identity in the minds of others.'[194]

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[189] John Goldberg and Benjamin Zipursky, 'A Tort for the Digital Age: False Light Invasion of Privacy Reconsidered' DePaul Law Review, p. 13.
[190] *Banks v Cadwalladr* [2023] EWCA Civ 219, para. 41.
[191] Supra (Restatement, n. 172).
[192] It should be noted that false light is not alone in stipulating such a requirement, as the public disclosure tort requires a comparable degree of publicity. Consequently, the above criticism applies with equal force to both causes of action.
[193] Supra (Goldberg and Zipursky, n. 189).
[194] Supra (Schwartz, n. 177), p. 898.

An added layer of complexity is, furthermore, introduced by the fact that, despite false light's apparent focus on falsity, many of the decisions to which Prosser had prayed-in-aid in suggesting that the common law had implicitly recognised the existence of such a tort had not tied liability to the element of falsity. Instead, 'they [merely] expressed a dainty, pre-modern sensibility according to which individuals have a general right to be free of media coverage regardless of whether they are being portrayed inaccurately or accurately, and regardless of newsworthiness.'[195] In other words, the gravamen of the wrong was the unwanted attention, not the quality of any information acquired or, indeed, its subsequent publication, an element which lends itself more cleanly to the intrusion upon seclusion tort than false light invasion of privacy. What seems clear then, in this sea of contradictions and criss-crossed values, is that false light invasion of privacy occupies a liminal space somewhere between a privacy tort and a defamation-like, reputational injury style tort (in the traditional sense of that term).

At this stage of the analysis, it behoves me to make clear a number of points. First, this thesis does not treat, as problematic, the mere fact that false light adopts for itself an intermediate position between a privacy action, and one intended to protect reputation. The clear thrust of the analysis of the first chapter (and, indeed, this entire thesis) was, after all, that privacy and reputation are very closely related interests. It would, therefore, be entirely contradictory to criticise false light on that basis. Importantly, however, the fact that such an overlap may, as a point of principle, prove acceptable, does not eliminate the need for consistency and certainty in developing a cause of action engineered to deal with such hybrid cases. It is suggested that this represents the primary issue in relation to false light. Despite Prosser's attempt to avoid structural and doctrinal instability by clearly distinguishing between what he perceived as the different facets of the privacy interest, it is simply not clear to what extent false light views privacy and reputation as interests which coincide or, indeed, which of the two the tort is designed to protect. As seen in the foregoing analysis, this is an issue that has plagued false light from the moment of its inception.

Second, and to return to the issue raised in the introduction to this chapter, how does an analysis of false light (an American tort) bear on the conceptual integrity of the privacy regime found in England and Wales? The reason, it is submitted, is because false light serves, in many ways, as a logical and useful comparator to the domestic action of misuse of private information. This can be seen in the fact that both torts can apply to 'false privacy' (although in the case of false light, this is the very nature of the action). While domestic law has, in its development of

[195] Supra (Goldberg and Zipursky, n. 193), p. 7.

MPI, eschewed several of the problems associated with false light – namely, its emphasis on falsity (an issue that will be discussed further on) – both torts blur the boundaries between privacy and reputation, with false light therefore serving as an ideal case study. False light is, then, a very useful illustration of the conceptual pitfalls that result from developing a cause of action which is intended to vindicate both privacy and reputation while simultaneously insisting that these constitute distinct interests (a mistake that domestic privacy law has been equally guilty of). A further reason why false light is relevant to this question, and one which will be addressed in full in the third chapter, is because it will be argued that 'falsity', by itself and divorced from the element of reputational harm, does not constitute an actionable harm and is, therefore, an insufficient basis upon which to argue that a given claim is most appropriately brought in defamation. Consequently, an analysis of false light is of assistance in considering the extent to which domestic law inadvertently facilitates procedural abuses.

Thus far, much of the discussion has focused on the extent to which false light has proven problematic. While false light does have its share of detractors, there are also those who maintain that the tort serves a useful purpose and one which, importantly, is not served equally by defamation or any of the other torts comprising Prosser's composite privacy interest. It will, therefore, prove illustrative to briefly outline and address some of the arguments advanced in favour of the continued application of false light. As previously discussed, many of the arguments made in support of false light focus on its potential jurisdiction over non-defamatory but highly offensive statements. Such statements are said to fall into several different categories. As noted by Schwartz, these include statements about private aspects of claimants' lives, statements which portray the claimant as having been victimised by various circumstances, and statements which attribute virtues or accolades to the claimant that they have not earned. In each of these examples, the essential harm appears to lie in the fact that the falsehood creates a discrepancy between how a claimant views themself, and how they are perceived by others. As observed by Osorio, 'the tort may be said to guard against the cognitive dissonance which arises when a false projection of the individual clashes with his own self-image.'[196]

While Schwartz appears to concede that false light statements can, therefore, bear on an individual's reputation – recognising that the harm arises from an inconsistency between an individual's self-image and any reputation attributed to them – he nonetheless contends that the harm which occasions a false attribution is wholly cognizable in privacy terms. He does this by suggesting that non-defamatory false statements very often concern deeply private areas of the

[196] Supra (Osorio, n. 186), p. 207.

subject's life. In this respect, he attempts to establish a clear theoretical connection between false light invasion of privacy and Prosser's disclosure tort, as the latter requires that the matter given publicity concern the private life of the claimant. This is a popular line of argument. Indeed, it had been previously suggested by Nimmer – using the famous example of a photo depicting a woman's head superimposed onto the nude body of another woman – that the publication of a false fact concerning a private area of life is no less offensive as a result of its falsity.[197] If, then, the publication is one which the law would, but for its falsity, consider a wrongful disclosure, Nimmer suggests that the defendant should not be able to escape liability simply by availing themself of the element of falsity. To hold otherwise would, as suggested by Zipursky and Goldberg, be to place a premium on falsehood.[198] This view is shared by Kalven, who similarly argues, '[the plaintiff should not] be allowed to bolster a claim for privacy on the ground that a statement is false.'[199] On this basis, supporters of false light argue that the tort is best seen as forming the other half of the disclosure tort under Prosser's taxonomy of privacy and, as a logical corollary, that the touchstone of liability for invasions of privacy should be taken as whether the complained of statement touches upon an individual's private life, as opposed to whether the statement is true or false. In principle, this argument seems persuasive. It is also highly reminiscent of the approach taken to privacy under English law, specifically, misuse of private information. Upon a closer inspection, however, certain cracks in the argument begin to appear.

First, and to address some of Zipursky and Goldberg's concerns, while the authors claim that adopting an approach under which the publication of non-newsworthy statements is not actionable either way would be tantamount to putting a premium on falsehood, this is precisely what the false light tort does. There is a clear difference between the law being *indifferent* to the truth or falsity of a particular statement on the one hand (as is the case under misuse of private information in domestic law), and the law *requiring* the presence of falsity as an element of liability, on the other. The latter approach clearly suggests that the element of falsehood forms the heart of the harm contemplated by the tort. While this accords with Prosser's initial conception of the tort,[200] as he believed that false light was primarily concerned with reputational

[197] Melville B. Nimmer, 'The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy' (1968) California Law Review 56(4).
[198] Supra (Zipursky and Goldberg, n. 195).
[199] Harry Kalven, 'Privacy in Tort Law – Were Warren and Brandeis Wrong?' (1966) Law and Contemporary Problems 31(2), p. 341.
[200] A later publication bearing Prosser's name, however, described the interest protected by false light invasion of privacy as that in being left alone; see William Prosser, *Prosser and Keeton on the Law of Torts* (West Publishing Company, St. Paul, 5th edn, 1984).

harm, it certainly does not align with those set out above. Moreover, the argument that false light should be treated as the logical adjunct to the disclosure tort falls into error in a further, key respect. As observed by Keeton, recovery for an invasion of privacy under a false light theory 'only makes sense when the account, if true, would not have been actionable as an invasion of privacy.'[201] In essence, it is, in large part, the falsity of a particular statement that renders its widespread publication 'highly offensive'[202] This view is logically consistent with the elements of the tort as set out in the Restatement.

Second, some of the situations said to justify the existence of false light could, in reality, also give rise to an action for defamation. This can be seen in the very example cited by Nimmer. Because an action for defamation can be brought in respect of the publication of statements which are strictly true, but which have a defamatory sting or imputation, there is no reason, in principle, why the woman in Nimmer's example would not be able to proceed under a theory of defamation.[203] The result of this is that the scope of a doctrine whose most ardent defenders had already conceded was limited, must be even further narrowed. The death knell for false light is, it is argued, sounded by the fact that, even within the narrow remaining circumstances in which the tort might be said to have some, limited, application, it will generally be the case that some other privacy tort (appropriation, for example) could also apply. While a tort such as appropriation might be said to have more in common with a proprietary interest than a right 'to be let alone', it is nonetheless the case that such an action would be capable of vindicating an individual's right to privacy in such circumstances. In this respect, and as observed by Osorio, many of the defenders of false light fall into the either-or fallacy, arguing that the inapplicability of defamation to the facts of a particular case serves to justify the existence of false light, without having regard to the suite of other torts which might provide a claimant with a remedy.[204]

If nothing else, it is hoped that the preceding section has succeeded in illustrating the extent to which false light invasion of privacy is a beleaguered tort, and one which has been plagued by criticism from its very inception. Indeed, even its author appeared, like a latter-day Victor Frankenstein, to look upon his creation with great scepticism and trepidation. While there are some convincing arguments in favour of the tort's continued existence as a discrete cause of action, this thesis takes the view that false light was fundamentally ill-conceived and theoretically stillborn. This view is, perhaps, best supported by Prosser's initial suggestion that the tort is

[201] Ibid. (Prosser), p. 865
[202] Ibid.
[203] Supra (Osorio, n. 196), p. 196.
[204] Ibid.

concerned with reputational harm. Despite repeated attempts to posthumously vindicate false light, it is argued that the tort was never able to escape the penumbra of Prosser's mistake. As a brief illustration, if we accept Nimmer's suggestion that the harm consequent upon an invasion of privacy does not revolve around the element of falsehood, but rather 'the injury […] to a man's interest in maintaining a haven from society's searching eye',[205] it becomes eminently clear that false light is not, based upon its current formulation, a privacy tort at all. Although the first chapter has sought to argue that the rights to privacy and reputation are more closely related than many would realise, this does not obviate the need for false light to justify its existence as an independent cause of action, nor does it excuse the high degree of ongoing uncertainty as to what exact interest the tort is intended to protect. While 'false privacy', as a distinct category of case, is a desirable concept, its utility lies primarily in its recognition that truth and falsity are secondary concerns. This aspect, at least, is effectively captured in the domestic action of misuse of private information. However, and as seen above, false light does not the exact opposite, making the element of falsity central to a claim that is portrayed as sounding *in privacy*. This cannot be right. For these reasons it is argued that false light invasion of privacy serves only to further obfuscate the true position in relation to the complex relationship between reputation and privacy – a position that was, importantly, already difficult to discern – and should, therefore, be reconstructed or consigned to history.

Intrusion Upon Seclusion

The first chapter, as well as the above section on false light, have largely been concerned with informational matters. As recognised earlier in this thesis, however, the right to privacy (in the abstract, and not simply as expressed in any particular legal system) is concerned with a wider range of issues. Of the conclusions reached in the first chapter, one of the most important is that breaches of informational privacy are the sole purview of the right to privacy recognised under the law of England and Wales (at least, in a formal sense). While this chapter will not seek to question this conclusion, it will ask whether liability for non-informational wrongdoing has been recognised in some other, less certain, sense. Importantly, and with regard to the primary research question, it will ask whether the absence of liability for 'physical' violations of privacy results in a privacy regime which is deficient, and which promotes incoherence by failing to provide protection for many of the values recognised as forming integral parts of the privacy

[205] Supra (Nimmer, n. 197), p. 958.

interest. With these issues in mind, we will now turn to another of the torts forming Prosser's composite privacy interest: 'intrusion upon seclusion.'

Before delving into the precise elements of the tort under US law, it will prove useful to briefly reiterate the basic position under English law. As stated in the first chapter, formally speaking, there is no tort of intrusion upon seclusion in English law. This means that any physical privacy interests that fall outside of the sphere of applicability of a disclosure-centred tort such as misuse of private information are afforded protection through a selection of alternative common law actions (e.g., trespass, private nuisance, etc.). Although a number of oblique references to 'intrusion' were made in the House of Lord's judgment in *Campbell*, it is almost certainly the case that the term was being used as a rough synonym for an invasion of privacy, and was not intended to invoke the spectre of an intrusion upon seclusion style tort.[206] A better example is, perhaps, the Supreme Court's judgment in *PJS*, in which intrusion represented a key theme, seemingly suggesting that such a tort may now form part of the common law. Even here, however, it is not entirely clear in what exact sense the language of 'intrusion' was being used.

While Wragg contends that the judgment had a 'paradigm-shifting effect', namely, that misuse of private information now covers intrusion,[207] we must ask ourselves whether the Court, in grounding their reasoning partly on the intrusive quality of the further publications, used that term within the same meaning routinely attributed to it throughout the privacy scholarship. On the one hand, the Court, citing Eady J, draws a clear distinction between informational and 'physical' (the inverted commas, here, are simply intended to denote the use of 'physical' as a kind of legal shorthand for intrusion) privacy cases, emphasizing that 'the modern law of privacy is not solely concerned with information or secrets: it is also concerned with intrusion.'[208] On the other hand, however, the Court consistently discusses intrusion alongside the element of publication or publicity. For example, the Court, in supporting its reasoning, cites the following portion of the Leveson Inquiry: '[t]here is a qualitative difference between photographs being available online and being displayed, or blazoned, on the front page of a newspaper such as the Sun. *The fact of publication in a mass circulation newspaper multiplies and magnifies the intrusion*, not simply

[206] It is in this sense, as opposed to that recognising intrusion as a discrete aspect of the privacy interest, that Nicole Moreham uses the term in her discussion of how the intrusive manner in which information is acquired can bear on the assessment of whether an individual had a reasonable expectation of privacy under MPI; see Tugendhat and Christie (n. 10), p. 456.
[207] Supra (Wragg, n. 126), p. 410.
[208] Supra (*PJS*, n. 123), para. 29; citing Eady J in *CTB v News Group Newspapers Ltd* [2011] EWHC 1326 (QB).

because more people will be viewing the images, but also because more people will be talking about them.'[209]

At first blush, this seems unproblematic. Indeed, it seems self-evident that such behaviour would be considered intrusive. It must be remembered, however, that whereas confidentiality, discovery, and publicity are essential elements of informational privacy (as traditionally understood), the same cannot be said of intrusion. This is demonstrated, in part, by the elements of the tort under US law. Per s.652B of the Restatement, '[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.'[210] Importantly, for present purposes, comment (a) to the section makes clear that liability, under this tort, is not contingent upon any publicity given to the claimant or his private matters. Instead, the tort consists entirely of 'an intentional interference with [the claimant's] interest in solitude or seclusion', with any subsequent publication simply causing liability to arise under both the intrusion and public disclosure torts. This is consistent with academic interpretations of the tort as essentially concerning the offensive prying into of the private realm of another. In outlining the kinds of acts which may give rise to liability, the section appears to contemplate two rough categories of potential interference. Indeed, this is made clear by comment (b) to the section, which expressly provides for direct, physical invasions of privacy, such as when an individual intrudes upon either your space or interferes with your bodily integrity, and the use of the senses (potentially with the assistance of some mechanical aid or device) to oversee or overhear a person's private affairs, such as by tapping one's phone.[211] Returning, now, to *PJS*, by focusing on the degree to which further publications would compound the harmful effects of an intrusion, rather than on the harm which results from the acquisition of personal information and interference with physical privacy interests (i.e., the frustration of a reasonable expectation of privacy), the Court appeared to 'elide the concept of intrusion with the degree of impact that the publication would have upon the claimant and his family.'[212] The effect of this is that intrusion is effectively collapsed, as opposed to incorporated, into misuse of private information. As Hartshorne notes, '[t]hus despite the

[209] Ibid. (*PJS*), para. 31.
[210] Supra (Restatement, n. 191).
[211] Ibid.
[212] Supra (Hartshorne, n. 103), p. 295.

references to intrusion [in this case], in practice [it offers] little in the way of direct support for the development of an intrusion upon seclusion tort within English law.'[213]

Is it correct, then, to assert that English law does not recognise a tort of intrusion upon seclusion? While this is, as mentioned above, the apparent position, the reality is slightly more nuanced. To begin, and as discussed in the first chapter, it is clear, both from an analysis of the decision in *Wainwright* and an understanding of the incremental fashion in which the common law develops in this country, that the courts are not entitled to simply create a new cause of action providing a remedy for intrusion-style violations of privacy.[214] As stated by Baroness Hale in *Campbell*, 'the courts will not invent a new cause of action to cover types of activity that were not previously covered: see *Wainwright v Home Office* […] That case indicates that our law cannot, even if it wanted to, develop a general tort of invasion of privacy.'[215] This means that for liability for non-informational breaches of privacy to be recognised, the courts would have to graft it on to an existing cause of action, much in the same way that the tort of misuse of private information was developed, by the courts, out of the equitable doctrine of breach of confidence.[216] How, then, would this apply to intrusion upon seclusion? Clearly, the action which would serve as the most suitable rubric for the introduction of an intrusion-style tort is that of misuse of private information. While it is, as seen above, argued that *PJS* did not have the effect of incorporating intrusion into misuse of private information, might it be the case that intrusion was implicitly recognised in any further cases? To answer this question, regard must be had to two key cases: *Vidal-Hall v Google*[217] and *Gulati v MGN*.[218] Each of these cases will now be discussed in turn.

Although reference has already been made to *Vidal-Hall*, it was only with regard to the first issue – that of whether misuse of private information can be classified as a tort for the purposes of service out of the jurisdiction – that the case was considered. In relation to the present analysis, however, it is the second issue that is of essential importance: that of whether 'damage' in Article 23 of Directive 95/46/EC (henceforth, 'the Directive) encompasses non-pecuniary harm. It should be stated at the outset that the subsequent analysis concerned the proper construction of the Directive and the legislative mechanism through which it was given

[213] Ibid. (Hartshorne). A similar point is made by Bennett who remarks, 'I will briefly note that the court's reference to intrusion takes place in the context of a discussion of the intrusive impact on the claimant's family life that the *publication* of the information would have […]'; see Bennett (n. 105), p. 753.
[214] Supra (*Wainwright*, n. 23) and (Bennett, n. 125).
[215] Supra (*Campbell*, n. 122), para. 133.
[216] Gavin Phillipson and Alexander Williams, 'Horizontal Effect and the Constitutional Constraint' (2011) Modern Law Review 74(6).
[217] Supra (*Vidal-Hall*, n. 7).
[218] Supra (*Gulati*, n. 6).

effect in domestic law: the Data Protection Act 1998 (henceforth, 'DPA').[219] While this might, then, appear to suggest that the Court of Appeal's reasoning, in *Vidal*, should be confined to such cases, few of the reasons given by the Court in support of its judgment (and certainly none of those discussed below) are uniquely applicable to the legislative framework of the DPA or data protection law more broadly. Moreover, while the Court was focused on a particular statutory regime, it was also concerned with overarching principles of privacy law. Consequently, it will be argued that, far from being irrelevant, this case offers substantial insight into the matter of whether intrusion has been surreptitiously transposed into misuse of private information.

As mentioned above, the second issue discussed in *Vidal-Hall* concerned whether the language of 'damage', under Article 23 of the Directive, could be interpreted in such a way as to include non-pecuniary harms such as emotional distress. At first blush, the relevance of this analysis to the foregoing discussion – that surrounding intrusion and its recognition under the common law – might not be immediately clear. It is, after all, well-established that damages may, in claims for misuse of private information, be awarded for emotional distress, injury to feelings, and loss of dignity.[220] Indeed, in justifying its decision to adopt an unrestricted meaning of 'damage', the Court stated that '[s]ince what the Directive purports to protect is privacy rather than economic rights, it would be strange if the Directive could not compensate those individuals whose data privacy had been invaded by a data controller so as to cause them emotional distress (but not pecuniary damage).'[221] How, then, does this discussion bear on the present analysis?

To answer this question, regard must be had to a further section of the judgment. In responding to an argument raised by counsel for the claimant – that Article 23 does not require compensation for non-pecuniary loss unless an individual has suffered a breach of their rights under Article 8 of the Convention (i.e., those cases in which the Article 8 threshold of seriousness has been met) – the Court held that the Directive does not draw any distinctions between different classes of data breach (specifically, those which attain a stipulated degree of severity and those which do not). As stated in the judgment, '[i]n many cases [the damage consequent on a data breach] will be an invasion of privacy which meets the threshold of seriousness required by article 8 of the Convention. But in some cases it will not. There is nothing in the language of article 23 which indicates an intention to restrict the right to

[219] 1998.
[220] Supra (Hariharan, n. 77) p. 190.
[221] Supra (*Vidal-Hall*, n. 217), para. 77.

compensation to the former.'[222] Despite the fact that the Court was, with regard to this particular issue, entirely concerned with non-pecuniary harm (i.e., emotional distress), it nonetheless held that the claimants were, in principle, entitled to compensation for a breach of privacy under the DPA irrespective of whether Article 8 was technically engaged.[223] This suggests that the Court considers the harm, in such cases, to centre on, or coincide with, a wrongful intrusion and/or frustration of a reasonable expectation of privacy, as opposed to being a consequence of either of these actions. In other words, these statements demonstrated a willingness, on the part of the Court, to award compensation for the breach of privacy *per se*, in light of its extent and intrusiveness.

This view is supported by the statement of the Court that '*it is the distressing invasion of privacy* [itself] which must be taken to be the primary form of damage (commonly referred to in the European context as 'moral damages'[224]) and the data subject should have an effective remedy in respect of that damage.'[225] This position is further buttressed by the Court's assertion that a restrictive interpretation of 'damage' (i.e., one which distinguishes between pecuniary and non-pecuniary loss) would substantially undermine the purpose of the Directive, that being, to afford an ample degree of protection to the 'spatial aloneness' of data subjects.[226] While it could be argued that the use of the language of 'distressing', in the above quote, suggests that any loss of autonomy or dignity must be reflected in actual distress (purportedly the sole compensable head of damage in such cases) arising from the invasion of privacy, it is argued that this is the less tenable interpretation of those available. The reason for this is that the language of 'distressing' modifies 'invasion of privacy.' It is not, therefore, the further publication or disclosure of private details which is treated as distressing, but rather the invasion of privacy itself. Clearly, then, the Court, in *Vidal-Hall*, took the view that the mere deprivation of this

[222] Ibid. (*Vidal-Hall*), para. 81.
[223] Ibid. It must be conceded, however, that the Court admitted that if a claim is not serious in terms of its privacy implications, this will typically provide sufficient cause to rule out the possibility of compensation for mere distress; see para. 82. Having said this, if we conceptualise the harm as concerning the wrongful intrusion itself then most, if not all, intrusions into private spheres will present serious issues in relation to privacy. This admission also needs to be balanced against later statements – made with respect to whether, in relation to the claims for misuse of private information and under the DPA, there was a real and substantial cause of action – that it was the intrusion upon the claimants' solitude and autonomy that caused the harm; see para. 137. See further Fiona Brimblecombe and Helen Fenwick, 'Keeping Control of Personal Information in the Digital Age: Efficacy and Equivalence of Tortious and GDPR/DPA Remedial Relief' (2022) Law Quarterly Review 138.
[224] Ibid. (*Vidal-Hall*). The judgment clarifies that such damages are intended, in part, to compensate injury to feelings or dignity (i.e., spiritual harms); see para. 70.
[225] Ibid., para. 77.
[226] To be clear, the language of 'spatial aloneness' has been adopted over that of 'informational privacy' to better link the purpose of the Directive to that of a tort like intrusion upon seclusion, and is not intended to suggest that intrusion is a purely spatial construct; see Wragg (n. 207), p. 412.

right,[227] independent of any subsequent publication or misuse, represents a recognised and, importantly, actionable harm.

There is a further point in relation to *Vidal-Hall* that merits brief discussion, and one which provides even more direct support for the proposition that misuse of private information has been extended such as to now recognise claims for intrusion. This is that the Court felt that a claim for misuse of private information was even arguable in the particular circumstances of the case. Before continuing, it will prove useful to very quickly recite the essential facts of the case. In brief, the heart of the complaints in *Vidal-Hall* concerned the use of cookies to track the claimants' internet usage on their Apple Safari browser. This information was subsequently aggregated and sold to advertisers who then tailored their advertisements to the apparent interests of each of the individuals concerned. As stated by the Court, '[t]his revealed private information about the claimants, *which was or might have been seen by third parties*.'[228] It is argued that the latter half of the above quote is rather telling. Although the Court stated that at least some of the complained of advertisements were viewed by third parties, with the claimants having ostensibly suffered distress and embarrassment on the basis of these disclosures, this cannot have been the case in relation to *all* of the claimants. If so, the Court would not have expressed the nature of the harm in the terms that it did. Specifically, they would not have introduced the qualification of 'might have been seen by third parties', as it would not, under such circumstances, have been necessary to point to a potential, rather than proven, disclosure.

What seems clear, therefore, is that any disclosure of, or publicity given to, the complained of information is, ultimately, immaterial, and that the mere possibility of a use or misuse of a person's private information is a sufficient condition for liability under misuse of private information. This is further supported by the Court's reference to the 2008 opinion of the Article 29 Working Party on data protection, itself cited by the trial judge, that '[t]he extensive collection and storage of search histories of individuals in a directly or indirectly identifiable form invokes the protection under article 8…An individual's search history contains a footprint of that person's interests, relations and intentions. These data *can* be subsequently used both for commercial purposes and as a result of requests and fishing operations […]'[229] The use of the hypothetical 'can', like that of the language discussed above, suggests that an actual use of the information is not required.

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[227] Specifically, the right to control the use and dissemination of one's private information.
[228] Supra (*Vidal-Hall*, n. 225), para. 3.
[229] Ibid., para. 138.

This begs an interesting question: is, then, the mere fact that the information could be sold to a third party or, to frame the issue in more familiar terms, that one's private information could, at any given moment, be discovered, a sufficient condition to give rise to an actionable invasion of privacy? It is suggested that this question should be answered in the negative. As discussed in relation to Moreham's analysis of the privacy interest in the first chapter, the absence of 'control' is, in all probability, a poor guide as to whether there has, in a given case, been an invasion of privacy.[230] While certain judges, notably Mann J in *Gulati*, have suggested that there is no reason in principle why the loss of the right to control the dissemination of information about one's private life should not attract a measure of compensation, [231] there is, in this regard, a single point worth briefly noting. Hearkening back to the discussion of 'control' and 'choice' in the first chapter, it is improbable that Mann J conceived of 'control' in the precise terms contemplated by Moreham and other scholars, and unlikely that, in formulating his judgment, he was bogged down by what are, admittedly, fairly academic questions. Consequently, Mann J's use of the language of 'right' to describe the exercise of control should not be taken as signifying that the mere loss of control, absent any intrusive act whatsoever, could result in compensation.[232]

Clearly, and returning now to *Vidal-Hall*, the Court was not providing a remedy for the loss of control (which can occur before or, indeed, without any invasion of privacy), but for the intrusion itself (which *may* then result in a loss of control). A substantially similar argument is made by Hartshorne, who observes: '[w]hile this case might therefore have involved in a limited respect the actual or potential *publication* of private information to third parties, in the sense that others could have seen the advertisements and therefore drawn inferences as to the claimants' Internet browsing habits, there nevertheless appeared to be an acknowledgement that the very realisation that the information had been wrongly acquired was in itself actionable.'[233] As the Court, in describing the nature of the harm suffered by the claimants, stated: '[t]he case relates to the anxiety and distress that this *intrusion upon autonomy has caused*.'[234] While the language of 'intrusion' can be misleading and does not in itself provide incontrovertible proof that the Court

[230] Supra (Moreham, n. 90).
[231] *Gulati v MGN Ltd.* [2015] EWHC 1482 (Ch), para. 111.
[232] Interestingly, the Court of Appeal, in *Imerman v Tchenguiz*, seemed to take a different view, suggesting that where an individual has established a right of confidence or reasonable expectation of privacy in respect of certain information, '[they] should be able to restrain any *threat* by an unauthorised defendant to look at, copy, distribute any copies of, or to communicate [the information] […] The claimant should not be at *risk*, through the unauthorised act of the defendant, of having the confidentiality of the information lost, *or even potentially lost*'; see *Tchenguiz v Imerman* [2010] EWCA Civ 908, para. 69.
[233] Supra (Hartshorne, n. 213), p. 297.
[234] Supra (*Vidal-Hall*, n. 229), para. 137.

intended for a claim of misuse of private information to now be possible absent publication – a fact demonstrated quite clearly by the judgment in *PJS* – here the attendant circumstances suggest that 'intrusion' was being used in a sense which closely mirrors that given to the term in jurisdictions, such as the United States, which have formally adopted a tort of intrusion upon seclusion.

While *Vidal-Hall* does, therefore, appear to provide some evidence for the proposition that misuse of private information is now capable of recognising claims that, under the orthodox approach, would be seen as more closely related to intrusion, further, and indeed, stronger support for this position can be found in the Court of Appeal's decision in *Gulati v MGN Ltd*.[235] Before delving into a considered analysis of the case, it should be stated that the appellants had admitted liability and declined to raise any affirmative defence in respect of their actions. The basis of the appeal, then, concerned the appropriateness of the awards issued by the trial judge.[236] For the purposes of the present analysis, it is the first of the four grounds of appeal that is of prime importance: that the awards should have been limited to damages for distress. As in relation to *Vidal-Hall*, it will prove helpful to provide a brief summary of the facts of the case before continuing.

Gulati was one of a large number of English authorities that concerned phone hacking, a practice involving the unauthorised access of a person's voicemail box, typically engaged in by unscrupulous media outlets with a view to using the pilfered messages to produce journalistic material. The scale and gravity of the phone hacking in *Gulati* were particularly large, having taken place with remarkable frequency over a period of many years, and involving multiple, high-profile individuals. Importantly, and as mentioned above, liability was conceded from the outset. Although the defendant had, at first instance, sought to argue that any award of damages should be confined to those intended to compensate distress, the judge disagreed. Rather than simply award damages for distress, the judge felt that he could also award damages *for the fact of intrusion itself*. In other words, the judge believed that the breach of the right to privacy, separate and apart from any further harms which might arise from that breach, was a recognised harm capable of giving rise to damages. As stated in Mann J's judgment, '[a] right has been infringed and a loss of a kind recognised by the court as wrongful has been caused. It would seem to me to be contrary to principle not to recognise that a potential route to damages.'[237] Interestingly, the appellants, in challenging this view of the law, relied on the Court of Appeal's judgment in *Vidal-Hall*,

[235] Supra (*Gulati*, n. 211).
[236] Ibid., paras. 9 – 11.
[237] Ibid., para. 16.

suggesting that this case was authority for the proposition that 'the mere invasion of a person's privacy [can] only give rise to nominal damages.'[238] Although this is, in a sense, correct, it should be acknowledged, first, that nominal damages are nonetheless damages. It was, therefore, clear even in *Vidal-Hall* that the level or scale of any publicity given to private information is a matter which is pertinent to the assessment of the remedy, as opposed to one which serves as a determinant of its availability. Second, and as a matter of principle, the Court, in *Vidal-Hall*, seemed quite open to the idea of permitting compensation for the 'mere' fact of intrusion, a disposition that can be clearly discerned at multiple points throughout its judgment. As the Court, citing counsel for the claimants, observed, 'the damages may be small, but the issues of principle are large.'[239]

Returning, now, to the Court of Appeal's decision in *Gulati*, the Court affirmed the conclusion reached by Mann J in relation to the award of damages for the fact of intrusion, holding that 'the judge was correct to conclude that the power of the court to grant general damages was not limited to distress and could be exercised to compensate the respondents also for the misuse of their private information. *The essential principle is that, by misusing their private information, MGN deprived the respondents of their right to control the use of private information*.'[240] On a cursory analysis of the judgment, this appears to be the end of the matter, with it seeming clear that English law now recognises liability for intrusive acts. This is, however, far from the case. Indeed, to any who might hastily suggest that *Gulati* is authority for the proposition that the common law now recognises an intrusion upon seclusion style tort, Bennett raises a number of important issues.[241] First, the case was pled exclusively in misuse of private information. Consequently, the case did not recognise a new head of liability, distinct from MPI, associated with intrusion (indeed the defendant's liability was uncontested). Second, while there was, in *Gulati*, at least one example of a claimant whose stolen information did not result in a publication about him (that being Mr Yentob), some information had, in every case, been acquired. It remains unclear, therefore – and assuming that *Gulati* had extended the limits of misuse of private information – whether the scope of the action is now sufficiently wide so as to accommodate what might be termed 'pure' intrusions (i.e., those cases in which an intrusion does not result in the acquisition of any information) such as those contemplated by US law (it should be remembered that under s. 652 of the Restatement there is no requirement that the

[238] Ibid. (*Gulati*), para. 39.
[239] Supra (*Vidal-Hall*, n. 234), para. 139.
[240] Supra (*Gulati*, n. 238), para. 45.
[241] Supra (Bennett, n. 213), p. 752.

intrusion lead to the discovery of some or any information).[242] Each of these criticisms will now be dealt with in turn.

It is, of course, true that *Gulati* was concerned with misuse of private information. Additionally, the principal issue was the assessment of damages, with the result that the exact scope of the tort was not directly at stake.[243] As Mann J remarked in his judgment, "those values [underpinning privacy] are not confined to protection from distress, and it is not in my view apparent why distress […] which would admittedly be a likely consequence of an invasion of privacy, should be the only touchstone for *damages*."[244] It is, however, nonetheless suggested that Bennett's criticism lacks force. The reason for this is that the essence of the argument advanced by those who rely on the decisions in *Gulati* and, to a lesser extent, *Vidal-Hall* as demonstrating the recognition of intrusion under the common law is that the implication of those cases is precisely that it is now possible to pursue a claim in circumstances more closely linked to intrusion *within* misuse of private information. To suggest, therefore, that this is not the case on the basis that the Court, in *Gulati*, did not expressly recognise a novel head of liability is to misunderstand the argument. It is submitted that a better critique – and one which might represent Bennett's true concern – would be to ask whether the decision in *Gulati* represented an appropriately incremental development as required of the common law. As Moreham argues, the decision in *Gulati* is, in certain respects, plainly at odds with misuse of private information precedent.[245] As stated in *Applause Store Productions v Raphael*, '[i]t is reasonably clear that damages in cases of misuse of private information are awarded to compensate the claimants for the hurt feelings and distress caused by the misuse of their information.'[246] This is equally apparent in the case that birthed misuse of private information, as the judgments in *Campbell* were uniformly focused on the *publication or disclosure* of private facts, with it being suggested that this represented the touchstone of liability in cases of misuse of private information.[247] It has, as seen above, been argued that *Vidal-Hall* subtly moved the law in the direction of recognising liability for intrusive

[242] Supra (Restatement, n. 210).
[243] Jacob Rowbottom, 'A Landmark at a Turning Point: Campbell and the Use of Privacy Law to Constrain Media Power' (2015) Journal of Media Law 7(2), p. 14.
[244] Supra (*Gulati*, n. 231), para. 111. In this regard, it is worth briefly noting that few things reveal quite so much about the essential nature of a given action as damages. As Moreham observes, '[t]here is nothing like the need to award damages to focus the mind on what [a] legal action is all about'; see Nicole Moreham 'Compensating for Loss of Dignity and Autonomy' in J Varuhas and N Moreham (eds) *Remedies for Breach of Privacy* (Hart Publishing 2018), p. 140.
[245] Nicole Moreham, 'Liability for Listening: Why Phone Hacking is an Actionable Breach of Privacy' (2015) Journal of Media Law 8, p. 4.
[246] [2008] EWHC 1781 (QB), para. 81.
[247] Supra (*Campbell*, n. 215).

acts. There are, moreover, further cases which evince a willingness to establish such a category of liability.

One such example is the Court of Appeal's judgment in *Tchenguiz v Imerman*.[248] Admittedly, this was not a case involving misuse of private information, but rather one concerning breach of confidence. It will, however, be argued that much, if not all, of the reasoning is readily translatable to the privacy context. In analysing the nature of a claim in confidence, the Court, in *Tchenguiz*, suggested that the test applied in claims for misuse of private information – that of whether the claimant had a reasonable expectation of privacy in respect of the disclosed facts – would be equally well suited to act as a barometer of confidence, recognising that the law in this area had begun to move away from its equitable origins – a fact seen clearly in the removal of the traditional requirement of an initial relationship of trust and confidence – with the true test now centring on whether the nature of the complained of information was such as to be obviously private.[249]

This is consistent with academic characterisations of misuse of private information's origins. Phillipson, for example, describes it in the following terms: 'the first limb – that the information must have the 'quality of confidence' – has been transformed: the notion that the information must be confidential has now morphed into a requirement that it be 'private' or 'personal' information.'[250]Although the Court alluded to certain dangers in conflating the law of privacy (specifically, misuse of private information) and breach of confidence, it nonetheless held that 'the law should be developed and applied consistently and coherently in both privacy and 'old fashioned confidence' cases, even if they sometimes have different features.'[251] Importantly, for present purposes, the Court held that the act of intentionally obtaining certain information in the knowledge that what has been obtained was intended to be kept private *is itself* a breach of confidence, as well as an actionable wrong. That the Court considered the intrusion into the private sphere to constitute the wrong was, as observed by Rowbottom,[252] made clear by its distinction between examining, making, or retaining confidential documents on the one hand, and *supplying* any such documents to a third party on the other.[253] As stated by the Court, '[t]he fact that misuse of private information has […] become recognised over the last few years as a wrong actionable in English law does not mean that there has to be such misuse before a claim

[248] Supra (*Tchenguiz*, n. 232).
[249] Ibid., para. 66.
[250] Gavin Phillipson, 'The Common Law, Privacy and the Convention', in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial Reasoning Under the UK Rights Act* (CUP 2007), p. 217.
[251] Supra (*Tchenguiz*, n. 249), para. 67.
[252] Supra (Rowbottom, n. 243), p. 13.
[253] Supra (*Tchenguiz*, n. 251), para. 69.

for breach of confidentiality can succeed […]'[254] Although it is clear that this dictum only applies to claims for breach of confidence, there are two points worth noting.

First, this statement must be read in the light of the Court's earlier statement that, in view of privacy's status as part of the confidence *genus* – a status that arose from misuse of private information having been shoehorned into the law of confidence – the law surrounding misuse of private information and breach of confidence must be developed and applied consistently.[255] Second, while the Court of Appeal's judgment in *Vidal-Hall* has effectively dispelled any doubt as to whether misuse of private information and breach of confidence constitute distinct causes of action, the Court suggested that this was the first case in which the issue of classification or nomenclature had made a difference.[256] In other words, it was only for the purposes of establishing whether a claim form could be served out of the jurisdiction that the question of whether misuse of private information should be classified as a tort or a claim for breach of confidence was of any real significance.

Furthermore, although the Court attempted to justify the rigid separation of privacy and confidence, in part, by relying on statements in *Douglas* that '[i]n other instances information may be in the public domain, and not qualify for protection as confidential, and yet qualify for protection on the grounds of privacy. Privacy can be invaded by further publication of information or photographs already disclosed to the public',[257] it is submitted that this reasoning is not, in light of recent cases (notably *Tchenguiz*), sustainable. Because *Tchenguiz* tells us that a claim for breach of confidence can succeed absent publication, it is clear that confidence can be established by reference to the medium of communication or storage of purportedly private information, and that it is not necessary that the information itself be paradigmatically private. Consequently, it would seem that confidence can be established absent any real privacy in the relevant information, an assessment which is directly at odds with the Court of Appeal's view in *Vidal-Hall*. While the Court cites *Tchenguiz* in suggesting that the difficulty in inserting misuse of private information into the confidence action is best resolved by recognising the differences between the two actions, it also suggests that 'it is more realistic to regard damages in article 8 cases [concerned with privacy] as based in tort rather than on a strained concept of an equitable obligation […]'[258] With regard to this statement, there are a further two points worth raising.

[254] Ibid. (*Tchenguiz*), para. 71.
[255] Supra (Hartshorne, n. 233), p. 297.
[256] Supra (*Vidal-Hall*, n. 239), para. 17.
[257] Ibid. (*Vidal-Hall*), para. 24.
[258] Ibid., para. 42.

First, while the correctness of the above statement is beyond doubt, it seems to imply that whereas claims for misuse of private information are tortious in nature, claims for breach of confidence are equitable. While this was once the case – indeed, breach of confidence originated as an equitable doctrine – it is argued that this no longer accurately reflects the nature of the action. As Lord Hoffman, in *Campbell*, observed 'equity traditionally fastens on the conscience of one party to enforce equitable duties *which arise out of his relationship with the other*.'[259] In other words, it is the relationship, specifically the trust reposed in one party by the other, that gives rise to the obligation. However, and as has been noted several times, breach of confidence no longer stipulates such a requirement. Indeed, this much was recognised in *Vidal-Hall*, with the Court, citing Lord Nicholls in *Campell*, noting that '[breach of confidence] has now firmly shaken off the limiting constraint of the need for an initial confidential relationship.'[260] In this way, it is argued that as of its 'mid-twentieth century revival', breach of confidence was no longer equitable at all, but closer, in nature, to a tort.[261] This is supported by judicial statements, like those seen in *Campbell*, that breach of confidence had, through its shedding of certain traditional requirements, 'changed its nature.'[262] It should be mentioned here that an in-depth analysis of the nature of breach of confidence and misuse of private information falls beyond the scope of this thesis. Indeed, it must be remembered that the sole purpose of the present analysis is to respond to Bennett's seeming criticism that *Gulati* had radically extended the limits of MPI – in awarding compensation for the fact of intrusion – by showing that, in view of the Court of Appeal's treatment of breach of confidence in *Tchenguiz* and the strong similarities between the two causes of action, there was existing precedent supporting such a narrow expansion. With that said, it is, without intending to invite a suite of further issues, argued that the proposed basis of distinction between the actions seen in *Vidal-Hall* above does not accurately reflect the current state of the law. As Bennett comments, despite the many allusions to the significant differences between misuse of private information and breach of confidence in *Vidal-Hall*, 'none [of the reasons given by the Court offers] any hint of the method by which the *law relating to* 'confidentiality' and 'privacy' has developed in such a way as to give expression to these 'different interests' [and] the judgment is also unhelpfully vague about just what these 'different interests' […] are.'[263]

[259] Supra (*Campbell*, n. 247), para. 44.
[260] Supra (*Vidal-Hall*, n. 258), para. 23.
[261] As Bennett notes, this is one way of making sense of the considerable degree of formal incoherence that ensues from accepting that breach of confidence, an equitable doctrine, birthed a tortious cause of action in misuse of private information; see Thomas DC Bennett, 'Confidence, Privacy, and Incoherence' (2022) Journal of Media Law 14(2), p. 9.
[262] Supra (*Campbell*, n. 259), para. 14. This is equally apparent in statements, like those of Buxton LJ in *McKennitt*, which describe the 'rechristening' of breach of confidence as misuse of private information; supra (n. 151), para. 8.
[263] Supra (Bennett, n. 25), p. 20.

To make, now, a brief second critique, it is not clear why the Court, in *Vidal-Hall*, appears to distinguish misuse of private information and breach of confidence on the basis that, while invasions of privacy involving the former are protected by Article 8, those concerning the latter are not.[264] Such a view is particularly difficult to reconcile with the process of 'absorption' used by the Court to describe the method by which breach of confidence was used to give effect to Article 8. While the right to private and family life encapsulated in Article 8 is expansive and infamously amorphous, it includes 'the right to identity […] and the right to personal development, whether in terms of personality […] or of personal autonomy, which is an important principle underlying the interpretation of the Article 8 guarantees.'[265] Consequently, it would seem that many, if not all, of the acts that would give rise to an action for breach of confidence are capable of falling within the remit of protection provided by Article 8. While it could be the case that this distinction arose from the familiar discourse suggesting that misuse of private information was 'shoehorned' into breach of confidence in order to give effect to Article 8 (i.e., that such a development was necessary to comply with states' positive obligation to adopt such measures as are necessary to ensure the protection of the right to privacy between the individual and the state, as well as between private individuals), and that misuse of private information is, therefore, uniquely concerned with Article 8, it is argued that such an interpretation cannot, in view of the above analysis of the relationship between misuse of private information and breach of confidence, stand.

A final point worth addressing is the recognition, in *McKennitt v Ash*, that articles 8 and 10 of the Convention 'are now not merely of persuasive or parallel effect but […] are the very content of the domestic tort that the English court has to enforce.'[266] While the degree to which this approach has been adhered to by the courts is a separate issue, this means that, so far as possible, regard should be had to the Article 8 jurisprudence and that domestic law must be developed in a manner which is compatible with that of the Strasbourg Court. As Hartshorne notes, 'it [is] patently clear from Strasbourg jurisprudence that Article 8 [can] be engaged where private information [has] been merely acquired, without any ensuing publication.'[267] This can be seen in the case of *Halford v United Kingdom*,[268] in which the Strasbourg court concluded that the monitoring of phone calls (without further disclosure) was an infringement of Article 8. Importantly, and as recognised by Mann J in *Gulati*, as there was no evidence to suggest that the

[264] Supra (*Vidal-Hall*, n. 260), para. 21.
[265] *Reklos v Greece*, Application no. 1234/05 (January 2009), para. 39.
[266] Supra (*McKennitt*, n. 262) para. 11.
[267] Supra (Hartshorne, n. 255), p. 297.
[268] Application no. 20605/92 (June 1997).

distress suffered by the claimant resulted from the interception of her phone calls, the award issued by the Court could only have been intended to compensate the intrusion itself.[269] Further examples can be seen in the decision in *Copland v United Kingdom*,[270] a case which, like *Halford* before it, held that telephone calls are *prima facie* covered by the notion of 'private life' under Article 8, as well as the cases of *Reklos v Greece*[271] and *Soderman v Sweden*.[272] As observed of the latter two cases by Giliker, 'liability [went] beyond the dissemination of private information and [extended] to intrusion into the private lives of the applicants […]'[273] The position, then, of the Strasbourg Court in relation to 'intrusion' and whether liability can arise in circumstances in which no information is published, seems relatively well-settled.

Returning, now, to *Gulati* and Bennett's first criticism, it is argued that, far from having radically developed the law, the Court of Appeal's judgment only moved the law slightly beyond the position that it had, by that time, already reached. Having dealt with the first objection, we must now consider the second: that every instance of hacking in *Gulati* led to the acquisition of information and that it is, therefore, unclear whether a similar result would have been reached had no information been acquired. It is submitted that this is a somewhat odd critique. This is due to the fact that, in holding that damages could be awarded for general hacking, both Mann J and Arden LJ were clearly of the view that the intrusion comprised a distinct wrong. Thus, it would seem that the question of whether or not information was acquired in a given case and, indeed, the fact that information was acquired in *Gulati*, is neither here nor there.

As Moreham, citing Mann J, observes, '[c]ompensation [in *Gulati*] was therefore as much about the claimants' 'horror' that 'journalists had been listening, on a regular and frequent basis, to all sorts of aspects of their private lives', as it was about the *acquisition of specific pieces of information*.'[274] While reference is made, here, to acquisition, with it being clear that this contributed to the distress suffered by the claimants, this is juxtaposed against the equal harm

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[269] Supra (*Gulati*, n. 244), para. 133. It is argued that this point is illustrative of an interesting contradiction in Mann J's thinking. Here, the judge focuses on the lack of a causal link between the distress and the intrusion as proving that the Court intended to compensate something other than distress. In this way, Mann J separates distress from the intrusion, something which seems at odds with his intended point that an intrusion into a person's private life, in and of itself, gives rise to distress. This can be seen in his classification of *Gulati* as a case involving compensation 'for misuse *not involving distress*'; see para. 130. It is argued that this misstates the case, and that Mann J has mistakenly applied a bipolar model to what is fundamentally a unipolar analysis of harm, as there is distress, it is simply that the distress inheres in the intrusion *per se*. The necessary implication of Mann J's suggestion, taken to its logical end point, is that an award of truly vindicatory damages, of the kind expressly rejected in *Lumba*, would be rendered permissible. While this does not taint his overall reasoning, it is worth noting.

[270] Application no. 62617/00 (April 2007).

[271] Supra (*Reklos*, n. 265).

[272] Application no. 5786/08 (November 2013).

[273] Paula Giliker, 'A Common Law Tort of Privacy? The Challenges of Developing a Human Rights Tort' (2015) Singapore Academy of Law Journal 27, p. 15.

[274] Supra (Moreham, n. 245), p. 9.

which arose from the disturbance of the claimants' privacy *per se*. It is, therefore, implicit in the above quote that, despite the clear acknowledgement that the acquisition of information about the claimants contributed to the distress they suffered, this was an *additional* harm, and that the hacking would have represented an equal incursion upon the claimants' privacy where no information about them or anyone else had been acquired. Although Mann J describes misuse of private information in the following terms '[i]t is a right to have one's privacy respected. *Misappropriating (misusing) private information* without causing 'upset' is still a wrong',[275] this should not be interpreted as requiring that an invasion of privacy must result in the acquisition of information for it to attract damages.

Here there are two points that merit brief discussion. First, to read such a meaning into the above statement would be plainly inconsistent with the rest of Mann J's judgment. While one can, and should, venture beyond this particular dictum in search of proof that acquisition of information is not a hard and fast requirement, this is not even necessary. The tort is, as Mann J puts it, a 'right to have one's privacy respected.' The question that must be asked is, therefore, whether one's privacy is any less invaded by an intrusive action for the fact that the said action did not disclose any information about the relevant person?[276] The caselaw would suggest that the answer to this question is 'no.' As seen in *Vidal-Hall*, to suggest otherwise would, in that case, have been to substantially undermine the purpose of the Directive (whose intended effect, it will be recalled, was to shore up protection for the right to privacy). There is no reason, in principle, why we cannot extrapolate from this reasoning to bolster the suggestion that the same should be true of privacy law more broadly; indeed, we should. As Mann J notes in *Gulati*, '[unless we adopt this approach] the right [to privacy] becomes empty, contrary to what the European jurisprudence requires.'[277]

While Mann J was, here, still seemingly focused on the acquisition of some information, earlier statements further support the view that this is not a requirement. A useful example can be seen in the fact that Mann J appears to conceive of the right to privacy as revolving, at least in part, around the concept of autonomy, alongside that of control over private information (incidentally, the two heads of the revised taxonomy of privacy set out in the first chapter). Although one could convincingly argue, for reasons that should now be familiar (see foregoing

[275] Supra (*Gulati*, n. 269), para. 143.
[276] Here, a conceptual link can be drawn to false light invasion of privacy (as well as false privacy in the context of misuse of private information) and the question of whether a statement bearing on one's private life is any less offensive for its falsity. As with the above question in relation to intrusion, it is submitted that this question should be answered in the negative.
[277] Supra (*Gulati*, n. 275) para. 143.

analysis of 'control' in chapter 1), that the right to control private information is not contravened in those cases where no information is acquired, the same cannot be said of autonomy. Indeed, and as discussed in *Gulati*, much of the harm in that case centred on a loss of trust suffered by the claimants and a sense that they were constantly being surveilled. These harms, specifically, would have been inflicted regardless of whether any information about the affected individuals had been acquired.[278] Consequently, and to the extent that autonomy forms an essential part of the privacy interest – a status that it is regularly afforded throughout the privacy scholarship – it would seem that for Article 8 to be given effect in such as way so as to ensure that rights are 'practical and effective', as is required under the European jurisprudence, neither Mann J's judgment nor that handed down in the Court of Appeal in *Gulati* can be reasonably interpreted as requiring that information be acquired before liability can be established.[279] This matter speaks equally to the issue of coherence, as it is clear that the acquisition of information cannot be a condition of liability in such cases if MPI is to accord with the values which the law has recognised as forming key components of the privacy interest.

Furthermore, and as a matter of principle, this approach makes perfect sense. While, to borrow Descheemaeker's language, a bipolar model of harm (i.e., one which distinguishes between the wrong and the consequences that flow from it) may be appropriate to injuries focused on economic loss, it is wholly unsuited to the law of privacy.[280] As illustrated by Descheemaeker, 'loss of privacy is not a detriment that flows from the wrong of breach of privacy […] rather it *is* the breach of privacy itself considered from another vantage point. It is analytically there by virtue of the breach having been committed; to put the same point differently, saying that the claimant has suffered the wrong of breach of privacy and saying that they have lost (some of) their privacy are exactly the same proposition.'[281] To suggest, therefore, that someone's privacy has not been invaded on the basis that no information about them had

[278] While it is maintained that both 'control' (or 'choice' to adopt the language used in the first chapter) and autonomy/dignity form indispensable aspects of the right to privacy, the above analysis would suggest that the latter element carries greater weight.
[279] To be clear, this argument presupposes that the limits of misuse of private information were extended in *Gulati*. In other words, it builds off of the argument expounded in response to Bennett's first objection.
[280] Eric Descheemaeker, 'Unravelling Harms in Tort Law' (2016) Law Quarterly Review 132, p. 5.
[281] Ibid. This is yet another way in which privacy can be seen to be qualitatively different from other rights afforded protection under the law, an argument that was previously made in relation to Moreham's analysis of 'control.' Additionally, and as Descheemaeker notes, this model can be traced back to the scholastics, who conceived of harm as 'being deprived of what belongs to oneself: not simply things external but also one's person: one's limbs, *dignity* and the like.' Not only is this consistent with the idea of moral loss/damages (discussed above) as concerning injury to a person's 'being' as opposed to their 'having' (a familiar distinction captured in the idea of 'material'/temporal and 'spiritual' harms seen throughout the first chapter), but also the fundamental importance of dignity. It offers further evidence, therefore, that for the law of privacy to provide any real utility and avoid incoherence it must adopt such a model of harm, and that there is no principled basis for making the acquisition of information a condition of liability in cases centring on intrusion.

been acquired is, it is argued, to misunderstand the very nature of privacy and the set of issues which are at stake. As amusingly illustrated by Hartshorne, it would be an adventitious and invidious result indeed if the peeping Tom, when faced with truthful allegations that he had spied on his neighbour, could escape liability by saying 'I've seen it all before!'[282]

Having now dealt with both of Bennett's objections – first, that there was no express recognition of an expansion of the scope of misuse of private information in *Gulati* and second, that even if there had been, the judgment made no suggestion that a claim for intrusion could be brought in circumstances in which no information had been acquired – it is hoped that the preceding section has gone some length in strengthening the argument that the common law has, albeit in a rather circuitous fashion, implicitly recognised some degree of liability for intrusive acts. There are, however, two final matters to which we must now attend.

First, and assuming that this proposition is correct, how does this bear on the conclusion, reached in the first chapter, that the right to privacy is most appropriately construed as a proxy for the right to reputation? As recognised throughout the foregoing analysis, 'intrusion' does not sit comfortably (if at all) within an informational paradigm of privacy. The objection in such cases is not, after all, to the quality of information obtained about oneself or, indeed, to the acquisition of any information at all.[283] Clearly then, 'intrusion' and the interests which it seeks to safeguard have little, if anything, to do with reputation. With regard to this issue, there are several points worth briefly addressing. First, despite the arguments made in the preceding section, it remains the case that, as a matter of formal law, the law of England and Wales does not recognise a tort of intrusion upon seclusion. Thus, and assuming that one accepts the remainder of the argument advanced in the first chapter, it is a technically accurate statement to say that, to the extent that domestic law formally recognises a right to privacy, any such right is concerned entirely with matters involving reputation. This is, however, a bit of a fudge. A better way of navigating this apparent contradiction, and one alluded to in the first chapter, might be to suggest that the proposition – that privacy is a proxy for reputation – applies only to informational privacy. While this seems a stronger argument, it too is not without its difficulties, as much of the above analysis seems premised on an assumption that a rigid separation between informational and physical privacy is undesirable, if not impossible. Perhaps

[282] Supra (Hartshorne, n. 267), p. 299. While some scholars (e.g., Hartshorne) argue that such an action would fall within an informational paradigm on the basis that the peeping Tom's intention was to acquire some information – as he puts it, '[he] doesn't just look into the window in vain, but because he wants to see something' – Moreham adopts a similar view to that advocated in this chapter, arguing that, under such circumstances, no information is acquired in a meaningful sense of the word; see Moreham (n. 95), p. 355.
[283] Supra (Wacks, n. 119).

the best way of circumventing this issue would be to suggest that, to the extent that reputation may be concerned with internal features and processes (e.g., self-repute and dignity), it is equally capable of being disturbed by an invasion of physical privacy (i.e., through an intrusive act) as it is by one of informational privacy (i.e., through the disclosure of private and embarrassing facts). However one resolves this tension, while it is acknowledged that these two conclusions do, at first glance, appear to conflict, it is argued that they are fully capable of reconciliation.

Second, it will be recalled that the first chapter suggested that there is, in relation to misuse of private information, a threshold of seriousness, and that claims concerning anodyne disclosures will not be entertained by the courts. While the position advanced in this chapter might seem divergent to and incompatible with that set out in the second chapter (with it perhaps appearing that violations of 'physical' privacy are actionable *per se*), the two stances are not mutually exclusive. This is because the latter simply takes a narrower view in relation the issue, and one which is encompassed by the broader view of the scope of the element set out in this chapter.

In summary, while some scholars continue to decry the historic and 'ongoing' lacuna for violations of physical privacy – as Moreham colourfully puts it, 'the facts [in many cases] cry out for a remedy'[284] – it is argued that this remedy has already been administered, or, if it has not, that the common law is slowly but steadily inching toward the recognition of an intrusion upon seclusion style tort. This can be seen in a number of cases, most prominently, *Tchenguiz*, *Vidal-Hall*, and *Gulati*. Furthermore, and as result of the duty to interpret national law in a manner that is consistent with the European jurisprudence, due regard must be had to the decisions of the Strasbourg Court. Like those of domestic courts, these signal a clear and consistent recognition of the fact that intrusions into the private sphere, separate and apart from any subsequent publication or the acquisition of any information, constitute a distinct and actionable harm, with examples of such cases including *Copland* and *Halford*. These decisions are, it is argued, indicative of a growing awareness that there is no sensible basis for denying claimants relief in the absence of such features and that the right to privacy must, therefore, be treated as a more elastic concept if it is to provide an adequate degree of protection. While such a development should not be seen as a legal panacea that will miraculously resolve all of the conceptual tension and uncertainty that has thus far formed the focus of this thesis, it should be seen as an important, natural, and, above all else, necessary step in the evolution of the right to privacy in English law if it is to achieve its aims and achieve an appropriate degree of theoretical consistency.

[284] Supra (Moreham, n. 274), p. 4.

Conclusion

This chapter has closely analysed two of the torts forming part of Prosser's privacy matrix: 'false light invasion of privacy' and 'intrusion upon seclusion.' While neither tort has been *formally* adopted in English law, many of their constituent elements form essential parts of domestic privacy actions (namely, misuse of private information). The extent to which these torts are represented in English law is, of course, a matter of degree. So far as false light is concerned, while there are obvious comparisons to be drawn to misuse of private information (they are, as discussed in the above analysis, both causes of actions which are capable of being engaged by claims for 'false privacy' – an issue that will be discussed in greater depth in the subsequent chapter), there are important differences too. Of these, perhaps the most obvious is the degree to which false light places emphasis on reputational harm, and has been treated as a substitute for defamation. While little objection is made to the essential idea which underlies false light, its development has proven problematic by generating the exact kind of uncertainty that forms the focus of this thesis. In particular, it has failed to establish the precise borderline between reputation and privacy or, to suggest that no such line should exist. In this sense, it is argued that false light invasion of privacy damages our understanding of the relationship between privacy and reputation and is almost the perfect case study of how not to develop a 'false privacy' tort.

The position in relation to intrusion upon seclusion is, thankfully, more positive. As discussed in the first chapter, privacy, as a general concept, is not simply concerned with informational matters, a fact that has been recognised countless times both by academics and the courts. Having said this, the conventional understanding of misuse of private information is that it does not provide a remedy for 'physical' violations of privacy. This wisdom has, of course, been challenged in the preceding chapter, which has argued that, on a close reading of authorities such as *Vidal-Hall*, *Tchenguiz*, and *Gulati*, it is reasonably clear that English law has implicitly recognised liability for such offences, and that – to the extent that privacy concerns such matters as choice, presentation, and dignity – this is fully consistent with the understanding of privacy set out in both the caselaw and the scholarship. While this view has been hotly contested by some (see Bennett's criticisms), what is generally agreed is that for English law to be internally consistent and give full effect to the values which it recognises as comprising the right to privacy, liability for intrusion-style violations must be firmly established.

- Chapter 3 -

False Privacy and 'Truth' Under English and Welsh Law

Introduction

While the previous chapter continued to address the conceptual overlap between privacy and reputation first discussed in chapter 1 – indeed, the section on false light invasion of privacy was wholly dedicated to an analysis of how this particular category of case is treated in the United States – this relationship will form the exclusive focus of this chapter. Like the second chapter, it will adopt a largely doctrinal approach, tracing the genesis of false privacy cases throughout the caselaw. Here, the focus will be three-fold. First, the chapter will seek to establish the degree to which the courts are, consistent with their claim, able to identify whether the heart of a given claim lies in privacy or reputation. This analysis, in particular, will be set against the backdrop of the theoretical framework advanced in the first chapter. Consequently, any judicial statements asserting an ability, in all cases, to clearly ascertain the 'nub' of a particular claim will be tested against the working proposition that the rights to privacy and reputation protect substantially similar interests. Second, and irrespective of the conclusion reached in relation the first issue, the chapter will ask whether, as a matter of principle, misuse of private information should be able to accommodate false statements. While this question has, in a somewhat anfractuous fashion, already been addressed by the previous two chapters, here the focus will lie less in matters of theory, and more in various practical considerations. In particular, this section will analyse the degree to which the performance of the balancing exercise required of the court is complicated by the erosion of the historic distinction between privacy and defamation (as discussed in the first two chapters), as well as the potential for procedural abuses through the circumvention of the rules, applying to defamation, concerning prior restraint. Third, and last, the chapter will examine the defence, to an action for defamation, of 'truth', and inquire into whether such a defence is compatible with the Article 8 right to respect for private and family life as given domestic effect through section 6 of the Human Rights Act 1998. Each of these topics will shortly be addressed in turn. Ultimately, the chapter will conclude that, as in the case of false light invasion of privacy, misuse of private information fails to precisely demarcate privacy from reputation (in the absence of any suggestion that these are coterminous rights) and

that the operation of 'truth' in certain circumstances promotes incoherence by affording different treatment to substantially similar elements.

True Privacy and False Facts

To repeat a familiar datum, misuse of private information, as it is now known, was first established in the case of *Campbell*.[285] This case was not, however, concerned with false information. As such, the issue of false privacy and whether such claims can be brought in misuse of private information did not arise for discussion. There was also nothing in any of the judgments to suggest that the previous position – as set out in relation to breach of confidence – had changed. Indeed, the speeches were suggestive of the exact opposite, as the label of 'misuse of private information' would, as a simple matter of logic, seem to indicate that there exists information which is capable of being misused. Otherwise, and as observed by Hartshorne, the real objection would be to the creation of false information, something which he described as bearing a worrying resemblance to defamation.[286] Of course, and as seen throughout the earlier section on false light, there is no reason, in principle, why false information should not be capable of grounding a privacy claim. Despite the seeming illogic in holding that false information referring to a non-existent sphere of a person's life can be misused, it is clear that such information can be used maliciously to create a misleading and damaging impression or mistakenly, in the belief that the information is true but knowing that there was no consent to its disclosure. For present purposes, however, what is important is that neither of these issues – nor any others concerning 'false privacy' – appear to have been in the contemplation of the Lords in *Campbell*, with the result that the language of 'information' in that case can be reasonably understood to denote true or accurate information only. This observation naturally prompts another: if misuse of private information was not originally capable of embracing false statements, then at what point did the courts first consider this issue and decide that misuse of private information could be extended to entirely false information? The starting point is, it is suggested, the case of *McKennitt v Ash*.[287]

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[285] Supra (*Campbell*, n. 262).
[286] John Hartshorne, 'An Appropriate Remedy for the Publication of False Private Information' (2012) Journal of Media Law 4(1), p. 95.
[287] Supra (*McKennitt*, n. 266). See further for discussion of these foundational MPI cases: Fiona Brimblecombe and Helen Fenwick, 'Protecting Private Information in the Digital Era: Making the Most Effective Use of the Availability of the Actions Under the GDPR/DPA and the Tort of Misuse of Private Information' (2022) Northern Ireland Legal Quarterly 73(1).

As discussed briefly in the first chapter, *McKennitt* was one of the first cases to provide a clear judicial indication that, to the extent that misuse of private information was intended to give effect to the protection afforded by Article 8, the truth or falsity of a statement subject to such a claim is a matter of indifference. This approach was quickly adopted in further cases. One such example is the judgment in *P v Quigley*, in which Eady J held that, despite the fact that the threatened publication, in that case, concerned imaginary activities, the claimants' privacy rights were nonetheless engaged. This, he argued, was justified by the fact that the publication would 'plainly be likely to cause distress and embarrassment and would constitute an unacceptable intrusion into a personal and intimate area of [the claimants'] lives.'[288] Before continuing, it is worth noting that not all cases involving 'false privacy' (as it is sometimes called)[289] are equal. Instead, and as observed by Hartshorne, there are different classes of claims involving false privacy, with what separates these classes being the extent to which the information forming the basis of the complained of allegation is false.[290] On one end of the spectrum, there are cases in which the majority of the bare facts asserted, and any associated imputations, are true, in which the element of falsity is encapsulated in fairly minor and often technical inaccuracies. Closer to the middle of the spectrum, one finds cases in which there is a substantial degree of intermingling of truth and falsehood. Finally, and at the opposite end of the spectrum, one encounters cases in which the relevant facts are largely, if not entirely, false. If we were to assign the aforementioned cases to these categories, *McKennitt* would fall most appropriately within the middle region, as it was held that the majority of the book's allegations in relation to the property dispute were untrue. As a practical matter, it is not overly difficult to see why the law would provide a remedy in such situations, as it would prove a deeply unsatisfying position if the law denied individuals protection against legitimate invasions of privacy on the basis that *some* of the complained of material is false, particularly in those cases in which the differing allegations are irreparably bound up.

What, however, of *Quigley*? Interestingly, this case is best grouped in the third category, as the whole of the allegation was false.[291] In contrast to those scenarios in which we are forced to reckon with closely interwoven sets of truths and falsehoods, in which liability is supported by various practical considerations, it is less clear why an individual's privacy right should be

[288] [2008] EWHC 1051 (QB), para. 6.
[289] For examples of this terminology, see Hartshorne (n. 286); see also Hugh Tomlinson KC, 'Defamation and False Privacy – Some Thoughts' (2010) The International Forum for Responsible Media Blog (INFORRM'S Blog).
[290] Ibid. (Hartshorne), p. 98.
[291] The false facts in this case concerned threats to publish an internet novella depicting the claimants as having engaged in assorted, deviant sexual activities.

engaged in the circumstances seen in *Quigley*, in which the relevant information is wholly false. There are, of course, several potential justifications. Of these, the most commonly invoked reason, and one which is hinted at in Eady J's statements in *Quigley*, is that the fact of whether or not information is private has nothing to do with whether it is true or false, with the latter representing an entirely distinct inquiry.[292] A near identical position had previously been taken in *McKennitt*, in which Buxton LJ noted that 'provided the *matter complained of is by its nature such as to attract the law of breach of confidence*, then the defendant cannot deprive the claimant of his Article 8 protection simply by demonstrating that the matter is untrue.'[293] This is, of course, a familiar refrain. Returning, briefly, to false light invasion of privacy, it was on this basis that academics such as Nimmer, Zipursky, and Goldberg argued that the tort retained a useful purpose not already served by defamation or publication of private and embarrassing facts.

Equally, this is an idea which forms the entire theoretical undercurrent of a tort such as intrusion upon seclusion. As Meltz argues, and as seen in the previous chapter, the harm, in such cases, is 'not one of damage to reputation or to image; it is simply the unwelcome invasion into a private space.'[294] As much is stated by Eady J himself, who once observed that '[i]t is the probing into […] forbidden territory that is objectionable – not the accuracy of the journalism.'[295] While there are obvious merits to this approach – indeed, and in relation to false light invasion of privacy, this thesis only objected to Nimmer's conceptualisation of the interest protected by the right to privacy on the ground that it was deployed in support of an interpretation of false light that was plainly inconsistent with the clear construction of the tort[296] – there are also real dangers. First, and most prominently, such an approach runs the risk of further eroding the distinction between privacy and defamation. Second, it could have severe ramifications on the exercise of free speech.[297] As argued by O'Callaghan, sweeping injunctions of the kind issued in *Quigley* '[have] the potential to prohibit the disclosure of an astonishingly wide range of information [and that we should therefore] pay close attention to the justifications for this false

[292] Ibid. (*Quigley*), para. 6.
[293] Supra (*McKennitt*, n. 287), para. 80.
[294] Eli Meltz, 'No Harm, No Foul? Attempted Invasion of Privacy and the Tort of Intrusion Upon Seclusion' (2015) Fordham Law Review 83(6), p. 3466.
[295] Mr Justice Eady, 'A Case of the Highest Authority…So What Does it Mean?' (Speech at University of Hertfordshire, 2023).
[296] As Parkes comments, '[the proposition that] the right to privacy can be infringed by a false allegation as well as by a true one […] is now accepted by the English courts, although it has not been expressed in terms of false light'; see Tugendhat and Christie (n. 206), p. 358.
[297] While it might be argued that this poses little issue on the basis that false information is a less valuable commodity than truth in the exercise of free speech, this is subject to a series of important caveats (e.g., the public interest of the relevant matter, the honesty and reasonableness of any belief in the accuracy of the publicized statements, etc.); see analysis below for further detail.

privacy remedy.'[298] This naturally leads to an important question, and one which will form the main focus of the subsequent section. While the application of misuse of private information to false statements seems relatively well-established, should this be the case? To put the question another way, does the ability of MPI to accommodate false statements promote coherence between privacy and reputation, or undermine it?

While the protection of reputation has traditionally been associated with defamation, it is now firmly established that this aim also forms a significant part of the right to privacy.[299] This much was apparent from the judgment in *Pfeifer v Austria*, in which the Strasbourg Court held that 'a person's reputation […] forms part of his or her personal identity and psychological integrity and therefore falls within the scope of his or her 'private life."[300] This approach has been similarly applied by domestic courts in the majority of cases. This can be seen in Lord Sumption's remarks in *Khuja* that, 'the protection of reputation is the primary function of the law of defamation. But although the ambit of the right of privacy is wider, it provides an alternative means of protecting reputation which is available *even* when the matters are true.'[301] Lord Sumption's use of the language 'even', here, is rather interesting. While this is a matter which will be discussed in greater detail further on, one would have thought that the default context in which privacy would offer a means of protecting reputation would be where one is concerned with the revelation of true and reputationally damaging facts. As Moreham argues, the right to privacy is chiefly intended to 'protect the *true self* from unwanted exposure.'[302] For this reason, one might have expected Lord Sumption to have said that privacy provides such protection *especially* when the matters are true. Although it may be that this choice of language was simply intended to address the longstanding consensus, in English law, that the right to reputation cannot operate in such a way as to restrict the dissemination of accurate, if negative, statements about an individual, it is nonetheless a somewhat confusing statement. Returning, now, to the issue at hand, further support for this position can be found in the judgment in *Richard v BBC*, in which Mann J made the following remarks: 'the protection of reputation is part of the function of the law of privacy as well the function of the law of defamation. That is entirely rational. As is

[298] Patrick O'Callaghan, 'False Privacy and Information Games' (2013) Journal of European Tort Law 4(3), p. 287.
[299] To be clear, it is not suggested that the protection of reputation is an essential or necessary function of a cause of action such as misuse of private information. Rather, and in keeping with the analysis in Chapter 1, it is simply argued that reputation is an important element of the privacy interest, and one which carries significant weight in the majority of privacy cases (but not, for example, in the child line of caselaw). This is consistent with the analysis set out in Chapter 2, as the nature of the offence in cases such as *Murray* and *Weller* was not harm to reputation caused by the publication, but instead its intrusive effect on the claimants' family life.
[300] Supra (*Pfeifer*, n. 146) para. 35.
[301] *Khuja v Times Newspapers Ltd* [2017] UKSC 49, para. 21.
[302] Nicole Moreham, 'Privacy, Reputation and ZXC v Bloomberg' (2022) Journal of Media Law 14(2), p. 234.

obvious to anyone familiar with the ways of the world, reputational harm can arise from matters of fact which are true but within the scope of a privacy right.'[303] It seems, therefore, that the question is not whether privacy is capable of providing protection against reputational harm – this question having been clearly answered – but rather what the ambit of the protection offered is, and whether any such protection is offered directly or is, instead, purely incidental to the principal aim of the right to privacy.

That the protection of reputation forms part of the privacy interest is entirely sensible.[304] First, and as noted by Bennett, 'a bad reputation is likely to see avenues for self-advancement and self-development that we might choose to take […] curtailed. Thus, we might say that a diminution in one's reputation *is* a diminution in one's right to private life.'[305] If this argument appears familiar it is because it is essentially that advanced in the first chapter, as well as by academics who adopt the notion of reputational damage as representing a classic – indeed, the archetypal – dignitary harm. In this respect, the growing recognition that reputation is firmly embedded in the right to privacy is entirely consistent with the analysis expounded in earlier chapters. Second, and contrary to the suggestions of certain academics,[306] it is not where the nub of a claim is in reputation that a claim should be brought in defamation, but instead falsity.[307] After all, it is, with regard to claims for defamation, not so much the fact that one's reputation has been damaged that is objectionable, as it is the fact that it has been damaged by *false* allegations. Were this not the case, defamation would reflect a general right to a good reputation. But this is not so. Indeed, and as noted by Gibbons, 'it is […] misleading to speak of the law of defamation as vindicating a right to reputation, [which] suggests a special claim to a particular conclusion about a person's status.'[308] Instead, the right is construed more narrowly, with it being a right not to be judged in a very particular sense, namely, on a false or inaccurate basis. As Hariharan notes, 'defamation protects an individual's specific interest in not having their standing in society besmirched by false allegations.'[309] This is clearly illustrated by Buxton LJ's statement in *McKennitt* that, '[i]f it could be shown that a claim [in privacy] was brought where the nub of the case was a complaint of the *falsity* of the allegations, and that that was done in

303 *Richard v BBC* [2018] EWHC 1837 (Ch), para. 345.
304 To reiterate a key point, this is not to suggest that the protection of reputation will manifest itself in every case involving misuse of private information; see fn 299.
305 Thomas DC Bennett and Paul Wragg, 'Was Richards v BBC Wrongly Decided?' (2018) Communications Law 23(3), p. 13.
306 Supra (Moreham, n. 302).
307 Robert Craig and Gavin Phillipson, 'Privacy, Reputation and Anonymity Until Charge: ZXC Goes to the Supreme Court' (2021) Journal of Media Law 13(2), p. 176.
308 Supra (Gibbons, n. 148), p. 593.
309 Supra (Hariharan, n. 220), p. 188.

order to avoid the rules of the tort of defamation, then objections could be raised in terms of abuse of process.'[310] As observed by Phillipson and Craig, the true test is, therefore, whether the complaint centres on false allegations, not damage to reputation. In this sense, the focus is very much on the mode of harm, as opposed to the actual, substantive damage sustained by the claimant. While falsity is, therefore, only an essential element of defamation (albeit one which *may* also maintain a presence in an action for misuse of private information), reputation cuts across both causes of action in a far more meaningful fashion.[311]

In a certain sense, this makes the putative task of the judge wrestling with such issues far easier. Provided one accepts the argument set out in the first chapter – that reputation and privacy are related to an even greater degree than what is suggested by the current body of caselaw – the requirement that a judge identify whether, in a given case, the nub of the complaint concerns reputation (in a general, undefined sense) would impose on judges an obligation to disentangle an element common to both defamation and misuse of private information from the wider factual matrix. Not only would such an obligation prove difficult from a practical standpoint, but it is also theoretically unjustifiable. It is, then, sensible that the test focuses not on this element, but instead on falsity. Having said this, falsity alone cannot support a remedy in relation to the publication of inaccurate statements. This was made clear in the above analysis of false light invasion of privacy, in which it was argued that false, but otherwise inoffensive, statements should not, as a matter of principle and good social policy, give rise to a claim in tort.[312] If, then, reputation forms part of the right to privacy and is not the sole province of defamation and falsity is not, by itself, capable of giving rise to a claim in defamation, it must be the specific relationship between these two elements – reputational harm and falsity – that forms the essential nature of the harm associated with defamation. While this may seem trite – these are, after all, foundational elements of defamation – it begs an interesting question: what is the 'nub' that a judge must identify to establish whether a given claim is most appropriately brought in defamation or misuse of private information? To approach the matter differently, this is an important issue because it is, above all else, the element of falsity that has been traditionally touted as the key feature distinguishing defamation from misuse of private information.[313]

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[310] Supra (*McKennitt*, n. 293), para. 79.
[311] The point is put quite succinctly by Tugendhat J, who held '[d]amages for defamation are a remedy to vindicate a claimant's reputation from the damage done by the publication of false statements. Damages for misuse of private information are to compensate for the damage, and injury to feelings and distress, caused by the publication of information which may be either true or false'; see *Cooper v Turrell* [2011] EWHC 3269 (QB), para. 102.
[312] Supra (Barinholtz, n. 180).
[313] Supra (*ZXC*, n. 151), para. 111.

Before continuing, it will prove useful to briefly outline some of the principles which have shaped the development of these two causes of action, specifically, those concerning the operation of prior restraint. As seen in the foregoing analysis, it is now widely accepted that reputation is capable of being vindicated by both defamation and misuse of private information. That is not to say, however, that reputation is affected in the same way by allegations which are false as by those which are true.[314] Unlike damage done to reputation through the publication of false statements, which, it is said, is capable of being remedied through the award of a vindicatory judgment, equivalent damage caused by the revelation of true information is permanent.[315] Indeed, as Hartshorne, quoting Keith Schilling, observes, 'once [the privacy ice cube is] melted, it is gone for ever.'[316] At least, this is the orthodox view. While the position in relation to the disclosure of true information is not disputed – instead, it is readily conceded that attempting to maintain confidentiality post disclosure is rather like closing the stable door after the horse has bolted – the position as to reputational harm caused by false statements is not, it is argued, quite so cut and dried. Although there will, undoubtedly, be cases in which a vindicatory judgment, often in combination with a correction or retraction on the part of the publisher, will prove sufficient to restore the claimant's reputation to its proper state, the fact that there exists a long line of caselaw dealing with police investigations and the need to protect suspects' identities up to the point of charge clearly suggests otherwise. Indeed, judicial scepticism of the average person's ability to give effect to the presumption of innocence indicates that, contrary to the idea that reputational harm occasioned by false allegations can be undone, such harm is largely ineradicable.[317] As noted by Patrick George, 'the plaintiff will often feel that, regardless of the monetary compensation, the slur remains or the mud sticks, to be resurrected whenever the opportunity may arise. The defamation is remembered, not the outcome.' This is exacerbated where, as in the context of police investigations into criminal conduct, it is the bare fact of an investigation that is asserted and that generates the defamatory sting. As Rowbottom notes, 'it is harder to undo the damage caused by publicity where the underlying information is true.'[318]

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[314] David Rolph, 'Vindicating Privacy and Reputation' in *Comparative Defamation and Privacy Law*, ed. by Andras Koltay and Paul Wragg (Edward Elgar Publishing, 2020).
[315] Ibid.
[316] Supra (Hartshorne, n. 290), p. 103.
[317] See Lord Sumption's comments in *Khuja* (n. 301). Though he found that Tugendhat J, in the lower court, had made no error of law and not proceeded on the basis that there is a legal presumption that members of the public are able to distinguish between innocence and guilt, his comments are suggestive of a certain degree of scepticism, paras. 33 – 34. See also Mann J in *Richard* (n. 303), para. 248.
[318] Jacob Rowbottom, 'Reporting Police Investigations, Privacy Rights and Social Stigma: *Richard v BBC*' (2018) Journal of Media Law 10(2), p. 123.

Still, let us suppose, for the sake of the present analysis, that the traditional view, however suspect, is correct. In light of this difference, domestic law has long held that an interim injunction will not be granted in an action for defamation where the defendant intends to raise an affirmative defence such as 'truth', and the proposed defence cannot be shown to be a sham or to have no real prospect of success. This is derived from the rule in *Bonnard v Perryman*.[319] While this rule stems, in part, from the aforementioned belief that damage caused by defamatory material can be undone, there is a further important aspect of the reasoning behind the rule. This is a desire to avoid awarding compensation to claimants on a false basis (i.e., compensating an underserved reputation). As stated by Nicklin J in *ZXC*, '[i]t is a fundamental principle in the law of defamation that damages and vindication of reputation will not be awarded on a false basis […] where the defamatory allegation can be proved to be substantially or partially true.'[320] The same does not, however, apply to claims for misuse of private information, in which the balance, at the interim stage, typically favours non-disclosure.

Returning, now, to the question of whether, as a matter of principle, it is desirable that claimants be able to reserve their position upon truth or falsity in actions for misuse of private information,[321] the treatment of 'true privacy' cases (i.e., those in which the complained of publication opened a window onto true facts) seems reasonable enough. As mentioned above, it is undoubtedly the case that (true) privacy, once destroyed, cannot be restored. The same reasoning cannot, however, be said to support the conclusion that 'false privacy' should be exempt from the free-speech protections built into the tort of defamation. In response to this, the courts have expressed the view that they are alive to the possibility that claimants may seek to disguise what are, in essence, claims for defamation as those for misuse of private information, and will, accordingly, look to the substance of the matter in every case.[322] For example, in *LNS v Persons Unknown*, Tugendhat J found that the nub of the claim concerned reputation and refused the grant of an injunction on that basis. There is, it is argued, an obvious problem here. As mentioned above, the test is not whether the preponderance of the harm lay in damage to reputation, as this would risk further conflating privacy and defamation. Instead, it is falsity. In this way, Tugendhat J appears to have made the same mistake as Moreham, who criticised the Supreme Court's decision, in *ZXC*, for failing to discuss the 'English cases saying that claimants should not be able to rely upon misuse of private information where the 'nub' of their complaint

[319] Supra (*Bonnard*, n. 16).
[320] *Bloomberg v ZXC* [2019] EWHC 970 (QB), para. 149.
[321] Supra (Hartshorne, n. 316), p. 114.
[322] Ibid.

is reputational harm.'[323] There is, however, a further problem, and one which arises as a logical corollary of the recognition that the test centres not on reputation, but on falsity. This is that where the principal complaint is damage to reputation, there is nothing wrong with engaging in an exercise of strategic pleading. Indeed, where a claim is capable of being brought in multiple actions, claimants are entirely within their rights to choose the avenue which is most advantageous to them.

If, then, 'false privacy' cannot be justified on the basis that judges are able to discern the essential nature of a claim, what else could serve as the touchstone for assessing whether MPI is being used to circumvent the procedural safeguards of defamation. One option is that discussed earlier in this chapter and throughout most of the second: that information is private because it touches upon an intimate area of life, and that the publication of such information can, accordingly, form the basis of a claim in misuse of private information. Unfortunately, this approach was expressly rejected in the Supreme Court's judgment in *ZXC*.[324] In that case, the appellant sought to argue that information is private because it concerns an area of life that is no-one else's concern, and not because any consequential harmful impact of publication relates to the relevant person's private life (i.e., because the publication is capable of causing reputational damage). Dismissing this interpretation, the Court held that this constituted 'an unduly restrictive view of the protection afforded by article 8 of the ECHR.'[325] In supporting its argument, the Court placed particular reliance on authorities, such as *Pfeifer*, which had previously recognised that reputation forms part of the Article 8 right to private life, as well as those concerned with the threshold of seriousness that must be met for the right to reputation to be engaged. The Court's view, on this issue, is effectively summarised in the following passage:

> 'We consider that article 8 does encompass a "reputational" dimension which in the United Kingdom is primarily protected by the tort of defamation. *However, reputational damage attaining a certain level of seriousness and causing prejudice to personal enjoyment of the right to respect for private life, can also be taken into account in determining whether information is objectively subject to a reasonable expectation of privacy in the tort of misuse of private information.* It is included in all the circumstances of the case which should be considered and "the effect on the claimant" is expressly one of the Murray factors.'

It is argued that this approach is somewhat problematic, and further damages our ability to neatly categorise the harms associated with privacy and defamation. First, and as a matter of

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[323] Supra (Moreham, n. 306), p. 231. A further example of this can be found in the decision in *BKM Ltd v BBC* [2009] EWHC 3151 (Ch), in which Mann J held that, despite the existence of a privacy point, a desire to protect reputation was a significant underlying element of the claim, para. 13.
[324] Supra (*ZXC*, n. 313), paras. 114 – 125.
[325] Ibid., para. 115.

logic, one might reasonably have thought that, as a rights-based inquiry, the concept of a reasonable expectation of privacy is naturally one which deals with a question of entitlement, and one which is, therefore, incapable of taking account of consequences of a violation of the right in question. To hold otherwise would, it is argued, be tantamount to allowing the conclusion to inform the question.[326] On this basis, it is submitted that the question of whether or not someone has or had a reasonable expectation of privacy in respect of certain information is a qualitatively different inquiry from whether information procured or disclosed in breach of the said expectation is capable of causing harm to reputation. Indeed, this conclusion is supported by the growing recognition, discussed throughout the second chapter, that there should be liability for intrusion-style offences.

There is, however, a second, if related, issue. This is that the assessment of whether information is capable of causing damage to reputation is clearly more relevant to the second stage of the test than the first. As argued by Barendt, '[a]nother […] drawback of the [reasonable expectation of privacy] test is that it too easily enables […] courts to consider arguments at the first stage – whether the claimant has a right under ECHR Article 8 – which should properly be taken into account only at the second stage of a privacy action, when the right is balanced against the right to freedom of expression.'[327] A similar argument is advanced by Moreham, who suggests that while misuse of private information can and does protect reputation, it only does so *because* the relevant information is private. In other words, the information is protected not because its disclosure is capable of causing reputational harm but because it is essentially private.[328] As Moreham continues, '[i]nformation that makes you look bad might belong to these realms of life but the inverse does not necessarily follow: something will not belong to the private realm of your life because it [is capable of harming] your reputation.'[329] For Moreham,

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[326] While this is not a perfect comparison – reputational harm is not, after all, a conclusion or, indeed, a consequence of the existence of a reasonable expectation of privacy – it is argued that this example nonetheless succeeds in illustrating the absence of a logical relationship between the two elements.

[327] Eric Barendt, "A Reasonable Expectation of Privacy': a Coherent or Redundant Concept?' in *Comparative Defamation and Privacy Law*, ed. by Andras Koltay and Paul Wragg (Edward Elgar Publishing, 2020), p. 108.

[328] Nicole Moreham, 'Privacy, Reputation and Alleged Wrongdoing: Why Police Investigations Should not be Regarded as Private' (2019) Journal of Media Law 11(2), p. 152.

[329] Ibid. This argument merits brief elaboration. It is agreed that if we accept, as a general proposition, that information is private because it pertains to a sphere of life which is rightly characterised as no one else's concern, then it follows that a tendency to cause reputational harm cannot, in and of itself, constitute a sufficient reason to regard information as private. If, for example, I maintained a secret identity as a serial killer or paedophile (identities that give rise to issues of widespread concern), the fact that disclosure of this part of my life would destroy my reputation is irrelevant in considering whether it was subject to a reasonable expectation of privacy. As Moreham notes, the question comprises a normative inquiry, with the result that the mere fact that certain information should, as a matter of fact, have been inaccessible to others is largely immaterial in assessing whether it is private. While Moreham is, in a sense, correct, it is submitted that she takes the argument too far, dismissing reputation and its ability to bear on the issue of whether material is (or should be) private in its entirety.

then, the protection of reputation appears, almost, an unintended consequence of the application of misuse of private information, a function which is entirely incidental to the primary aim of the privacy action: to maintain confidentiality in *private* information. While the view that potential to damage reputation should not factor into the assessment of a reasonable expectation of privacy is accepted (for reasons that have been explained), it is submitted that the idea that reputation is only protected in a *purely* incidental sense clashes too strongly with the established caselaw, which has repeatedly affirmed the contrary position.[330]

In fairness, this is a critique which is equally capable of being brought against the former argument: that reputational harm is an irrelevant consideration. Indeed, and as seen in the above cited passage in *ZXC*, one of the *Murray* factors relevant to the assessment of whether someone has or had a reasonable expectation of privacy in respect of certain information is 'the effect on the claimant.' To address this apparent conflict, while the effect, of a given publication, on the claimant can be illustrative, it is not conclusive. To the extent, then, that *Murray* presents this factor as but one of several to be considered as part of the assessment, this approach proves largely unproblematic. By contrast, the Strasbourg jurisprudence repackages this factor as a discrete threshold test which must be satisfied before the Article 8 right can be engaged.[331] This is exacerbated by the fact that, through the Court's framing in *ZXC*, a false equivalence is established between the scope of misuse of private information and the Article 8 right, with the judgment appearing to suggest that 'the reasonable expectation of privacy is similar in scope to the Convention right to respect for private life.'[332] By doing this, the Court failed to have due regard to the role played by defamation and, in doing so, artificially expanded the remit of protection provided by misuse of private information.[333] As a final, brief, point, it seems strange (if not incoherent) that the jurisprudence insists, on the one hand, that reputational harm attain a certain degree of severity before Article 8 is engaged while also holding, as was argued in the case of *Hannon*,[334] that the presence of a heavy element of reputational harm in a claim for misuse of private information is strong evidence that the case should have been pled in defamation, and

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[330] This view is also diametrically opposed to that set out in the first chapter that the right to informational privacy is a proxy for the right to reputation. Interestingly, Hariharan accepts that MPI protects informational privacy specifically, yet nonetheless contends that the action only protects reputation *incidentally*. This is likely a consequence of his view that aspects of well-being protected by defamation outside of the right not to be judged on a false basis (e.g., the ability to form and maintain social relationships), are only protected in a 'subsidiary' sense, with these further interests being secondary to or parasitic of the primary one safeguarded by the tort. If Hariharan accepted that these interests should be placed on equal footing with that of not being judged on the basis of false wrongs, it is argued that the conclusion that MPI protects reputation *directly* is inescapable; see Hariharan (n. 309).
[331] Supra (*ZXC*, n. 324), para. 120; see also the decisions in *Karako* (n. 136) and *A v Norway* (n. 138).
[332] Supra (Moreham, n. 323), p. 231.
[333] Ibid.
[334] 2014 [EWHC] 1580, para. 19.

that the claim should, accordingly, be dismissed as an abuse of process. While Mann J, in *Hannon*, navigated around the latter proposition by holding that the fact that reputational harm formed a significant part of the claim was made acceptable by existence of a further series of privacy concerns which were not *de minimis*, this cannot be the relevant question.[335] Rather, the exercise that should be conducted must, as a matter of logic, involve establishing the balance between the two harms, something which is reflected by the language of 'nub.'

It would seem, then, that, in relation to 'false privacy' and our ability to ensure that individuals do not dress up claims for defamation as those for misuse of private information, we are left in a somewhat unsatisfactory position. This is due, principally, to the incoherent manner in which reputation cuts across both privacy and defamation. To be clear, no objection is made to the fact that reputation is treated as forming part of the package of rights protected by Article 8 and the domestic privacy action. To suggest otherwise would, after all, be patently inconsistent with the argument set out in the first chapter: that (informational) privacy and reputation are closely interwoven interests. Rather, it is said that the core issue lies in the fact that, as a consequence of this overlap, we are left with no principled basis upon which we might identify the 'nub' of an individual's claim in instances involving 'false privacy.' As this section has sought to argue, it cannot be reputation – this being a shared interest (whether a secondary or ancillary aspect of privacy or not) – and neither can it be falsity, as this, in and of itself, would equate to a right to be seen exactly as one is. While a right not to be judged on the basis of false wrongs exists, there is no inverse right to judged exclusively on the basis of true facts. Lastly, it cannot be that we are able to sift out claims for defamation on the basis that the true objection is to the fact that the claimant has been judged on the basis of *irrelevant* (as to opposed to false) facts, as this approach was explicitly rejected in *ZXC*.[336] What, then, are we left with? While the answer to this question is not entirely clear, it is argued that the current approach is theoretically unsound, promotes uncertainty, and runs a very real risk of permitting claimants to circumvent the procedural safeguards built into the tort of defamation and receive compensation on a false basis. There is, therefore, a real and pressing need for the courts to develop a more principled set of criteria for the determination of the true nature of the applicant's claim in cases involving 'false privacy.'

[335] Ibid. (*Hannon*).
[336] Supra (*ZXC*, n. 331), paras. 114 – 125.

'Truth' as a Defence to Defamation and its Relationship to Privacy

In discussing 'false privacy' and the desirability of misuse of private information making provision for false statements, the preceding section has highlighted the often made argument that damage awards in claims for misuse of private information should not, as a general rule, include compensation for reputational harm, as to do so would be to risk awarding damages on a false basis (i.e., compensating an undeserved reputation). As previously discussed, this point of principle is reflected in the defence to an action for defamation of 'truth', which holds that no action will lie where the complained of allegations can be proven to be substantially true. Although this is a long-established rule of law, it will be argued that 'truth', both as a defence to a claim for defamation and as a potential bar to the recovery of reputational damages in a claim for misuse of private information, is, in many respects, both problematic and unprincipled.

As seen above, the substantial 'truth' of a statement is an absolute defence to an action for defamation. In the words of Richard Parkes QC, '[t]he overriding principle in the law of defamation […] is that truth justifies any publication at all. If a publication can be proved true, then it does not matter how private the information may be, or how humiliating, or how lacking in public interest.'[337] The same cannot, however, be said in relation to misuse of private information. This is entirely logical. Although defamation is focused quite narrowly on falsehoods, the privacy action is, to once again borrow the language of Warren and Brandeis, more concerned with the right to be 'let alone.' As Harnett and Thomson write, '[s]ince the purpose of the privacy action is essentially to protect those elements of a man's life which society feels are particularly his own, the defence of truth is, of course, not recognised.'[338] With respect to Mr Parkes, it is submitted that his statement of principle is overly broad and is missing an important qualification. As Descheemaeker argues, 'reputation' refers, specifically, to *deserved* reputation, with the tort of defamation serving to 'protect a person against stains imparted by others on their reputation, not to protect a stained character.'[339] In this sense, reputation, which is traditionally seen as something external – as one's appraisal in the eyes of members of the public – is equated with character: what one actually is. Were this not the case, then truth would, of course, serve as no defence to an action for defamation. To the extent, then, that the aim of defamation proceedings is to vindicate the actual, deserved reputation of the claimant, it is for

[337] Richard Parkes QC, 'Privacy, Defamation and False Facts' in *The Law Privacy and the Media*, Tugendhat and Christie (n. 296), p. 354.
[338] Bertram Harnett and John V. Thornton, 'The Truth Hurts: A Critique of a Defense to Defamation' (1949) Virginia Law Review 35(4), p. 440.
[339] Eric Descheemaeker, "Veritas Non Est Defamatio?' Truth as a Defence in the Law of Defamation' (2011) Legal Studies 31(1), p. 16.

precisely this reason that it is said that no wrong is done to the claimant through the making of true statements.[340] Although this may initially appear an entirely reasonable position to take, several problems reveal themselves upon a closer analysis. First, it is important to understand that unlike misuse of private information, which imposes no requirement that the complained of material reduce the claimant's estimation in the eyes of others – defamation requires that the relevant statement or publication have this effect. This prompts an important question: how do we define the language of 'defamatory'?

As hinted at above, the principal test for what constitutes defamatory material is whether it would cause the general public to think less of you. As stated in *Sim v Stretch*, the key question is whether 'the words tend to lower the plaintiff in the estimation of *right-thinking* members of society.'[341] Notice that the emphasis, here, is on the right-thinking population (i.e., decent, forward minded individuals). That this is the relevant group for the purpose of assessing the nature of the complained of material is a long-established tenet of defamation law, with it being the case that no action will lie where one's reputation has been injured solely in the eyes of immoral individuals.[342] While the above formulation, set out in *Sim*, is the primary means of assessing whether material is defamatory of the claimant, there are several supplementary tests. These include whether the complained of words cause the claimant to be 'shunned and avoided' or render them ridiculous. While the latter test is ordinarily framed in slightly broader terms, and in ones which also encompass actions which risk exposing the claimant to hatred or contempt, the present analysis will treat 'ridicule' as the essential criterion for reasons that will soon be made clear.[343] Though there are important similarities between the principal and supplementary tests – words demonstrating a tendency to significantly lower the claimant's esteem will, after all, generally render them a social pariah – there is key difference. As observed by McNamara, this distinction lies in the fact that, whereas the former test implies a moral judgement about the actions of the claimant – with the law assessing whether the conduct forming the basis of the claim falls among the set of values to which it affords ethical recognition – the same cannot be said to be true of either of the two supplementary tests.[344] Instead, and as seen in *Youssoupoff v Metro-Goldwyn Mayer*, '[n]ot only is the matter defamatory if it brings the plaintiff into hatred,

[340] David Rolph, 'Preparing for a Full-Scale Invasion? Truth, Privacy and Defamation' (2007) Legal Studies Research Paper No. 07/85, p. 2.
[341] [1936] 2 All ER 1237.
[342] Supra (*Byrne*, n. 98).
[343] While 'hatred' and 'contempt' alike are typically concerned with actions which tend to elicit a negative evaluation of the claimant's moral worth, 'ridicule' is not (at least, not to the same extent).
[344] Lawrence McNamara, *Reputation and Defamation* (Oxford University Press, New York, first published 2007), p. 185.

ridicule, or contempt *by reason of some moral discredit on her part*, but also if it tends to make the plaintiff be shunned and avoided and that *without any moral discredit on her part*.'[345] Similar statements can be seen in *Berkoff v Burchill*, in which Neill LJ held that 'words may be defamatory, even though they neither impute disgraceful conduct to the plaintiff nor any lack of skill or efficiency in the conduct of his trade […] if they hold him up to contempt, scorn or ridicule or tend to exclude him from society.'[346] While fault or moral blameworthiness is, therefore, a key element of the principal test, it forms no part of the two supplementary tests.

What, then, is the significance of this observation, and how do these matters relate to the issue of 'truth'? As mentioned earlier, we are, in conducting this analysis, concerned with *deserved* reputation. As the concept of fault is inextricably linked to notions of autonomy and agency, how can it be said that the substantial truth of the allegation should operate as a defence in the context of actions wholly outside of the claimant's control? This is complicated by the fact that, as seen above, it is now well-established that reputation can form part of the right to privacy conferred by Article 8. In light, therefore, of the recognition that reputation can be damaged by the publication of private information, how is it theoretically sound that a defendant, in an action for defamation, is able to avail themself of a complete defence by simply showing that the published information is true, despite the fact that it may be irrelevant and, in many cases, discloses no real public interest?[347] As has been frequently argued, the gratuitous or purely malicious destruction of reputation is wrong in principle, and that for it to be justified 'it must be undergirded by the achievement of a particular good, if not for the defamed individual, then for the community as a whole.'[348] One will likely have noticed that, in relation these matters, the true concern is the protection of *privacy*. Through their shared focus on 'ridicule', the supplementary tests concentrate, not just upon reputation and how the claimant is perceived by others, but also on the claimant's feelings, and how they view themself.[349] In this way, it is argued that the damage, in those cases which engage this basis of actionability, is less to a sense of social-worth (i.e., to the claimant's public façade) and more to the claimant's self-esteem. In other words, and to adopt the language used in the first chapter, they constitute 'spiritual harms'

[345] [1934] 50 TLR 581.
[346] [1997] EMLR 139, *146.
[347] The complexity of the issue is further compounded if we conceptualise the right protected by defamation as that to be assessed on the basis of true and *relevant* facts (i.e., those facts which would inform the judgement of a reasonable and forward-thinking member of society). Information may be deemed irrelevant for a number of reasons. It may, as mentioned, be the case that the information is not of a kind that would factor into the legitimate assessment of a person's character or that it was, previously, of such a type, but is no longer representative of who the relevant person is (as in the context of spent convictions).
[348] Supra (Descheemaeker, n. 339), p. 11; see also Peter Kutner, 'Truth in the Law of Defamation' (2023) Journal of Comparative and International Private Law, 87(2).
[349] Supra (McNamara, n. 344).

within the meaning contemplated by Warren and Brandeis.[350] While this might appear to be of limited relevance, as it was previously argued that reputational harms are generally spiritual in nature to the extent that they commonly abridge limbs of social engagement, it nonetheless serves as a useful illustration of the overlap between the two actions. While these supplementary tests are, admittedly, infrequently used, they survive as potential bases for liability. For this reason, it is argued that consistency and coherence demand that 'truth', which has no place in the law of privacy (for obvious reasons), should likewise be struck from the expanded bases of liability found in the law of defamation (i.e., where the relevant material is deemed defamatory on the basis that it exposed the claimant to ridicule, as opposed to its having revealed any wrongdoing).

Not everyone, however, shares this view. Rolph, for example, suggests that '[a]ny privacy protection afforded by defamation law has been or should be incidental or indirect at best […] it is not the function of defamation law to protect a plaintiff's privacy.'[351] He makes this argument on the basis of the commonly articulated view that defamation and privacy protect distinct legal interests.[352] Descheemaeker adopts a similar position, suggesting that if we accept the premise that defamation serves to protect reputation rooted in character, then, as a matter of logical consistency, we must likewise accept that 'truth' does act as a complete defence. Interestingly, he stops short of saying that this should be the case (i.e., he leaves open the normative question), suggesting, on the contrary, that it may well be the case that the gratuitous destruction of reputation *should* be legally wrong.[353] Like Rolph, then, he believes that defamation is solely concerned with reputation, and that we should be chary of its use to protect other, unrelated interests. This can be seen in the following remarks: 'if one is allowed to publish true words which might cast unwanted (and unwarranted) publicity on the claimant, it is in order to protect his dignity – and in particular his privacy […] it has nothing to do with reputation.'[354] It will be argued that both Rolph and Descheemaeker fall into error in several, key respects. First, and to address Descheemaeker's view, it might be the case that in a perfectly rational world, in which individuals were, in their appraisal of others, capable of exercising perfect judgement and having due regard to relevant considerations while dismissing those that are not, his argument would carry more weight. In such a world there would, after all, exist a perfect degree of correspondence between someone's character and their social evaluation. This is not, however,

[350] Supra (Warren & Brandeis, n. 61).
[351] Supra (Rolph, n. 340), p. 7.
[352] Ibid.
[353] Supra (Descheemaeker, n. 348), p. 12.
[354] Ibid., p. 12.

the world we inhabit. Reputations do not develop within the parameters of such an objectivist framework, which ensures that certain, reasonable, expectations are satisfied. Instead, and as Gibbons observes, '[reputations] are conferred in a social environment in which the normative standards which are brought to bear on somebody's personal image are much more diffuse and contestable. Members of an audience are under no obligation to apply particular standards; the ones which are in fact applied will reflect the shifting patterns of common morals [and] may actually have a morally questionable base, as when the mentally disordered or the financially embarrassed are shunned and avoided.'[355]

A further problem lies in the fact that the question of what constitutes a deserved reputation is a fundamentally normative inquiry. It does not ask what a given person's reputation *is*, but rather what it *should* be. While Descheemaeker leaves open the normative question – deeming it an irrelevant consideration – it is argued that it is, in truth, of essential importance, and, importantly, an inquiry which cannot be logically detached from the question which Descheemaeker does seek to address. Viewed in this way, it becomes clear that it cannot be the case that someone is any more or less deserving of a particular reputation in the absence of some degree of moral responsibility, a position affirmed by the caselaw. That Descheemaeker views the issue through an overly descriptive lens, and one which places a premium on the veracity of assertions of bare fact, is evidenced by his statement that 'the publication of spent convictions does cause an injury to the plaintiff's reputation in the wider sense – but not to his *deserved* reputation, which is what the law of defamation exists to protect.'[356] It could, however, be argued that this is of little consequence. As has been discussed, defamation's purpose is not so much to promote a *deserved* reputation as it is to protect against an *underserved* reputation, with the relevant basis for this assessment being falsehood. This is, in a sense, logically consistent with Descheemaeker's view, as 'relevance' is not the touchstone for liability. While this argument may carry some weight, it cannot stand alongside the ongoing recognition of the 'ridicule' basis of actionability under defamation, which makes express provision for this species of defamatory material.[357]

Although it could be that Descheemaeker's principal concern is simply one of coherence, namely, that the limits of defamation not be artificially extended to accommodate matters which are, on his analysis, the clear territory of privacy – indeed, his writing suggests as much – this too

[355] Supra (Gibbons, n. 308), p. 592. This is further reflected in judicial accounts of the presumption of innocence as a social (as opposed to legal) construct, and one that is not always given effect by members of the public; see *Richard* (n. 317).
[356] Supra (Descheemaeker, n. 353), p. 17.
[357] Supra (McNamara, n. 349).

is problematic. As we know, privacy is frequently concerned with reputation and is able to take account of entirely false matters. If, then, privacy is able to encroach upon defamation's domain (which is not to say that it should), it seems only right that the reverse should be true as well. Although it is accepted that reputation is the principal focus of defamation, the suggestion, advanced by Rolph, that privacy is only ever protected in an incidental fashion is similarly given to difficulties. This is because of the fact that 'privacy' is susceptible of such a wide definition. If we look past formal labels to the substance of the interests that privacy actions protect, it becomes clear that many of them are deeply intertwined with reputation. This was the essence of the analysis set out in the first chapter. Indeed, and as McCloskey, paraphrasing Fried, notes, '[privacy has a] deep interrelation with other values, the values of respect, love and friendship in particular […] [privacy is based] on the right to respect, and on the value and possibility of love and friendship, these being based on the morality of respect for persons, *the right to privacy being seen as an aspect of the right to respect as a person*.'[358] Provided, of course, that one accept this conceptualisation of the privacy interest – although it is suggested that the above undoubtedly forms *part* of the right to privacy – the conclusion that defamation, which protects reputation (albeit, in a specific and narrow sense),[359] provides direct protection for a particular aspect of privacy seems inescapable.

As a final note in relation to this issue, it might be said that many of these points are overly academic, as several of the cases which relied on the expanded bases of liability in defamation could now (if not then) be pled in misuse of private information. While this might seem persuasive, it is suggested that it is, ultimately, immaterial. As Harnett and Thornton note, 'it is hardly a valid argument to say that there is no need to improve the operation of the action for defamation merely because another remedy is available. Remedies and defences should not in an enlightened age be fractionated and pigeon-holed into rigid categories as was done in the primitive formative era of the common law.'[360] To the extent, then, that the issue is one of coherence and a desire to establish parity between inherently similar elements, it is nothing to the point to suggest that a person could or, indeed, should have pled their case in misuse of private information instead of defamation.

[358] HJ McCloskey, 'Privacy and the Right to Privacy' (1980) Philosophy 55(211), p. 26; see also Fried (n. 80).
[359] Supra (Hariharan, n. 330).
[360] Supra (Harnett and Thornton, n. 338), pp. 440 – 441.

Article 8 and 'Truth': A Skewed Balance?

Before concluding, it will prove useful to briefly address the extent to which Article 8 bears on the issues concerning 'truth.' As previously discussed, the protection afforded by Article 8 entails both a positive and negative dimension. While the latter has sometimes been described as the primary purpose of Article 8,[361] the article also entails serious, positive undertakings. This can be seen in the requirement that states take active steps to facilitate the individual's right to privacy, even as between private individuals.[362] The essential question is, therefore, to what extent does 'truth', as a defence to defamation, come into conflict with this obligation by rendering permissible the publication of private information without requiring, as in the case of a privacy action, that the defendant establish the existence of a countervailing interest in disclosure? As one of a series of qualified rights set out in the Convention, reliance on any of the exceptions under Article 8(2) must be prescribed by law, pursue a legitimate aim, and be necessary in a democratic society (i.e., both necessary and proportionate to one or more of the legitimate aims set out in the second paragraph). In the context of actions such as defamation and misuse of private information, the obvious tension is between the right to respect for private and family life captured in Article 8(1), and the right to freedom of expression afforded by Article 10. In striking the correct balance between these rights (or, indeed, any other competing, qualified rights), states enjoy a wide margin of appreciation, with the Strasbourg Court exercising a predominantly supervisory jurisdiction. As stated by the Court, 'the central question under Article 8 is not whether different rules might have been adopted by the legislature, but whether, at striking the balance at the point at which it did, [it] exceeded the margin of appreciation afforded to it under that Article.'[363] The approach applied by domestic courts has been heavily influenced by the reasoning of Lord Steyn in *Re S*.[364] This case, which is frequently cited in connection with the 'ultimate balancing test', set out a number of useful propositions. These included the fact that neither article has presumptive priority over the other and that, in assessing which of the two values should prevail over the other in a given case, an intense focus must be had on the relative importance of the rights being claimed, with a proportionality test applied to each.[365]

Of the factors which carry significant weight in the balancing exercise, one of the most commonly applied is the extent to which the matter publicized pertains to an issue of public

[361] See *Libert v France*, Application no. 588/13 (February 2018), para. 43.
[362] *Evans v United Kingdom*, Application no. 6339/05 (April 2007), para. 75
[363] Ibid., para. 91.
[364] *Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47.
[365] Ibid.

interest. As stated in *Axel Springer v Germany*, '[a]lthough the press must not overstep certain bounds, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on *all matters of public interest*.'[366] With regard to this point, it is important to note that there is an important distinction to be drawn between matters which are of public interest, and those which may be of interest to the public.[367] While the latter is capable of embracing matters which are typically relegated to the pages of tabloid journalism, the former requires the satisfaction of a higher standard, and one which reflects journalists' collective role as a 'public watchdog.' That this is a factor of particular importance was emphasized in the case of *Von Hannover*, in which the Strasbourg Court held that the public interest is 'the decisive factor in balancing the protection of private life against freedom of expression.'[368] As a brief counter-point, it could be suggested that the key factor in the balancing exercise is not, as suggested above, the degree to which the publicised matter concerns an issue of general concern or interest, but rather the authenticity of the information disclosed, specifically, the degree to which the defendant reasonably believed in the accuracy of the information forming the basis of the claim. As much was made explicit in the case of *Brcko and Others v Bosnia and Herzegovina*,[369] in which the Strasbourg Court described this factor as the most important of those it was required to balance.

With regard to this issue, there is an important point worth addressing. Despite the Court's seeming statements to the contrary, it is argued that the above factor was not the most important in that case. Instead, it was the public interest in the content at issue. Indeed, it is, upon a close reading of the judgment, reasonably clear that 'authenticity' only becomes a relevant consideration once it has been established that the publicised matter engages the public interest. This can be clearly discerned in the Court's statement that 'the safeguard afforded by Article 10 to journalists [or anyone playing the role of a social watchdog] in relation to reporting on *issues of general interest* (my emphasis) is *subject to the proviso* that they are acting in good faith in order to provide accurate and reliable information […]'[370] In other words, the issue of whether, to borrow Lord Nicholl's language from *Reynolds*,[371] the standard of 'responsible journalism' is satisfied in a given case is only relevant if the reporting relates to a matter of public interest. In the absence of the latter element, the accuracy of a defamatory statement (typically a contradiction, as

366 *Axel Springer AG v Germany* Application no. 39954/08 (February 2012), para. 79.
367 See LJ Stephenson's comments in *Lion Laboratories v Evans* [1985] QB 526: 'there is a wide difference between what is interesting to the public and what is in the public interest to make known', *537.
368 Supra (*Von Hannover (no 1)*, n. 115), para. 76.
369 Application no. 17224/11 (June 2017).
370 Ibid. (*Brcko*), para. 87.
371 *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

defamatory material will, as seen above, generally assert some form of wrongdoing and will, therefore, trigger the public interest)[372] is neither here nor there. In this sense, 'authenticity', as a factor to weighed in the balancing exercise, is naturally subsidiary to, and inseparable from, the 'public interest.'[373] This is partially reflected in the fact that, under domestic law, a failure to substantiate information informs the reasonableness of any belief that publication was in the public interest (i.e., whether the defendant can avail themselves of the section 4 defence under the 2013 Act), with 'truth' constituting an entirely distinct defence. In light, then, of the heavy focus on the elements of public interest and proportionality, it would seem that there is a risk that the current approach falls short of the United Kingdom's Article 8 obligation to promote the right to privacy.

While Parliament has seen fit to legislate to prevent the dredging up of spent convictions,[374] 'there is no equivalent protection against the exhumation of behaviour that is not criminal, or at least has not involved conviction.'[375] Furthermore, the nature of the two supplementary tests of defamatory meaning is such that they will often centre on actions which do not engage the public interest. While it might be said that there is a legitimate interest in being able to speak the truth, however unpleasant, about others without fear of legal action,[376] an approach which gave strict effect to this view would likely fall foul of the proportionality requirement, as it can less easily be said that someone's right to privacy (a right which is afforded an increasingly privileged status)[377] had to be qualified to the extent that it was necessary to allow others to speak true, if irrelevant and degrading, facts about them.[378] With that said, it is important to remember that, in striking the correct balance, states enjoy a wide margin of appreciation.[379] Given, therefore, the relative infrequency at which the expanded bases of

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[372] For the sake of clarity, the essential point being argued here is that it makes little sense, if any, to speak of the possibility of a defamatory statement arising in circumstances in which the underlying allegation fails to trigger the public interest, as the very nature of defamatory material is such that the public interest will almost always be engaged (this is, of course, subject to the key exceptions that form the focus of much of this section).

[373] It is a similar principle that helps to explain why satire may be permissible despite the fact that it will, in most cases, expose the relevant individual to ridicule. As McNamara notes, 'satire is not simply ridicule […] it is *critique*'; see (n. 357). While it is conceded that the language of 'critique' does not, as a matter of logical necessity, require that the relevant issue be one which engages the public interest, it is suggested that this will generally be the case. This is supported by the Strasbourg Court's statements that '[satirical forms of expression *relating to topical issues*] could themselves play a very important role in the free discussion of *questions of public interest*, without which there [is] no democratic society'; see *Eon v France*, Application no. 26118/10 (March 2013).

[374] See Rehabilitation of Offenders Act 1974.

[375] Supra (Tugendhat and Christie, n. 337), p. 362.

[376] Supra (Descheemaeker, n. 356), p. 13.

[377] See Jeevan Hariharan, 'Has English Privacy Law Gone Too Far? Police Investigations and the Media's Ability to Report on Serious Wrongdoing' (2025) Journal of Media Law (forthcoming), p. 8.

[378] See Lord Hoffmann's statements in *Campbell* (n. 285): '[t]he question is […] the extent to which it is necessary to qualify the one right in order to protect the underlying value which is protected by the other. And the extent of the qualification must be proportionate to the need', para. 55.

[379] Supra (*Axel Springer*, n. 366), paras. 85 – 88.

actionability are engaged, in combination with the difficulty that the imposition of a public interest test on to the defence of 'truth' might entail,[380] it is not entirely clear whether the current balance struck by domestic law falls outside of its admittedly wide discretion.[381]

Finally, there is one further issue which merits brief discussion. The fact that this section has focused on 'truth' would suggest that what we are concerned with are assertions of fact, as opposed to value judgements or opinions. After all, the latter are not susceptible of proof in the same way as the former, a fact that the Strasbourg Court has made clear on numerous occasions.[382] While this section is, indeed, focused quite narrowly on statements which assert a particular state of affairs, it should be acknowledged that one of the most famous cases engaging the expanded bases of liability was one in which the claimant had been described as 'hideously ugly.'[383] Although it is argued that this does little to detract from the preceding analysis – both the 'shun and avoid' and 'ridicule' tests, are of course, equally capable of being engaged by factual allegations – it is important to admit that there may be instances, as in the above case of *Berkoff*, in which the supplementary tests are concerned with statements of opinion, in relation to which 'truth' has little bearing. At the same time, it should be noted that this example does not threaten theoretical consistency in the way complained of earlier in this section. This is because there was nothing inherently private about the claimant's appearance in *Berkoff*. While the state of his appearance was irrelevant, and crude comments about it, undoubtedly malicious, the impugned publication did not constitute a violation of privacy in the ordinary sense (despite wounding the claimant's sense of self-esteem). It is not, therefore, inconsistent with the rules of privacy to apply ordinary principles of defamation (specifically, the defence of 'truth') in such cases.[384]

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[380] As Rolph argues, albeit in the context of Australian law, 'few [defamation] cases in practice [turn] on whether or not a publication concerned a matter of public interest or was for the public benefit' (n. 351), pp. 4 – 5. On that basis, he argues that there is little to suggest that 'truth' threatens the balance between the rights to privacy and freedom of expression.

[381] Support for the view that the current balance may exceed its margin of appreciation can, however, be found in the Strasbourg Court's statements that the principle preventing an individual from complaining of a foreseeable loss of reputation covers not only criminal offences, 'but also any other misconduct entailing a measure of legal responsibility […]'; see *Denisov v Ukraine*, Application no. 76639/11 (September 2018), para. 98. While 'legal responsibility' is not directly synonymous with 'moral blameworthiness', the judgment nonetheless succeeds in illustrating that some kind of fault – and by logical extension, responsibility or control – is required for 'truth' to be a relevant criterion.

[382] See *Cumpana and Mazare v Romania*, Application no. 33348/96 (December 2004), para. 98. It should be noted that the question of whether a particular judgement is supported by a factual matrix is, ultimately, a matter of degree; see *Jerusalem v Austria* (2003) 37 EHRR 567.

[383] Supra (*Berkoff*, n. 346).

[384] To be clear, the point being argued here is that while it is both wrong and inconsistent for 'truth' to justify the publication of information which is private and defamatory (on the basis that it exposed the claimant to ridicule), the same can clearly not be said of information which is defamatory, but not private.

Where, then, does this leave us? Generally speaking, 'truth' is an unproblematic defence. Indeed, it serves a useful purpose, as the vast of majority of aspersions forming the base of claims for defamation will imply some degree of wrongdoing. In such cases, it is only right that, if the allegation can be proven substantially true, the claimant suffer the consequences of their actions.[385] This is, however, an incomplete picture. As seen in the foregoing analysis, the language of 'defamatory' carries a wider meaning and does not, as a matter of legal or logical necessity, require any wrongdoing on the part of the claimant. This can be seen in the supplementary tests concerning actions which cause the individual to be 'shunned or avoided' or which risk exposing them to 'ridicule.' While these tests are, admittedly, little used, they survive as additional bases of actionability. The social policy which drives 'truth' in the former context, clearly does not support its application in the latter. It seems clear, therefore, that 'truth' should not operate as a defence to an action for defamation *in all circumstances*. Although certain academics have sought to argue that this issue is plainly more concerned with privacy than it is with reputation,[386] that argument has been rejected. As we have seen, reputation is a core focus of both defamation and the privacy action, with the principal difference between the two lying in the *sense* in which reputation is protected. As Nicklin J observed in *ZXC*, 'these causes of action cannot be neatly divided into their own compartments; they overlap.'[387] Recognising this, it is argued that more needs be done to ensure that the relevant sets of rules be developed consistently and in such a way as to promote coherence between the two bodies of law, specifically, in relation to the operation of 'truth.'

Conclusion

The preceding section has sought to highlight some of the theoretical concerns in relation to 'false privacy' and 'truth.' To repeat what is likely, by now, a familiar refrain, it is not the fact that misuse of private information (or, indeed, any other privacy action) is capable of being engaged by falsehoods that is seen as cause for concern. This much was, it is hoped, clearly established in the earlier analysis of false light invasion of privacy in chapter 2. Rather, and as in relation to that tort, it is the way that this aim has been given effect in domestic law that is

[385] This statement of principle is subject to an important qualification. As seen above, the Strasbourg Court has stated that, 'article 8 cannot be relied on in order to complain of a loss of reputation which is the *foreseeable* consequence of one's own actions'; see *Denisov* (n. 382), para. 98. It would seem, therefore, that the loss of reputation must be roughly commensurate to the severity of the wrongdoing.
[386] See Descheemaeker (n. 376) and Rolph (n. 380).
[387] Supra (*ZXC*, n. 320), para. 149.

treated as problematic. Specifically, and in light of the now blurred boundaries between privacy and reputation, it is not clear how judges are able to discern the essential nature of a claim so as to avoid procedural abuses. While the solution to this problem is not obvious, it is argued that, for as long as it is maintained that privacy and reputation are distinct interests, more work needs to be done to clearly delineate between the two rights. Similar arguments have been raised in relation to the operation of 'truth' which, it is suggested, contributes to the lack of cohesion between privacy and defamation by allowing the defence in circumstances in which the complained of publication discloses neither any wrongdoing on the part of the claimant, nor any activity which is likely to trigger the public interest.

- Chapter 4 -

What, then, is the state of privacy law in England and Wales? This is, of course, a very open question, and one which this thesis has sought to address from a number of vantage points. While it has been argued that our privacy law finds itself in an unhappy state – beset by innumerable gaps and inconsistencies – to suggest that the domestic privacy regime is completely incoherent would be to strongly overstate the case. Rather, domestic privacy law is, in many ways, remarkably well-developed, particularly for a relatively nascent body of law which has evolved in so peculiar a fashion. Having said this, there are significant issues. While these problems manifest themselves across a variety of contexts, it is in relation to two matters, in particular, that they are of particular importance. The first, and overarching issue, is the uncertain relationship between privacy and reputation. While this is a question which has, historically, proven rather bedevilling, this thesis has taken the view that reputation is simultaneously personal and public, innate and external, the object and its reflection. This is sensed most keenly in the way that reputation cuts sharply across both defamation and misuse of private information.

This can be seen in a number of different ways. As discussed in the first chapter, while privacy has, at times, been thought of as a right which is more concerned with the individual's sense of self within society, and their ability to exercise control in both the development of their

personality and their relationships with others, reputation is similarly concerned with many, if not all, of these interests. Indeed, while privacy actions (among them, misuse of private information) have frequently cast damages in terms of humiliation, distress, and loss of control, such harms can, upon a close analysis, often be seen to circle back to reputational matters. This is not to suggest that reputation is the antecedent right from which privacy flows, merely, that the two interests do not lend themselves to the kind of rigid separation that is often described (indeed, sought) in the jurisprudence. It is, in large part, for this reason that it is suggested that, to the extent that English law formally recognises a right to privacy, this right is, to a significant extent, concerned with the vindication of reputation (i.e., that the right to privacy is a proxy for reputation).

Privacy – as a broad concept – is, of course, concerned with a wider array of issues than simply the protection of reputation. This is illustrated by the fact that the first chapter treated the core constituent elements of the privacy interest as dignity and *choice*. While the two are undoubtedly related, with choice often being described as an aspect or function of dignity (itself, a famously expansive concept), the former is likely to be more focused on issues relevant to reputation than the latter. This can be seen in the analysis of the 'intrusion upon seclusion' tort under US law, and the growing recognition, in England and Wales, that there should be liability for 'physical' invasions of privacy. This, it is argued, is the second matter in relation to which many of the problems with the domestic privacy regime come to the forefront. While 'choice' can refer to a decision as to which aspects of our lives we will make public, it also serves to allow us to abstain from revealing any such details altogether. In other words, and to once again borrow the language of Warren and Brandies, it serves to 'control absolutely the act of [disclosure].'[388] This dimension of the privacy intertest can be seen quite clearly in the context of intrusion-style violations of privacy in which it is not the acquisition of private information, or any reputational harm which follows, which is of principal concern. Instead, it is the frustration of one's ability to retreat from public life in breach of a reasonable expectation of privacy that underlies the essential harm. While it is clear, then, that the above interest forms part of the right of privacy, the courts have yet to expressly confirm that liability can arise in such circumstances, absent some form of informational-based wrongdoing.

The overlap between privacy and reputation is equally apparent in the context of cases concerning 'false privacy.' While their treatment of such cases differs, both the United States and England recognise, as a point of principle, that falsehoods can form part of the confidence

[388] Supra (Warren & Brandeis, n. 350).

provided protection by the law. This, despite the fact that such statements have generally been associated with defamation, a cause of action which has, historically, served as the primary means by which individuals have sought to shield their reputations (as opposed to their true, private lives).

In this author's view, it is only right that the law is constructed in such a way that clearly reflects the close relationship between privacy and reputation. While there is a growing recognition of the deep-rooted connection between these two rights, views to this effect are still relatively recent. Throughout most of their history, reputation and privacy have been treated as disparate rights serving distinct interests. Unfortunately, this view strongly informed the development of the relevant law. The issue has been further compounded by the fact that, for many years, the prevailing approach under English law was that there was no general, common-law right to privacy. It is, then, no small wonder that the courts have struggled to identify the precise set of interests enshrined in the right to privacy, as well as how these interests relate to reputation, a right which was, historically, considered the exclusive province of defamation (an unsurprising statement of fact given the absence of a discrete right to privacy). As seen throughout this thesis, this has resulted in a considerable number of theoretical inconsistencies and gaps. While this thesis has asked more questions than it has answered – its principal aim having been to identify problematic areas rather than to offer up potential reforms – it is suggested that recent developments hint at a hopeful future for defamation and privacy law. This can be seen in the emergent intrusion doctrine identified in cases such as *Gulati*. With that said, many of these hopes remain, for the time being, unrealised. It remains the case, therefore, that, in light of the issues highlighted throughout this thesis, the current approach under domestic law continues to risk engaging in an exercise akin to gilding a scaffold of rotting timber. Consequently, it is argued that more needs to be done to strengthen the theoretical foundations of privacy and defamation – with a particular focus on establishing the precise extent to which they spring from the same, or a similar, conceptual source – in order to promote coherence, avoid inconsistency, and reduce uncertainty.

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