Balancing Privacy and Free Speech: A Critique of English Privacy Law under the Human Rights Act

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CONTENTS

CHAPTER I

PRIVACY AND FREE SPEECH: THEORETICAL PERSPECTIVES

Introduction

This chapter will introduce the subject of the thesis from a theoretical perspective and outline the research questions to be discussed. The definition of privacy will be narrowed, for the purposes of this thesis, to the right to informational autonomy, or control over private information. The term 'balancing', used in the title, refers to the values underlying both privacy and free speech which are considered in this chapter. Discussion of the justifications for effective legal protection of privacy and free speech, in this context, will develop a suggested theoretical model for privacy protection. Having presented both privacy and free speech as strongly supported in theory, and often furthering the same goals, the chapter will conclude by considering the utility of the model when the two rights appear to clash. Given that much privacy-invading speech is not strongly supported at the theoretical level, the model will provide a means of critiquing the balance struck by domestic courts and the ECtHR within current 'privacy' law.

Privacy Theory

As one commentator notes, privacy is a 'sweeping concept'[1] covering issues as varied as the storage of personal information by organisations, protection from searches of the home and interception of communications, protection of reputation and control over what is done to one's body. The potential breadth of privacy has led some writers to conclude that 'the quest for a singular essence of privacy leads to a dead end. There is no overarching conception of privacy'.[2] In the case of media invasions of privacy, the concern of the law is with misuse of personal information.[3] The term privacy, within this

[1] D J Solove, *Understanding Privacy* (Harvard University Press 2008) 1.
[2] ibid ix. For a similar view see R Wacks, *The Protection of Privacy* (Sweet & Maxwell 1980) 21.
[3] R Wacks, *Privacy and Press Freedom* (Blackstone Press Limited 1995) 23.

thesis, will therefore denote informational autonomy, a concept discussed in greater detail below. To draw out the philosophical arguments in favour of the protection of informational autonomy this chapter will take the view that privacy is best understood, in this context, by identifying the values promoted by its protection.[4] Exploring these principles reveals that the legal protection of privacy is essential to the development of both individuals and society collectively.

Informational Autonomy

As mentioned, the concern of the law to protect individuals against press invasions of privacy is rooted in the notion of informational autonomy. Often described as the right to 'selective disclosure',[5] informational autonomy refers to the right to control the flow of information about oneself.[6] The term is used to suggest the right to determine whether, in what manner, and to whom the dissemination of personal information may occur. Substantive autonomy, in contrast, refers to the ability to make decisions regarding personal life and exercise choice. Substantive autonomy, in terms of its connection with informational autonomy, will be considered in greater detail below. A number of issues related to substantive autonomy, such as the right to abortion and the right to die, are not relevant in this particular context and so will not be considered.

A further interesting aspect of informational autonomy is that in protecting one's right to select certain information to be disclosed, the concept might cover the inaccurate presentation of oneself to others. Rachels takes the view that people often construct an image to be portrayed depending on the audience and situation.[7] This has also been termed control over 'editing one's self'.[8] He concludes that '[t]here need be nothing dishonest or hypocritical in any of this, and neither side of his personality need be the

[4] Gavison's reasoning will be employed here; '[t]he strength of…justifications depends on the extent to which other goals promoted by privacy are considered important, and on the extent to which the relationship between the two is established'. R Gavison, 'Privacy and the Limits of Law' (1980) 89(3) The Yale Law Journal 421, 441. An alternative view is that privacy is merely an aspect of the right of property; a number of distinctive rights may have elements of privacy but they lack a common foundation. See J Jarvis Thomson, 'The Right to Privacy' (1975) 4(4) Philosophy & Public Affairs 295.

[5] E L Beardsley, 'Privacy: Autonomy and Selective Disclosure' in J Roland Pennock and J W Chapman (eds), *Privacy (Nomos XIII)* (Atherton Press 1971) 56. See also C Fried, 'Privacy' (1968) 77(3) The Yale Law Journal 475, 483; D Feldman, 'Secrecy, Dignity, or Autonomy? Views of Privacy as a Civil Liberty' (1994) 47(2) CLP 41, 53.

[6] C Fried, 'Privacy' (1968) 77(3) The Yale Law Journal 475, 482; D Feldman, 'Secrecy, Dignity, or Autonomy? Views of Privacy as a Civil Liberty' (1994) 47(2) CLP 41, 53.

[7] J Rachels, 'Why Privacy is Important' (1975) 4(4) Philosophy and Public Affairs 323, 327.

[8] R Gavison, 'Privacy and the Limits of Law' (1980) 89(3) The Yale Law Journal 421, 450.

"real him", any more than any of the others'.[9] Moreover, people frequently present and perceive false impressions in the course of daily social interactions. In domestic law, celebrities have often been termed role models and, consequently, a public interest has been found in publishing information exposing their false image.[10] This concept will be reconsidered in chapter 4, concerning the balance of privacy and free speech, but for present purposes, it is enough to say that informational autonomy appears to be furthered by protecting the right to project a public image, even when it does not mirror private life.[11] Moreover, a privacy claim need not automatically be defeated by a false image, in the balance with free speech.

The concept of informational autonomy, as a sub-set of the right to privacy, gains support from the other related values of self fulfilment, dignity and substantive autonomy, considered in the following discussion. These values, it will be argued, are threatened by failure to protect informational autonomy.

Self-Fulfilment and Dignity

As Feldman observes; '[a]ny attempt to identify a *single* interest at the core of privacy is doomed to failure, because privacy derives its weight and importance from its capacity to foster the conditions for a wide range of other aspects of human flourishing'.[12] Another way of putting it might be that 'privacy is essential to the creation and maintenance of selves'.[13] One aspect of the self-fulfilment argument is that privacy creates space for the development of intimate relationships. As Fried suggests:

> [A] threat to privacy seems to threaten our integrity as persons. To respect, love, trust, feel affection for others and to regard ourselves as the objects of love, trust and affection is at the

[9] Rachels, 'Why Privacy is Important' (n 7) 327. Griffin makes a similar argument; '[n]ot all persons whose appearance differs from their reality are thereby hypocrites. A homophobe, whether homosexual or not, who acts hostilely towards homosexuals solely because they are homosexuals is unjust. The injustice deserves exposure. *That* is the public interest. But if the homophobe is himself also homosexual, to publicise that further fact is protected neither by the other's freedom of expression not the public's right of information. On the contrary, it is an outrageous infringement of the homophobe's right to privacy. It is not that a person's sex life is never of public interest, but that usually it is not'. J Griffin, *On Human Rights* (OUP 2008) 240.
[10] See chapter 4 at p 91.
[11] H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (OUP 2006) 804.
[12] D Feldman, 'Privacy-Related Rights and their Social Value' in P Birks (ed), *Privacy and Loyalty* (Clarendon Press 1997) 21.
[13] J H Reiman, 'Privacy, Intimacy, and Personhood' (1976) 6(1) Philosophy and Public Affairs 26, 41.

> heart of our notion of ourselves as persons among persons, and privacy is the necessary atmosphere for these attitudes and actions.[14]

Without privacy Fried finds the existence of such relationships 'simply inconceivable'.[15]

The connection between selective disclosure and the formation of close relationships is clear; 'intimacy is the sharing of information about one's actions, beliefs, or emotions which one does not share with all, and which one has the right not to share with anyone'.[16] The formation of relationships of differing levels of intimacy is also dependent on control over disclosure of information; more information might be shared with a spouse than a friend, more with a friend than a colleague. Moreover, there may be differences in the types of information disclosed to different people. Informational autonomy confers the ability to choose the audience for information about oneself and the content of that information, enabling the maintenances of 'degrees of intimacy'.[17] The fact that such relationships are, many would argue, a vital aspect of a life worth living provides strong support for effective protection of informational autonomy.

The risk of violations of dignity, without the security of privacy protection, might inhibit the development of intimate relationships. As Griffin notes; 'the richness of personal relations depends on our emerging from our shells, but few of us would risk emerging without privacy'.[18] Parent makes clear that 'intimacy involves much more than the exclusive sharing of information. It also involves the sharing of one's total self—one's experiences, aspirations, weakness, and values'.[19] Thus when personal information is placed before the public, human dignity is violated[20] regardless of the public reaction to that information.[21] The sense of humiliation, mortification and degradation, likely to be experienced by anyone suffering such exposure, captures the offence to dignity. Again, a

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[14] C Fried, 'Privacy' (1968) 77(3) The Yale Law Journal 475, 477-478. For similar arguments see Rachels, 'Why Privacy is Important' (n 7); T Gerety, 'Redefining Privacy' (1977) 12(2) Harvard Civil Rights-Civil Liberties Law Review 233; F D Schoeman, *Privacy and Social Freedom* (CUP 1992) 18.
[15] Fried, 'Privacy' (n 14) 477.
[16] ibid 484.
[17] ibid 485. See also D Feldman, 'Secrecy, Dignity, or Autonomy? Views of Privacy as a Civil Liberty' (1994) 47(2) CLP 41, 81.
[18] J Griffin, *On Human Rights* (OUP 2008) 226.
[19] W A Parent, 'Privacy, Morality, and the Law' (1983) 12(4) Philosophy and Public Affairs 269, 275.
[20] E J Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39(6) New York University Law Review 962, 1006.
[21] 'It matters not whether the public is repulsed or sympathetic; the harm is that one's dignity has been affronted and his private life has been forcibly subjected to public scrutiny'. S M Scott, 'The Hidden First Amendment Values of Privacy' (1996) 71(3) Washington Law Review 683, 722.

particular affront to dignity is having control over private information taken away from the individual.[22] Feldman makes a similar argument; '[d]ignity…is essential to the forms of human flourishing which depend on the exercise of autonomy'.[23] Effective protection of informational autonomy would appear, therefore, to respect the dignity of individuals and promote their self-fulfilment.

Substantive Autonomy

One powerful justification for privacy might be its role in providing the 'social and legal space to develop the emotional, cognitive, spiritual and moral powers of an autonomous agent'.[24] Another privacy justification is its role in fostering autonomy in its substantive form; the ability to act on those beliefs. Substantive autonomy refers to human behaviour and actions; the ways in which an individual chooses to live their life. In this way privacy protection appeals to the wider concerns of liberty; 'our pursuit of our conception of a worthwhile life',[25] whilst maintaining those other values that warrant specific laws regulating the (mis)use of private information.

There is widespread acceptance of the connection between the above interests and substantive autonomy.[26] The threat posed by invasions of privacy could inhibit engagement in certain types of behaviour, particularly those considered to be controversial in terms of prevailing social attitudes; 'privacy permits individuals to do what they would not do without it for fear of an unpleasant or hostile reaction from others'.[27] Thus the substantive autonomy of individuals may be constrained and their self-fulfilment similarly impeded if privacy is not protected. Gavison argues that 'respect for privacy will help a society attract talented individuals to public life. Persons interested in government service must consider the loss of virtually all claims and expectations of privacy in calculating the costs of running for public office. Respect for privacy might

[22] Bloustein refers, specifically, to physical isolation, but the point can easily be extended to selective disclosure of personal information; 'personal isolation and personal control over the conditions of its abandonment is the very essence of personal freedom and dignity'. Bloustein, 'Privacy as an Aspect of Human Dignity' (n 20) 973.
[23] D Feldman, 'Secrecy, Dignity, or Autonomy? Views of Privacy as a Civil Liberty' (1994) 47(2) CLP 41, 55.
[24] F D Schoeman, *Privacy and Social Freedom* (CUP 1992) 13.
[25] Griffin, *On Human Rights* (n 18) 233.
[26] Fenwick and Phillipson, *Media Freedom under the Human Rights Act* (n 11). See also J Wagner DeCew, 'The Scope of Privacy in Law and Ethics' (1986) 5(2) Law and Philosophy 145; Feldman, 'Secrecy, Dignity, or Autonomy?' (n 23); Griffin, *On Human Rights* (n 18).
[27] Gavison, 'Privacy and the Limits of Law' (n 8) 451.

reduce those costs'.[28] This argument might be extended to include talented musicians, actors and entertainers who, in some cases, may be deterred from pursuing a career in the public eye if effective privacy protection is lacking. The result is an unreasonable curb on the substantive autonomy of individuals, and the possible loss to society of having such individuals shy away from public roles.

In contemporary society, the need for effective laws protecting privacy has never been plainer. Writing in 1989, Warren and Brandeis signalled the challenges posed to privacy by a combination of new technology and a press increasingly driven to expose and disseminate gossip and trivia.[29] Such comments have only grown more accurate in recent years:

> Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops'.[30]

In addition:

> The press is overstepping in every direction the obvious bonds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.[31]

As the recent Leveson Inquiry[32] highlights, recourse to criminal and unethical behaviour has also been detected in some areas of the press as a means of obtaining personal information. Thus the motivation of media organisations to provide readers with the most intimate detail about the private lives of celebrities and public figures, to ensure their commercial success, is clear. Against this background, it is essential therefore that

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[28] ibid 456.
[29] S D Warren and L D Brandeis, 'The Right to Privacy' (1890) 4(5) Harvard Law Review 193.
[30] ibid 195.
[31] ibid 196.
[32] The Leveson Inquiry, *An Inquiry into the Culture, Practices and Ethics of the Press – Report* (2012) <http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780.pdf> accessed 3 December 2012.

privacy law provides practical and effective protection if it is to respond to the theoretical justifications outlined above.

Free Speech Theory

As the title suggests, a theme central to this thesis is the balance struck between privacy and free speech. Chapter 4 will provide a full discussion of the influence of Strasbourg jurisprudence, and the structure and principles utilised by the judiciary when balancing privacy and free speech. This section will consider free speech justifications from a philosophical perspective. Again, a greater understanding of the underlying principles will be used to develop the theoretical model for privacy protection. The rationales introduced here will be of crucial importance in critiquing the UK judiciary's approach to privacy protection when faced with arguments in favour of press freedom. Furthermore, analysis of privacy and free speech theory will be used to challenge the argument commonly used in favour of restricting the development of privacy law; namely that privacy law is necessarily a threat to press freedom, or that the two concepts are 'mutually exclusive'.[33] This section will therefore not seek to comprehensively analyse the free speech theories but will consider the points at which they might engage with privacy, and identify how any conflict may be resolved.

Argument from Democracy

The argument from democracy is based on the idea of self-government; this means that 'ultimate political power resides in the population at large, that the people as a body are sovereign, and that they, either directly or through their elected representatives, in a significant sense actually control the operation of government'.[34] Freedom of speech is then justified to give the sovereign population access to the information required to carry out their democratic role. As Schauer points out; '[b]ecause we cannot vote intelligently without full information…denying access to that information is as serious an infringement of the fundamental tenets of democracy as would be denying the right to vote'.[35] Another facet of the argument from democracy is that uninhibited speech allows for criticism of leaders and exposure of corruption; 'since citizens' votes matter so much

[33] T Gerety, 'Redefining Privacy' (1977) 12(2) Harvard Civil Rights-Civil Liberties Law Review 233, 291.
[34] F Schauer, *Free Speech: A Philosophical Enquiry* (CUP 1982) 36.
[35] ibid 38.

in a liberal democracy, the importance of their being informed of government misconduct is particularly great under that form of government'.[36] Given the power of the media to disseminate information to masses, the argument from democracy is often used to justify particular protection for the press; 'if public opinion acts as a check on governmental power, then a medium that can inform or mobilize the public is notably important'.[37] As mentioned, however, the press may, for commercial reasons, be particularly motivated to invade privacy, providing a powerful reason for considering competing privacy and speech claims on an equal footing, rather than allowing an automatic presumption in favour of freedom of speech.

Clearly the argument from democracy provides strong support for the protection of political speech,[38] but perhaps little or no justification for the protection of privacy-invading speech, when no political element is present. As Fenwick and Phillipson point out:

> In many cases [political speech] will not raise privacy issues, as where it consists of the discussion of political ideas, institutions, and policies. Where political speech *does* concern individuals, as where it reveals abuse of state power, the conflict is more likely to be with reputation than privacy…Thus, it will only be in a fairly narrow category of cases that any real conflict will arise – those where a publication relates to the personal life of a particular figure, but there is a serious argument that it serves a valuable purpose in revealing a matter relevant to that person's fitness for office, or in furthering public knowledge or debate about matters of legitimate public concern.[39]

The difficulty with making a distinction between political speech and privacy-invading speech is that it may not always be easy to distinguish between political and non-political speech in practice; 'speech that is not explicitly political often has political implications'.[40] Arguably, any aspect of the private life of a politician, or political candidate, could impact upon the political process.[41] While those in public office may be considered to have impliedly accepted a level of intrusion into their private life,[42] 'the argument that adopting

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[36] K Greenawalt, 'Free Speech Justifications' (1989) 89(1) Columbia Law Review 119, 146.
[37] Schauer, *Free Speech: A Philosophical Enquiry* (n 34) 107.
[38] The argument from democracy is reflected in the Strasbourg and domestic Article 10/free speech jurisprudence. See chapter 4.
[39] H Fenwick and G Phillipson, 'Breach of Confidence as a Privacy Remedy in the Human Rights Act Era' (2000) 63(5) MLR 660, 685.
[40] K Greenawalt, *Speech, Crime and the Uses of Language* (OUP 1989) 45.
[41] See discussion below at p 16.
[42] Warren and Brandeis, 'The Right to Privacy' (n 29) 215.

a public life forfeits a private life' is, according to one commentator; 'ridiculous.[43] In addition, the press may argue that publications raise important political issues, despite invading the privacy of celebrities or others in the public eye. As Neill observes, 'in addition to acting as watchdogs the organs of the media are commercial organisations and are part of the entertainment industry'.[44] Thus particular articles may often consist of speech that serves to both attract the reader *and* discuss contemporary issues such as moral and social values. Stories drawing on examples from the celebrity world, or 'infotainment', may therefore have the dual purpose of providing entertaining speech which contributes to important debates, with political implications.[45] Chapter 4 will expand upon the role of the domestic judiciary in balancing privacy and free speech, and analyse the current resolution of such cases. From a theoretical perspective, however, it would appear that there are no grounds for prioritising either free speech or privacy; a theoretical model of privacy striving to deliver both effective privacy protection and preserve free speech would not privilege political speech without careful scrutiny of the competing privacy interests, but nor should it be automatically assumed that intrusive articles about the private lives of celebrities have no political speech value.

Argument from Truth

One leading commentator on free speech theory has suggested that:

> Of all [the free speech justifications] the predominant and most persevering has been the argument that free speech is particularly valuable because it leads to the discovery of truth. Open discussion, free exchange of ideas, freedom of enquiry, and freedom to criticize…are necessary conditions for the effective functioning of the process of searching for truth.[46]

The argument from truth, derived largely from Milton's *Areopagitica* and Mill's *On Liberty*,[47] is premised on the twin assumptions that truth is a goal worth pursuing,[48] and

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[43] Griffin, *On Human Rights* (n 18) 240.
[44] B Neill, 'Privacy: A Challenge for the Next Century' in B S Markesinis (ed), *Protecting Privacy* (OUP 1999) 27.
[45] See discussion below at p 17.
[46] Schauer, *Free Speech: A Philosophical Enquiry* (n 34) 15.
[47] ibid.
[48] As Barendt suggests; '[t]ruth may be regarded as an autonomous and fundamental good, or its value maybe supported by utilitarian considerations concerning progress and the development of society'. E Barendt, *Freedom of Speech* (2nd edn, OUP 2005) 7. Clearly, there is overlap between the argument from truth and the argument from democracy on this point.

that it will 'emerge victorious from the competition among ideas'[49] provided the conditions of free discussion are present.

Compared with the law of defamation, which is concerned with false claims, privacy law aims to restrict some speech despite its content being true. The argument from truth would therefore appear to conflict with any law protecting privacy. This apparent conflict may be resolved by a number of arguments. Firstly, Mill's argument from truth fails to explicitly distinguish between stated opinions and true facts,[50] leading esteemed commentators to conclude that 'Mill's truth argument…applies most clearly to speech stating beliefs and theories about political, moral, aesthetic, and social matters', rather than facts about an individual's private life.[51] It might be said, then, that arguments in favour of privacy protection might easily overcome those supporting free speech, based on the argument from truth.

Moreover, Mill never intended to prioritise the search for truth above all other legitimate societal goals. As Marshall points out, Mill recognised the difficulty posed by the protection of privacy and found that it might be possible to accommodate such protection without disturbing the argument from truth, provided the speech in question is not in the public interest.[52] Schauer comes to a similar conclusion:

> Any strong version of the argument from truth must elevate the search for knowledge to a position of absolute priority over other values. In this form the argument is so powerful as to be unworkable. If [the argument is weakened] to take account of other interests that may at times predominate…the argument from truth [says] little more than that the quest for knowledge is a value that ought to be considered.[53]

If, as this chapter has suggested, privacy is an important interest, furthering both individual and societal goals,[54] there is clearly scope for a carefully reasoned balance to be made between privacy and free speech. The argument in favour of free speech would be bolstered by the importance of the speech in terms of the public interest it serves, in line

[49] Schauer, *Free Speech: A Philosophical Enquiry* (n 34) 16.
[50] G Marshall, 'Press Freedom and Free Speech Theory' [1992] PL 40, 51-52.
[51] E Barendt, *Freedom of Speech* (2nd edn, OUP 2005) 10; Greenawalt, 'Free Speech Justifications' (n 36) 121.
[52] Marshall, 'Press Freedom and Free Speech Theory' (n 50) 51-52.
[53] Schauer, *Free Speech: A Philosophical Enquiry* (n 34) 28.
[54] The preceding section demonstrates the wealth of academic literature in favour of such an interpretation.

with Mill's own concession.[55] It appears therefore that the argument from truth, on its true construction, would not bar the application of the law to protect intrusive, but true, private facts.

Arguments from Self-Fulfilment and Autonomy

The argument from self-fulfilment is based on the idea that 'restrictions on what we are allowed to say and write, or…to hear and read, inhibit our personality and its growth. A right to express beliefs and political attitudes instantiates or reflects what is it to be human'.[56] At this point it is possible to distinguish between the interests of the speaker and receiver of information. In terms of the speaker; 'communication is a crucial way to relate to others; it is also an indispensable outlet for emotional feelings and a vital aspect of the development of…personality and ideas'.[57] Although this is a powerful argument for the protection of various forms of expression, in the context of press invasions of privacy, it is less clear how such an argument may be successfully deployed. As Barendt persuasively argues:

> While an unlimited, or at least very wide, freedom to communicate one's own views may be considered an integral aspect of self-development or human dignity, it is surely far-fetched to make the same claim for the disclosure of news and information, unless perhaps the communicator has assembled or is in some way responsible for it.[58]

Consequently, the argument from self-fulfilment 'makes little sense [when applied to] the press and other media'.[59] Again it would appear that any conflict between privacy and protection and free speech, based on the argument from self-fulfilment, is likely to be only slight and relatively easily resolved in favour of privacy interests.

In terms of the receiver of information, the argument in favour of free speech relates to personal autonomy. The ability to receive a breadth of information, ideas and opinions enhances an individual's ability to form their own opinions and make life-choices

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[55] As Fenwick and Philipson point out; 'whether truth is valued instrumentally—for example, as essential to self-development—or as a good in itself, some kinds of truths must be regarded as more important that others.' The argument from truth therefore 'provides sharply differentiated support for different classes of speech'. Fenwick and Phillipson, *Media Freedom under the Human Rights Act* (n 11) 15-16.
[56] E Barendt, *Freedom of Speech* (2nd edn, OUP 2005) 13.
[57] Greenawalt, 'Free Speech Justifications' (n 36) 144.
[58] Barendt, *Freedom of Speech* (n 56) 15.
[59] ibid.

accordingly. As Scanlon states; 'an autonomous person cannot accept without independent consideration the judgement of others as to what he should believe or what he should do'.[60] This argument is clearly also important in terms of autonomy to form political views and make political decisions, engaging the powerful argument from democracy. Furthermore, 'any restriction on what an individual is allowed to read, see, or hear clearly amounts to an interference with [their] right to judge such matters for [themselves]'.[61] In this way free speech fosters individual autonomy. It could be suggested that the argument from autonomy can be applied to a very wide range of speech; virtually all information is potentially relevant to the formation of views of some sector of the population.

Given that both informational autonomy and substantive autonomy are supported by privacy protection,[62] the better argument is that, in the privacy context, autonomy is furthered, rather than sacrificed, by laws granting privacy rights. As Fenwick and Phillipson argue:

> It is immediately apparent that much privacy-invading speech, by both directly assaulting informational autonomy and indirectly threatening the individual's freedom of choice over substantive issues, far from being *bolstered* by the autonomy rationale, is in direct conflict with it. The state, in restricting what one citizen may be told about the private life of another, is not acting out of a paternalistic desire to impose a set of moral values thereby, but rather to assure an equal freedom to all to live by their own values.[63]

Furthermore, if political autonomy is an important aspect of the arguments from democracy and autonomy, then 'without the possibility of a self-subsistent critical standpoint from which to judge the will of the community, politics becomes corrupt and unable to transform itself…privacy [is] precisely the condition through which one can experience that inner independence from the social [and] political…realm'.[64] Privacy therefore supports the aims of the arguments from democracy and autonomy. If privacy and free speech are accepted as sharing a common goal, the debate is clearly more

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[60] T Scanlon, 'A Theory of Freedom of Expression' in R M Dworkin (ed), *The Philosophy of Law* (OUP 1977) 163.
[61] Fenwick and Phillipson, *Media Freedom under the Human Rights Act* (n 11) 14.
[62] See above at p 3.
[63] Fenwick and Phillipson, 'Breach of Confidence as a Privacy Remedy in the Human Rights Act Era' (n 39) 682. Scott similarly observes that privacy and free speech 'both are critical to autonomy'; S M Scott, 'The Hidden First Amendment Values of Privacy' (1996) 71(3) Washington Law Review 683, 723.
[64] S Scoglio, *Transforming Privacy: A Transpersonal Philosophy of Rights* (Greenwood Press 1998) 36.

nuanced than a simple play-off between two opposed principles. Instead, the resolution of cases becomes a more complex balancing exercise, with privacy clearly being capable of standing up against free speech arguments.

Further Free Speech Justifications

A further free speech justification is considered separately here, although it can be rightly viewed as aspects of the arguments from democracy, self-fulfilment and autonomy. Raz argues that free speech is a public good because it validates a diversity of views, opinions and lifestyles.[65] Furthermore, freedom to express a plurality of views would appear to promote tolerance of different ways of life.[66] Raz, however, explicitly states that his justification is not aimed at speech relating to specific individuals, except perhaps the narrow exception of public officials and candidates.[67] As with the argument from truth, this justification appears to provide stronger support for the expressions of opinions, especially those that might be controversial or unpalatable to many members of society. It is possible to argue that the 'personal identification' argument could be used to support freedom of privacy-invading speech; reading about the personal troubles of celebrities and other public figures could enable individuals to find themselves 'reflected in the public media' and give them a 'feeling that their problems and experiences are not freak deviations'.[68] However, as mentioned above, a fundamental justification for effective privacy protection is its indirect support of substantive autonomy. Again it appears that privacy and free speech are 'mutually supportive',[69] in that 'this justification for speech argues also for its restriction where required to ensure a reasonable degree of privacy'.[70] Furthermore, a better way to promote tolerance is arguably the provision of a private sphere in which an individual can make autonomous choices without intrusion.[71]

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[65] J Raz, 'Free Expression and Personal Identification' in W J Waluchow (ed), *Free Expression: Essays in Law and Philosophy* (Clarendon Press 1994) 4-10. Barendt concurs; '[f]reedom of speech reflects and reinforces pluralism, ensuring that different types of life are validated and promoting the self-esteem of those who follow a particular lifestyle'. Barendt, *Freedom of Speech* (n 56) 34.
[66] K I Kersch, *Freedom of Speech: Rights and Liberties under the Law* (ABC-CLIO 2003) 24.
[67] Raz, 'Free Expression and Personal Identification' (n 65) 18.
[68] ibid 12.
[69] C Emerson, 'The Right of Privacy and Freedom of the Press' (1979) 14(2) Harvard Civil Rights-Civil Liberties Law Review 329, 331.
[70] Fenwick and Phillipson, 'Breach of Confidence as a Privacy Remedy in the Human Rights Act Era' (n 39) 683.
[71] Gavison, 'Privacy and the Limits of Law' (n 8) 455.

To conclude this section on the theory underlying privacy and free speech, the analysis has revealed that in many instances both are supported by the same justifications. The argument made by Emerson is borne out; [a]t most points the law of privacy and the law sustaining a free press do not contradict each other. On the contrary, they are mutually supportive, in that both are vital features of the basic system of individual rights. At other points there is only a minor likelihood of conflict.[72] So far, the points made have been based on theoretical and philosophical arguments, before the discussion of domestic and Convention case law. The final section of this chapter will therefore consider the possibility of using this theory in developing privacy law and resolving cases.

Utility of Theory in Privacy Law: A Basic Theoretical Model

As this chapter has argued, informational autonomy (supported by its connection with substantive autonomy) is at the core of the right to privacy in this context. A legally enforceable right based on this concept could potentially be framed so widely as to be unworkable. As Moreham notes, a subjective approach encompassing 'any information which x wishes to keep to him or herself' would be too broad to form the basis of a legal right.[73] Instead, it would seem to be appropriate to incorporate objectivity or 'reasonableness' when determining the types of information attracting privacy protection. Some categories of information would clearly satisfy such a test; information relating to sexuality, relationships, health and the home are generally recognised as very intimate, personal information. Such information captured in visual form (photographs or videos) would be likely to increase the sense of intrusion, given the added detail conveyed to the audience, and accordingly could strengthen a claim that the information was private in nature.

On this basis, distinguishing between private and non-private information by reference to whether it was obtained in a private/secluded location or a public location would not give strong protection to informational autonomy.[74] The potential for obviously private information to be revealed in public is clear; the existence of an intimate relationship, an individual's sexual orientation or treatment for a health condition could be discovered

[72] Emerson, 'The Right of Privacy and Freedom of the Press' (n 69) 331.
[73] N A Moreham, 'Privacy in the Common Law: A Doctrinal and Theoretical Analysis' (2005) 121 LQR 628, 641.
[74] E Paton-Simpson, 'Private Circles and Public Squares: Invasion of Privacy by the Publication of "Private Facts"' (1998) 61(3) MLR 318, 320.

and recorded while an individual carries out their activities in a public location. Failure to restrict the mass dissemination of such information would not only interfere with informational autonomy; substantive lifestyle choices could also be affected. In an attempt to conceal private information certain individuals could resort to editing their behaviour in public; modifying their movements and associations with potentially harmful consequences (if, for example, an individual refrained from seeking medical assistance). However, information acquired in a public place may not concern one of the core aspects of private life. Although publication of photographs of a celebrity going about their daily life may not appear to strongly engage the right to privacy, the result may be a similar impact on substantive autonomy and lifestyle choices. Therefore, in theory, to give maximum protection to the principles of informational and substantive autonomy (and the other related privacy interests of self-fulfilment and dignity) the categories of private information potentially attracting protection should be widely drawn, encompassing obviously private, and anodyne, information obtained in public locations.

Such a definition of private information may seem overly-inclusive, thus presenting a threat to press freedom and possibly resulting in a chilling effect on important forms of speech. However, the shared aims of privacy and free speech, highlighted in this chapter, call for a presumption of equality between the two rights. Therefore, even if a wide range of information attracts the initial protection of the law, the competing rights should always be balanced against each other and the claims on either side scrutinised, avoiding the unnecessary restriction of valuable speech. Both the privacy and free speech justifications discussed in this chapter might be utilised to inform the balancing act carried out between the rights, leading to 'consistent, principled and reasonably foreseeable resolutions…rather than amounting merely to *ad hoc* exercises of judicial "common sense"'.[75]

It has been suggested that the argument from democracy supports the protection of political speech. It would seem arbitrary to create a general presumption in favour of free speech in cases of threatened disclosure of information about politicians' private lives; those contemplating entering public office may be deterred from taking such a course to protect their personal privacy and that of their family and associates. However, as

[75] Fenwick and Phillipson, 'Breach of Confidence as a Privacy Remedy in the Human Rights Act Era' (n 39) 681.

Schauer persuasively argues, there is a strong competing interest in allowing the electorate to make informed voting decisions based on whatever criteria they deem fit:

> If there is…a right to vote, and if voting decisions are essentially individual decisions that embody an important dimension of individual autonomy, then it seems wrong to contend that the information that some voters require for making their voting decisions should be subject to majoritarian control.[76]

Therefore, speech relating to aspects of politicians' private lives would seem to fall into an exceptional category, requiring very strong reasons to justify its restriction.

As mentioned, 'infotainment' (entertaining speech which may draw on the private lives of celebrities and other public figures to stimulate debate on contemporary issues) is, arguably, also a form of political speech. As well as the argument from democracy, speech genuinely contributing to such debate would also appear to engage the arguments from self-fulfilment and autonomy; furthering the audience's ability to form opinions, make lifestyle choices and have these validated.[77] Such justifications defend a wide range of speech, potentially including 'revelations relating to matters as diverse as eating disorders, abortion, attitudes to sexuality, education and the like; it will often concern not politicians, but celebrities, their relatives and those who for a short time and for a particular reason only are thrust into the public gaze'.[78] As Phillipson persuasively argues, however, it is difficult to justify an approach which allows the non-consensual disclosure of private information to promote debate:

> It posits an extraordinarily weak utilitarian argument against a powerful principle – that privacy-invading disclosures are a gross violation of individual autonomy. Such media stories amount in effect to *forcing* a person to provide highly personal information for the purposes of fuelling public debate; they thus amount to one of the clearest breaches one could imagine of the Kantian imperative to treat persons as ends in themselves. It is a little like a group of friends who want to discuss the topic of monogamy, and decide to read an absent friend's letter to his wife, confessing

[76] F Schauer, 'Can Public Figures have Private Lives?' (2000) 17(2) Social Philosophy and Policy 293, 308-309.
[77] See above at p 14 for discussion of Raz's 'personal identification' argument.
[78] Fenwick and Phillipson, *Media Freedom under the Human Rights Act* (n 11) 694.

> infidelity, in order to lend the discussion some focus and bite. It treats the person as a mere means – something to stimulate discussion.[79]

Therefore, while 'infotainment' should be recognised as potentially having some speech value, it may often have to give way to a competing privacy claim. Given that many individuals might be found who are willing to share their stories and images, thus satisfying the need to stimulate public debate, invasions of privacy of this kind may often be unnecessary; the public interest could be served by an alternative route.

Conclusion

This chapter has suggested a basic theoretical model for the legal protection of private information, based on the theoretical justifications for privacy and free speech. Both rights are supportive of important philosophical goals, particularly personal autonomy and self-fulfilment, so, at the theoretical level, there would appear to be no reason to afford either right automatic priority over the other. The model outlined in the 'utility' section does not purport to resolve the vast array of factual situations that can potentially arise in privacy litigation. Instead, it considers the important general principles that might be used to determine both the types of information attracting legal protection and the balance between competing privacy and speech claims.

As argued, the protection of informational and substantive autonomy calls for privacy protection being extended to innocuous information acquired in a public place, as well as more obviously private categories of information. In seeking to resolve the clash between privacy and free speech at the theoretical level, the argument from democracy would generally lend itself towards the protection of directly political speech (that relating to those in public office) and some indirectly political speech ('infotainment'). However, in line with Phillipson's view, the interest in stimulating debate on contemporary issues would, in general, not be strong enough to outweigh a competing privacy claim.

As the following chapters will demonstrate, the ECtHR in the seminal decision of *Von Hannover v Germany*[80] provided the level of privacy protection argued for in this chapter.

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[79] G Phillipson, 'Memorandum to the Leveson Inquiry' (28 March 2012) <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/03/Submission-by-Professor-Gavin-Phillipson-Durham-Law-School.pdf> accessed 10 August 2012, [15].

The thesis will therefore come to a conclusion as to whether the protection currently achieved in domestic law for private information does now reach the level of protection offered at Strasbourg in the light of the very recent decisions there. But, bearing in mind the influence of the margin of appreciation doctrine at Strasbourg,[81] the thesis will go on to ask whether the domestic level of protection aligns to an acceptable extent with the level of protection that the justifications underpinning the concept of informational autonomy (as set out above) would demand. The thesis will also seek to determine whether the current protection for expression at both the Strasbourg and domestic level is in line with the theoretical model, or whether trivial expression with no real public interest value, receives a level of protection it does not deserve. Finally, if disparity between the Strasbourg and domestic levels of privacy protection is found, the thesis will question why the instruments of the HRA (particularly sections 2 and 6) have not been utilised by English courts to afford greater protection to informational autonomy, based on current understandings of their operation. Given that the central aim of the thesis is to intensively discuss speech/privacy balancing, remedies for misuse of private information in UK domestic law will not be considered.[82]

Route-Map

Chapter 1 introduces the subject of the thesis from a theoretical perspective, setting out a basic model for the legal protection of private information against which the level of protection achieved by English domestic courts, and the ECtHR, can be compared and critiqued. Chapter 2 considers the impact of the HRA on common law breach of confidence through the development of indirect horizontal effect. Chapter 3 discusses the tests used to determine the types of information attracting legal protection both at Strasbourg and in English domestic courts, with particular emphasis upon whether innocuous information obtained in public locations is afforded the level of protection required by the theoretical model. Chapter 4 examines the balancing exercise carried out by the Strasbourg and domestic courts, considering whether, in line with the theoretical

[80] [2004] EMLR 21.
[81] See discussion at p 67.
[82] See H Fenwick, *Civil Liberties and Human Rights* (4th edn, Routledge-Cavendish 2007) 981. The most recent debates on the effectiveness of privacy remedies, in this context, are discussed in G Phillipson, 'Max Mosley Goes to Strasbourg: Article 8, Claimant Notification and Interim Injunctions' (2009) 1(1) JML 73; A Scott, 'Prior Notification in Privacy Cases: A Reply to Professor Phillipson' (2010) 2(1) JML 49; K Hughes, 'Privacy Injunctions: No Obligation to Notify Pre-Publication' (2011) 3(2) JML 179; K Hughes, 'Parliament Reports on the Law of Privacy and Injunctions' (2012) 4(1) JML 17.

model, informational autonomy is adequately protected by the restriction of speech that is unsupported by the values discussed in chapter 1. Chapter 5 concludes the thesis by evaluating the balance currently struck between privacy and free speech by the ECtHR and English domestic courts, and considering the future development of privacy law.

CHAPTER II

THE DEVELOPMENT OF INDIRECT HORIZONTAL EFFECT IN THE CONTEXT OF PRIVACY LAW UNDER THE HUMAN RIGHTS ACT

Introduction

Prior to enactment of the HRA, the potential remedies available to an individual for non-consensual disclosure of personal information were limited. As Lord Justice Glidewell stated in *Kaye v Robertson*;[1] '[i]t is well-known that in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy'.[2] Thus, when the actor Gorden Kaye was interviewed and photographed by a journalist while in hospital recovering from surgery, only a limited injunction was granted under the doctrine of malicious falsehood, despite Lord Justice Bingham finding that there had been a 'monstrous invasion of [Kaye's] privacy'.[3] The laws of trespass and nuisance may have provided some redress for physical intrusions by information-seeking journalists,[4] but clearly failed to provide any protection for the revelation of private facts when the information was obtained by other means. Pre-HRA, breach of confidence was often the most useful remedy for protecting informational autonomy but, as this chapter will argue; effective protection was only achieved in certain confined circumstances.[5] The second part of this chapter will suggest that, as a result of the indirect horizontal effect of the HRA, informational privacy is protected to a far greater extent than in the pre-HRA era; the tort of misuse of private information now grants remedies for the unauthorised publication of private information on the basis of the private nature of the information itself. The chapter will go on to argue that, whilst English judges have failed to endorse any of the horizontal effect models suggested in the academic literature, the most

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[1] [1991] FSR 62.
[2] ibid 66.
[3] ibid 70. It is possible, however, that breach of confidence might have provided more complete protection for Kaye's privacy in the light of pre-HRA developments to the doctrine (see below), had the argument been raised. See R Scott, 'Confidentiality' in J Beatson and Y Cripps (eds), *Freedom of Expression and Freedom of Information* (OUP 2000) 270; H Fenwick and G Phillipson, 'Confidence and Privacy: A Re-Examination' (1996) 55(3) CLJ 447, 454.
[4] Following enactment of the Protection from Harassment Act 1997 it has also become possible to obtain injunctions and claim damages for anxiety and financial loss resulting from harassment.
[5] See *Coco v A N Clark (Engineers) Limited* below at p 22.

persuasive interpretation of the courts duty under section 6, the 'constitutional constraint' model,[6] theoretically empowers the judiciary, in the context of informational privacy, to develop the common law, incrementally, to meet the current demands of Articles 8 and 10 ECHR.

Breach of Confidence in the Pre-HRA Era

Traditionally, breach of confidence was comprised of three elements. 'First, the information itself…must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it'.[7] The action for breach of confidence could fail if publication was deemed to be in the public interest. The first element of the test (information with the necessary quality of confidence) could be satisfied if the information was more than 'trivial tittle-tattle',[8] and was not already in the public domain.[9] As mentioned in *Coco*; '[s]omething which is public property and public knowledge cannot *per se* provide any foundation for proceedings for breach of confidence'.[10] The third limb (unauthorised use of the information) would invariably be made out in the paradigm case of press publication of private facts; consent would not have been given and detriment would be established by the non-consensual disclosure of the information.[11]

The main barrier to the utilisation of the action for breach of confidence to create comprehensive privacy protection was the second limb; the need for information to be imparted in circumstances imposing an obligation of confidence. This requirement could

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[6] G Phillipson and A Williams, 'Horizontal Effect and the Constitutional Constraint' (2011) 74(6) MLR 878.
[7] *Coco v A N Clark (Engineers) Limited* [1969] RPC 41, 47-48. Affirmed by the House of Lords in *A-G v Guardian Newspapers (No 2)* [1990] 1 AC 109.
[8] ibid 48 (Megarry J).
[9] In *Woodward v Hutchins*, activities carried out by a group of musicians on a jumbo jet was not confidential because it was found to be in the public domain; [1977] 1 WLR 760. However, in the later case of *Stephens v Avery* Sir Nicholas Browne-Wilkinson V-C held that 'information only ceases to be capable of protection as confidential when it is in fact known to a substantial number of people'; [1988] Ch 448, 454.
[10] [1969] RPC 41, 47 (Megarry J).
[11] *A-G v Guardian Newspapers (No 2)* [1990] 1 AC 109, 265 (Lord Keith). The case of *X v Y* suggests that detriment is not required at all; [1988] 2 All ER 659, 651.

be satisfied by the existence of a confidential relationship[12] or an agreement of confidentiality (express or implied), between confider and confidant.[13] Therefore, while a limited range of private information could gain protection from the doctrine of confidence, no redress could be awarded in the case of a journalist acquiring the information without having any kind of communication or relationship with the claimant.[14] As Wacks puts it; '[t]he action is inappropriate because it is, quite simply, based on a different theory. Its main purpose is to protect the business interests of the plaintiff rather than his interests in preserving privacy'.[15] Clearly, traditional breach of confidence was ill-equipped to respond to the theoretical justifications for privacy protection set out in chapter 1, leaving, as *Kaye* illustrated, a considerable gap in English law.

Prior to the HRA, the common law doctrine of breach of confidence had undergone significant development, extending the types of confidential information covered and shedding the requirement of circumstances imposing an obligation of confidence.[16] As to the first development, though breach of confidence was initially used mainly for the protection of trade secrets,[17] the 'necessary quality of confidence' limb was found to cover private information disclosed during the course of a marriage in *Argyll v Argyll*.[18] Then later, in *Stephens v Avery*,[19] the sexual orientation of the claimant, and details of a homosexual relationship, were found to constitute confidential information, a step further than providing protection for the institution of marriage.[20] The fact of having a particular medical condition was covered in *X v Y*,[21] and details of Lady Archer's

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[12] Such relationships include those arising between doctors and patients (*W v Edgell* [1990] Ch 59) and spouses (*Argyll v Argyll* [1965] 1 All ER 611).
[13] As might arise in commercial dealings, for example.
[14] This was recognised by the Law Commission; *Breach of Confidence* (Law Com No 110, 1981).
[15] R Wacks, *The Protection of Privacy* (Sweet & Maxwell 1980) 16.
[16] H Fenwick and G Phillipson, 'Confidence and Privacy: A Re-Examination' (1996) 55(3) CLJ 447; H Fenwick and G Phillipson, 'Breach of Confidence as a Privacy Remedy in the Human Rights Act Era' (2000) 63(5) MLR 660; G Phillipson, 'Privacy: The Development of Breach of Confidence – The Clearest Case of Horizontal Effect?' in D Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (CUP 2011).
[17] For example, the invention of a tool used in manufacturing; *Ackroyds (London) Ltd v Islington Plastics Ltd* [1962] RPC 97. See W Wilson, 'Privacy, Confidence and Press Freedom: A Study in Judicial Activism' (1990) 53(1) MLR 43, 44.
[18] [1965] 1 All ER 611. For further discussion of this limb of the action see R Wacks, *Personal Information: Privacy and the Law* (Clarendon Press 1989); H Fenwick and G Phillipson, 'Confidence and Privacy: A Re-Examination' (1996) 55(3) CLJ 447.
[19] [1988] 1 Ch 449.
[20] Confirmed in *Barrymore v News Group Newspapers Ltd* [1997] FSR 600.
[21] [1990] 1 QB 220.

cosmetic surgery, disclosed by an employee, were protected in *Archer v Williams*.[22] The extension of the first limb of confidence meant that, pre-HRA, it could potentially be applied to a wide range of scenarios in which privacy was invaded.

Reform of the second requirement of breach of confidence probably began with *Stephens v Avery*.[23] As mentioned, information relating to the claimant's sexual orientation was revealed by her close friend. It was held that although an 'express statement that the information is confidential is the clearest possible example of the imposition of a duty of confidence', a duty was nevertheless imposed because it would be 'unconscionable' for a confidant to impart information received 'on the basis that it is confidential'.[24] The relationship between the parties was not the determining factor'.[25]

In *Francome v Mirror Group Newspapers*[26] an action for breach of confidence succeeded when the defendant acquired private information by tapping the home telephone of sportsman John Francome. Clearly, no confidential relationship was in existence and there was no communication between the parties: the information was simply taken without the knowledge of the claimant. A breach of confidence was found when photographs were taken on the film set of *Frankenstein*, in the absence of communication between the film-maker and photographer.[27] On similar facts, an injunction was granted when photographs of a new *Oasis* album cover were obtained on set.[28] In both cases the test applied was whether a reasonable man in the position of the defendant would have assumed an obligation of confidentiality. These cases demonstrate that, even in the pre-HRA era, an action for breach of confidence no longer required a pre-existing relationship, an express promise of confidentiality or communication between the parties.[29] Thus it is possible to discern a move towards protecting *privacy*, as opposed to *confidence*, values; greater emphasis was placed on the private nature of the information itself as the significance of the relationships concerned fell away.

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[22] [2003] EMLR 38.
[23] [1988] 1 Ch 449.
[24] ibid 482.
[25] ibid.
[26] [1984] 1 WLR 892.
[27] *Shelley Films v Rex Features Limited* [1994] EMLR 134.
[28] *Creation Records Ltd v News Group Newspapers Ltd* [1997] EMLR 444.
[29] H Fenwick and G Phillipson, 'Confidence and Privacy: A Re-Examination' (1996) 55(3) CLJ 447, 452.

The communication element had not been completely dispensed with, however. In both *Shelley Films* and *Creation Records* the presence of signs expressly forbidding photography made it possible to find that the reasonable man was aware of the obligation of confidentiality. Such a requirement, in addition to the private nature of the information, would clearly restrict the reach of confidence as a privacy remedy because individuals 'do not carry warning signs upon their person, expressly putting journalists on notice that they consider what they are doing as confidential'.[30] Nevertheless, breach of confidence had reached a point at which one judge felt able to make the following (*obiter*) comments:

> If someone with a telephoto lens were to take from a distance, and with no authority, a picture of another engaged in some private act, his subsequent disclosure of the photograph would in my judgment as surely amount to a breach of confidence as if he had found or stolen a letter or diary in which the act was recounted, and proceeded to publish it. In such a case the law would protect what might reasonably be called a right of privacy, though the name accorded to the cause of action would be breach of confidence.[31]

The next phase in the development of breach of confidence would follow the enactment of the HRA.[32] In 1998 the European Commission on Human Rights (now abolished) found a claim lodged by Earl and Lady Spencer to be inadmissible.[33] The *News of the World* had published photographs of Lady Spencer, taken with a long-lens camera, walking in the grounds of a private clinic. The accompanying article revealed that Lady Spencer was receiving treatment for alcoholism and bulimia. The newspaper apologised after an adverse finding by the Press Complaints Commission but, with no ability to

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[30] H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (OUP 2006) 730.
[31] *Hellewell v The Chief Constable of Derbyshire* [1995] 1 WLR 804, 807 (Laws J).
[32] In 1998 Parliament also passed the Data Protection Act; a statute designed to regulate the processing of personal data. In addition to breach of confidence, the Act has some potential to protect informational privacy (as recognised by the House of Lords in *Campbell v MGN Ltd* [2004] 2 AC 457). Private information/data is broadly defined in the Act to include information and photographs of a particular individual (section 1(1), interpreted in the case of *Durant v Financial Services Authority* [2003] EWCA Civ 1746). Moreover, data 'processing', including media dissemination, must be in accordance with the Data Protection Principles (Schedules 1-3). For example, processing must be fair and legal, and consent is required in a range of situations. In addition, post-2000, the DPA would have to be interpreted compatibly, so far as possible, with Articles 8 and 10 ECHR, by virtue of section 3 HRA. However, the potential for the DPA to provide effective protection of informational privacy is undermined by the exemptions provided for in Act. Data controllers are exempt from the Data Protection Principles if the processing was undertaken with a view to the publication for any journalistic purposes and the date controller reasonably believed publication would be in the public interest (section 32). Furthermore, while compensation is available for wrongful processing of personal data; injunctions are not. Thus, the DPA has not proven to be a popular route taken by celebrities claiming invasion of privacy and hence its limited significance for the purposes of this thesis.
[33] *Earl Spencer v United Kingdom* 25 EHRR CD 105 (1998).

obtain an injunction or damages,[34] the Spencers petitioned the Strasbourg Court, claiming a breach of their Article 8 right to privacy. Their application was refused by the Commission because the domestic remedy of breach of confidence had not been exhausted; the Spencers had not shown that it was 'insufficient or ineffective in the circumstances of their case'.[35] The Commission concluded that 'the matter should be put to the domestic courts for consideration in order to allow those courts, through the common law system in the United Kingdom, the opportunity to develop existing rights by way of interpretation'.[36] This decision of the Commission represented an early (if implicit) indication that the facts of *Spencer* would require an effective legal remedy for breach of Article 8 at Strasbourg,[37] but also found that breach of confidence could provide that remedy and should continue to be developed in the future. Speaking extra-judicially in 1996, Lord Bingham appeared to concur with this view:

> To a very large extent the law already does protected personal privacy; but to the extent that it does not, it should…My preference would be for legislation, which would mean that the rules which the courts applied would carry the imprimatur of democratic approval. But if, for whatever reason, legislation is not forthcoming, I think it almost inevitable that cases will arise in the courts in which the need to give relief is obvious and pressing; and when such cases do arise, I do not think the courts will be found wanting.[38]

When the HRA came into force in October 2000 it became clear that it would have a considerable impact on the development of privacy law in the UK. The question of what exactly that effect would be sparked a significant (and continuing) academic debate.

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[34] The Press Complaints Commission, established in 1991, is a regulatory body consisting of newspaper editors and public members. Claimed breaches of the Privacy Code (available at <http://www.pcc.org.uk/cop/practice.htmlare>) are adjudicated by the PCC. Operating alongside the developing tort of misuse of private information, the PCC offers a fast and inexpensive method to have privacy violations recognised. However, the lack of power to award damages or grant injunctions has led to the system becoming marginalised in recent years. See H Fenwick, *Civil Liberties and Human Rights* (4th edn, Routledge-Cavendish 2007) 846.

[35] 25 EHRR CD 105 (1998) 117-118.

[36] ibid.

[37] R Singh, 'Privacy and the Media after the Human Rights Act' (1998) 6 EHRLR 712, 720; H Fenwick and G Phillipson, 'Breach of Confidence as a Privacy Remedy in the Human Rights Act Era' (2000) 63(5) MLR 660, 666.

[38] T Bingham, 'Should there be a Law to Protect Rights of Personal Privacy?' [1996] EHRLR 450, 461-462.

The Academic Debate on Horizontal Effect

The introductory text to the HRA states that its aim is to give 'further effect to rights and freedoms guaranteed under the [ECHR]', which, significantly for this thesis, includes the right to respect for private and family life (Article 8), and the right to freedom of expression (Article 10). What exactly 'further effect' entails would be determined by the provisions of the HRA. Judicial interpretation of sections 2, 3 and 6 would clearly be significant in terms of the domestic application of the Convention.[39] Section 6(1) makes it 'unlawful for a public authority to act in a way which is incompatible with a Convention right'. Were it not for sub-section 6(3) it would appear, therefore, that the HRA is limited to creating vertical effect between state actors and individuals. In such circumstances private bodies including newspapers and magazines—those often responsible for privacy invasions—would not be bound by section 6 and could not be liable for breach of Convention rights. However, the inclusion of courts within the definition of public authorities,[40] even when deciding cases between two private parties, clearly had the potential to create some form of horizontal effect because the courts would have to develop the common law in light of section 6.[41] This potential was expressly recognised during the passing of the Human Rights Bill in response to fears that it would result in the development of privacy law. Lord Wakeham, then Chairman of the PCC, attempted to introduce amendments to the HRA so that courts would not fall within the definition of public authorities if neither party to the proceedings was a public authority itself. In response, Lord Irvine made the following comments:

> [I]t is right as a matter of principle for the courts to have the duty of acting compatibly with the Convention not only in cases involving other public authorities but also in developing the common law in deciding cases between individuals. Why should they not? In preparing this Bill, we have taken the view that it is the other course, that of excluding the Convention altogether from cases between individuals which would have to be justifiable.[42]

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[39] Dealing with the interpretation of Convention jurisprudence, interpretation of domestic legislation, and the acts of public authorities respectively.
[40] Section 6(3) HRA.
[41] For an opposing view see R Buxton, 'The Human Rights Act and Private Law' (2000) 116 LQR 48. Buxton LJ argued that no private law rights would be created by the HRA based, in part, on the argument that the ECHR does not create rights between private citizens capable of enforcement in domestic law. Subsequent cases under the HRA show that this view has now been refuted by the judiciary (see below at p 33) so it will not be considered further.
[42] HL Deb 24 November 1997, vol 583 col 783.

The 'matter of principle' Lord Irvine spoke of presumably concerns the general debate over whether human rights should only apply vertically or whether, on principle, it is not appropriate to draw a distinction between state power and private power. In the context of privacy invasions by private media bodies there would seem to be strong justifications favouring the interpretation of the HRA envisaged by Lord Irvine. As Phillipson notes:

> The main argument for allowing a degree of horizontal effect is the recognition that powerful private bodies are sometimes in a position to inflict upon those basic human interests which rights seek to protect harms equivalent to those which the state could perpetrate. This may be taken further: in some cases private bodies may be able to inflict a greater harm …Newspapers actually have more power than Governments to disseminate abroad private information and near-equal powers to obtain it surreptitiously in the first place. They also have greater motivation to carry out such dissemination.[43]

In light of Lord Irvine's comments, and the fact that the proposed amendments did not become part of the enacted HRA, some form of horizontal effect was clearly intended by the government and Parliament.[44] This view is consistent with section 3(1) HRA, which imposes a duty on the courts to interpret legislation so that it is compatible, so far as it is possible, with the Convention.[45] The duty applies regardless of whether such interpretation impacts upon private parties, giving rise to 'statutory horizontality'.[46] Given that the HRA is, other than section 6, silent regarding its effect on private law and the common law generally, the form that such horizontal effect should take became a matter of fierce academic debate soon after the inception of the HRA.

Before determining the duty imposed by the HRA in a case concerning two private parties, the courts must examine whether the Convention requires positive state action in the particular context.[47] This is as a result of section 2 HRA, which requires that relevant Strasbourg jurisprudence be taken into account 'in determining any question…in connection with a Convention right', including the potential horizontal effect of the

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[43] G Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law: A Bang or a Whimper?' (1999) 62(6) MLR 824, 847. Markesinis concurs; '[o]f all the (private) oppressors, the press stands out most for criticism and as a source of concern'; B S Markesinis, 'Privacy, Freedom of Expression, and the Horizontal Effect of the Human Rights Bill: Lessons from Germany' (1999) 115 LQR 47, 78.
[44] B S Markesinis, 'Privacy, Freedom of Expression, and the Horizontal Effect of the Human Rights Bill: Lessons from Germany' (1999) 115 LQR 47, 72-73.
[45] *Ghaidan v Godin-Mendoza* [2004] UKHL 30.
[46] A L Young, 'Mapping Horizontal Effect' in D Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (CUP 2011) 21.
[47] G Phillipson 'Clarity Postponed: Horizontal Effect after *Campbell*' in H Fenwick, G Phillipson and R Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP 2007) 149.

Convention.[48] Once it is found that a positive obligation is placed on the State, the interpretation of the HRA governs the way in which that obligation is discharged domestically. The first stage of the analysis (interpretation of the Convention) in the privacy context will be discussed in the following chapter. In this chapter the focus will be on the second level; how the Convention should be given effect in domestic law via section 6.

Wade predicted that section 6 HRA would result in full indirect horizontal effect.[49] By making it unlawful for the courts (as public authorities) to act incompatibly with the Convention, the HRA imposes a duty upon them to protect Convention rights regardless of whether the parties to a case are public or private. In Wade's view the spirit of the HRA reflects 'a new culture of human rights…in the Western world', and therefore 'the citizen can legitimately expect that his human rights will be respected by his neighbour as well as by his government'.[50] The practical effect of this interpretation would be that the courts, through their development of the common law, would have to create new causes of action if parties argued that their Conventions rights had been violated.[51] In addition, there would be no need to enquire as to whether either party was a public authority because it would make no difference to the outcome of the case.[52] A similar argument in favour of full indirect horizontal effect is made by Beyleveld and Pattinson.[53] Given that, at stage one, conceptually, the Convention rights apply horizontally as well as vertically, the courts must 'in all cases before them give horizontal effect to the Convention rights' as a result of section 6 HRA.[54] According to these commentators the absence of an existing cause of action does not prevent the Convention rights being directly actionable; the HRA itself creates a cause of action in horizontal situations,[55] as it does under Wade's model. Other proponents of this model suggest that the creation of a new cause of action would not be an instance of the courts taking on an illegitimate legislative role, but that they would be simply exercising their traditional power to develop the common law

[48] In *X v Y* the Court of Appeal found that s 2(1) HRA required it to examine relevant Strasbourg jurisprudence in deciding the horizontal effect point; [2004] ICR 1634.
[49] H W R Wade, 'Horizons of Horizontality' (2000) 116 LQR 217. Although there is a technical distinction between full indirect horizontal effect (a duty on the court to developing existing law to give effect to the Convention) and direct horizontal effect (a statutory cause of action), both concepts, in practice, result in new Convention based causes of action. See S Gardbaum, 'Where the (State) Action is' (2006) IJCL 760.
[50] ibid 224.
[51] ibid 221-222.
[52] ibid 223-224.
[53] D Beyleveld and S D Pattinson, 'Horizontal Applicability and Horizontal Effect' (2002) 118 LQR 623.
[54] ibid 634.
[55] ibid 642-643.

only, under the HRA, they would have Parliament's seal of approval.[56] This argument, of course, depends on acceptance of the view that Parliament intended to create full indirect horizontal effect, a view which, as will be seen, is strongly contested by advocates of weaker versions of indirect horizontal effect.

One of the central criticisms levelled at the full/direct horizontal effect models is that the HRA makes clear that only public authorities are to be liable for acting incompatibly with a Convention right.[57] If any party could be so liable, this wording of the HRA would be redundant. As Lester and Pannick note:

> It would frustrate this carefully designed statutory scheme to ignore the distinction between claims against public authorities under section 7(1)(a) for breach of the section 6 duty, and reliance on the Convention rights in any other legal proceedings against a public authority (under section 7(1)(b)). The only causes of action created by the Act are direct actions against public authorities for the new public law tort.[58]

Furthermore, the HRA does not incorporate Article 1 ECHR, or an equivalent provision, stating that the Convention rights shall be secured to everyone within the jurisdiction.[59] Nor does the HRA incorporate Article 13 ECHR, granting the right to an effective remedy for violations of rights under the Convention. These features suggest that direct or full indirect horizontal effect are not options under the HRA. Those supporting indirect horizontal effect therefore argued that breaches of Convention rights are not directly actionable against private individuals, but, as public authorities themselves, the courts must not act incompatibly with the Convention when a cases involving private parties, based on an existing cause of action, arises. The Convention may, in this way, 'govern or at least influence the interpretation and application of existing law'.[60]

The 'strong' version of indirect horizontal effect, advocated by Hunt, means that:

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[56] T D C Bennett, 'Horizontality's New Horizons - Re-Examining Horizontal Effect: Privacy, Defamation and the Human Rights Act: Part 2' (2010) 21(4) Entertainment Law Review 145, 148.
[57] This suggests that there are 'persons who are not bound to act compatibly with the Convention'; M Hunt, 'The "Horizontal Effect" of the Human Rights Act' [1998] PL 423, 438. In addition, statements made during the passing of the Human Rights Bill do not appear to envisage direct horizontal effect. See Lord Irvine's comments; '[w]e have not provided for the Convention rights to be directly justiciable between private individuals. We have sought to protect the human rights of individuals against the abuse of power by the state, broadly defined, rather than to protect them against each other'.
[58] A Lester and D Pannick, 'The Impact of the Human Rights Act on Private Law: The Knight's Move (2000) 116 LQR 380, 382.
[59] Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law' (n 43) 835.
[60] Phillipson, 'Clarity Postponed' (n 47) 151.

> [C]ourts will not merely have a power to 'consider' the Convention when interpreting the common law in private disputes, nor will they merely have an obligation to take into account Convention 'values'. Rather they will be under an unequivocal duty to act compatibly with Convention rights. In some cases, this will undoubtedly require them actively to modify of develop the common law in order to achieve such compatibility.[61]

Though this model does not authorise judges to create new causes of action, once an existing cause of action is established they are obliged to act compatibly with the Convention. To ensure compatibility, courts would have to apply the Convention right(s) in question, only allowing interference with a Convention right to be justified by the express exceptions to it.[62] A weaker version of indirect horizontal effect would require the courts to take account of the values or principles underpinning Convention rights.[63] Convention values would provide 'a reason for deciding a case in a particular way' but could be 'overridden by any other interest that the court finds compelling in a particular case'.[64] A weaker model would therefore enable the judiciary to retain the flexibility it has traditionally had in common law adjudication; the interest in protecting the Convention right(s) at stake could be outweighed by consideration of any other factor.

Another possible model for horizontal effect is the 'constitutional constraint' model, suggested by Phillipson and Williams.[65] Under this model, the courts are obliged to develop the common law compatibly with the Convention, provided this can be achieved by incremental development.[66] Thus, respect for the foundational constitutional principles of parliamentary sovereignty, the rule of law and the separation of powers restrain the judiciary from carrying out legislative-style law reform, even when this appears to be what is required by the Convention.[67] In terms of the strength of the judicial obligation, the constitutional constraint model sits between strong indirect horizontal effect and weak indirect horizontal effect. This is because:

> [T]he Convention principles *always* function as…'fundamental mandatory principles'; that is, principles which the court must consider *and* which presumptively prevail unless displaced by

[61] M Hunt, 'The "Horizontal Effect" of the Human Rights Act' [1998] PL 423, 441.
[62] Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law' (n 43) 832-833.
[63] ibid 832-830.
[64] Phillipson, 'Clarity Postponed: Horizontal Effect after *Campbell*' (n 47) 154.
[65] Phillipson and Williams, 'Horizontal Effect and the Constitutional Constraint' (n 6).
[66] ibid 879.
[67] ibid 880.

> countervailing factors – in this case, the constitutional constraint. [The constraint] model thus *requires* courts to develop the common law, subject only to incrementalism.[68]

When considered in light of the HRA's overall sovereignty preserving mechanisms, there would seem to be merit in the inference that there are some limits on the judicial development of the common law.[69] As the only model to take into consideration the courts' duty to develop the common law incrementally, and in accordance with fundamental constitutional principles, the constitutional constraint model offers a persuasive new interpretation of the section 6 obligation.

As the following chapters will argue, until very recently, the level of privacy protection provided at Strasbourg, in terms of both the scope of Article 8 and the balance struck between privacy and free speech, aligned with the level of protection demanded by the justifications underpinning informational autonomy, set out in chapter 1.[70] Given that, pre-HRA, breach of confidence failed to provide full protection for informational autonomy (discussed in the first part of this chapter), in theory, it would appear that direct, full indirect, or strong indirect horizontal effect would result in the development of a strong privacy remedy. In contrast, weak indirect horizontal effect would not necessarily result in as strong a protection. If the Convention rights count only as values or principles, the courts are given less guidance for how to resolve cases, and could take account of a wider range of factors than the Strasbourg Court, in striking the balance between privacy and free speech. For example, the historic importance attached to free speech in the common law (compared with that attached to informational privacy) could lead to inadequate protection of privacy. However, under a weak model, it would also be open to domestic courts to recognise the importance of informational autonomy, and protect it accordingly. Deviation from the Strasbourg standard would be less likely under the constitutional constraint model because Convention principles could only be discounted by the constraint of incrementalism. Therefore, given that the courts had already developed breach of confidence to some extent in the pre-HRA era, and could continue to develop it without necessarily resorting to legislative-style law reform,[71]

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[68] ibid 888.
[69] ibid 892. For example, the judiciary are not empowered, under the HRA, to strike down incompatible primary legislation and must continue to apply it following a declaration of incompatibility (sections 3(2) and 4(6)).
[70] See chapters 3 and 4.
[71] Legislative style law reform in this context was ruled out in 2004 when the House of Lords declined to develop a comprehensive, 'blockbuster', privacy tort; *Wainwright v Home Office* [2004] 2 AC 406. However,

judicial interpretation of section 6 HRA under the constitutional constraint model could meet the demands of Articles 8 and 10, thus, in theory, providing a strong measure of privacy protection.

The following analysis of the privacy cases will argue that although indirect horizontal effect has had a significant impact on the development of privacy law, providing much greater protection of informational autonomy than in the pre-HRA era, the judiciary have not clearly endorsed any of the horizontal effect models discussed.

The Contribution of the Privacy Cases to the Resolution of the Horizontal Effect Debate

The Pre-*Campbell* Cases

The first significant privacy case to be heard following enactment of the HRA, and the Commission admissibility decision in *Spencer*,[72] was the Court of Appeal decision in *Douglas v Hello!*[73] The case concerned Michael Douglas and Catherine Zeta-Jones' attempt to restrict publication of their wedding photographs. The couple had made clear to their guests that photography was prohibited and security checks were carried out at the event to safeguard the exclusivity of the deal they had made with *OK!* magazine. No extension of the current action for breach of confidence would have been needed to grant the Douglases relief. *Creation Records*, for example, made clear that, even pre-HRA, a duty of confidence could be implied if it was sufficiently clear that the information concerned was confidential.[74] The security arrangements and warning signs in *Douglas* put the photographer on notice that the information was to be treated as confidential. However, the Court did consider the issue of horizontal effect. Lord Justice Brooke and Lord Justice Keene appeared to favour a weak indirect approach; as a result of section 6 HRA the courts would be obliged to 'take account' of Article 8 when interpreting the common law.[75] Lord Justice Sedley took a stronger stance:

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as the discussion of *Campbell* in this chapter indicates, significant modifications could be made to breach of confidence without violating the principle of incrementalism. See below at p 37.

[72] See above at p 25.

[73] [2001] QB 967.

[74] See above at p 24.

[75] [2001] QB 967, [167] (Keene LJ), [91] (Brooke LJ).

> [B]y virtue of section 2 and section 6 of the Act, the courts of this country must not only take into account jurisprudence of both the Commission and the [ECtHR]…they must themselves act compatibly with that and the other Convention rights. This…arguably gives the final impetus to the recognition of a right of privacy in English law.[76]

Lord Justice Sedley also found that section 12(4) HRA, requiring the courts to have 'particular regard to the importance of the Convention right to freedom of expression' when considering whether to grant relief, 'puts beyond doubt the direct applicability of at least one Article of the Convention as between one private party to litigation and another—in the jargon, its horizontal effect'.[77] Given the qualified nature of Article 10 it would not be possible to have particular regard to Article 10 'without having equally particular regard at the very least to Article 8'.[78] The Court of Appeal therefore recognised that the HRA would have some horizontal effect but the nature of the courts' duty under section 6 was left unclear.

In *Venables*[79] an injunction was granted against the world to prevent the publication of information that could lead to the identification of those convicted of the murder of James Bulger upon their release. The injunction would apply however the information was acquired: it would not be necessary to point to the breach of a relationship of confidence or circumstances in which the reasonable man would have assumed an obligation of confidentiality (the second limb of traditional breach of confidence). The nature of the information itself was enough to import an obligation of confidentiality. Significantly, there was a real risk that the Article 2 and 3 rights of the claimants would be violated if the injunction was not granted. Although Dame Elizabeth Butler-Sloss recognised that breach of confidence was being extended in this case,[80] it was clear that this was an exceptional case in which it was unnecessary for her to assess the weight of the Article 8 claim alone. The court had not yet protected information based on privacy values alone, without the probable grave consequences present in *Venables*. Moreover, the discussion of section 6 in the case failed to resolve the horizontal effect debate. The suggestion that the courts must 'act compatibly with Convention rights in adjudicating upon existing common law causes of action',[81] without explanation of what is meant by

[76] ibid [111].
[77] ibid [133].
[78] ibid [133].
[79] *Venables and Thompson v News Group Newspapers Ltd* [2001] Fam 430.
[80] ibid 462.
[81] ibid 446.

'acting compatibly', does not distinguish between strong and weak indirect horizontal effect. Nor does it rule out, or endorse, the constitutional constraint model of indirect horizontal effect.

An injunction was granted in *Theakston*[82] restricting publication of covertly taken photographs of Jamie Theakston in a London brothel. Although the information itself was not protected (on the basis that a transient relationship between a prostitute and client could not been confidential) the photographs were protected. Theakston had not given any kind of notice that the activities were confidential, and had no pre-existing relationship with the photographer; it was the nature of the information that persuaded the court to grant relief. The judge made no significant findings regarding horizontal effect.

The issue of the 'obligation of confidentiality' was expressly considered by the Court of Appeal in *A v B plc*,[83] a case concerning exposure of the extra-marital affairs of a premiership footballer. In setting out guidelines for lower courts on the granting of interim injunctions, Lord Woolf, giving the judgment of the court, stated that '[t]he need for the existence of a confidential relationship should not give rise to problems as to the law…A duty of confidence will arise whenever the party subject to the duty is in a situation where he either knows or ought to know that the other person can reasonably expect his privacy to be protected'.[84] Had this principle been applied in practice, the effect would have been to transform breach of confidence into a remedy capable of protecting information based on its private nature. However, the continued emphasis on the relationships between the parties, a breach of confidence requirement, tempered any conclusions that might be drawn from the more radical statements made by the court. The injunction was set aside because the relationships concerned were not found to be protected by the doctrine of confidence. Therefore, Lord Woolf's comments were technically *obiter*. In terms of horizontal effect, Lord Woolf suggested a form of indirect horizontal effect:

> [U]nder section 6 of the 1998 Act, the court, as a public authority is required not to act 'in a way which is incompatible with a Convention right'. The court is able to achieve this by absorbing the

[82] *Theakston v MGN Ltd* [2002] EMLR 22.
[83] [2003] QB 195.
[84] ibid [11].

> rights which Articles 8 and 10 protect into the long-established action for breach of confidence. This involves giving a new strength and breadth to the action so that it accommodates the requirements of those Articles.[85]

Clearly, his Lordship took the view that an existing cause of action would be required for section 6 to operate in the private sphere, but defining the courts' duty in such vague terms means that it is unclear whether Lord Woolf had weak or strong indirect horizontal effect in mind (or something akin to the constitutional constraint model). The potentially important *obiter* comments from *A v B plc* were not followed by the Court of Appeal in *D v L*,[86] which, again, concerned intimate personal information but failed to consider the impact of Article 8.

The pre-*Campbell* cases demonstrate that, in general, the lower courts viewed section 6 HRA as requiring them to give some influence to the Convention in common law adjudication, but the precise obligation was not clear. Moreover, the courts had not fully dispensed with the second limb of breach of confidence; the need for circumstances importing a duty of confidentiality. As Fenwick and Phillipson note; '[t]he law stood in a state of uneasy ambivalence between its desire to protect privacy and the continuing pull of its roots in confidence…The maintenance in practice of confidentiality requirements meant that the courts' attempts to fulfil their duty to mould the common law into a remedy in order to fulfil their duty of acting compatibly with the Article 8 were proving a failure'.[87] The hesitancy may be partly attributed to the fact that during this transitional phase there was no clear imperative for Member States to provide a remedy for the disclosure of private information, as required by the first stage of the horizontal effect analysis.[88] However, as mentioned, the Commission decision in *Spencer* implied that such a remedy may be required.[89] In addition, the Strasbourg decision in *Peck v United Kingdom*[90] demonstrated that Article 8 could be violated by media dissemination of intrusive images, and that breach of confidence would probably not have provided Peck with a satisfactory

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[85] ibid [4].
[86] [2004] EMLR 1.
[87] Fenwick and Phillipson, *Media Freedom under the Human Rights Act* (n 30) 737.
[88] See above at p 25.
[89] See above p 25. Another Commission admissibility decision (*Campmany Y Diez de Revenga v Spain* (2000) no 54225/00)) similarly suggested that Article 8 would cover media publication of information relating to sexual activities. Spanish privacy laws, requiring remedies for such publication, were found not to breach Article 10.
[90] (44647/98) (2003) 36 EHRR 41.

remedy.[91] *Peck* concerned a local authority but it was fairly clear that liability would have been found if the recording had been made and released by a private company.[92]

The Language and Values of Privacy in *Campbell*

The *Campbell* case concerned the publication in the *Mirror* of details of supermodel Naomi Campbell's treatment at Narcotics Anonymous for drug addiction, together with photographs, covertly taken, of her leaving the clinic and saying goodbye to the other patients. Campbell accepted that the newspaper was entitled to publish the fact of her addiction and treatment to correct her previous denials that she was a drug addict, her claim in breach of confidence was regarding the publication of the additional details. The details of Campbell's treatment had probably been disclosed to the newspaper in breach of confidence by either a member of Campbell's staff or a fellow attendee at NA. Liability for the publication of those facts would not therefore require an extension of the law. In terms of the photographs, however, there was clearly no pre-existing relationship between Campbell and the photographer (the pictures were taken covertly), no communication between them, and nothing to put the photographer on notice that the activities were of a confidential nature. The House of Lords, by a majority of three to two, nevertheless found that protection could be extended to the photographs; breach of confidence had 'firmly shaken off the limiting constraint of the need for an initial confidential relationship'.[93] The only circumstances creating liability in *Campbell* were that the photographs depicted obviously private information, the second element of breach of confidence was no longer required. Lord Hope made clear that '[i]f the information is obviously private, the situation will be one where the person to whom it relates can reasonably expect his privacy to be respected'.[94] This comment also serves to highlight the discarding of the language of confidence in *Campbell*. Thus, Lord Nicholls found that:

> [T]the description of the information as 'confidential' is not altogether comfortable. Information about an individual's private life would not, in ordinary usage, be called 'confidential'. The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information.[95]

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[91] ibid [111].
[92] The fact that the footage had been aired by private companies was no barrier to Peck's claim.
[93] [2004] 2 AC 457, [13]-[14] (Lord Nicholls).
[94] ibid [96].
[95] ibid [14].

Lord Hoffmann went further, emphasising that the human right of privacy had become the underlying concern of the law in this area:

> Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity—the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people.[96]

What role did horizontal effect play in the 'transformation' of breach of confidence into a full privacy remedy in *Campbell*? Lord Hope, in the majority, did not take a clear stance on the issue of horizontal effect:

> The language has changed following the coming into operation of the [HRA] and the incorporation into domestic law of Article 8 and Article 10 of the Convention…The jurisprudence of the European Court offers important guidance as to how these competing rights ought to be approached and analysed. I doubt whether the result is that the centre of gravity, as my noble and learned friend Lord Hoffmann says, has shifted. It seems to me that the balancing exercise to which that guidance is directed is essentially the same exercise, although it is plainly now more carefully focussed and more penetrating.[97]

Lord Hope seemed expressly to deny that the HRA would have any significant impact on the common law, yet, in *Campbell*, he extensively cited Convention jurisprudence to inform the new privacy/speech balancing exercise.[98] This could indicate acceptance of either strong or weak indirect horizontal effect, or the constitutional constraint model. Lord Hope could have been acting on an assumed obligation to give effect to Convention principles but, alternatively, he may have been exercising choice over the principles to be applied. Moreover, his development of the law may have been within the constraint of incrementalism, as required by the constitutional constraint model. Baroness Hale's statements were equally unclear; '[t]he 1998 Act does not create any new cause of action between private persons. But if there is a relevant cause of action applicable, the Court as a public authority must act compatibly with both parties' Convention rights. In a case such as this, the relevant vehicle will usually be the action for breach of confidence'.[99] Although Baroness Hale expressly rejected the Wade model,

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[96] ibid [51].
[97] ibid [86].
[98] 'The jurisprudence of the [ECtHR] explains how these principles are to be understood and applied in the context of the facts of each case'; ibid [113].
[99] [2004] 2 AC 457, [132].

by failing to explain what acting compatibly means, her comments cannot be taken to endorse either strong or weak indirect horizontal effect, or the constitutional constraint model. Lord Carswell did not make any independent findings on horizontal effect. Therefore, the discussion of horizontal effect by the majority judges cannot be taken to endorse any particular model of indirect horizontal effect.

Lord Nicholls, in the minority, initially suggested a weak version of indirect horizontal effect, in which Article 8 and 10 *values* could be applicable in disputes between two private parties,[100] while the tests he applied were in Convention terms; '[w]hen both [Article 8 and 10] are engaged a difficult question of proportionality may arise'.[101] His stance could therefore be taken to indicate strong, weak, or constitutional constraint indirect horizontal effect. The other dissenting judge, Lord Hoffmann, expressly denied that the HRA would lead to horizontal effect[102] and yet found that there was no 'logical ground for saying that a person should have less protection against a private individual than he would have against the State for the publication of personal information for which there is no justification'.[103] It is clear, however, that, as with the other judges, the Convention had some influence on his reasoning in the case but, again, this may be as a result of strong, weak, or constitutional constraint, indirect horizontal effect.[104]

Overall, *Campbell* demonstrates no clear resolution of the horizontal effect debate. The Convention was used by all of the judges, in varying degrees of strength, to guide their development of breach of confidence, but, contrary to Baroness Hale and Lord Hoffmann's comments,[105] there was no consensus on the courts' duty under section 6. It seems fairly clear that Wade's model was not favoured by any of the judges (and was discounted by Baroness Hale) but the failure to clarify the matter further may indicate an early preference for flexibility in judicial decision-making and the development of the common law as under a weak model,[106] or may suggest some restriction on the extent on the judicial power to modify the common law, as under the constitutional constraint model. The post-*Campbell* privacy cases, contrary to the views of a number of

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[100] ibid [17].
[101] ibid [20].
[102] 'Although the Convention, as an international instrument, may impose upon the United Kingdom an obligation to take some steps (whether by statute or otherwise) to protect rights of privacy against invasion by private individuals, it does not follow that such an obligation would have any counterpart in domestic law'; ibid [49].
[103] [2004] 2 AC 457, [50].
[104] ibid [53].
[105] ibid [36] (Lord Hoffmann), [126] (Baroness Hale).
[106] Phillipson, 'Clarity Postponed: Horizontal Effect after *Campbell*' (n 47).

commentators, do not appear to have provided any further resolution of the horizontal effect debate.

The Post-*Campbell* Privacy Cases

In the 2005 *Douglas v Hello!*[107] decision the Court of Appeal confirmed the transformation of breach of confidence into a privacy remedy for the unauthorised publication of private facts; 'in so far as private information is concerned, we are required to adopt, as the vehicle for performing such duty as falls on the courts in relation to Convention rights, the cause of action formerly described as breach of confidence'.[108] In terms of horizontal effect, Lord Phillips, on behalf of the Court of Appeal, commented that '[s]ome, such as the late Professor Sir William Wade…and Jonathan Morgan…contend that the [HRA] should be given full, direct, horizontal effect. The courts have not been prepared to go this far'.[109] Lord Phillips went on to state that, in the privacy context, 'the court should, insofar as it can, develop the action for breach of confidence in such a manner as will give effect to both Article 8 and Article 10 rights'.[110] These comments do not indicate any kind of resolution of the horizontal effect issue; Lord Phillips merely stated that the courts had not *so far* given the Convention direct horizontal effect.[111] However, the second comment suggests the existence of some restriction on the power of the courts to apply Convention rights, as well as the need for an existing cause of action, and so is more indicative of weak indirect horizontal effect or the 'constitutional constraint' model.

Since *Douglas*, the language used by the courts when discussing the framework of the misuse of private information tort has become more suggestive of strong indirect horizontal effect, or even of direct effect. Lord Justice Buxton in the Court of Appeal in *McKennit v Ash*[112] considered that 'in order to find the rules of the English law of breach of confidence we now have to look in the jurisprudence of Articles 8 and 10. Those Articles 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'.[113] Sir Anthony Clark, giving the

[107] [2006] QB 125.
[108] ibid [53]. This was an appeal following the trial of the action.
[109] ibid [50].
[110] ibid [53].
[111] Moreover, Lord Phillips was drawing on the comments of Lord Nicholls and Baroness Hale in *Campbell* which, as has been shown, were not in harmony.
[112] [2006] EWCA Civ 1714.
[113] ibid [11].

judgment of the Court of Appeal in *Murray v Big Pictures (UK) Ltd*,[114] found that the court must first ask 'whether the information is private in the sense that it is in principle protected by Article 8 (i.e. such that Article 8 is in principle engaged) and, secondly, if so, whether in all the circumstances the interest of the owner of the information must yield to the right to freedom of expression conferred on the publisher by Article 10'.[115] In subsequent cases the courts have followed a similar trend, usually referring to either *McKennitt* or *Murray*, and framing their enquiry, at least initially, in Articles 8 and 10 terms.[116] In this way, the courts may have given the impression that they are duty bound to give overriding status to the Convention rights in this context. As Clayton and Tomlinson observe; 'the strong approach is now well established in the case law'.[117] Other commentators argue that the recent cases in fact demonstrate direct horizontal effect because Articles 8 and 10 were applied to the disputes with very little regard to the common law.[118] Bennett suggests that *McKennitt* makes 'clear beyond doubt that the HRA, and the Convention rights it protects, is being given direct horizontal effect'.[119] *Murray*, according to Bennett, 'effectively confirms that English privacy law is now to be regarded as completely in line with ECtHR jurisprudence. The effect of this is that it almost goes so far as to make the jurisprudence of the ECtHR…binding on English courts when assessing privacy claims'.[120]

The following chapter will assess the claims of these commentators against the substantive law,[121] however, as Phillipson argues, there are a number of clear weaknesses in the arguments used.[122] Importantly, Lord Justice Buxton's comments in *McKennitt* were partly derived from the earlier Court of Appeal decision in *A v B plc*.[123] As mentioned, in that case Lord Woolf spoke of 'absorbing the rights which Articles 8 and 10 protect into

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[114] [2008] EWCA Civ 446.
[115] ibid [27].
[116] See *HRH Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57; *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB); *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB); *Spelman v Express Newspapers* [2012] EWHC 355 (QB); *Trimingham v Associated Newspapers Limited* [2012] EWHC 1296 (QB).
[117] R Clayton and H Tomlinson (eds), *The Law of Human Rights* (2nd edn, OUP 2009) 276. Fenwick finds that *McKennitt* appears to 'impose something that comes close to an absolute duty to develop the common law compatibly with the rights rather than a requirement merely to have regard to them'; H Fenwick, *Civil Liberties and Human Rights* (4th edn, Routledge-Cavendish 2007) 255.
[118] Bennett, 'Horizontality's New Horizon' (n 56); K Hughes, 'Horizontal Privacy' (2009) 125 LQR 244; N A Moreham 'Privacy and Horizontality: Relegating the Common Law' (2007) 123 LQR 373.
[119] Bennett, 'Horizontality's New Horizons' (n 56) 99.
[120] ibid 102-103.
[121] See chapters 3 and 4.
[122] G Phillipson, 'Privacy: The Development of Breach of Confidence – The Clearest Case of Horizontal Effect?' in D Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (CUP 2011) 152.
[123] [2003] QB 195.

the long-established action for breach of confidence'.[124] He then set out guidelines directing lower courts to avoid determining whether a privacy cause of action existed[125] and decided the case purely on confidence grounds.[126] The other authorities cited by Lord Justice Buxton do nothing to support his claim. Baroness Hale in *Campbell* stated that '[t]he 1998 Act does not create any new cause of action between private persons'[127] and, as shown, Lord Phillips in *Douglas* denied that direct horizontal effect had been interpreted by the courts.[128] Therefore, to suggest that Lord Justice Buxton in *McKennitt* resolved the horizontal effect issue in favour of direct horizontal effect would appear to be inaccurate; the authorities cited clearly referred to *indirect* horizontal effect. As Phillipson notes; 'this purported announcement in favour of full or direct horizontal effect…in *McKennitt* and…[*Murray*] merely amounts to Sir Anthony repeating an inaccurate summary of Buxton LJ of previous dicta, which in fact rule out direct and full horizontal effect'.[129]

Leaving aside Phillipson's argument about the origins of these judicial statements, and before considering the substantive law, it should be noted that the undoubted influence of the Convention in these cases, without more, does not indicate a *duty* to give it direct horizontal effect, or strong indirect horizontal effect. It could equally be the result of the courts finding strong reasons to give effect to the protection of privacy, an important human right, and using the Convention as a source of inspiration, under a weak model. Moreover, similar developments could occur under the 'constitutional constraint' model. As this chapter has demonstrated, pre-HRA, the incremental development of common law breach of confidence had enhanced its capacity to protect private information. Further development along these lines would probably not, therefore, raise constitutional concerns in the minds of the judiciary, enabling them to apply Convention principles when deciding privacy cases.

Conclusion

This chapter has examined the transformation of breach of confidence, from a limited privacy remedy in the pre-HRA era, into a full privacy remedy, protecting individuals

[124] ibid [4].
[125] ibid [11].
[126] ibid [45].
[127] [2004] 2 AC 457, [132].
[128] See footnote 109 above.
[129] G Phillipson, 'Privacy: The Development of Breach of Confidence' (n 122) 152.

from the unauthorised disclosure of private information, following the House of Lords' decision in *Campbell*. As well as the practical significance of dispensing with the second limb of the confidence action, the case marked a shift in the law towards the values underpinning the protection of privacy. Thus, as a result of the indirect horizontal effect of the HRA, informational privacy is now protected to a far greater extent than in the pre-HRA era. As noted in chapter 1, one of the aims of this thesis is to identify areas of disparity between the levels of privacy protection at Strasbourg and in English domestic courts, and to question why the instruments of the HRA (particularly sections 2 and 6) have not been utilised by English courts to afford greater protection to informational autonomy. Although only an interim conclusion can be drawn at this stage, this chapter has suggested that the courts have not resolved the horizontal effect debate by endorsing any of the models suggested in the academic commentary. The following chapters, by identifying a number of areas in which the balance struck between privacy and free speech falls short of the Strasbourg standard, will provide further evidence to refute the claim that the most recent privacy cases show judicial endorsement of direct horizontal effect or strong indirect horizontal effect. However, if, as this chapter has argued, the constitutional constraint model, suggested by Phillipson and Williams, most persuasively captures the duty of the court under section 6 HRA, there would not appear to be any reason for the domestic courts to dilute the level of privacy protection afforded by Strasbourg, given that already, both pre- and post-HRA, breach of confidence has been developed, incrementally, into the tort of misuse of private information in order to fill a clear lacuna in the law. Chapter 5 will therefore consider why English courts have, to some extent, failed to utilise indirect horizontal effect to maximise the protection of informational privacy.

CHAPTER III

THE REASONABLE EXPECTATION OF PRIVACY

Introduction

The basic theoretical model outlined in chapter 1 suggested that the types of information attracting the legal protection of privacy should include both obviously intimate information (for example, that relating to sexuality, relationships, health and the home), but also more innocuous information (such as photographs of an individual going about their daily life). Moreover, whether the information was acquired in a private or public location should not form the basis of a distinction between the kinds of information afforded protection. As chapter 1 argued, if the law is to respond to the core principles of privacy, the interpretation of 'private information' must be widely drawn, encompassing information which, if widely disseminated, would necessarily involve a loss of an individual's right to informational autonomy and possibly a significant impact on their substantive autonomy.[1]

This chapter will begin by examining the first stage of the privacy analysis carried out by the ECtHR—whether the disclosed information falls within the scope of Article 8 in this context—as set out in the leading decision of *Von Hannover (No. 1)*,[2] now potentially modified by *Von Hannover (No. 2)*,[3] demonstrating that the approach of the Strasbourg Court, particularly the pre-*Von Hannover (No. 2)* approach, closely adheres to the theoretical model. In contrast, in the years following the *Von Hannover (No. 1)* decision, domestic courts, while giving a strong influence to Convention jurisprudence, do not appear to have considered themselves bound to bring UK privacy law into line with the Convention. As one leading commentator has suggested, the circumstances in which an individual might have a reasonable expectation of privacy is '[o]ne of the most difficult questions facing English courts as they develop the common law right to privacy'.[4] In answering this question the courts must not only ensure that the law is sufficiently certain, by coming to a consensus on the breadth and depth of privacy protection, but

[1] See chapter 1 at p 15.
[2] *Von Hannover v Germany* [2004] EMLR 21.
[3] *Von Hannover v Germany (No. 2)* App no 40660/08 (ECHR, 7 February 2012).
[4] N A Moreham, 'Privacy in Public Places' (2006) 65(3) CLJ 606.

must also grapple with the equally controversial issue of how strong an influence the Convention is to have in UK domestic law through their interpretation of the HRA. Therefore, in light of the discussion in chapter 2 of the significant impact of sections 2 and 6 of the HRA on the development of breach of confidence into the misuse of private information tort, this chapter will provide further evidence that the domestic jurisprudence, in this context, does not, contrary to the opinion of a number of commentators, indicate an acceptance of strong indirect horizontal effect[5] or direct horizontal effect.[6] It will be argued that British judges are not, in fact, using Strasbourg jurisprudence to provide the content of the new privacy tort and, instead, appear to be preserving a degree of autonomy in privacy adjudication. Clearly the reasonable expectation of privacy test is only the first stage of the courts' analysis, therefore only interim conclusions will be drawn about the courts' reasoning under sections 2 and 6 HRA, until the 'parallel analysis' has been considered in the following chapter.

The Facts and Findings of *Von Hannover v Germany*

The background to the *Von Hannover* case is that since the early 1990s Princess Caroline of Monaco had been trying to prevent newspapers and magazines from publishing photographs of her private life in a number of European countries. In the German courts, the Princess had succeeded in preventing further publication of photographs in which she was shown with her children, and where she had sought seclusion at the far end of a restaurant courtyard. Being classified as a 'figure of contemporary society *par excellence*' meant that publication of other photographs taken in public places, showing scenes from her daily life,[7] could not be restrained. The public had a legitimate interest in knowing how she behaved in public and so she had to tolerate this kind of publicity. Having exhausted all domestic remedies in Germany, Princess Caroline applied to the ECtHR alleging that her Article 8 right to respect for private and family life had been infringed.

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[5] R Clayton and H Tomlinson (eds), *The Law of Human Rights* (2nd edn, OUP 2009) 276; H Fenwick, *Civil Liberties and Human Rights* (4th edn, Routledge-Cavendish 2007) 255.

[6] T D C Bennett, 'Horizontality's New Horizons - Re-Examining Horizontal Effect: Privacy, Defamation and the Human Rights Act Part 1' (2010) 21(3) Ent LR 96; K Hughes, 'Horizontal Privacy' (2009) 125 LQR 244; N A Moreham 'Privacy and Horizontality: Relegating the Common Law' (2007) 123 LQR 373.

[7] The photographs included images of Princess Caroline horse riding, shopping, in a restaurant, cycling, on a skiing holiday, leaving her Paris home with her husband, playing tennis, and tripping over an obstacle at a beach club in Monte Carlo.

Importantly, the Strasbourg Court found that although this was a matter concerning the legal relations between two private parties, it could require the State to adopt measures to secure respect for private life (normally called positive obligations).[8] The Court went on to find that the photographs concerned contained 'very personal or even intimate "information"'[9] and so had 'no doubt that the publication by various German magazines of photos of the applicant in her daily life either on her own or with other people [fell] within the scope of her private life'.[10] The public context did not prevent the pictures engaging Article 8 because of the need for a zone of interaction, even in public, 'to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings'.[11]

The Court classified Princess Caroline as a private individual as she had not exercised any official functions on behalf of the State of Monaco and, as the photographs showed the Princess 'engaged in activities of a purely private nature'[12] and related solely to her private life, they could not be said to contribute to a political or public debate of general interest.[13] For these reasons, having noted the importance of the press in a democratic society to inform the public, the Court found that Article 10 must be given a narrow interpretation while according Article 8 an expansive one. The Court therefore concluded that 'the public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded and despite the fact that she is well known to the public'.[14] The German Courts had failed to provide sufficient protection of Princess Caroline's private life as the spatial isolation criterion was too vague and difficult for her to determine in advance, and she would have the burden of proving that she had an expectation of privacy by retreating to a secluded place.[15] There had therefore been a violation of Article 8.

[8] [2004] EMLR 21, [57].
[9] ibid [59].
[10] ibid [53].
[11] ibid [50].
[12] ibid [61].
[13] ibid [64]; [76]; [77].
[14] ibid [76]; [77].
[15] ibid [74].

The Reasoning in *Von Hannover v Germany*

Possibly the most striking aspect of the Court's decision in *Von Hannover* is its treatment of the types of information falling within the scope of private life. Firstly, it held that the photographs of Princess Caroline (alone and with others) were 'very personal or even intimate'.[16] The German courts had already restricted publication of arguably the most private images, those showing her with her children and in a secluded location, but protection was extended to the quite mundane pictures of the Princess, including those showing her alone which therefore fell outside the 'zone of interaction' justification, without much explanation by the Strasbourg Court. The earlier ECtHR decision in *Peck v United Kingdom*[17] had generally been taken to suggest that Article 8 would only apply to images showing some very private or sensitive information (in that case CCTV images of a person walking in the street immediately after an unsuccessful suicide attempt). Instead of articulating why protection should be extended to apparently inoffensive photographs of the Princess in her daily life,[18] which would have provided clarity and legitimacy,[19] the Court reasoned that as Princess Caroline did not exercise official functions (unlike, say, a politician) and as the photographs did not depict her performing any official role, they must fall within the scope of private life. The Court distinguished between the publication of facts 'capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who…does not exercise official functions'.[20] Therefore, the stance taken in *Von Hannover* appears to be that Article 8 is engaged by the publication of any unauthorised photograph of an individual in a public location, provided they are not performing official duties.

Kirsty Hughes, commenting on the case, has suggested that the private nature of the images was exaggerated by the Court to reach the conclusion they wanted, which was to protect the Princess from harassment by the press.[21] The Court *did* stress that the photographs had been taken in a 'climate of continual harassment' inducing a 'very

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[16] ibid [59].
[17] (2003) 36 EHRR 41. *Peck* is not completely analogous to cases arising between two private parties, but did give a strong indication of the reasoning the ECtHR would be likely to employ in a horizontal case with similar facts.
[18] Something attempted in chapter 1 and below at p 48.
[19] H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (OUP 2006) 677.
[20] [2004] EMLR 21, [63].
[21] K Hughes, 'Photographs in Public Places and Privacy' (2009) 1(2) JML 159, 167.

strong sense of intrusion…or even of persecution',[22] allowing for the possibility of a second interpretation of the case based on that factor.[23] Subsequent cases, however, seem to confirm that 'the publication of a photograph falls within the scope of private life', even in the absence of persistent photography or harassment.[24] While it might not be immediately attractive to suggest that pictures of an individual walking down a public street constitute a violation of their right to privacy, the Court in *Von Hannover* rejected a 'rigid compartmentalisation of human activity along the "public-private" border and, instead, [adopted] a more holistic reading of private life, treating it as a continuum which extends to activity in the public sphere'.[25]

In so doing the judgement recognises the reality of daily life for the modern celebrity. As suggested in chapter 1, there is huge demand for anodyne, as well as personal, information about those in the public eye. The lucrative 'infotainment' industry encourages newspapers and magazines to employ paparazzi to pursue and capture images of celebrities, regardless of their location or activities, and the prevalence of camera phones and other technology means that they can be photographed or recorded by almost anyone at any time. If publication is permitted, these individuals have completely lost control of information about themselves. Granting such strong privacy rights, and extending them to activities in a public place as well as more obviously private activities, reduces the chance of any interference with an individual's substantive autonomy; for

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[22] [2004] EMLR 21, [59].

[23] Fenwick and Phillipson have suggested an alternative interpretation of *Von Hannover*; '[t]he photographs…fall within Article 8 because, while not revealing anything generally considered personal, they induce an acute feeling of intrusion because of the persistent campaign of low-level intrusion of which they are a part'. Combined with the decision in *Peck*, this version of Article 8 protection would cover information related to some intimate aspect of private life such as walking in the street following a suicide attempt (as in *Peck*), engaging in sexual activity in a secluded but public place, or in the street outside a rehabilitation or abortion clinic, for example. Alternatively, pictures of an individual going about their daily life could be protected provided a context of harassment or persistent photography reached a level violating Article 8. See Fenwick and Phillipson, *Media Freedom under the Human Rights Act* (n 19) 681-682.

[24] *Sciacca v Italy* (2006) 43 EHRR 20, [29]. The same reasoning was used by the Court in *Reklos and Davourlis v Greece* App no 1234/05 (ECHR 200, 15 January 2009), *Eerikäinen v Finland* App no 3514/02 (ECHR 255, 10 February 2009) and *Egeland and Hanseid v Norway* App no 34438/04 (ECHR 622, 16 April 2009). However, the photographs protected in these cases were more intrusive than those in *Von Hannover*. In *Sciacca* the article complained of contained a photograph of the applicant at the time of her arrest, *Reklos* concerned the photograph of a newborn baby taken in the restricted area of a hospital, and in *Egeland* a convicted murderer was photographed in distress as she left the courtroom following sentencing. So while the statements of the Strasbourg Court in a number of cases support the reading of *Von Hannover* advocated in this thesis, the decisions themselves are not conclusive. A further Strasbourg development is indicated by a number of these cases. *Reklos* and *Egeland* suggest that Article 8 maybe engaged (and privacy invaded) at the point of taking a photograph, though the Strasbourg requirement remains unclear. See Hughes, 'Photographs in Public Places and Privacy' (n 21).

[25] N Hatzis, 'Giving Privacy its Due: Private Activities of Public Figures in *Von Hannover v Germany*' (2005) 16 KCLJ 143, 147.

example their choices in daily life as to where they go and who they are seen with. The Court's concept of private life therefore maximises the ability of these individuals to lead an autonomous life. It may also discourage the practice of harassment (or 'doorstepping') carried out by some photographers and clearly of concern in the case. *Von Hannover* therefore appears to provide a very strong commitment, and practical legal effect, to the foundational principles of privacy—informational and substantive autonomy—discussed in chapter 1, even if this was not fully explained by the Strasbourg Court in its judgment.

The second important (and less convincing) finding regarding the scope of Article 8 protection was the classification of Princess Caroline as a private individual, given that she did not perform any official State functions.[26] Within the *Von Hannover* judgement itself there was some uneasiness with this finding. Judge Cabral Barreto, in his Concurring Opinion, took the view that Princess Caroline was a public figure as she had 'for years played a role in European public life, even if she [did] not perform any official functions in her own country'.[27] The Judge preferred a wider definition of 'public figure' to include 'persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life'.[28]

A number of commentators have taken a similar view. Rudolf argues that the distinction made between politicians exercising official functions and private individuals 'fails to address the case of nonpoliticians who are nonetheless persons of social or economic influence'.[29] Sanderson makes a similar argument, criticising the Court for failing to recognise what he terms 'intermediate figures'; 'those figures, like the Princess, who enjoy a sufficiently high public profile to be of interest to the general public'.[30] Sanderson makes a strong argument by seeking to identify *why* individuals such as Princess Caroline are of legitimate interest and so have a lesser expectation of privacy than a purely private individual. He suggests that the position of the Royal Family in Monaco, Princess Caroline's proximity to the throne, and the 'cultural, social and economic power' it

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[26] It was noted in the judgement that Princess Caroline represented the ruling family at cultural and charitable events.
[27] [2004] EMLR 21, 409.
[28] ibid 409. The judge was clearly referring to the Council of Europe resolution on privacy; '[p]ublic figures are persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain'.
[29] B Rudolf, 'Council of Europe: *Von Hannover v Germany*' (2006) 4(3) IJCL 533, 537.
[30] M A Sanderson, 'Is *Von Hannover v Germany* a Step Backward for the Substantive Analysis of Speech and Privacy Interests?' (2004) 6 EHRLR 631.

confers on her mean that it seems 'wrong to permit her the same degree of Article 8 protection that one might allow an ordinary citizen who does not enjoy a similar quality of influence'.[31] By simply classifying the Princess as a private individual, the Strasbourg Court failed to engage with these persuasive arguments that call for a more nuanced approach rather than a clear cut distinction between politicians and private individuals. While the outcome may have been right in this case, there is a plausible argument that some private individuals such as business or religious leaders and celebrities, though unelected, hold sufficient power to be considered public figures. Adopting such a restrictive conception of 'public figure' not only expanded the scope of Article 8 protection enormously but also effectively closed off discussion of the Article 10 value of the speech concerned; once it was accepted that the information related to a private figure, in their private life, it became much harder to persuade the Court that there was any free speech interest involved at all.

The discussion of certain aspects of *Von Hannover* in this chapter suggests that the Strasbourg Court provides full privacy protection for the unauthorised publication of photographs of any individual not performing official functions and, therefore, demonstrates a strong adherence to the theoretical model of privacy protection set out in chapter 1. As the academic commentary indicates, the decision is undoubtedly very controversial and, depending on its incorporation into UK domestic law, clearly has the potential to reform an industry built upon the widespread demand for information about the private and daily lives of celebrities and other 'public figures'. Before examining how far the UK has followed *Von Hannover* it is necessary to consider some further recent developments at Strasbourg.

Does *Von Hannover (No. 2)* Modify the Strasbourg Position?

In February 2012 the ECtHR sitting as a Grand Chamber (suggesting that the case was of particular importance) handed down its decision in *Von Hannover (No. 2)*. The applicants, Princess Caroline and her husband, complained of the German courts' implementation of the first *Von Hannover* judgement, with regards to the publication of further unauthorised photographs in two German magazines. The position in German domestic law had been modified, following *Von Hannover (No. 1)*, to the extent that, in

[31] ibid 637-638.

the second set of proceedings, photographs of the applicants walking in St Moritz and on a chair lift during a skiing holiday were restrained. Importantly, the photographs and accompanying articles were found to be for entertainment purposes only. The claim concerned another photograph of the applicants walking in the street during the skiing holiday. This had not been protected by the Federal Constitutional Court of Germany because it accompanied, and was linked to, an article about the failing health of Prince Rainier III, the then Sovereign Prince of Monaco, which was said to be a matter of public interest. Illustrating such an article with related photographs, showing scenes from daily life, was justified according to German law.

The Grand Chamber unanimously determined that there had been no violation of Article 8; the German courts had not failed to comply with their positive obligations to protect private and family life. Reaffirming those principles already quoted from *Von Hannover (No. 1)*,[32] the Court added that:

> [A] person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers. The right to the protection of one's image is thus one of the essential components of personal development. It mainly presupposes the individual's right to control the use of that image, including the right to refuse publication thereof.[33]

By emphasising 'control' over the use of personal information the Court again indicates its commitment to the underlying values of privacy, improving upon the justification used in *Von Hannover (No. 1)* which could have been taken to indicate that the Strasbourg Court sought only to further the development of human relationships. Nevertheless, the Court accepted that the photograph 'did contribute, at least to some degree, to a debate of general interest',[34] given that it accompanied an article found to be in the public interest because it concerned the health of Monaco's reigning head of state. The case is primarily concerned with balancing the competing privacy and speech rights,[35] and proceeded on the basis that publication of the photographs engaged Article 8. However, some aspects of the judgement can be interpreted as modifying *Von Hannover (No. 1)* in terms of the scope of private life within the meaning of Article 8(1) in this context, and

[32] See text to footnote 11 above.
[33] App no 40660/08 (ECHR, 7 February 2012), [96].
[34] ibid [118].
[35] See chapter 4 at p 83.

could therefore have an effect on the developing reasonable expectation of privacy test in UK domestic law.

The first significant modification concerns the distinction drawn by the ECtHR between public and private figures. As will be recalled, in *Von Hannover (No. 1)* Princess Caroline was categorised, for Article 8 purposes, as a private individual as she exercised no official functions. In the second *Von Hannover* case, however, the Strasbourg Court found that 'irrespective of the question whether and to what extent the first applicant assumes official functions on behalf of the Principality of Monaco, it cannot be claimed that the applicants, who are undeniably very well known, are ordinary private individuals. They must, on the contrary, be regarded as public figures'.[36] In the case of *Axel Springer v Germany*,[37] handed down at the same time as *Von Hannover (No. 2)*, a television actor was found to be sufficiently well-known to be considered a public figure.[38] The Court added that, in principle, it would be for domestic courts to assess how well known a person is,[39] a markedly different stance from *Von Hannover (No. 1)* which appeared to make a clear distinction between those who could and could not be termed public figures. As noted above, once an individual is found to be a public figure it becomes much easier for the Court to find a stronger public interest in allowing Article 10 to prevail over the relevant privacy interest, as it did in both *Von Hannover (No. 2)* and *Axel Springer*. It appears, therefore, that in allowing the term 'public figure' to be applied to individuals exercising no official functions, the Court has, in effect, reduced the expectation of privacy for certain categories of people.[40]

Secondly, given that the applicants had not adduced evidence demonstrating that the photos were taken in unfavourable circumstances (covertly or in a climate of harassment, for example) it was found that 'the photos of the applicants in the middle of a street in St Moritz in winter were not in themselves offensive to the point of justifying their prohibition'.[41] This statement seems to be inconsistent with *Von Hannover (No. 1)* which strongly suggested that *any* publication of unauthorised photographs showing scenes from daily life strongly attracted the protection of Article 8. It appears, therefore, that

[36] App no 40660/08 (ECHR, 7 February 2012), [120].
[37] App no 39954/08 (ECHR, 7 February 2012).
[38] ibid [99].
[39] ibid [98].
[40] E C Reid, 'Rebalancing Privacy and Freedom of Expression' (2012) 16(2) Edin LR 253, 252.
[41] App no 40660/08 (ECHR, 7 February 2012), [123].

whilst purporting to follow the first *Von Hannover* decision, the Grand Chamber may have, in fact, retreated from some aspects of it.[42] Anodyne photographs of individuals going about their daily lives in public places will still be protected if they are for entertainment purposes only. However, *Von Hannover (No. 2)* suggests that such images are not particularly intrusive and involve a weaker privacy claim than was previously held. The result of this decision may be that in attempting to redress the imbalance that *Von Hannover (No. 1)* arguably created between Articles 8 and 10, the Court has, in effect, downgraded an individual's reasonable expectation of privacy.[43] The result of these subtle shifts at Strasbourg may have a further impact as the decisions are absorbed into UK domestic law, potentially making it much easier now to bring UK privacy law into line with the Convention given that, as will be argued, pre-*Von Hannover (No. 2)*, UK law was inconsistent with the first *Von Hannover* decision. Before this is considered in the light of the most recent English cases, it is necessary to examine the reasonable expectation of privacy test used by the UK judiciary to assess how far it covers the same information protected under Article 8 by the Strasbourg Court.

The Reasonable Expectation of Privacy Test

As will be recalled from chapter 2, prior to *Von Hannover (No. 1)* the House of Lords in *Campbell v MGN Ltd*[44] replaced the first two elements of the breach of confidence action with a 'reasonable expectation of privacy' test. The Court of Appeal, by applying the test of whether publication 'would be highly offensive to a reasonable person of ordinary sensibilities',[45] found that protection did not extend to the details of Campbell's treatment for drug addiction at Narcotics Anonymous, including photographs of her leaving the clinic and saying goodbye to other patients. Campbell had accepted that the newspaper was entitled to publish the fact of her drug addiction and treatment at NA to correct her previous denials that she was a drug addict. The House of Lords determined that the 'highly offensive' test, not based on Convention jurisprudence, should not be the

[42] B Jordan and I Hurst, 'Privacy and the Princess - A Review of the Grand Chamber's Decisions in *Von Hannover* and *Axel Springer*' (2012) 23(4) Ent LR 108, 113.
[43] It is possible that the ongoing debates about the future of the Strasbourg Court impacted upon *Von Hannover (No. 2)* and *Axel Springer* (among others), demonstrating, what one commentator has termed an 'appeasement approach' on behalf of the ECtHR towards certain Member States. See H Fenwick, 'An Appeasement Approach in the European Court of Human Rights?' (UK Constitutional Law Group, 5 April 2012) < http://ukconstitutionallaw.org/blog/> accessed 10 May 2012. This suggestion will be considered in greater detail in chapter 5.
[44] [2004] 2 AC 457.
[45] Taken from an Australian High Court decision; *Australian Broadcasting Corporation v Lenah Game Meats* [2001] HCA 63. See *Campbell v MGN Ltd* [2003] QB 633, [55].

primary test in domestic privacy cases. Lord Nicholls found that English courts should instead consult Article 8 case law and ask 'whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy'.[46] Lord Hope concurred; '[i]f the information is obviously private, the situation will be one where the person to whom it relates can reasonably expect his privacy to be respected. So there is normally no need to go on and ask whether it would be highly offensive for it to be published'.[47] The information complained of in *Campbell* was 'obviously private' because it related to therapeutic treatment and health.[48] If the 'highly offensive' test were to be used in a future case, for example if the court was uncertain about whether the information was 'obviously private', the court should examine the offensiveness of publication to a reasonable person in the same circumstances as the claimant, rather than a reasonable person receiving the information.[49]

The majority therefore found that the published details of Campbell's treatment, including the photographs, gave rise to a reasonable expectation of privacy, partly on the basis that the publicity given to her therapeutic treatment was likely to 'deter her from continuing the treatment which was in her interest and also to inhibit other persons attending the course from staying with it, when they might be concerned that their participation might become public knowledge'.[50] In particular, the photographs 'added to the potential harm, by making Campbell think that she was being followed or betrayed, and deterring her from going back to the same place again'.[51]

Subsequent cases demonstrate that a claimant has a better chance of successfully persuading the court that they have a reasonable expectation of privacy if it can be shown that the information was private due to its nature, form, and/or because it was disclosed in a breach of confidence. Often a reasonable expectation of privacy will be found if the information relates to health,[52] personal and sexual relationships,[53] or the

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[46] [2004] 2 AC 457, [21].
[47] ibid [94].
[48] The Law Lords were unanimous in finding that the information was private. The dissenting judges, Lord Nicholls and Lord Hoffmann, held that the additional details, including the photographs, could not be protected because they added nothing further to the information they had already found the *Mirror* entitled to publish.
[49] [2004] 2 AC 457, [99] (Lord Hope) and [136] (Baroness Hale).
[50] ibid [165] (Lord Carswell).
[51] ibid [155] (Baroness Hale).
[52] ibid.
[53] *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB). *McKennitt v Ash* made clear that such information need not be intimate or embarrassing to give rise to a reasonable expectation of privacy.

home,[54] because such information is by its nature obviously private. The form the information takes may also be significant.[55] Photographs have been described as 'worth a thousand words'[56] because of the level of detail usually conveyed and their added impact. Information in the form of correspondence is expressly protected in the text of Article 8(1) and accordingly gives rise to a reasonable expectation of privacy. The Court of Appeal in *Ferdinand v MGN Ltd*[57] found that text messages sent from mobile phones could qualify as examples of correspondence and gain Article 8 protection.[58] The personal opinions of Prince Charles expressed in handwritten journals, and sent to selected recipients marked 'private and confidential', were found by the Court of Appeal to be 'paradigm examples of confidential documents'.[59] Mr Justice Tugendhat in the recent *Trimingham*[60] case suggested that if certain information had been contained in a diary piece the balance might have tipped in favour of finding a reasonable expectation of privacy.[61]

The third factor of potential importance is whether the information was disclosed in a breach of confidence. In *McKennitt v Ash*[62] the Court of Appeal took into account the fact that the claimant had a pre-existing relationship with the defendant—they had previously worked together professionally and had a close friendship—finding that certain private facts were 'doubly private when…imparted in the context of a relationship of confidence'.[63] The fact that Prince Charles' diaries had been obtained by a staff member subject to an express duty of confidentiality, as well as the implied duty existing between 'master and servant', contributed to the court finding a reasonable expectation of privacy.[64] In *Mosley v News Group Newspapers Ltd*[65] Mr Justice Eady found the privacy claim to be 'partly founded' on traditional breach of confidence because of the intimate relationship between the claimant and 'Woman E' who disclosed the information to the defendant.[66] Most recently, in *Gold v Cox*,[67] Mr Justice Tugendhat, with reference to

[54] *McKennitt v Ash* [2006] EWCA Civ 1714.
[55] *Douglas v Hello!* [2006] QB 125, [83].
[56] *Campbell v MGN Ltd* [2004] 2 AC 457, [31] (Lord Nicholls).
[57] [2011] EWHC 2454 (QB).
[58] ibid [55].
[59] *HRH Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57, [35].
[60] *Trimingham v Associated Newspapers Ltd* [2012] EWHC 1296 (QB).
[61] ibid [305].
[62] [2006] EWCA Civ 1714.
[63] ibid [23].
[64] [2008] Ch 57, [28].
[65] [2008] EWHC 1777 (QB).
[66] ibid [6]; [108].
[67] [2012] EWHC 367 (QB).

breach of confidence values, granted an injunction preventing two former employees of Jacqueline Gold (Chief Executive of Ann Summers) disclosing information relating to her private and family life.

The Court of Appeal in *Murray v Big Pictures (UK) Ltd*[68] summarised the domestic inquiry into the reasonable expectation of privacy:

> [T]he question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They 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 absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.[69]

These factors are now consistently used to assist the courts in their determination.[70] At the outset it is clear that the reasonable expectation of privacy test is quite different from the application of Article 8 at Strasbourg. The importance placed on finding a traditional breach of confidence, in particular, is clearly rooted in the common law rather than the Convention. Moreover, domestic courts rarely consider whether the claimant is a public figure at stage one, a matter of concern in terms of the scope of Article 8 in both *Von Hannover* judgements.[71] This issue is clearly of less significance following *Von Hannover (No. 2)* and *Axel Springer* because in both cases the ECtHR found that 'well-known' individuals could be classed as public figures. Therefore recent cases such as *Spelman*,[72] in which a 17 year-old England rugby player was found to be a public figure,[73] and *Trimingham*, in which a press officer who entered into an affair with the prominent politician she worked for was not found to be a private figure, are probably in line with the later Strasbourg rulings. However, prior to *Von Hannover (No. 2)* and *Axel Springer*, UK courts clearly did not see themselves as under a duty to give the public figure criterion, as established in *Von Hannover (No. 1)*, a strong influence in their stage one

[68] [2008] EWCA Civ 446.
[69] ibid [36].
[70] *Terry (Previously 'LNS') v Persons Unknown* [2010] EMLR 16, [55]; *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB), [46]; *Spelman v Express Newspapers* [2012] EWHC 355 (QB), [31]; *Trimingham v Associated Newspapers Limited* [2012] EWHC 1296 (QB), [286].
[71] See above at p 49 and p 52.
[72] *Spelman v Express Newspapers* [2012] EWHC 355 (QB).
[73] ibid [72].

analysis.[74] Again, this suggests that the domestic test is independent from that applied by the ECtHR. The current compatibility with the later Strasbourg cases seems to be more a result of coincidence rather than judges of the High Court feeling bound to give effect to the substance of Convention jurisprudence. As breach of confidence failed to protect information obtained in fully public locations, the true test of whether the content of the reasonable expectation of privacy test is taken directly from Article 8 jurisprudence is the extent to which innocuous photographs of individuals in their daily life are now protected by UK courts.

Do UK Courts Provide the Level of Protection Required by the *Von Hannover* Judgments?

In *Campbell*, decided prior to *Von Hannover (No. 1)* the majority of the House of Lords found that the public location of the photographs did not prevent them being protected by law. This significant extension of the breach of confidence doctrine marks an acceptance by the House of Lords that private life can be engaged in a public place and indicates adherence to the privacy justifications set out in chapter 1. However, *Campbell* appears to represent only a partial acceptance of the full implications of *Von Hannover (No. 1)*.

The photographs in *Campbell* were protected because they clearly showed her leaving Narcotics Anonymous; this was 'obviously private' information because it related to therapeutic treatment and health. Baroness Hale made her position clear:

> We have not so far held that the mere fact of covert photography is sufficient to make the information contained in the photograph confidential. The activity photographed must be private. If this had been, and had been presented as, a picture of Naomi Campbell going about her business in a public street, there could have been no complaint…If…she pops out to the shops

[74] Lord Hoffmann considered Naomi Campbell to be a public figure [2004] 2 AC 457, [36] and the Court of Appeal in *Murray* suggested (*obiter*) that J K Rowling would be classed as a public figure, though her young son was not [2008] EWCA Civ 446, [15]. Only in *McKennitt v Ash* did the court specifically inquire into Strasbourg's meaning of public figure in the light of *Von Hannover (No. 1)*—finding that the ECtHR would be unlikely to classify a well-known folk singer as a public figure—but the Court only considered the point in relation to the public interest, not the reasonable expectation of privacy. While the issue in a strong case like *McKennitt* may have been minor, for the sake of clarity it would have been better for 'public figure' to have been considered at stage one, as it is at Strasbourg. It may then have had a greater influence in more borderline cases such as *Spelman*, in which the public figure finding was questionable.

> for a bottle of milk…there is nothing essentially private about that information nor can it be expected to damage her private life.[75]

Lord Hoffmann came to a similar conclusion; '[i]n the present case, the pictures were taken without Ms Campbell's consent. That in my opinion is not enough to amount to a wrongful invasion of privacy. The famous and even the not so famous who go out in public must accept that they may be photographed without their consent, just as they may be observed by others without their consent'.[76] However, '[t]he widespread publication of a photograph of someone which reveals him to be in a situation of humiliation or severe embarrassment, even if taken in a public place, may be an infringement of the privacy of his personal information'.[77] Lord Hope emphasised that the pictures were specifically taken of Campbell in secret, commenting that 'Miss Campbell could not have complained if the photographs had been taken to show the scene in the street by a passer-by and later published simply as street scenes'.[78] It would therefore be necessary for the claimant to have been the intended subject of any published photograph, a requirement usually satisfied in instances of media publication of photographs of celebrities and public figures.

The House of Lords, pre-*Von Hannover*, therefore stopped short of granting individuals a general right to control the use of their image. Where the photograph captured some obviously private information (within the meaning of the domestic reasonable expectation of privacy test) it could be protected even if the activities shown had taken place in a public location. When *Campbell* was decided in 2004 this development would have been in line with the then leading Strasbourg decision in *Peck*, but, as this chapter has shown, *Von Hannover (No. 1)* extended the Strasbourg requirement to affording full Article 8 protection to photographs of someone in their daily life in public. As Phillipson points out, the House of Lords in *Campbell* did not dismiss the possibility that UK privacy law might develop to accommodate what was to become the *Von Hannover* position.[79] Baroness Hale merely stated that the House of Lords had not '*so far*' extended protection to photographs of daily life,[80] but, as *Campbell* did not concern such

[75] [2004] 2 AC 457, [154].
[76] ibid [363].
[77] ibid [75].
[78] ibid [123].
[79] G Phillipson, 'The "Right" of Privacy in England and Strasbourg Compared' in A T Kenyon and M Richardson (eds), *New Dimensions in Privacy Law: International and Comparative Perspectives* (CUP 2006) 209.
[80] [2004] 2 AC 457, [154] (emphasis added).

photographs, her comments were strictly *obiter* and do not bind lower courts. However, the courts in subsequent cases have taken account of Baroness Hale's statements, arguably giving them far greater status than they should, and, as a consequence, have failed to bring UK privacy law into line with *Von Hannover*.

In 2006 Sir Elton John was refused an injunction to prevent the *Daily Mail* publishing a photograph of him standing with his driver in the street outside his London home.[81] Mr Justice Eady could not find that the applicant had a reasonable expectation of privacy as the information was not obviously private and there was no element of harassment that might have enabled him to apply *Von Hannover*. The interpretation of *Von Hannover* suggested in this thesis (and later endorsed by the Court of Appeal in *McKennitt*) was not considered. Despite finding that the article was likely to cause offence and embarrassment to Sir Elton, Mr Justice Eady was 'not persuaded that there is…any doctrine operative in English law whereby it is necessary to demonstrate that to publish a photograph one has to show that the subject of the photograph gave consent'.[82]

Later in 2006, the Court of Appeal in *McKennitt* expressly accepted the full implications of *Von Hannover* but neglected to discuss the inconsistency with *Campbell*.[83] The court went on to grant protection only to the obviously private information about Loreena McKennitt's relationships and health, but not the anodyne facts about a shopping trip; for example. *McKennitt* might possibly be distinguished from *Von Hannover* because it concerned a book rather than photographs—English courts have often held that photographs are a particularly intrusive method of communicating information[84]—but this distinction was not suggested in the judgment.

The *Murray* case concerned J K Rowling's attempt to restrict publication of an unauthorised photograph of her young son, taken with a long-range lens while they were walking in the street.[85] As previously mentioned, the Court of Appeal took into account, *inter alia*, the location and activities the claimant was engaged in to help them determine whether the information should be protected at stage one.[86] The Court of Appeal found

[81] *John v Associated Newspapers Ltd* [2006] EWHC 1611 (QB).
[82] ibid [20], [21].
[83] [2006] EWCA Civ 1714, [41].
[84] See for example *Douglas v Hello! (No 3)* [2005] EWCA Civ 595, [105].
[85] [2008] EWCA Civ 446.
[86] ibid [36].

that there was an arguable case despite the fact that there was nothing 'obviously private' about the photograph; '[i]f a child of parents who are not in the public eye could reasonably expect not to have photographs of him published in the media, so too should the child of a famous parent'.[87] The case was strongly influenced by the special need to protect a young child[88] and the fact that the photographing was not an isolated incident,[89] again raising the issue of harassment and the true meaning of *Von Hannover (No. 1)*. However, the case settled before it went to trial so there has been no definitive resolution of the issue, but it is by no means clear that the same outcome would have occurred if the applicant had been an adult.[90]

The most recent cases in which claimants have complained of the publication of photographs have not concerned those taken in public places. However, they may be of some assistance by indicating current judicial attitudes to the unauthorised publication of photographs and anodyne information. *Ferdinand* concerned an article published in the *Sunday Mirror*[91] giving Carly Storey's account of her affair with the captain of the England football team, Rio Ferdinand. The article included a photograph showing Storey and Ferdinand in a hotel room together. It might have been expected that, following *Von Hannover*, a photograph taken in a private location would easily be identified as private information, even if the activities photographed were not particularly intimate. Indeed, Mr Justice Nicol, in the High Court, did find that Ferdinand had a reasonable expectation of privacy with regard to the photograph, without referring to *Von Hannover*. However, the photograph had probably not been taken covertly[92] and 'its unexceptional character'[93] meant that the right was of relatively low importance:

> [It] showed the Claimant and Ms Storey clothed. They are not even engaging with each other. The Claimant is speaking on a mobile phone. It is an unexceptionable picture. It was taken in a private room, but its publication could have caused nothing comparable to the additional harm

[87] ibid [46].
[88] ibid [45].
[89] ibid [18].
[90] Sir Anthony Clarke MR, on behalf of the Court of Appeal made clear that '[t]he position of an adult may be very different from that of a child. In this appeal we are concerned only with the question whether David, as a small child, had a reasonable expectation of privacy, not with the question whether his parents would have had such an expectation'. ibid [56].
[91] A similar version of the article was also posted on the newspaper's website.
[92] [2011] EWHC 2454 (QB), [101].
[93] ibid [102].

> that was referred to in *Campbell* and none of the embarrassment that pictures of sexual activity may cause.[94]

Although *Ferdinand* was decided some months before *Von Hannover (No. 2)*, it strikes a very similar chord. In both cases the photographs were protected in principle at stage one, but the relatively anodyne information depicted was said to be of low importance and easily overcome by the claim for freedom of expression when linked to a story in the public interest. It appears therefore that *Ferdinand* is unintentionally in line with the slightly weaker privacy protection provided by the Strasbourg Court in *Von Hannover (No. 2)*, rather than *Von Hannover (No. 1)*.

In April 2012 Carina Trimingham sought damages and an injunction to prevent further publication of two photographs. Both photographs had been published on a number of occasions after the story of Trimingham's affair with MP Chris Huhne broke.[95] Trimingham had previously given a journalist a cropped image of herself taken in her home just before her civil partnership ceremony which was published in a different context, presumably with her consent. The same picture was used as her public Facebook profile before she de-activated her account when knowledge of the affair came to the attention of the media. The other image was a family photograph taken at the civil partnership ceremony itself and obtained from a family member. Mr Justice Tugendhat found that 'the publication of the versions of these photographs, cropped as they were, disclosed no significant information in respect of which Ms Trimingham had a reasonable expectation of privacy',[96] adding that the images were 'simple (and flattering)'[97] and revealed no more information about her than the public already knew.[98]

In terms of the first image, the fact that Trimingham had previously consented to it being in the public domain, at least to some extent, appears to have influenced the finding that its later publication could not give rise to a reasonable expectation of privacy but, regardless of this, it would probably have been treated in the same way as the second photograph. The second image had not been previously published and, although the judge found on the facts that it had been voluntarily given to the defendant by a family

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[94] ibid [102].
[95] *Trimingham v Associated Newspapers Limited* [2012] EWHC 1296 (QB).
[96] ibid [316].
[97] ibid [318].
[98] ibid [338].

member (not stolen, as Trimingham alleged), the nature of the information contained in the picture was considerably downplayed in this case. The photograph clearly did convey more information about Trimingham than the public already knew; it showed the appearance of her and her civil partner and their guests in intimate detail on a private occasion. As Lord Justice Keene mentioned in relation to the wedding photographs of Michael Douglas and Catherine Zeta-Jones; '[t]he photographs conveyed to the public information not otherwise truly obtainable, that is to say, what the event and its participants looked like'.[99] In that case elaborate security measures had been used to ensure the exclusivity of the claimant's deal with *OK!* magazine, but arguably the same principle can be applied in the *Trimingham* case. While Trimingham was probably happy to have the photograph circulated amongst friends and family, the case demonstrates that she did not wish to relinquish control completely and allow the photograph to then be repeatedly published in an entirely different context. Whether or not the photograph was 'flattering' in the opinion of the judge was not a relevant consideration that should have been used to determine the claimant's reasonable expectation of privacy: as Lord Hope made clear in *Campbell*, '[t]he question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant *and faced with the same publicity*'.[100] Trimingham gave the clear impression from her evidence that she felt violated by the use of photographs she had expected would remain within a limited circle of individuals to illustrate reports about her sexuality and private life. *Trimingham* differs from *Ferdinand* and *Von Hannover (No. 2)* in that the first stage of the privacy analysis was not satisfied; it was not accepted that the photographs contained any private information. The approach of Mr Justice Tugendhat in this case, therefore, does not seem to be fully aligned with either the strong privacy protection required by *Von Hannover (No. 1)* or the slightly weaker standard suggested in *Von Hannover (No. 2)*; an even weaker standard is demonstrated.

Overall, it appears that there is some inconsistency between the scope of privacy protection afforded by the Strasbourg Court under Article 8 and the types of information giving rise to a reasonable expectation of privacy in UK domestic courts. *Murray* was the obvious high-point for the protection of unauthorised photographs of daily life, but this may not necessarily establish a precedent for enhanced privacy protection for children.

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[99] *Douglas v Hello!* [2001] QB 967, [165].
[100] [2004] 2 AC 457, [99] (emphasis added). Lord Hope added that 'the text cannot be separated from the photographs', [121].

Mr Justice Tugendhat recently held that the fact that the claimant was a child offered only limited support to his expectation of privacy.[101] Since *Murray* the courts have avoided protecting less intrusive photographs of individuals (even if taken in private locations) by accepting that they constitute private information but giving them a low weight in the balancing exercise (*Ferdinand*), and by denying that they give rise to a reasonable expectation of privacy at all (*Trimingham*). While the *Ferdinand* position may be unintentionally compatible with *Von Hannover (No. 2)*, neither position seems to be aligned with the full privacy protection advocated in *Von Hannover (No. 1)* or the theoretical model outlined in chapter 1.

It is perhaps hard to criticise the High Court and Court of Appeal for these decisions; Baroness Hale's comments in *Campbell* that the activity photographed must be private to incur liability have undoubtedly had a strong influence in subsequent cases. However, those comments were not binding and the lower courts could have given a stronger influence to the *Von Hannover* judgements if they had been inclined to do so. To attempt to understand why *Von Hannover* has not been applied fully in domestic cases, it is necessary to examine the courts' duty under section 2 of the HRA, and then to look at its particular application in the privacy cases.

The Duty of the Court under Section 2 HRA

Section 2(1) HRA guides the courts with regards to the treatment of Convention jurisprudence, requiring them to 'take into account' any relevant Strasbourg decision when determining a question which has arisen in connection with a Convention right. The plain wording of the provision suggests that the domestic courts should have flexibility or discretion when applying decisions of the ECtHR. This view is consistent with the Parliamentary debates during the passing of the HRA, and the government White Paper. Notably, the Home Secretary commented that '[t]hrough incorporation we are giving a profound margin of appreciation to British courts to interpret the Convention in accordance with British jurisprudence as well as European

[101] *Spelman v Express Newspapers* [2012] EWHC 355 (QB). It should be emphasised that Spelman appeared to turn on specific facts, given that the young claimant had been found to be a public figure. Moreover, the judge made clear that this was a borderline case and Spelman may have been able to establish a reasonable expectation of privacy at final trial even though he did not meet the threshold for continuation of the interim injunction, [2012] EWHC 355 (QB), [100].

jurisprudence'.[102] Moreover, an amendment to section 2 that would have expressly made Convention jurisprudence binding was rejected in the House of Lords.[103]

The somewhat vague wording of section 2 has given rise to a range of judicial approaches to its interpretation which has, in turn, led to a significant academic debate.[104] Judicial pronouncements in a number of cases have created a strong presumption in favour of following or 'mirroring'[105] Strasbourg jurisprudence, in the absence of some special circumstances.[106] As Lord Slynn stated in *Alconbury*;[107] '[a]lthough the [HRA] does not provide that a national court is bound by [the decisions of the ECtHR] it is obliged to take account of them so far as they are relevant. In the absence of some special circumstances it seems…that the court should follow any clear and constant jurisprudence of the [ECtHR]'.[108] This position was then endorsed by Lord Bingham in *Anderson*[109] when he suggested that the court 'will not without good reason depart from the principles laid down in a carefully considered judgement of the [ECtHR]',[110] and again in *Ullah*;[111] '[t]he duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less'.[112] This approach has been justified by the judiciary on the (somewhat controversial) grounds that the Convention should have a uniform interpretation across the Member States,[113] and that a claimant could take their case to the ECtHR which would be likely to follow a clear line of its own authority.[114] There is another aspect of the 'mirror' principle based on Lord Brown's comments in *Al-Skeini*[115] that there is 'even greater danger in the national courts

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[102] HC Deb 3 June 1998, vol 313, col 424.
[103] HL Deb 18 November 1997, vol 583, col 511.
[104] See F Klug and H Wildbore, 'Follow or Lead? The Human Rights Act and the European Court of Human Rights' (2010) 6 EHRLR 621; J Lewis, 'The European Ceiling on Human Rights' [2007] PL 720; R Masterman, 'Aspiration or Foundation? The Status of the Strasbourg Jurisprudence and the "Convention Rights" in Domestic Law' in H Fenwick, G Phillipson and R Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP 2007); E Wicks, 'Taking Account of Strasbourg? The British Judiciary's Approach to Interpreting Convention Rights' (2005) 11(3) European Public Law 405.
[105] J Lewis, 'The European Ceiling on Human Rights' [2007] PL 720.
[106] A Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP 2009) 144.
[107] *R (Alconbury et al) v Secretary of State for Environment, Transport and the Regions* [2001] UKHL 23.
[108] ibid [26].
[109] *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46.
[110] ibid [18].
[111] *R (Ullah) v Secretary of State for the Home Department* [2004] UKHL 26.
[112] ibid [20].
[113] *R (LS and Marper) v Chief Constable of South Yorkshire Police* [2004] UKHL 39.
[114] *Alconbury* (n 107). The ECtHR is not bound by a system of precedent, however, it has remarked that 'in the interests of legal certainty, foreseeability and equality before the law…it should not depart, without good reason, from precedents laid down in previous cases'; *Chapman v United Kingdom* App no 27238/95 (ECHR, 18 January 2001), [70].
[115] *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26.

construing the Convention too generously in favour of an applicant than in construing it too narrowly'.[116] This interpretation, taken to impose a 'ceiling' as well as a 'floor' on rights, has proven to be highly controversial,[117] but is not of direct concern here as the issue is with meeting the basic Strasbourg requirement for rights protection rather than going beyond it.

An important example of the 'mirror' principle is *AF (No. 3)*[118] in which the House of Lords followed the decision of the Grand Chamber in *A and Others v United Kingdom*,[119] rather than *MB*,[120] a relevant domestic decision, with the knowledge that doing so would undermine Parliament's intention in legislating for counter-terrorism control orders.[121] A number of the Lordships expressed their disagreement with the Strasbourg case but nevertheless felt bound to apply it. Lord Roger's comments were striking; '[e]ven though we are dealing with rights under a United Kingdom statute, in reality we have no choice…Strasbourg has spoken, the case is closed'.[122] Such statements are likely to have been strongly influenced by the fact that the UK was a party to *A and Others v United Kingdom* and, although that case was not concerned with control orders specifically (as *AF (No. 3)* was), it was sufficiently analogous to convince the judges that the same standard of rights protection would be required by the Strasbourg Court in a control orders case. It is possible therefore that the pronouncements on section 2 in *AF (No. 3)* were restricted to the specific context of that case and may not indicate judicial attitudes to Strasbourg jurisprudence generally. However, a similar stance was taken by the Supreme Court when applying *Salduz v Turkey*,[123] a Grand Chamber decision to which the UK was not a party, in *Cadder v HM Advocate (HM Advocate General for Scotland)*.[124]

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[116] ibid [106].
[117] In particular it has been argued that such a restrictive interpretation of section 2 inhibits the development of uniquely British rights and the contribution such rights could make to the human rights discourse across Europe, one of the aims of the HRA. See See Lord Irvine's comments; HL Deb 18 November 1997, vol 583, col 515. Lord Irvine has recently reaffirmed this view. See A Irvine, 'A British Interpretation of Convention Rights' [2012] PL 237. It should be mentioned that this interpretation has not been applied when there is no existing Strasbourg guidance on the issue; see *Re P* [2008] UKHL 38.
[118] *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28.
[119] (2009) 49 EHRR 625.
[120] *Secretary of State for the Home Department v MB* [2007] UKHL 46.
[121] The ECtHR in *A v United Kingdom* required a stronger level of Article 6 protection than the House of Lords had in *MB*.
[122] (2009) 49 EHRR 625 [98].
[123] (2009) 49 EHRR 19.
[124] [2010] 1 WLR 2601.

The dominant judicial approach to section 2, therefore, 'comes close to affording binding force to the [Convention] jurisprudence',[125] but crucially judicial discretion is preserved by the possibilities for departure from decisions of the ECtHR. These possibilities have been expressly (and implicitly) realised by the courts in a number of cases.[126] Lord Hoffmann said in *Alconbury* that if the jurisprudence 'compelled a conclusion fundamentally at odds with the distribution of powers under the British Constitution, [he] would have considerable doubt as to whether [it] should be followed'.[127] Recently in *Horncastle*[128] Lord Phillips, on behalf of the Supreme Court, stated that there will be 'rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course'.[129] In another instance, the *Animal Defenders*[130] case, the House of Lords declined to follow what was arguably the most relevant Strasbourg case (*VgT*[131]) as it would have compelled the court to find that the UK's ban on political broadcasting breached Article 10. The justification for such a departure, apart from the lack of consensus across Europe on the matter, was not articulated by the court; Lord Scott merely suggested that 'the judgements of the European Court…constitute material, very important material, that must be taken into account, but domestic courts are nonetheless not bound by the European Court's interpretation of an incorporated article'.[132]

The cases discussed demonstrate that the courts will usually follow a clear line of Strasbourg jurisprudence but may, with or without express justification, depart from such authority, in certain circumstances. It is interesting therefore that the *Ullah* principle has not been utilised to give full effect to the *Von Hannover* judgements and there continues to be some unacknowledged judicial reluctance to apply the leading Strasbourg case law.

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[125] H Fenwick, *Civil Liberties and Human Rights* (4th edn, Routledge-Cavendish 2007) 193. Lewis argues that the 'mirror' principle is 'practically inescapable'; Lewis, 'The European Ceiling on Human Rights' (n 105) 731.
[126] For example, the courts have justified departure from Strasbourg if the relevant ECtHR decision is old (*Re F (Children)(Care: Termination of Contract)* [2000] 2 FCR 481), if the ECtHR has misunderstood or been misinformed about some aspect of English law (*R v Lyons* [2003] 1 AC 976), or if the Strasbourg Court had not received all the help it needed to form a conclusion (*R v Spear* [2002] UKHL 31).
[127] [2001] UKHL 23, [76].
[128] *R v Horncastle* [2009] UKSC 14.
[129] ibid [11].
[130] *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15.
[131] *Verein gegen Tierfabrieken v Switzerland* (2001) 34 EHRR 159.
[132] [2008] UKHL 15, [44].

At this stage it may be tentatively suggested that the resistance indicates a judicial feeling that creating the right to control the use of one's image is beyond the constitutional powers of the judiciary, or is simply seen as an undesirable extension of the law in this area. Moreover, given the particular area of law concerned, the UK courts might have legitimately expected that States would be given a wide margin of appreciation to determine the scope of privacy protection, provided a minimum standard was met. This is because the case involved a complainant seeking to impose positive obligations on the State to protect them from the actions of a private party, and a balance between two conflicting Convention rights was required.[133] The Court in *Von Hannover (No. 1)* and *(No. 2)* did refer to the State's margin of appreciation in fulfilling its positive obligations,[134] but it does not appear to have played a significant role. Nicolas Bratza, the current President of the ECtHR, has recently commented that 'the *Von Hannover* case is a good example of a case where the Strasbourg [Court substituted] its own view for that of the German Constitutional Court'.[135] The fact that such exacting standards of privacy protection appeared to be imposed by a court of review may account for some of the ambiguity surrounding the reception of *Von Hannover* into domestic law, particularly given that until *Von Hannover* it had not been clear that domestic authorities would even be required to provide a remedy for privacy invasions carried out by private individuals.

For a variety of reasons, therefore, *Von Hannover (No. 1)*, in particular,[136] creates a considerable dilemma for the courts and, so far, rather than reluctantly following the case or declining to follow it with clear reasons, as they have in other contexts, the issue has not been fully confronted. This is particularly unsatisfactory because the case is of critical importance and, when combined with those judicial statements seemingly endorsing strong indirect horizontal effect, the scope of the misuse of private information tort remains uncertain. Moreover, by avoiding a clear resolution of the issue the courts are not giving the Strasbourg Court 'the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable

[133] Fenwick and Phillipson, *Media Freedom under the Human Rights Act* (n 19) 673-674.
[134] [2004] EMLR 21 [57]; App no 40660/08 (ECHR, 7 February 2012), [104].
[135] N Bratza, 'The Relationship between the UK Courts and Strasbourg' (2011) 5 EHRLR 505, 511. Fenwick and Phillipson concur, suggesting that the margin of appreciation 'appears to have been cut to vanishing point'. Fenwick and Phillipson, *Media Freedom under the Human Rights Act* (n 19) 674.
[136] While *Von Hannover (No. 2)* has admittedly weakened the level of protection of daily-life photographs, as argued, there is still some apparent inconsistency between that case and the recent *Trimingham* decision.

dialogue between [the domestic] court and the Strasbourg Court',[137] as occurred when the Grand Chamber re-heard *Al-Khawaja*[138] following the Supreme Court's decision not to follow it in *Horncastle*. Arguably, dialogue between the Strasbourg Court and domestic courts would be a better method of harmonising human rights interpretation, rather than the kind of State pressure that appears to have had an impact on the decisions in *Von Hannover (No. 2)* and *Axel Springer*. As this chapter will move on to suggest, a further aspect of the reasonable expectation of privacy test, the argument of waiver, supports the conclusion that domestic judges in the UK have not sought to mirror the Convention through their use of section 2 HRA. Instead, consistency has apparently been achieved following the recent *Axel Springer* decision which, on this point, demonstrates a further retreat by the Strasbourg Court from its previous strong protection of privacy.

The Argument of Waiver

'Implied consent' or 'waiver' are terms used to describe the argument that a claimant, by seeking publicity in the past and voluntarily placing their private life in the public domain, should be taken to have consented to the publicity they now complain of.[139] Waiver operates in this context as a defence of sorts because the press must raise and prove the argument.[140] Waiver will be considered in this chapter, however, because if an individual is deemed to have waived their privacy rights it is the reasonable expectation of privacy that is defeated; in a sense it never existed.

The concept of waiver is problematic in terms of the interests sought to be protected by privacy law in this context. As chapter 1 emphasised, informational autonomy or control over personal information is generally considered to underpin the legal regulation of private information. Thus, selective disclosure within a chosen sphere furthers the development of intimate relationships, self-fulfilment and dignity. [141] It follows therefore that 'previous disclosures amount not to an *abandonment* of the right to privacy, but an

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[137] *R v Horncastle* [2009] UKSC 14, [11]. Lord Neuberger made a similar point in *Pinnock v Manchester City Council* ; '[t]his court is not bound to follow every decision of the European Court. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the court to engage in…constructive dialogue with the [ECtHR] which is of value to the development of Convention law', [2010] UKSC 45, [48].

[138] *Al-Khawaja v UK* (2009) 49 EHRR 1.

[139] See for example, comments made by Lord Wakeham, former Chair of the PCC, that Princess Diana was 'fair game' for the press to comment on her private life given that she had discussed it herself in interviews.

[140] Fenwick and Phillipson, *Media Freedom under the Human Rights Act* (n 19) 771.

[141] See chapter 1.

exercise of it'.[142] In many cases, to justify unauthorised publication of personal information with the notion of implied consent would be contrary to the foundational principles of privacy protection. There may be a plausible argument that the private nature of certain information might be lost by the claimant having repeatedly and consensually discussed it with the media. There would be in that instance no reason for the court to protect it by the tort of misuse of private information. If such an argument is to be compatible with the theoretical model for privacy protection this thesis is putting forward, the waiver argument should be restricted to the very limited circumstances in which the publicity complained of virtually mirrored the previous disclosures; a limited 'zonal' or 'differentiated' waiver approach. In this way, interviews given by a celebrity about certain aspects of her relationship would not, from then on, entitle the press to publish any details of her personal life (a 'blanket waiver' approach) or even of her future relationships. As Fenwick and Phillipson suggest; 'a claim would still lie where the publication went further in terms of intimate detail than any disclosures voluntarily made by the claimant'.[143] Similarly, waiver would have little or no impact regarding the publication of photographs. Consent to take part in specific photo-shoots, and the implicit consent given when celebrities attend red-carpet events, could not be said to permit the publication of any photographs of the individual, particularly given the special protection photographs are given by the courts.[144]

Until recently, the ECtHR had provided no clear guidance as to the appropriate treatment of the waiver argument.[145] However, cases such as *Tammer v Estonia*,[146] which granted strong Article 8 protection to a politician's private life, and later *Von Hannover (No. 1)*, indicated that such an argument would be unlikely to undermine the privacy claim at Strasbourg. The UK courts' inconsistent application of waiver, it will be argued, reflects some judicial hesitancy about the extent to which the reasonable expectation of privacy test should continue to be informed by the principles of common law breach of confidence, which accepted the waiver argument. Furthermore, the apparent recent acceptance of waiver by the Strasbourg Court creates further uncertainty regarding this crucial aspect of the reasonable expectation of privacy test, while, technically, resulting in greater consistency between it and UK courts.

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[142] Fenwick and Phillipson, *Media Freedom under the Human Rights Act* (n 19) 777.
[143] ibid 774.
[144] *Douglas v Hello! (No. 3)* [2005] EWCA Civ 595, [105].
[145] The recent case of *Axel Springer* is considered below at p 72.
[146] (2001) 37 EHRR 857.

Waiver was accepted by the courts in a number of pre-HRA breach of confidence cases. In *Lennon*,[147] John Lennon sought to prevent his former wife publishing details about their married life. The Court of Appeal, in dismissing his appeal against the refusal to grant an injunction, held that as both parties had previously disclosed information about their relationship it had 'ceased to be their own private affair'.[148] Lennon had effectively waived his right to restrict publication.[149] Early privacy cases in the post-HRA era also accepted the argument of waiver. In *A v B* Lord Justice Woolf commented (*obiter*) that '[i]f you have courted publicity then you have less ground to object to the intrusion which follows',[150] suggesting a blanket waiver approach whereby the expectation of privacy in *all aspects* of private life would be diminished by previous voluntary publicity. A more restrictive version of waiver was applied in *Theakston*; '[h]aving courted publicity and not complained of it when hitherto it had been very largely favourable to him, the claimant could not complain if the publicity given to his sexual activities in this instance were less favourable'.[151] Although Theakston's previous disclosures had been in the same zone as the information complained of (his sex life) the publication certainly added additional details that, based on the model outlined above, he should not have been deemed to consent to.

In contrast, the Court of Appeal in *Douglas (No. 2)* rejected the waiver argument and instead examined the couple's attempts to retain the privacy of their wedding, as opposed to their past publicity. The fact that ultimately the photographs would be sold to *OK!* magazine, and widely disseminated, could affect the remedy granted but not the expectation of privacy.[152] Lord Hoffmann in *Campbell* rejected the notion of a blanket waiver; '[a] person may attract or even seek publicity about some aspect of his or her life without creating any public interest in the publication of personal information about other matters'.[153] The finding that Campbell could not conceal the fact of her treatment for drug addiction was said to be a matter of public interest (that the public should not be misled) rather than an issue of waiver and Campbell's past publicity did not prevent the court protecting the details of her treatment at NA. Lord Hoffmann did, however,

147 *Lennon v News Group Newspapers Ltd and Twist* [1978] FSR 573.
148 ibid 574.
149 See also *Woodward v Hutchins* [1977] WLR 760. The Court of Appeal declined to grant an injunction that would have prevented the former press-agent of a number of well-known singers disclosing information about their private lives on the basis that they had previously sought publicity.
150 [2002] 3 WLR 542, 552.
151 [2002] EWHC 137.
152 *Douglas v Hello! (No. 2)* [2003] EWHC 786, [217]; [224].
153 [2004] EMLR 21, [57].

appear to contemplate a narrow zonal approach; '[Campbell and the media] have for many years…fed upon each other. She has given them stories to sell their papers and they have given her publicity to promote her career. This does not deprive Ms Campbell of the right to privacy *in respect of areas of her life which she has not chosen to make public*'.[154] The italicised text suggests that had Campbell, in the past, publicised specific details of her treatment there might have been some application of a restrictive version of the waiver doctrine and the publication of these details may have been permitted.

Post-*Campbell* the waiver argument has been inconsistently applied. In *A v B*[155] a musician, who had previously disclosed his drug-taking to the press, sought to restraint publication of an article written by his former wife detailing the effects drugs had on him and his treatment at NA. Mr Justice Eady emphasised the importance of waiver to the outcome of the case; '[t]he critical question is whether *the claimant* has a reasonable expectation that such information should be protected, [which] depends to a large extent upon his own circumstances and conduct'.[156] Rejecting the notion of a blanket waiver, he went on to state that:

> [I]n identifying the scope of material within the public domain, once such a claimant has chosen to lift the veil on his personal affairs, the test will be 'zonal'; that is to say, the court's characterisation of what is truly in the public domain will not be tied specifically to the details revealed in the past but rather focus upon the general area or zone of the claimant's personal life (e.g. drug addiction) which he has chosen to expose.[157]

This fairly broad approach to waiver is, along with the blanket approach, out of accord with the principle of informational autonomy because it takes a specific instance of an exercise of control over personal information and applies it to a much wider context that, in many cases, probably would not have been consented to. The case may have been driven by a desire, on the part of the judge, to prevent that particular claimant obtaining redress given his prior criminal conduct, but to broaden the scope of zonal waiver from that discussed by the House of Lords in *Campbell* (itself not clearly in accord with Strasbourg at that time) was an unsatisfactory outcome in the case.

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154 [2004] 2 AC 457, [66] (emphasis added).
155 [2005] EMLR 36.
156 ibid [21].
157 ibid [28].

More recently, the higher courts have not applied the *A v B* approach to waiver. In the *Prince of Wales* case the Court of Appeal rejected the notion that by speaking publicly and publishing articles on political matters Prince Charles had forfeited his reasonable expectation of privacy with regard to his private diary.[158] The waiver argument was convincingly dismissed at first instance in *McKennitt*; 'there is… a significant difference between choosing to reveal aspects of private life with which one feels comfortable and yielding up to public scrutiny every detail of personal life'.[159] The Court of Appeal confirmed this view, finding that '[t]he zone argument completely undermines [the] reasonable expectation of privacy'.[160] In *Murray* the Court of Appeal contemplated some use of the waiver argument; 'if the parents of a child courted publicity by procuring the publication of photographs of the child in order to promote their own interests, the position would or might be quite different from a case like this, where the parents have taken care to keep their children out of the public gaze'.[161] Though those comments were strictly *obiter* it is possible that celebrities, who might be said to commodify aspects of their private life by regularly featuring their children in photo-shoots and television series, may now find it difficult to object to the unauthorised publication of photographs of them. In *Ferdinand* the waiver argument was once again dismissed. Although Ferdinand had previously discussed his sex life with the media, it was found that there was 'no basis for arguing that…he had forsaken a reasonable expectation of privacy in connection with his relationship with Ms Storey'.[162] By this statement, the court seemed to imply that for the zone argument to have any chance of success it would have to be shown that the material complained of was in the same narrow zone as the previous disclosures.

While *Murray* may indicate some inconsistency, following *Ferdinand* it seemed that the waiver argument was becoming marginalised by the courts, demonstrating an increasing judicial commitment to the theoretical justifications for privacy protection and consistency with the Convention, though this was not expressly mentioned by the courts. Decisions in the domestic courts may now be influenced by the Grand Chamber's recent decision in *Axel Springer AG v Germany*.[163] *Bild* newspaper ran a front-page story, featuring three photographs, covering the arrest of a well-known television actor who had been

[158] [2008] Ch 57, [115].
[159] [2006] EMLR 10, [79].
[160] [2006] EWCA Civ 1714, [55].
[161] [2008] EWCA Civ 446, [38].
[162] [2011] EWHC 2454 (QB), [56].
[163] [2012] EMLR 15.

found in possession of cocaine at the Munich Beer Festival. The story was followed up several months later with publication of the actor's confession and criminal prosecution. The German courts granted injunctions to prevent further publication of the material and fined the publisher. *Bild's* publisher complained that Article 10 had been violated by the restriction. The ECtHR held that the actor was sufficiently well-known to be rightly classed as a public figure, there was a public interest in the material[164] and consequently there had been a violation of Article 10. The most interesting aspect of the Court's judgement, for present purposes, is the credence given to the argument of waiver.

The Court, speaking of the waiver argument in general terms, suggested that:

> The conduct of the person concerned prior to publication of the report or the fact that the photo and the related information have already appeared in an earlier publication are also factors to be taken into consideration…However, the mere fact of having cooperated with the press on previous occasions cannot serve as an argument for depriving the party concerned of all protection against publication of the report or photo at issue.[165]

These comments indicate a rejection of the blanket waiver approach with a possible acceptance that Article 8 protection may be reduced if a person seeks publicity in respect of one aspect of their private life. The Court then purported to apply this principle in the case, finding that as the claimant had previously sought the limelight by giving numerous interviews, his legitimate expectation of privacy was reduced.[166] This finding was made without clarification of precisely how or why actor 'X' had, in effect, waived his rights. Of more concern are the findings of the German Regional Court which shed light on X's publicity seeking past and are summarised in the ECtHR's judgement:

> X had not sought to portray himself as an emblem of moral virtue; neither had he adopted a stand on matters relating to drug abuse. The interviews reported by the applicant company contained no comment by X on the subject. In Issue No.48/2003 of the magazine Bunte, X had stated, in passing, that he did not have any alcohol in the house and that he had become a big tea connoisseur. In the [Regional] court's view, the fact that X had briefly remarked on his previous conviction in two interviews with magazines in 2000 and 2001 did not mean that he had

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[164] This aspect of the judgement will be considered in detail in chapter 4 on the speech/privacy balance.
[165] [2012] EMLR 15, [92].
[166] The Court stated at [101] that X 'had himself revealed details about his private life in a number of interviews…he had therefore actively sought the limelight, so that, having regard to the degree to which he was known to the public, his "legitimate expectation" that his private life would be effectively protected was henceforth reduced'.

> portrayed himself as an advocate or critic of the fight against drugs or as an expert in the field. That subject had been only marginally covered in the interview, which had mainly concerned the actor's professional prospects and his difficulties in his relationships.[167]

Given that X did not appear to have extensively publicised his use of drugs in the past, the Court seems to have in fact adopted a wide zonal waiver approach,[168] contrasting the apparently more restrictive position taken by the English court in *Ferdinand*. The waiver issue was again raised in the post-*Axel Springer* decision of the High Court in *Trimingham*. Mr Justice Tugendhat found that the claimant's Article 8 rights were limited 'because she herself had been open about her sexuality and her sexual relationships'.[169] This statement can be interpreted as an acceptance of the zonal waiver approach, or could refer to the fact that a number of people were aware of the information complained of in the case, highlighting the overlap between the two concepts. In either instance this factor should not have undermined the claimant's reasonable expectation of privacy. The judge accepted that '*those who knew her* knew of her sexuality' and it was clear that Trimingham had not revealed the more explicit details of her relationship with Chris Huhne beyond a limited group of people she was 'comfortable with'.[170] As previously discussed, the courts are reluctant to find that a controlled release of information destroys the expectation of privacy[171] so the fact that a number of people were aware of the information should not have been significant. Moreover, the waiver argument should not have been applied because the judge accepted that Trimingham had not previously *publicised* information relating to her sex life.

It does not appear that the revival of the issue of waiver in *Trimingham* was a direct result of its mention in *Axel Springer*. However, the *Trimingham* case demonstrates that some English judges remain open to the waiver argument in certain cases and, in the light of Strasbourg's apparent endorsement of the doctrine, it is likely that barristers for the press will renew their attempts to show that a claimant has waived their privacy rights through prior publicity. In this they will be assisted by section 2 HRA and the PCC Privacy

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[167] [2012] EMLR 15, [25].
[168] Again, this receptivity to more pro-speech arguments, and break from past judgements, may be symptomatic of current debates about reform of the ECtHR. See chapter 5 at p 108.
[169] [2012] EWHC 1296 (QB), [263].
[170] ibid (emphasis added).
[171] See, for example, the *Prince Charles* case.

Code[172] which states that 'account will be taken of the complainant's own public disclosures of information'. If the waiver argument, as conceived in these cases, does achieve more prominence in the future, though it may technically be in line with the Strasbourg ruling in *Axel Springer*, would have the effect of widening the distance between the theoretical and legal models of privacy protection.

Conclusion

In answering the research questions, this chapter has argued that the ECtHR's interpretation of the scope of Article 8 in *Von Hannover (No. 1)* fully adheres to the theoretical model for privacy protection discussed in chapter 1. Protection of the core values of privacy (informational and substantive autonomy) was maximised by granting strong protection to anodyne information (in speech terms), acquired in a public location. The recent Strasbourg decisions in *Von Hannover (No. 2)* and *Axel Springer* appear to have downgraded the degree of Article 8 protection by extending the category of 'public figures' to include well-known, as well as political, figures, and suggesting that only a weak engagement with Article 8 occurs when anodyne information is published by the media. The developments identified in these cases have significant implications for the balancing stage of the courts analysis (discussed in the following chapter), but, depending on their interpretation by the domestic judges, arguably should not have a major impact in English law. In both cases it was accepted that the information *prima facie* engaged Article 8. Of greater concern is the doubtful application of waiver in *Axel Springer*. Given that, as argued, the notion of waiver of privacy rights is inconsistent with informational autonomy, this aspect of the case, in particular, indicates a shift in favour of media freedom at Strasbourg and, moreover, involves a significant departure from the theoretical model.

It has further been argued that the reasonable expectation of privacy test in UK law is quite different from the equivalent test at Strasbourg. This is most striking in terms of the emphasis placed by the courts on the finding of a traditional breach of confidence and their continued hesitancy over the issue of innocuous photographs of individuals in public locations. The domestic courts seem to have reached the position that information will be protected if it can be shown that it was private due to its nature, form, and/or because it was disclosed in a breach of confidence. Following the 2008 Court of Appeal

[172] Which must be taken into account under section 12(4) HRA.

decision in *Murray*, the courts have avoided protecting less intrusive photographs of individuals. Information such as anodyne photographs of an individual, in either a public or private location, must usually have the addition of surreptitious acquisition, an element of harassment, or a particularly vulnerable claimant, for the court to find a reasonable expectation of privacy, despite the presumption in favour of following Strasbourg jurisprudence that has been developed by the courts under section 2 HRA.

As suggested, the Strasbourg decisions in *Von Hannover (No. 2)* and *Axel Springer* appear to have relaxed some of the more stringent requirements of the first *Von Hannover* decision, and the domestic reasonable expectation of privacy test (with the exception of the High Court decision in *Trimingham*) is now broadly in harmony with Strasbourg's application of Article 8. However, it is clear that this consistency has been more coincidental[173] than as a direct result of English courts feeling bound to import the content of Article 8 into the tort of misuse of private information. Therefore, the language of strong indirect horizontal effect, or even direct effect, used by the judges in some of these cases is misleading and masks the fact that in practice the cases are much more suggestive of a weak version of indirect horizontal effect and the preservation of the flexibility of common law judicial decision making. While the most recent domestic decisions indicate consistency with Strasbourg, the inconsistent application of waiver in *Ferdinand* and *Trimingham*, together with a continued reluctance to afford strong protection to 'anodyne' information, suggests that informational autonomy is not afforded full protection in English law.

[173] And is probably linked to the dissatisfaction with *Von Hannover (No. 1)* among Member States. See chapter 5 at p 108.

CHAPTER IV

THE ULTIMATE BALANCING EXERCISE

Introduction

The theoretical model for privacy protection outlined in chapter 1 suggested that when balancing privacy and free speech courts should initially presume that the respective rights are of equal value. The degree of engagement with the philosophical justifications underlying the respective rights may then be used to determine which right should ultimately prevail. As argued, directly political speech, potentially impacting upon the voting decisions of the electorate, engages the powerful argument from democracy and may, in general, require very strong reasons to justify interference with it. In contrast, celebrity gossip, often involving photographs of celebrities in their daily lives and more intrusive information relating to their intimate relationships, usually finds no support from the core speech rationales. The 'infotainment' category of speech, containing elements of both celebrity gossip and political speech (broadly defined) may, depending on its link to issues of public importance, have some value in speech terms. While the courts should recognise the possible value of such speech, if a practical and effective privacy action is to emerge, such speech should not generally override a competing privacy claim.[1]

This chapter will begin by considering the leading Strasbourg authorities on the speech/privacy balance, arguing that while *Von Hannover (No. 1)* demonstrated a strong adherence to the theoretical model, recent modification of that position, following the 2012 decisions in *Von Hannover (No. 2)* and *Axel Springer*, suggests that the ECtHR now accepts relatively weak speech justifications as legitimate interferences with the right to privacy. A comparison with the domestic speech/privacy balances adds further support to the conclusion reached in chapter 3; post *Von Hannover (No. 1)* UK judges do not appear to have felt bound to bring UK law into line with the Convention. While a number of encouraging post-*Von Hannover (No. 1)* domestic decisions may have indicated

[1] See chapter 1 at p 15.

a stronger commitment by the English judiciary to mirror Strasbourg, more recently it appears that weaker public interest claims have been given greater prominence. The current harmony between the domestic and European courts appears to be as a result of the Strasbourg Court weakening the level of privacy protection. Therefore, while the Convention jurisprudence has provided a strong measure of guidance for the UK courts, in terms of the structure of the balancing exercise, there is little evidence of direct horizontal effect or strong indirect horizontal effect in the substance of the balancing act carried out in domestic privacy adjudication.

The Balance Struck by the Strasbourg Court

Freedom of expression is protected by the Convention under Article 10, which states that 'everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'. As with the Article 8 right to respect for private and family life, Article 10 is qualified and may be restricted under paragraph two provided the interference is prescribed by law, pursues a legitimate aim, is necessary in a democratic society and is a proportionate response to the aim pursued. The Article 10 jurisprudence reveals that, although freedom of expression 'constitutes one of the essential foundations of a democratic society',[2] a hierarchy of different types of expression has been developed by the ECtHR. Political speech, engaging the argument from democracy,[3] generally receives a stronger level of protection than artistic and commercial expression.[4] Privacy actions involve the conflict of two rights. The complaint could be initially framed in either Article 8 terms—the State had failed to sufficiently protect the applicant's right to private life—or Article 10 terms—the State had infringed the applicant's right to freedom of expression by imposing sanctions aimed at protecting private life. Therefore, when considering whether the primary right may be restricted under paragraph two, the Court must consider the conflicting right based on the

[2] *Handyside v United Kingdom* (1976) 1 EHRR 737.
[3] See chapter 1 at p 8.
[4] The leading cases such as *Sunday Times v United Kingdom* (1979) 2 EHRR 245, *Lingens v Austria* (1986) 8 EHRR 103, *Thorgeirson v Iceland* (1992) 14 EHRR 843, *Jersild v Denmark* (1995) 19 EHRR 1 demonstrate that when political speech is at stake the ECtHR applies a narrow margin of appreciation, subjecting the interference with expression to 'intensive review'. In contrast, in cases concerning the restriction of artistic expression the Court tends to grant domestic authorities a wide margin of appreciation, enabling them to respond to the perceived religious and moral needs of the state. See *Müller v Switzerland* (1991) 13 EHRR 212; *Otto-Preminger Institute v Austria* (1995) 19 EHRR 34; *Wingrove v United Kingdom* (1997) 24 EHRR 1. See H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (OUP 2006) 50.

presumption that Articles 8 and 10 are of equal value, rather than considering the conflicting right as an exception to the primary right. This approach is consistent with the overall scheme of the Convention, which does not seek to prioritise the qualified rights such as Article 8 and Article 10,[5] but also ensures that any restriction on either right is closely scrutinised and a fair balance is struck between the two. The pre-*Von Hannover (No. 1)* cases did not expressly endorse this method of balancing Articles 8 and 10,[6] following *Von Hannover (No. 1)*, however, it is clear that, initially, neither right takes precedence over the other.

As will be recalled from chapter 3, in *Von Hannover (No. 1)* the Strasbourg Court ruled that Princess Caroline's rights under Article 8 had been infringed by the publication in German magazines of photographs of her in her daily life. Having found that Article 8 was engaged, because the Princess was a private individual and the photographs showed scenes from her private life, the Court went on to balance the protection of privacy against freedom of expression, guaranteed by Article 10.[7] In determining how the balance should be struck, the Court considered that the 'decisive factor… should lie in the contribution that the published photos and articles make to a debate of general interest'.[8] The Federal Constitutional Court of Germany had, as Fenwick and Phillipson note, conducted a 'relatively subtle and sophisticated' enquiry into the value of the type of speech in question:[9]

> [T]here is a growing tendency in the media to do away with the distinction between information and entertainment both as regards press coverage generally and individual contributions, and to disseminate information in the form of entertainment or mix it with entertainment ("infotainment")…Nor can mere entertainment be denied any role in the formation of opinions. That would amount to unilaterally presuming that entertainment merely satisfies a desire for amusement, relaxation, escapism or diversion. Entertainment can also convey images of reality and propose subjects for debate that spark a process of discussion and assimilation relating to philosophies of life, values and behaviour models…The same is true of information about people. Personalisation is an important journalistic means of attracting attention. Very often it is

[5] There is, however, a distinction between the absolute rights (Articles 2, 3, 4, 6 and 7) and the qualified rights (Articles 8 to 11).
[6] As Fenwick and Phillipson argue, however, such an approach may be implicit in *Tammer v Estonia* (2003) 37 EHRR 43 and *Peck v United Kingdom* (2003) 36 EHRR 41. Both cases suggested that the scope of Article 8 would not be narrowed when it came into conflict with Article 10. See H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (OUP 2006) 691.
[7] [2004] EMLR 21, [58].
[8] ibid [76].
[9] H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (OUP 2006) 694.

> this which first arouses interest in a problem and stimulates a desire for factual information…Additionally, celebrities embody certain moral values and lifestyles. Many people base their choice of lifestyle on their example. They become points of crystallisation for adoption or rejection and act as examples or counter-examples. This is what explains the public interest in the various ups and downs occurring in their lives.[10]

The German Court had found that there could be a public interest in the dissemination of entertaining speech about the private lives of celebrities and other individuals, primarily to stimulate debate and further the personal development of the audience. The reasoning, to some extent, reflects Raz's 'personal identification' argument, discussed in chapter 1.[11] Moreover, it accords with the earlier Strasbourg decision in *Thorgeirson v Iceland*.[12] In that case the Court had found that there was 'no warrant in its case-law for distinguishing…between political discussion and discussion of other matters of public concern'.[13] Thus the high level of protection given to political speech could extend beyond information relating strictly to politicians and the political process.

The Strasbourg Court, in *Von Hannover (No. 1)* 'implicitly rejected'[14] this interpretation of the public interest, finding that 'the publication of the photos and articles in question, of which the sole purpose was to satisfy the curiosity of a particular readership regarding the details of the applicant's private life, cannot be deemed to contribute to any debate of general interest to society despite the applicant being known to the public'.[15] In concluding that freedom of expression should be interpreted narrowly on the facts,[16] the Court employed the same reasoning as when determining whether Article 8 was engaged.[17] Thus the criticisms relating to the classification of Princess Caroline as a private individual, and the finding that the photographs contained private information, are also relevant at the balancing stage.[18] In term of striking the balance between the protection of private life and freedom of expression, the case makes clear that, in general, if the applicant claiming a breach of Article 8 performs no official functions, and the

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[10] [2004] EMLR 21, [25].
[11] See chapter 1 at p 14.
[12] (1992) 14 EHRR 843.
[13] ibid [64].
[14] B Rudolf, 'Council of Europe: *Von Hannover v Germany*' (2006) 4(3) IJCL 533 (note), 535.
[15] [2004] EMLR 21, [65].
[16] ibid [66].
[17] ibid [76].
[18] See chapter 3 at p 47. This is highlighted in the Concurring Opinion of Judge Cabral Barreto. Having found that Princess Caroline was a public figure, the Judge went on to decide that 'information about her life [contributed] to a debate of general interest'; [2004] EMLR 21, 409.

information relates solely to their private life, no contribution to a debate of general interest will be made by its publication.[19]

In contrast, the Strasbourg Court considered that the public's right to be informed could 'in certain special circumstances… extend to aspects of the private life of public figures, particularly where politicians are concerned'.[20] The *Von Hannover (No. 1)* judgement is therefore consistent with the decision in *Plon (Société) v France*.[21] The Court had found that a permanent injunction prohibiting the publication of a book written by a doctor of the late President Mitterrand, revealing that the President had concealed his serious health problems for over a decade, breached Article 10. Despite the sensitive nature of the information disclosed, the speech in question was clearly of high value and, accordingly, the Court found that the French public had an interest in being informed about the secrecy surrounding the President's illness, and the opportunity to discuss his suitability for office. While *Plon (Société)* confirms that political speech (relating to politicians and the political process) is afforded strong protection by the Strasbourg Court, to the extent that it may be found to override even strong competing privacy rights, it should be emphasised that the Court upheld an interim injunction lasting nine months out of respect for the President's grieving family immediately after his death. Moreover, in an earlier political speech case, *Tammer v Estonia*,[22] concerning the reporting of an affair between a senior politician and a former government official, the Court found that criminal sanctions imposed on the journalist by the domestic courts were necessary and proportionate to protect the Article 8 rights of those concerned.[23] Thus, while political speech may be an exception to the general rule favouring the protection of Article 8, following *Von Hannover (No. 1)*, the cases mentioned demonstrate that even speech going to the heart of the political process may, in certain circumstances, be restricted in the interests of protecting privacy.

The balance struck in *Von Hannover (No. 1)* appears, therefore, to closely adhere to the theoretical model discussed in chapter 1. On the facts, no plausible argument could have

[19] See, however, the Concurring Opinion of Judge Cabral Barreto who broadly agreed with the reasoning of the Federal Constitutional Court of Germany, adding that 'the public has a legitimate interest in being allowed to judge whether the personal behaviour of the individuals in question, who are often regarded as idols or role models, convincingly tallies with their behaviour on their official engagements' [2004] EMLR 21, 409.
[20] [2004] EMLR 21, [64].
[21] (2006) 42 EHRR 36.
[22] (2001) 37 EHRR 857.
[23] ibid [59].

been, or was, raised to demonstrate that the published photographs of Princess Caroline in her daily life genuinely contributed to a debate of general interest. The information could not have been said to engage the argument from democracy, in a strict sense, as Princess Caroline was not involved in political life in Monaco. As argued in chapter 1, the truth value of the speech was of limited importance and must have given way to the much stronger privacy claim.[24]

In accordance with the view of the Federal Constitutional Court of Germany, the speech may have had some value in terms of proposing subjects for debate, and the possible positive impact of this on the self-fulfilment and personal development of the audience.[25] However, the Strasbourg Court was right to afford the speech a low weighting given that, for the majority of readers, the information would have merely been for entertainment purposes and any debate sparked would have related to the anodyne facts of Princess Caroline's daily lifestyle choices; the information did not genuinely relate to a matter of public concern. Even if such a link had been established, on the other side of the balance, the threat to Princess Caroline's informational and substantive autonomy was relatively serious, notwithstanding the fact that the photographs did not immediately appear to be particularly intrusive or embarrassing.[26] The Article 8 claim would have been even stronger if the speech related to medical data or sexual life, for example.[27] As discussed in chapter 1,[28] it would arguably be an unjustifiable intrusion to publish such facts for entertainment or in order to foster public debate, particularly given that this need could be satisfied by those willing to share their stories and images.[29] For the Strasbourg Court, in *Von Hannover (No. 1)*, to have found in favour of Article 10, the right to respect for private life would have been outweighed by the interest in entertaining the masses, or, effectively, '[t]he debasement of individual rights to the collective whim'.[30] If this position had been adopted, it would have been contrary to the notion that human rights aim to protect the rights of all against such an exercise of power by the majority.[31]

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[24] See chapter 1 at p 10.
[25] See above at p 79 and chapter 1 at p 12.
[26] See chapter 3 at p 47.
[27] See chapter 1 at p 17.
[28] ibid.
[29] H Fenwick, *Civil Liberties and Human Rights* (4th edn, Routledge-Cavendish 2007) 950.
[30] G Phillipson, 'Memorandum to the Leveson Inquiry' (28 March 2012) <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/03/Submission-by-Professor-Gavin-Phillipson-Durham-Law-School.pdf> accessed 10 August 2012, [10].
[31] ibid [9].

Moreover, by emphasising that public figures (referring essentially to politicians within Strasbourg's sense of the term) are the exception to the general rule, the Court set out to ensure that speech engaging the argument from democracy, one of the central justifications for freedom of speech, would receive stronger protection. The controversial interpretation of the term 'public figure',[32] however, and the reasoning used by the Court—that there can generally be no public interest in the private life of non-public figures—risks the automatic restriction of expression, without close scrutiny of the speech itself, or recognition that such speech *can* contribute to debate. The Court's approach runs the risk of prematurely tipping the balance in favour of Article 8, potentially leading to the restriction of valuable speech. Although, as has been argued, it will often be the privacy interest that prevails, the value of the speech in question should always be seriously considered and articulated by the court.

The guidance of the Strasbourg Court in *Von Hannover (No. 1)*, with regards to balancing the competing rights under Articles 8 and 10, suggests that private information about non-politicians should not be deemed to contribute to a debate of general interest. Consequently, it is of little value in Article 10 terms and, generally, in such cases, Article 8 should prevail. While the outcome of the case was, it is argued, correct, the reasoning of the Court could have demonstrated a more nuanced approach to the speech in question. This would have recognised that although such speech may have some value, the competing right to private life will often be sufficient to outweigh any benefit the audience would have by receiving it. Before considering how far the UK judiciary has followed *Von Hannover (No. 1)* it is necessary to consider some further recent developments at Strasbourg.

Re-Balancing at Strasbourg following *Von Hannover (No. 2)* and *Axel Springer*?

In *Von Hannover (No. 2)* and *Axel Springer* the ECtHR set out a list of criteria relevant for the balancing exercise. These were to include; (1) the contribution of the information to a debate of general interest, (2) how well know the person concerned is (their role or function) and the subject of the report, (3) the prior conduct of the person concerned, (4) the content, form and consequences of the publication, (5) the circumstances in

[32] See chapter 3 at p 49.

which the photographs were taken (were they taken covertly or with consent and what was the nature or seriousness of publication?).[33] The case concerned publication of a photograph of Princess Caroline and her husband walking in the street during a skiing holiday in St. Moritz, to illustrate an article about the failing health of Monaco's reigning Head of State. Although the Strasbourg Court maintained that 'whilst a private individual unknown to the public may claim particular protection of his or her right to private life, the same is not true of public figures'[34] (the *Von Hannover (No. 1)* position), the Court modified its definition of public figures to include those simply well-known to the public.[35] The Court did not find unreasonable the German Courts' characterisation of Prince Rainier's illness as an event of contemporary society.[36] Therefore, in line with the findings of the Federal Constitutional Court, the press could legitimately report on how the Prince's children reconciled family duties with their private life, which, in this instance, included going on holiday during the time of the Prince's illness.[37] There was, in the view of the Strasbourg Court, a sufficiently close link between the event and the photograph; 'the photos in question, considered in the light of the accompanying articles, did contribute, at least to some degree, to a debate of general interest'.[38] Moreover, the photographs themselves were not offensive to the extent that their prohibition was justified.[39]

As argued in relation to stage one of the Court's analysis (whether Article 8 is engaged by the publication), the expansion of the Court's definition of 'public figure' in *Von Hannover (No. 2)* is somewhat more satisfactory, although it does appear to downgrade the privacy rights of certain categories of people.[40] It invited the Court to recognise that speech relating to non-politicians may be of value in Article 10 terms, as reflected in *Thorgeirson* and the academic literature.[41] Beyond this, however, the reasoning of the Court was not wholly convincing. As Jordan and Hurst persuasively argue, although 'the differentiation between the subject matter of the articles in *Von Hannover (No. 1)* and *(No. 2)* is understandable, the link between the article in *Von Hannover (No. 2)* and the

[33] App no 40660/08 (ECHR, 7 February 2012), [108].
[34] ibid [110].
[35] As discussed in chapter 3, see p 52.
[36] App no 40660/08 (ECHR, 7 February 2012), [118].
[37] The German Courts had already restrained publication of similar photographs taken of the applicants on holiday which made no reference to an event of contemporary society.
[38] App no 40660/08 (ECHR, 7 February 2012), [118].
[39] ibid [123].
[40] See chapter 3 at p 52.
[41] See above at p 80 and chapter 1 at p 14.

photograph of Princess Caroline taking a walk with her husband on a public street in St. Moritz during a skiing holiday is strained'.[42] There is little to distinguish between the photographs found to be relatively inoffensive in this case, and those described as 'very personal or even intimate' in *Von Hannover (No. 1)*. The tenuous link found between the article and the photographs appears to demonstrate the Strasbourg Court retreating from the strong commitment to informational privacy shown in the first *Von Hannover* decision.[43] Moreover, the Court failed to confront the issue of whether, in future, the media would use an 'event of contemporary society' as a pretext to justify the publication of images of celebrities in daily life (or possibly more intrusive images), thereby circumventing the protection of privacy. Given the looseness of the connection between the article and photographs in *Von Hannover (No. 2)*, it would appear that this may be a real possibility, depending on how the decision is interpreted by UK courts and absorbed into the action for misuse of private information.

Similarly, *Axel Springer*, handed down at the same time as *Von Hannover (No. 2)*, indicates a 'perceptible shift towards freedom of expression'.[44] The case concerned publicity given to the arrest of a well-known television actor, found in possession of cocaine at the Munich Beer Festival. The Strasbourg Court found that, in principle, the public had an interest in being informed about criminal proceedings, whilst strictly observing the presumption of innocence, particularly as the arrest had taken place in public.[45] This was despite the fact that the offence was common, of medium or minor seriousness, and 'the applicant company's interest in publishing the articles in question was solely due to the fact that X had committed an offence which, if it had been committed by a person unknown to the public, would probably never have been reported on'.[46]

While the arrest of a well-known actor at a public festival for a drugs related offence, may have contributed, to some extent, to a debate of general interest, the Court went on to take into account the actor's television role as supporting that contribution:

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[42] B Jordan and I Hurst, 'Privacy and the Princess - A Review of the Grand Chamber's Decisions in *Von Hannover* and *Axel Springer*' (2012) 23(4) Ent LR 108,113. For a concurring view, see E C Reid, 'Rebalancing Privacy and Freedom of Expression' (2012) 16(2) Edin LR 253, 257.
[43] See chapter 5 for suggested reasons for this retreat.
[44] E C Reid, 'Rebalancing Privacy and Freedom of Expression' (2012) 16(2) Edin LR 253, 256.
[45] [2012] EMLR 15, [96].
[46] ibid [100].

> [W]hilst it can be said that the public does generally make a distinction between an actor and the character he or she plays, there may nonetheless be a close link between the popularity of the actor in question and his or her character where, as in the instant case, the actor is mainly known for that particular role. In the case of X, that role was, moreover, that of a police superintendent, whose mission was law enforcement and crime prevention. That fact was such as to increase the public's interest in being informed of X's arrest for a criminal offence.[47]

Although not articulated in the judgement, the Court seems to have accepted that actor X, given his popularity, was a role model.[48] The applicant magazine was, therefore, justified in revealing that an aspect of his personal life did not match that of the character he portrayed on television. Reid makes the point that '[t]his seems to be a straightforward example of a feature which increased the *public's interest* in the story but which had little bearing on its *public interest* value as such'.[49] As discussed in chapter 1, the theoretical model of privacy protection suggested in this thesis does not, generally, support intrusions into private life for the purposes of correcting false impressions created by involuntary role models.[50] The Court's expansion of the role model argument, to include the correcting of false impressions created during the course of an individual's acting career, seems wholly illogical. Moreover, no convincing reason for this aspect of the decision was supplied by the Court. By allowing such a flimsy justification to bolster the public interest in the article, the Court, again, appears to have weakened the privacy protection for certain individuals.

Von Hannover (No. 2) and *Axel Springer*, taken together, affirm some of the principles set out in the first *Von Hannover* decision. Private information (including photographs) will still be protected if publication is for entertainment purposes only. The information must be linked to an event of contemporary society or be said to contribute to a debate of general interest, and, provided evidence can be adduced by the party claiming a breach of Article 8, other factors (such as harassment) may be taken into account. However, as has been argued, the inclusion of well-known individuals in the 'public figure' category has weakened the privacy rights of certain celebrities. Moreover, both cases suggest that very weak public interest justifications may be used to support publication of the information itself (as in *Axel Springer*) as well as photographs having little to do with the content of

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[47] ibid [99].
[48] The reasoning is therefore more in line with the Concurring Opinion of Judge Cabral Barreto in *Von Hannover (No. 1)*, as opposed to the judgement of the Court in that case.
[49] Reid, 'Rebalancing Privacy and Freedom of Expression' (n 44) 257.
[50] See chapter 1 at p 3 and below at p 91.

the article (as in *Von Hannover (No. 2)*). Furthermore, and seemingly in contrast to *Von Hannover (No. 1)*, the focus of the Court was on reviewing the criteria applied by the domestic courts in conducting the balance, as opposed to scrutinising the substance of the competing claims. Overall, the later cases represent a retreat from the strong privacy protection demonstrated in *Von Hannover (No. 1)*, both in terms of the scope of Article 8, in this context,[51] and the way the balance is struck between privacy and freedom of expression. This chapter will move on to consider whether this shift has made it easier for UK courts to bring the balance struck in domestic law into line with the Convention given that, as will be argued, pre-*Von Hannover (No. 2)*, some inconsistency with *Von Hannover (No. 1)* was apparent.

The Ultimate Balancing Exercise in UK Domestic Courts

It will be argued in this section that UK domestic courts have now settled upon an approach to the speech/privacy balance that grants equal status to the two rights, consistent with the leading Strasbourg authorities. The remainder of this chapter will critique the English courts' interpretation of the public interest.

The Structure of the Enquiry

Section 12(4) HRA enjoins domestic courts to 'have particular regard to the importance of the Convention right to freedom of expression' when considering whether to grant relief. Although this provision may indicate some Parliamentary intention to afford priority to Article 10 when balancing it against privacy and other interests,[52] such an interpretation would have resulted in a structural imbalance between Articles 8 and 10, lacking consistency with the scheme of the Convention and even pre-*Von Hannover (No. 1)* jurisprudence.[53] Moreover, an approach treating the privacy claim as a restriction on expression under Article 10(2), using the reasoning of Lord Steyn in *Reynolds v Times Newspapers*,[54] would have a similar effect in practice:

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[51] See chapter 3 at p 50.

[52] However, debates in the commons during the passing of the Human Rights Bill do not suggest that the government intended to create a hierarchy of rights domestically. See HC Deb 2 July 1998, vol 315 col 535-39.

[53] See footnote 6 above.

[54] In considering the speech defence in libel law, Lord Steyn commented that '[t]he starting point is now the right of freedom of expression, a right based on a…higher legal order foundation. Exceptions…must

> [P]rivacy would lose its Convention status as a fully-fledged right, becoming instead merely a narrowly interpreted exception to the right to freedom of expression. Such an approach…could not be right…The protection of the right to privacy would have to be justified as necessary in a democratic society, while the claims of free speech would be simply assumed.[55]

Lord Justice Sedley, in *Douglas v Hello! Ltd*, recognised that to achieve compatibility with the Convention, when balancing the competing rights under Articles 8 and 10, domestic courts would have to treat the two rights, at least initially, as having equal value:

> The European Court of Human Rights has always recognised the high importance of free media of communication in a democracy, but its jurisprudence does not - and could not consistently with the Convention itself - give Article 10(1) the presumptive priority which is given, for example, to the First Amendment in the jurisprudence of the United States' courts. Everything will ultimately depend on the proper balance between privacy and publicity in the situation facing the court.[56]

However, in subsequent pre-*Campbell* cases, the structural approach of UK domestic courts appeared to grant the right to free speech automatic priority in this context. In *Venables*, when considering whether publication of information relating to the whereabouts of the killers of James Bulger could be restricted, Dame Elizabeth Butler-Sloss expressly treated the conflicting Article 2, 3 and 8 rights of the boys as narrowly interpreted exceptions to the Article 10 guarantee.[57] A similar approach was applied in *Theakston*[58] and implied in *A v B plc*,[59] two cases in which Article 10 prevailed on arguably spurious public interest grounds.[60]

The House of Lords in *Campbell* expressly and actually applied Lord Justice Sedley's method of balancing the competing rights, confirming beyond doubt the presumptive equality of the two rights. As Lord Nicholls put it; '[t]he case involves the familiar competition between freedom of expression and respect for an individual's privacy. Both

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be justified as being necessary in a democracy. In other words, freedom of expression is the rule, and regulation of speech in the exception requiring justification'. [1999] 4 All ER 609, 629.

[55] H Fenwick and G Phillipson, 'Breach of Confidence as a Privacy Remedy in the Human Rights Act Era' (2000) 63(5) MLR 660, 686.

[56] [2000] EWCA Civ 353, [135].

[57] [2001] Fam 430, 931.

[58] [2002] EWHC 137 (QB), [34].

[59] [2002] EWCA Civ 337, [11].

[60] See G Phillipson, 'Judicial Reasoning in Breach of Confidence Cases under the Human Rights Act: Not Taking Privacy Seriously?' [2003] EHRLR (Special Issue: Privacy) 54.

are vitally important rights. Neither has precedence over the other'.[61] From this starting point, their Lordships conducted a 'parallel analysis'[62] by scrutinising the strength of the claims under both Articles and assessing whether interference with either right would go further than necessary. Lord Steyn reaffirmed and clarified this approach in the House of Lords decision in *Re S*:

> First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each.[63]

These guidelines are now consistently referred to and applied by the lower courts in privacy cases.[64] It is therefore clear that UK domestic courts are, at least in terms of structure, approaching speech/privacy balances compatibly with the overall Convention system and the leading jurisprudence of the Strasbourg Court. However, this correct structural approach could be seriously undermined if the principles applied by the courts fail to accord with Strasbourg, an eventuality which, as will be argued, has intermittently occurred in domestic privacy cases.

Information Contributing to a Debate of General Interest in Domestic Decisions

The House of Lords in *Campbell* made clear that in carrying out the parallel analysis courts should scrutinise the strength of the competing claims by considering the values underlying both Article 8 and 10. Thus Lord Hope, recognising the hierarchy of expression developed by the Strasbourg Court, commented that 'there were no political or democratic values at stake' in the case, and that it was 'not enough to deprive Miss Campbell of her right to privacy that she is a celebrity and that her private life is newsworthy'.[65] Baroness Hale came to a similar conclusion; '[t]he political and social life of the community, and the intellectual, artistic or personal development of individuals, are not obviously assisted by pouring over the intimate details of a fashion model's

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[61] [2004] UKHL 22, [12]. Similar comments were made by Lord Hoffmann at [55], Lord Hope at [113] and Baroness Hale at [138].
[62] H Tomlinson and H Rogers, 'Privacy and Expression: Convention Rights and Interim Injunctions' [2003] EHRLR (Special Issue: Privacy) 37, 50.
[63] [2005] 1 AC 593, [17].
[64] See, for example, *McKennitt v Ash* [2005] EWHC 118 (QB), [46].
[65] [2004] UKHL 22, [117].

private life'.[66] In a subsequent, post-*Von Hannover (No. 1)* case, Baroness Hale reiterated these strong pro-privacy statements:

> The public only have a right to be told if two conditions are fulfilled. First, there must be a real public interest in communicating and receiving the information. This is, as we all know, very different from saying that it is information that interests the public - the most vapid tittle-tattle about the activities of footballers' wives and girlfriends interests large sections of the public but no-one could claim any real public interest in our being told all about it.[67]

Foreshadowing the decision of the Strasbourg Court in *Von Hannover (No. 1)*, the House of Lords therefore recognised that in many instances press publication of facts about celebrities' private lives would not necessarily be in the public interest and must often give way to a competing claim under Article 8. In contrast, interference with political speech, engaging the core free speech rationales, would require stronger justification.

Mr Justice Eady in the High Court in *Mosley* built upon some of the principles considered in *Campbell*. As previously mentioned, the case concerned an article published by the *News of the World* detailing (with written descriptions, photographs and video footage) Max Mosley's sexual activity in his private residence with a number of sex-workers. Having found that there was no Nazi theme to the 'S and M' activity, which may have justified publication of the information,[68] Mr Justice Eady concluded that there was no public interest justifying publication of the material. Given Strasbourg's strong protection of information relating to sexuality,[69] Mr Justice Eady elaborated on the evolving judicial role in the context of intimate personal information:

> [I]t is not for the state or for the media to expose sexual conduct which does not involve any significant breach of the criminal law. That is so whether the motive for such intrusion is merely prurience or a moral crusade. It is not for journalists to undermine human rights, or for judges to refuse to enforce them, merely on grounds of taste or moral disapproval. Everyone is naturally entitled to espouse moral or religious beliefs to the effect that certain types of sexual behaviour are wrong or demeaning to those participating. That does not mean that they are entitled to hound those who practise them or to detract from their right to live life as they choose.[70]

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[66] ibid [149].
[67] *Jameel v Wall Street Journal* [2006] 2 AC 465, [147].
[68] [2008] EWHC 1777 (QB) [122].
[69] *Dudgeon v United Kingdom* 4 EHRR 149.
[70] [2008] EWHC 1777 (QB), [127].

Similar ideas were reiterated by the High Court in *Terry*.[71] While these strong pro-privacy statements created a significant backlash from some areas of the press,[72] they demonstrate a strong judicial commitment to the privacy values contained in the Strasbourg jurisprudence and clear commitment to the value of informational and substantive autonomy, furthered by privacy protection. *Mosley* aside, the overall picture of speech/privacy balancing in domestic decisions has been, it is argued, undermined by the intermittent acceptance of an argument commonly raised by the media; namely that there is a strong public interest in revealing private information about celebrities, sometimes termed 'role models', in order the put the record straight if it is discovered that they fail to live up to their public persona in some aspect of their private life.

Role Models and Putting the Record Straight

The PCC Code, which the courts must take into account under section 12(4) HRA, refers to the notion that there may be a public interest in 'preventing the public from being misled by an action or statement of an individual or organisation'. Lord Woolf, setting out guidance for the lower courts in *A v B plc*, commented that:

> A public figure is entitled to a private life. The individual, however, should recognise that because of his public position he must expect and accept that his actions will be more closely scrutinised by the media. Even trivial facts relating to a public figure can be of great interest to readers and other observers of the media…The public figure may hold a position where higher standards of conduct can be rightly expected by the public. The public figure may be a role model whose conduct could well be emulated by others. He may set the fashion. The higher the profile of the individual concerned the more likely that this will be the position…In many of these situations it would be overstating the position to say that there is a public interest in the information being published. It would be more accurate to say that the public have an understandable and so a legitimate interest in being told the information. If this is the situation then it can be appropriately taken into account by a court when deciding on which side of the line a case falls.[73]

Following this reasoning, the Court of Appeal declined to grant an injunction preventing publication of the details of a footballer's extra-marital affairs with two women; 'it is not self-evident that how a well known premiership football player, who has a position of

[71] *Terry (Previously 'LNS') v Persons Unknown* [2010] EMLR 16 [101].
[72] P Dacre, 'Speech by Paul Dacre – Editor in Chief of the Dail Mail at the Society of Editors Conference in Bristol' (November 2009) <http://www.societyofeditors.co.uk/page-view.php?pagename=thesoelecture2008> accessed 30 January 2012.
[73] [2002] EWCA Civ 337, [11] (xii).

responsibility within his club, chooses to spend his time off the football field does not have a modicum of public interest. Footballers are role models for young people and undesirable behaviour on their part can set an unfortunate example'.[74] A similar stance was taken in *Theakston*. Although Mr Justice Ouseley accepted that BBC television presenter Jamie Theakson probably could not be classed as a role model, he went on to find that 'the very nature of his job as a TV presenter of programmes for the younger viewer means that he will be seen as somebody whose lifestyle, publicised as it is, is one which does not attract moral opprobrium and would at least be generally harmless if followed'.[75]

A related argument, often raised by media organisations to justify intrusive publications, was considered by the House of Lords in *Campbell*. The Court unanimously agreed that it was in the public interest to correct the false impression Campbell had created by publicly and repeatedly denying drug addiction.[76] Had Campbell not made such public statements, all of the information would have, in principle, been protected by the tort of misuse of private information:

> Miss Campbell cannot complain about the fact that publicity was given in this article to the fact that she was a drug addict. This was a matter of legitimate public comment, as she had not only lied about her addiction but had sought to benefit from this by comparing herself with others in the fashion business who were addicted. As the Court of Appeal observed…where a public figure chooses to make untrue pronouncements abut his or her private life, the press will normally be entitled to put the record straight.[77]

Taken together, these three cases establish that domestic courts have been persuaded by the arguments that there may be a public interest in publishing private information if the subject of the article was a role model whose behaviour may influence others, particularly the young (*A v B plc*), if they presented a false image which belied the reality of their private life (*Theakston*), or if the public had been deceived by express lies about some aspect of the individual's private life (*Campbell*). The underlying rationale of the courts in

[74] [2002] EWCA Civ 337, [11] (vi).
[75] [2002] EWHC 137 (QB), [69].
[76] Counsel for Campbell conceded this point, arguing that it was the level of intrusive detail contained in the article that gave rise to an invasion of privacy. See below at p 101.
[77] [2004] UKHL 22, [82] (Lord Hope).

these cases does not appear, therefore, to be furtherance of the argument from truth,[78] but instead an interest in exposing 'misconduct by hypocrisy'.[79]

As suggested in chapter 1, a privacy law strongly committed to the right to informational autonomy would not generally support such arguments tipping the balance in favour of free speech.[80] This right grants individuals the freedom to set their own parameters for disclosure of private information, thereby enabling them to establish varying levels of intimacy in relationships and furthering personal development in a variety of ways.[81] Inevitably, this may lead to the public developing incorrect impressions about how certain high-profile individuals behave in their private lives. It is not clear, however, why such impressions are damaging to the public interest and thus entitle the press to put the record straight.[82] What does seem clear is that this general approach would seriously threaten the right to selective disclosure, undermining, *inter alia*, individual choice over self-presentation, something practiced routinely by most of the population in the course of everyday social interaction.[83] A problem with the role model idea in particular is that while some celebrities may willingly accept such a title, many do not. Sometimes a celebrity may be seen as a role model because of their career in the media, as in *Theakston*. Moreover, as Hatzis points out, the more media attention someone is given the more likely it is that they will be seen as a role model -the media may project an individual as a role model and then rely on this to serve their own commercial ends in justifying privacy invasions.[84]

Campbell, it is argued, is a less clear-cut example because the model had taken a more active role in misleading the public by repeatedly stating that she was not a drug addict, gaining favourable publicity by so doing. However, there are other strong arguments against allowing the press to invade privacy in order to expose hypocrisy. As Baroness Hale recognised in *Campbell*; '[i]t might be questioned why, if a role model has adopted a stance which all would agree is beneficial rather than detrimental to society, it is so important to reveal that she has feet of clay'.[85] As Fenwick and Phillipson point out, any

[78] See chapter 1 at p 10.
[79] J W Devine, 'Privacy and Hypocrisy' (2011) 3(2) JML 169, 171.
[80] See chapter 1 at p 3.
[81] See chapter 1 at p 4.
[82] Fenwick and Phillipson, *Media Freedom under the Human Rights Act* (n 9) 803. See chapter 1 at p 4.
[83] ibid 804.
[84] N Hatzis, 'Giving Privacy its Due: Private Activities of Public Figures in *Von Hannover v Germany*' (2005) 16 KCLJ 143, 149.
[85] [2004] UKHL 22, [151].

potential damage to those influenced by Campbell's behaviour would be as a result of the *Mirror* bringing her wrongdoing to the public's attention, rather than the fact of the behaviour itself.[86] Logically, therefore, the public interest would be better served by preventing disclosure of the information to eliminate the possibility that her young fans could be encouraged to emulate her illegal activities.

Given the clear inconsistency between *Von Hannover (No. 1)* and *A v B plc*, the Court of Appeal in *McKennitt v Ash* downplayed the effect of Lord Woolf's guidance; '[i]f the court in *A v B* had indeed ruled definitively on the content and application of Article 10 then the position would be different; but that is what the court did not do'.[87] Having found that *A v B plc* was not binding on the content of Articles 8 and 10,[88] Lord Justice Buxton found that McKennitt, a well-known folk singer, did not 'hold a position where higher standards of conduct [could] be rightly expected by the public'.[89] Moreover, he doubted the validity of the concept of involuntary role models, particularly given that McKennitt had sought to maintain a degree of privacy over her personal life.[90] The court was equally dismissive of Ash's claim that the press were entitled to reveal that McKennitt had acted hypocritically by presenting a public image of proper behaviour, whilst mistreating Ash in her private capacity.[91] The Court of Appeal did not, however, fully support the view of Mr Justice Eady in the High Court who had commented that 'a very high degree of misbehaviour must be demonstrated' to trigger a public interest defence:

> All of us try to behave well, no doubt, for most of the time, but hardly anyone succeeds in achieving that ideal. The mere fact that a 'celebrity' falls short from time to time, like everyone else, could not possibly justify exposure, in the supposed public interest, of every peccadillo or foible cropping up in day-to-day life.[92]

Although the Court of Appeal in *McKennitt* took the positive step of minimising the effect of Lord Woolf's comments in *A v B plc*, importantly, they left open the possibility that a public interest defence could be established to expose the hypocrisy of a public figure, falling short of the Campbell situation in which she wilfully mislead the public by

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[86] Fenwick and Phillipson, *Media Freedom under the Human Rights Act* (n 9) 804-805.
[87] [2002] EWCA Civ 337, [63].
[88] ibid [64].
[89] That, according to the court, was 'no doubt the preserve of headmasters and clergymen, who according to taste may be joined by politicians, senior civil servants, surgeons and journalists'. [2005] EWHC 3003, [65].
[90] [2005] EWHC 3003, [65].
[91] ibid.
[92] ibid [97].

lying about her drug addiction. Moreover, despite the strong pro-privacy ruling in *Mosley*, Mr Justice Eady also recognised some potential, albeit marginal, impact of the 'role model' argument in speech/privacy balancing:

> This modern approach of applying an 'intense focus' is thus obviously incompatible with making broad generalisations of the kind to which the media often resorted in the past such as, for example, 'public figures must expect to have less privacy' or 'people in positions of responsibility must be seen as "role models" and set us all an example of how to live upstanding lives'. Sometimes factors of this kind may have a legitimate role to play when the 'ultimate balancing exercise' comes to be carried out, but generalisations can never be determinative. In every case 'it all depends' (i.e. upon what is revealed by the intense focus on the individual circumstances).[93]

The possibility opened up in *McKennitt* and *Mosley* was realised by the High Court in the subsequent *Ferdinand* case. As discussed in chapter 3, *Ferdinand* concerned articles published by the *Sunday Mirror* revealing Rio Ferdinand's extra-marital affair with Carly Storey. When balancing the competing rights, Mr Justice Nicol found that Article 10 should prevail. The judge's reasoning was partly based on the argument that Ferdinand had projected a false public image which the defendant newspaper was entitled to correct. Statements made in Ferdinand's autobiography and in previous media interviews, suggesting that he had left behind his wild past in favour of a committed relationship, were given detailed consideration by the judge,[94] leading to the conclusion that Ferdinand had 'projected an image of himself and, while that image persisted, there was a public interest in demonstrating…that the image was false'.[95] Ferdinand and Storey had not been in contact at the time of the misleading interviews and comments, therefore, unlike Campbell, Ferdinand had not lied to the public, nor could his comments be taken as a promise to remain faithful to his partner indefinitely, as the judge recognised.[96] In giving this factor significant weight in the balance, the High Court appears to have arguably taken a broader approach to the public interest than the House of Lords in *Campbell*.

Another important consideration in the case was Ferdinand's role as captain of the England football team. Mr Justice Nicol accepted that a substantial body of the public would expect higher standards of behaviour, both on and off the pitch, from someone

[93] [2008] EWHC 1777 (QB), [12].
[94] [2011] EWHC 2454 (QB), [84].
[95] ibid [85].
[96] ibid.

holding the captaincy.[97] The judge made clear that *he* was not making a judgement about Ferdinand's fitness for the role, he was instead deciding that the article could contribute to a public debate on the matter.[98] The case, therefore, arguably indicates a regressive step towards the criticised *A v B plc* position. The court found that by virtue of his role there was a public interest in exposing intimate aspects of Ferdinand's private life, without precise explanation as to why they were relevant to the performance of that role.[99] One aspect of Ferdinand's conduct which arguably did impact upon his suitability to captain the England football team was that he had, against rules set by the team's management, admitted Storey into hotel rooms where the team were staying. This, in the view of the judge, reinforced the public interest in exposing Ferdinand's wrongdoing, regardless of whether it had happened during his captaincy (something denied by Ferdinand).[100] While such an argument may have some persuasive force, given that, on the evidence, no such behaviour had occurred during the time of his captaincy and the very strong privacy interests at stake on the other side of the scales, it may not without more have been said to tip the balance in favour of Article 10.

Rather than taking a restrictive interpretation of *Campbell*, as suggested by the Court of Appeal in *McKennitt* and Mr Justice Eady in the High Court in *Mosley*, *Ferdinand* marks a return to the heavily criticised *A v B plc* position and a widening of the gap between domestic law and the theoretical model. *Ferdinand* may now technically be aligned with the Convention, following the apparent acceptance of a form of 'role model' argument in *Axel Springer*. However, the public interest element in *Springer* related to a criminal offence in a public location, arguably of greater seriousness in public interest terms than a footballer's extra-marital affair. Moreover, given that *Ferdinand* was decided prior to the decision of the ECtHR, it is evident that Mr Justice Tugendhat felt no obligation to discount the 'role model' argument in light of *Von Hannover (No. 1)*. While this case may be a slight anomaly, in view of the relatively clear line of preceding authority which has seemed to marginalise the argument, it provides some further evidence that the UK judiciary do not, in practice find the content of the speech/privacy balance in Convention jurisprudence. A more Convention-compatible approach has been reached with regards to the argument that the public interest is supported by the commercial interests of the media.

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[97] ibid [90].
[98] ibid [92].
[99] See above at p 94.
[100] [2011] EWHC 2454 (QB), [96].

Lord Woolf, in *A v B plc*, suggested that '[t]he courts must not ignore the fact that if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest. The same is true in relation to other parts of the media'.[101] The same argument was raised in *Campbell* by Lord Hoffmann, in the minority,[102] and Baroness Hale, in the majority:

> One reason why press freedom is so important is that we need newspapers to sell in order to ensure that we still have newspapers at all. It may be said that newspapers should be allowed considerable latitude in their intrusions into private grief so that they can maintain circulation and the rest of us can then continue to enjoy the variety of newspapers and other mass media which are available in this country.[103]

Such a broad justification for press freedom does not appear to be supported by the Strasbourg jurisprudence, or the theoretical model. This is because it automatically adds extra weight to the Article 10 side of the balance, without requiring the court to scrutinise the value of the speech in question, elevating entertaining speech to a higher position than it would normally occupy, which is out of accord with both *Von Hannover* decisions and *Axel Springer*.

In subsequent cases, a more satisfactory position has now been reached with regards to this argument. Although *McKennitt* concerned the publication of a book, rather than a newspaper article, the Court of Appeal implicitly rejected the notion that the commercial interests of the media in reporting entertaining stories could have any significant weight in the balance between privacy and freedom of speech; '[t]he width of the rights given to the media by *A v B* cannot be reconciled with *Von Hannover*'.[104] Moreover, such a factor 'is difficult to reconcile with the long-standing view that what interest the public is not necessarily in the public interest'.[105] Following *McKennitt*, the 'commercial interest' factor does not appear to have been influential to the outcome of domestic privacy cases,[106]

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101 [2003] QB 195, [4(xii)].
102 'We value the freedom of the press but the press is a commercial enterprise and can flourish only by selling newspapers' [2004] UKHL 22, [77].
103 [2004] UKHL 22, [143].
104 [2005] EWHC 3003 (QB), [61].
105 ibid [66].
106 See *HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWCA Civ 1776; *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446; *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB); *Terry (Previously 'LNS') v Persons Unknown* [2010] EMLR 16; *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB); *Spelman v*

reflecting greater harmony with the key Strasbourg rulings, and the theoretical model suggested in this thesis.

Factors Strengthening the Article 8 Claim

As suggested in chapter 1, when determining the weight of the Article 8 claim the courts should draw on the fundamental privacy values of informational autonomy, self-fulfilment, dignity and substantive autonomy. Although the ECtHR has not fully articulated these underlying principles,[107] nor does there appear to be a hierarchy of interests (as is the case with Article 10), such values could be drawn out from the leading Strasbourg cases and academic literature. While the minority judges in *Campbell* recognised that the 'protection of human autonomy and dignity' had become the focus of the new tort of misuse of private information,[108] the majority judges appeared to be more concerned with the physical harm that may have resulted from failure to restrict publication of the details of Campbell's treatment. Thus Lord Hope found that 'the potential for disclosure of the information to cause harm is an important factor to be taken into account in the assessment of the extent of the restriction that was needed to protect Miss Campbell's right to privacy'.[109] Baroness Hale came to a similar conclusion:

> Not every statement about a person's health will carry the badge of confidentiality or risk doing harm to that person's physical or moral integrity. The privacy interest in the fact that a public figure has a cold or a broken leg is unlikely to be strong enough to justify restricting the press's freedom to report it. What harm could it possibly do? …The risk of harm is what matters at this stage, rather than the proof that actual harm has occurred. People trying to recover from drug addiction need considerable dedication and commitment, along with constant reinforcement from those around them. That is why organisations like Narcotics Anonymous were set up and why they can do so much good. Blundering in when matters are acknowledged to be at a 'fragile' stage may do great harm.[110]

In *Murray* the real risk of future intrusion, if publication of a photograph of J K Rowling's young son was permitted, seemed to carry significant weight in the Court of Appeal's conclusion that the balance was more likely than not to come down in favour of

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Express Newspapers [2012] EWHC 355 (QB); *Trimingham v Associated Newspapers Limited* [2012] EWHC 1296 (QB).
[107] See chapter 3 at p 46; 48.
[108] [2004] UKHL 22, [51] (Lord Hoffmann).
[109] ibid [118].
[110] ibid [157].

Article 8.[111] The Court considered that, given the evidence of press interest in the family, it was likely that there would be considerable disruption to the child's life, possibly amounting to harassment.

While publicity likely to cause some form of tangible harm is obviously an important practical consideration that should be given due weight by the court in privacy cases, a potential pitfall is that in the absence of such harm an Article 8 claim appears relatively weak, unless the court also gives sufficient weight to the core theoretical values underpinning the right to privacy. Arguably, a number of recent cases indicate that domestic courts are less prepared to find in favour of Article 8 if it is only the *values* of privacy at stake, as opposed to the risk of some identifiable harm to the individual. In *Spelman*, also concerning the private life of a minor, it was found that there was unlikely to be further intrusion following the initial publication. Partly on this basis, Mr Justice Tugendhat was unable to find that Spelman was more likely than not to have his Article 8 rights vindicated at final trial.[112] The point was emphasised in the earlier *Terry* case; '[t]his is not a case where, on the evidence before me, the potential adverse consequences are particularly grave. On the evidence…I do not think it likely that [Terry] regards as particularly sensitive information of the kind that is sought to be protected'.[113] Therefore, while the courts often acknowledge the distress caused by publicity given to private information there is often little or no express discussion of the underlying values of Article 8, in the absence of specific harm.[114] While it is very difficult to assess the impact of this issue on the overall outcome of the cases discussed, it is tentatively suggested that a full judicial discussion of the privacy values at stake in these cases might reveal the true strength of certain privacy claims, potentially resulting in a stronger level of privacy protection being granted.

The domestic courts have also determined that the Article 8 claim is strengthened if the information was originally disclosed in breach of confidence. In *HRH Prince of Wales v Associated Newspapers Ltd*, concerning the disclosure of Prince Charles' private diaries by an employee, the Court of Appeal considered that there is an important public interest in upholding duties of confidentiality, particularly those expressly assumed under

111 [2008] EWCA Civ 446, [18] and [50].
112 [2012] EWHC 355 (QB), [102].
113 [2010] EWHC 119 (QB), [127].
114 See e.g. *Spelman v Express Newspapers* [2012] EWHC 355 (QB); *Trimingham v Associated Newspapers Limited* [2012] EWHC 1296 (QB).

contract.[115] The court concluded that '[b]oth the nature of the information and of the relationship of confidence under which is was received weigh heavily in the balance in favour of Prince Charles'.[116]

As mentioned in chapter 3 the confidentiality aspect of the case had already been considered when determining whether the Prince had a reasonable expectation of privacy and, although prevention of breach of confidence is expressly mentioned in Article 10(2) as possibly a legitimate restriction on freedom of expression, the emphasis on breach of confidence in this instance may have distracted the court from conducting a more searching assessment of the speech at stake. The diary extract, printed in the *Mail on Sunday* soon after a State visit to London by the Chinese President, described Prince Charles' impressions of events marking the handing over of Hong Kong to China. The newspaper placed particular emphasis on his description of the Chinese visitors as 'appalling waxworks'. Arguably, as an expression of the political views and lobbying activities of the future head of state, this information had significant value in Article 10 terms.[117] The Court of Appeal, however, was not persuaded that there was more than minimal public interest in the information.[118] It is perhaps surprising that the Court was so ready to dismiss the public interest claim in this case when it is contrasted with the relative ease with which the courts often find a public interest in the publication of details of the sexual relationships of celebrities and sports figures.[119] The outcome of the *Prince Charles* case may therefore be partly attributed to the significance placed on the breach of confidence dimension, with the result that future debate on a matter of political importance was stifled. While the Court of Appeal was right to take into account the circumstances in which the information was disclosed to bolster the Article 8 claim, the outcome in *Prince Charles* indicates that such an approach may lead to an imbalance between Articles 8 and 10. A final point of comparison between the domestic speech/privacy balancing exercise and Convention principles relates to the application of proportionality. In this respect it will also be argued that domestic courts could, in the most recent cases, demonstrate greater adherence to the principle of proportionality.

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[115] [2006] EWCA Civ 1776, [71]. The Court cited with approval findings made in *Campbell v Frisbee*; 'it is arguable that a duty of confidentiality that has been expressly assumed under contract carries more weight, when balanced against the right of freedom of expression, than a duty of confidence that is not buttressed by express agreement' [2002] EWCA Civ 1374, [22].
[116] [2006] EWCA Civ 1776, [71].
[117] G Phillipson, 'The Common Law, Privacy and the Convention' in H Fenwick, G Phillipson and R Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP 2007) 251-252.
[118] [2006] EWCA Civ 1776, [72].
[119] See, for example, *Ferdinand v MGN Ltd.*

Is the Degree of Intrusion Proportionate to the Public Interest?

The House of Lords decision in *Campbell* demonstrates strong judicial commitment to the proportionality approach of balancing the competing rights. While the judges were unanimous in finding that the basic facts of Naomi Campbell's drug addiction and treatment could be published, their Lordships went on to scrutinise whether the additional details (including the photographs) went further than was necessary to inform the public. Attention was given, by a number of the judges, to the degree of discretion that should be granted to editors and journalists when presenting particular news stories. Lord Nicholls found that '[t]he balance ought not to be held at a point which would preclude…a degree of journalistic latitude in respect of [the] information published'.[120] Lord Hoffmann considered that the photographs, in particular, had some value in terms of corroborating the story that the *Mirror* was legitimately entitled to publish; '[f]rom a journalistic point of view, photographs are an essential part of the story. The picture carried the message, more strongly than anything in the text alone, that the *Mirror's* story was true. So the decision to publish the pictures was…within the margin of editorial judgment and something for which appropriate latitude should be allowed'.[121] Having determined that the additional details involved no significant further intrusion, the minority judges found that Article 10 should prevail in relation to all of the information, when the margin of discretion had been taken into account.

The majority judges also recognised the editorial interests of the press,[122] but the balance they struck was in favour of Article 8. Given that publication of the additional details was likely to have caused Campbell significant distress, and may have interfered with her treatment by revealing the location and frequency of her visits to NA,[123] the majority found that it constituted an unjustifiable invasion of privacy. As Lord Hope pointed out; 'it is hard to see that there was any compelling need for the public to know the name of the organisation that she was attending for therapy, or for the other details of it to be set out…The decision to publish the photographs suggests that greater weight was being given to the wish to publish a story that would attract interest rather than to the wish to maintain its credibility'.[124] Thus the judges closely scrutinised the public interest in

[120] [2004] UKHL 22, [28].
[121] ibid [77].
[122] ibid [112] (Lord Hope); [156] (Baroness Hale); [166] (Lord Carswell).
[123] ibid [155] (Baroness Hale).
[124] ibid [120].

knowing the details of Campbell's treatment, and applied the Convention-derived principle of proportionality, to conclude, convincingly, that their publication went further than was necessary to convey the information that the public was entitled to know.

In a number of subsequent cases, the guidance set out by the majority in *Campbell* appears to have been accepted. In *Mosley*, Mr Justice Eady found:

> [The] 'ultimate balancing test' has been recognised as turning to a large extent upon proportionality…The judge will often have to ask whether the intrusion, or perhaps the degree of the intrusion, into the claimant's privacy was proportionate to the public interest supposedly being served by it…Sometimes there may be a good case for revealing the fact of wrongdoing to the general public; it will not necessarily follow that photographs of 'every gory detail' also need to be published to achieve the public interest objective.[125]

Having recognised that there could be some 'scope for editorial judgment as to what details should be included within the story',[126] the judge went on to find that none of the information relating to Max Mosley's sexual activity was in the public interest. Mr Justice Tugendhat in *Terry* suggested that further intrusive details would receive different treatment to information relating to the existence of a relationship, although, on the facts, the judge did not find that there was a real threat to publish such details.[127]

It may be possible to detect, in more recent cases, a less intense proportionality exercise in terms of the additional detail to certain stories and, consequently, a shift towards greater press freedom. In *Ferdinand*, the additional details published by the *Sunday Mirror* included a relatively innocuous photograph of the footballer and Carly Storey in a hotel room together. As discussed in chapter 3, Mr Justice Nicol in the High Court found that there was a reasonable expectation of privacy with regards to the photograph but, when balancing the competing rights, held that Article 10 should prevail. Given its 'unexceptionable character', the photograph, he found:

> [C]ould have caused nothing comparable to the additional harm that was referred to in *Campbell* and none of the embarrassment that pictures of sexual activity may cause. In this case, the picture did provide an element of support to the story because it showed the Claimant and Ms Storey together. It was of limited value because of the age of the photograph but to that limited extent it

[125] [2008] EWHC 1777 (QB), [14].
[126] ibid [21].
[127] [2010] EWHC 119 (QB), [69].

> did do more than the picture in *Campbell*…Unlike in *Campbell,* I find that publication of the picture did not cause the Claimant justifiable additional distress.[128]

By contrasting the different factual circumstances of *Campbell* and *Ferdinand*, the judge, in the latter case, appears to have concluded that publication of the photograph had not (and would not in future) cause Ferdinand any tangible harm. Employing such reasoning, however, meant that the violation of Ferdinand's right to informational autonomy was considerably downplayed in the case. The potential for photographs to invade privacy has been repeatedly emphasised by the higher domestic courts[129] and the ECtHR.[130] This was a photograph taken in a private hotel room, probably without Ferdinand's consent, providing readers with detailed information about his appearance and activities. In terms of corroborating the story, the photograph did no more than show that Ferdinand and Storey had been present, amongst others, in a hotel room on that particular occasion; it did not prove they were in a relationship at that time. As with *Campbell*, the significance of the photograph only became apparent in the context of the article as a whole. Had the nature of Ferdinand and Storey's relationship been obvious from the photograph, Article 8 would have undoubtedly prevailed.[131] It is argued, therefore, that the photograph did little to contribute to the story and, had the judge had greater regard to the likely sense of violation and intrusion caused by its publication, a reverse finding may have been more consistent with the Convention. Following *Von Hannover (No. 2)*, however, the outcome in *Ferdinand* (in terms of the photograph) is probably Convention-compatible. As discussed above, the Court in that case approved the publication of loosely connected photographs to illustrate a story found to be in the public interest,[132] although those photographs had been taken in a public, rather than private, location. Had the Strasbourg Court heard *Ferdinand*, and found the fact of the affair to be in the public interest, they may well have permitted publication of the photograph.

The recent *Trimingham* case demonstrates some similarities to *Ferdinand.* Carina Trimingham had accepted that the press could legitimately publish the fact of her affair with MP Chris Huhne; her complaint concerned the additional details included in a number of articles. In what was arguably a misapplication of the law, Mr Justice

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[128] [2011] EWHC 2454 (QB), [103].
[129] For example, *Campbell v MGN* [2004] UKHL 22, [31] (Lord Nicholls).
[130] *Von Hannover v Germany* [2004] EMLR 21.
[131] [2011] EWHC 2454 (QB), [103].
[132] See above at p 83.

Tugendhat found that Trimingham did not have a reasonable expectation of privacy in terms of the photographs of her at her civil partnership ceremony,[133] the necessity of their publication was not therefore considered in the judgement. The additional written details consisted of information about a previous relationship[134] and descriptions of her sexual activity with Chris Huhne, attributed by the newspapers to Trimingham.[135] Although it is not entirely clear, the judge appears to have conducted a balancing exercise with regards to these details, finding simply that the information relating to a previous relationship was not 'sufficiently serious' to justify a successful misuse of private information claim,[136] and the details of sexual activity came within the 'range of editorial judgment, given the overall nature and content of the articles in question'.[137] The judge's inadequate reasoning on this point reflects the fact that publication of the additional details was wholly unjustified. As Lord Hoffmann made clear in *Campbell*:

> The relatively anodyne nature of the additional details is in my opinion important and distinguishes this case from cases in which (for example) there is a public interest in the disclosure of the existence of a sexual relationship (say, between a politician and someone whom she has appointed to public office) but the addition of salacious details or intimate photographs is disproportionate and unacceptable. The latter, even if accompanying a legitimate disclosure of the sexual relationship, would be too intrusive and demeaning.[138]

The details in *Trimingham*, while clearly relating to a core aspect of the right to privacy—sexual activity—added nothing to the public interest of the story beyond entertainment value and interest. Had the judge strictly applied the proportionality test, the obvious conclusion would have been that the additional details should have been protected in this case.

In conclusion, a majority in the House of Lords in *Campbell* opened up the opportunity for domestic courts to apply a highly sensitive, proportionality based approach to the publication of additional details. Whilst recognising that the press have a margin of discretion in terms of presenting particular stories of public interest, the Court concluded that this could not necessarily trump an individual's rights under Article 8. As *Ferdinand*

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[133] See chapter 3 at p 61.
[134] [2012] EWHC 1296 (QB), [304].
[135] ibid [306].
[136] ibid [305].
[137] ibid [308].
[138] [2004] UKHL 22, [60].

and *Trimingham* demonstrate, a less sensitive approach may be emerging in the recent case law. Once publication of the basic information was found to be in the public interest, the judges appeared to conduct a far less intense scrutiny of the necessity of the further details. This relatively subtle shift in judicial reasoning suggests a weaker adherence to the theoretical model suggested in this thesis, and, while *Ferdinand* might possibly be consistent with the Convention, *Trimingham* seems to be out of accord with the core values of Article 8.

Conclusion

In answering the research questions, this chapter has argued that the speech/privacy balance achieved by the Strasbourg Court in *Von Hannover (No. 1)* fully accords with the theoretical model in that celebrity gossip, and probably 'infotainment', types of speech, unsupported by the free speech values discussed in chapter 1, and with little or no public interest dimension, are afforded a low weighting. Thus informational autonomy received a strong measure of protection by the Court at the balancing stage. The Strasbourg position has been modified to some extent by the recent decisions in *Von Hannover (No. 2)* and *Axel Springer*. Private information will still be protected if it is published for entertainment purposes only, but both cases suggest that very weak public interest justifications may be used to support publication of the information itself (as in *Axel Springer*) as well as photographs having little to do with the public interest dimension of an article (as in *Von Hannover (No. 2)*). Therefore, in the most recent Strasbourg decisions on speech/privacy balancing, speech unsupported at the theoretical level appears to be given a stronger level of protection.

It has further been argued that, in UK domestic law, the Convention has clearly had a significant impact on the structure of domestic speech/privacy balancing; the courts consistently emphasise the initial presumption of equality between the two rights. The principles applied to determine the weight of the competing rights, however, indicates some inconsistency between the Strasbourg Court and UK domestic courts. Prior to *Von Hannover (No. 2)*, English courts intermittently accepted the argument that Article 10 should prevail in order to put the record straight about the inconsistent behaviour of role models and other public figures. This justification is supported by neither the theoretical model nor, until recently, the Strasbourg jurisprudence; yet, in the recent *Ferdinand* case,

Mr Justice Tugendhat revived the argument, denying Rio Ferdinand protection for the private information relating to his extra-marital affair, and displaying no awareness of the incompatibility of his reasoning with *Von Hannover (No. 1)*, the then leading Strasbourg authority. Moreover, on the Article 8 side of the balance, the domestic cases suggest a tendency among the judiciary to focus on the potential for specific harm to stem from permitting publication, whilst neglecting to fully consider the threat to informational and substantive autonomy. Thus, while it is difficult to gauge the impact of this trend, it is tentatively suggested that the courts could have given greater force to the privacy rights at stake and, accordingly, achieved greater consistency with the Convention. In addition, a more rigorous application of the proportionality test in a number of recent cases could have achieved a similar result.

Therefore, it appears that, in terms of speech/privacy balancing the most recent cases at both the Convention and domestic levels indicate a widening of the gap between privacy law and the theoretical model. The consistency currently achieved between the ECHR and UK domestic law appears to be as a result of the re-balancing occurring in the Strasbourg Court, rather than as a direct result of English courts feeling bound to import the content of Article 8 into the tort of misuse of private information. Speech now appears to be protected at Strasbourg on spurious public interest grounds. In domestic law, the failure to fully recognise the impact of intrusive articles on informational autonomy and other privacy-related values, together with the application of a weak proportionality test and the recent revival of the role model argument, suggest that the balance currently struck fails to accord fully with the free speech values considered in chapter 1. Intrusive articles, unsupported at the theoretical level, are accorded an unwarranted level of protection, leaving informational autonomy inadequately protected.

CHAPTER V

CONCLUSION

Privacy Law at the Convention and Domestic Levels Critiqued Against the Theoretical Model

The theoretical model for privacy protection set out in chapter 1 aimed to provide some of the basic principles to be applied when determining the types of information attracting legal protection, and balancing the competing rights of privacy and free speech. It was suggested that, for the law to provide effective protection for informational autonomy and other privacy-related interests, the concept of private life should be widely drawn, encompassing relatively anodyne information (from the perspective of 'expression') and information acquired in a public place. Such an interpretation of 'private life' would not pose an unacceptable threat to press freedom because, as argued, the privacy *and* speech value of the information in question should always be scrutinised on the basis that the two rights are presumptively equal. The model suggested that, in general, information relating to politicians' private lives, potentially impacting upon voting practices and thus engaging the powerful argument from democracy, might tend to prevail in the balance. In contrast, privacy-invading speech with no element of public interest, such as celebrity gossip, often would not engage any of the core free speech rationales and its restriction would generally be justified. 'Infotainment', using examples from the private lives of celebrities to both entertain and stimulate debate on important contemporary issues, admittedly may have some speech value. However, the theoretical balance would normally come down in favour of privacy; to do otherwise would, in line with Phillipson's argument, be contrary to the notion that human rights aim to protect the individual against the will of the majority.[1]

Chapters 3 and 4 concluded that, in terms of both the concept of private life and the speech/privacy balance, the decision of the Strasbourg Court in *Von Hannover (No. 1)* clearly mapped on to the theoretical model. Princess Caroline was afforded a full

[1] G Phillipson, 'Memorandum to the Leveson Inquiry' (28 March 2012) <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/03/Submission-by-Professor-Gavin-Phillipson-Durham-Law-School.pdf> accessed 10 August 2012.

measure of privacy protection for apparently anodyne information, acquired in a public place. Moreover, such speech was given a very low weighting and was therefore restricted in favour of the protection of privacy. The 2012 decisions of the Strasbourg Court in *Von Hannover (No. 2)* and *Axel Springer*, however, appear to have downgraded the level of protection at both stages of the analysis. The Court now accepts that certain well-known individuals (such as actors and royals) are public figures, that Article 8 rights may be waived by prior consensual disclosure and that photographs taken in daily life, previously considered to be 'intimate', may be published when loosely connected to a story of general interest. Thus, the 2012 cases mark a departure from the theoretical model relied on in this thesis. The decisions give the general impression that provided domestic authorities have, as a matter of procedure, considered the relevant criteria set out by the Strasbourg Court, it may be reluctant to interfere with their decision.

As chapter 3 suggested, these shifts in emphasis may be a result of the ongoing debates about the future of the Strasbourg Court. The first *Von Hannover* case was heavily criticised in a number of Member States for giving privacy too strong a protection and potentially destroying the 'infotainment' industry. In *Von Hannover (No. 2)*, for example, there were submissions from six third parties arguing that Article 10 should prevail, suggesting that the ECtHR was under some pressure to reconsider its earlier decision.[2] Moreover, *Von Hannover (No. 2)* and *Axel Springer* may be influenced by the wider debates about the future of the ECtHR.[3] By the time *Von Hannover (No. 2)* was heard, members of the Council of Europe had issued two declarations on reform of the ECtHR (Interlaken in 2010 and Izmir in 2011) stressing a desire for greater subsidiarity and a less interventionist Strasbourg Court, as well as concerns about the competence of some ECtHR judges and the massive backlog of cases waiting to be heard. The Brighton Conference, expected to call for more radical reforms, was also on the horizon, taking place in April 2012. It is possible therefore that these ongoing debates impacted upon *Von Hannover (No. 2)* and *Axel Springer* (among others), demonstrating, what one commentator has termed, an 'appeasement approach' on behalf of the ECtHR towards certain Member States, possibly in an attempt to prevent significant weakening of the Convention through dissatisfaction of the Council of Europe members.[4]

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[2] *Von Hannover v Germany (No. 2)* App no 40660/08 (ECHR, 7 February 2012) [90].
[3] H Fenwick, 'An Appeasement Approach in the European Court of Human Rights?' (UK Constitutional Law Group, 5 April 2012) < http://ukconstitutionallaw.org/blog/ > accessed 10 May 2012.
[4] ibid.

The conclusions drawn in chapters 3 and 4, on the level of protection provided in UK domestic law, reflect a similar pattern, although, it will be argued, as a result of different concerns. Chapters 3 and 4 demonstrated that in determining what constitutes 'private information', and conducting the balancing exercise, Convention jurisprudence has had a significant impact. The framework of the action for misuse of private information is now consistently defined in Convention terms. As to the content of the action, however, chapters 3 and 4 emphasised that, post *Von Hannover (No. 1)*, domestic courts have retained a substantial degree of autonomy, creating a rift between the level of protection (until recently) provided by the Strasbourg Court and the domestic courts. This was particularly highlighted in reference to the treatment of anodyne photographs of individuals taken in public locations. Although the *Murray* case gave encouraging signs that protection may be extended to such photographs, the courts have consistently avoided confronting the issue. Additionally, concerning the speech/privacy balance, the judicial commitment to robust protection of privacy shown in *Mosley* and *McKennitt* has, to an extent, been undermined by intermittent acceptance of the argument that false impressions of celebrities should be corrected, an argument which was then out of accord with Strasbourg and, moreover, fails to uphold the core principle of informational autonomy. Another point of significance is the continuing role of common law breach of confidence which, as the *Prince Charles* case clearly demonstrates, may be drawn on at both stages of the courts' analysis.[5]

While it has been suggested that the state of the current law, inferred from the most recent High Court cases (*Ferdinand*, *Spelman* and *Trimingham*), demonstrates a fairly high level of consistency with Strasbourg, this is, it has been argued, a matter of coincidence following Strasbourg's modification of its stance in 2012. The post-*Von Hannover (No. 2)/Axel Springer* cases show no judicial awareness of the step change at Strasbourg, though, in future, those Strasbourg decisions may be given greater consideration by the domestic courts. Taken together, these factors appear to provide no evidence to suggest a binding obligation on the judiciary to bring the misuse of private information tort into line with Convention via sections 2 and 6 HRA. The content of the action is not to be found exclusively in the jurisprudence of the ECtHR. Moreover, while greater harmony between the Convention and domestic systems is evident, domestically, the reluctance to

[5] See G Phillipson, 'Privacy: The Development of Breach of Confidence – The Clearest Case of Horizontal Effect?' in D Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (CUP 2011).

afford strong protection to 'anodyne' information, continued (albeit intermittent) application of waiver and re-emergence of the 'role model' argument, suggest that informational autonomy is not afforded full protection in English law.

Utilisation of the HRA in the Development of Domestic Privacy Law

Chapter 2 discussed the competing academic views on horizontal effect. The interim conclusion drawn was that judicial statements in both the pre- and post-*Campbell* privacy cases fail to demonstrate commitment to any one version of horizontal effect. Moreover, contrary to the view of a number of commentators,[6] comments in the post-*Campbell* privacy cases do not indicate acceptance of direct effect or strong indirect horizontal effect. While such a view has been refuted by Phillipson, on the basis of the origins of the judicial statements in the cases,[7] neither is the view borne out by the analysis of the content of the action for misuse of private information, carried out in chapters 3 and 4. The substantial degree of autonomy from Strasbourg shown, including frequent reference to common law breach of confidence, shows that a weaker model is employed in this context. A more difficult conclusion to draw, however, is whether the apparent judicial autonomy indicates weak indirect horizontal effect (judicial flexibility to exercise choice between the Convention and the common law when applying legal principles to a case) or the slightly stronger, and more persuasive, 'constitutional constraint' model (an obligation on the judiciary to develop the common law compatibly with the Convention provided this can be done incrementally, with observance of fundamental constitutional principles).[8]

Arguably, the constitutional constraint model is supported by evidence as to judicial attitudes towards the development of privacy law in this context. In *Mosley*, for example, Mr Justice Eady stated that:

> The law now affords protection to information in respect of which there is a reasonable expectation of privacy, even in circumstances where there is no pre-existing relationship giving rise of itself to an enforceable duty of confidence. That is because the law is concerned to prevent

[6] T D C Bennett, 'Horizontality's New Horizons - Re-Examining Horizontal Effect: Privacy, Defamation and the Human Rights Act Part 1' (2010) 21(3) Ent LR 96; K Hughes, 'Horizontal Privacy' (2009) 125 LQR 244; N A Moreham 'Privacy and Horizontality: Relegating the Common Law' (2007) 123 LQR 373.
[7] Phillipson, 'Privacy: The Development of Breach of Confidence' (n 5) 152.
[8] G Phillipson and A Williams, 'Horizontal Effect and the Constitutional Constraint' (2011) 74(6) MLR 878.

> the violation of a citizen's autonomy, dignity and self-esteem. It is not simply a matter of 'unaccountable' judges running amok. Parliament enacted the 1998 statute which *requires* these values to be acknowledged and enforced by the courts.[9]

These comments suggest that section 6 HRA creates a general presumption in favour of Convention-compatible development (as the constitutional constraint model requires), as opposed to the wide discretion permitted by Phillipson's weak indirect horizontal effect model. Thus, given that the HRA does not displace the constraint of 'incremental development',[10] Mr Justice Eady's comments would appear to support the suggestion that section 6 requires domestic courts to give effect to ECHR principles, subject to the constraints discussed above.

At first glance, it could appear that the constitutional constraint model does not fully explain why the courts have, to some extent, failed to utilise indirect horizontal effect to maximise domestic privacy protection, particularly in the post-*Von Hannover (No. 1)*, pre-*Von Hannover (No. 2)/Axel Springer*, era. As argued in chapter 2, pre-HRA, the incremental development of common law breach of confidence had enhanced its capacity to protect informational privacy, the House of Lords' decision in *Campbell* 'transformed' breach of confidence into a tort providing remedies for the misuse of private information, and the 2008 Court of Appeal decision in *Murray* came very close to creating a general image right. Further development along these lines, to achieve the level of privacy protection (until very recently) afforded by the Strasbourg Court, arguably would not raise constitutional concerns in the minds of the judiciary. For example, the waiver doctrine, already an uncertain aspect of the law due to its intermittent application in a number of cases, could have been abandoned by incremental development. Moreover, following *Murray*, the protection of innocuous photographs of daily life could also have been achieved without offence to fundamental constitutional principles. Thus, stronger privacy protection could possibly have been granted, without recourse to the legislative-style common law development that had been expressly ruled out by the House of Lords in *Wainwright v Home Office*.[11]

Moreover, if constitutional concerns have prevented the judiciary from granting stronger protection for informational privacy, it is unclear why this has never been articulated in

[9] [2008] EWHC 1777 (QB), [7].
[10] Phillipson and Williams, 'Horizontal Effect and the Constitutional Constraint' (n 8) 888.
[11] [2003] 3 All ER 943.

the privacy judgments. In the context of statutory interpretation under section 3 HRA, the courts have expressly stated that their duty to interpret statutes compatibly with the Convention rights, so far as it is possible to do so, is limited by constitutional principles.[12] It could reasonably be expected, therefore, that they would do the same in the context of interpretation of section 6. Similarly, the judges have failed to explain why the general presumption in favour of following Strasbourg jurisprudence, under section 2 HRA, has been displaced in this context, as they did in *Horncastle*.[13] Even if Phillipson's 'weak indirect horizontal effect' model is preferred,[14] conferring a wider discretion on the judiciary in their application of the Convention rights, the decisions themselves do not disclose why such a discretion has been used to weaken the protection afforded in *Von Hannover (No. 1)*. In other words, it is unclear what other factors prevented the courts from affording maximum protection for informational autonomy via sections 2 and 6 HRA.

However, the controversial nature of privacy is an important background to the developments that have taken place in this area. While this thesis has argued in favour of a concept of privacy that provides strong protection for informational autonomy, chapter 1 emphasised that there is no general consensus about how privacy should be defined. Moreover, views as to the value of different types of speech, and how balances should be struck between the competing rights, are equally diverse. These concerns were articulated by Lord Justice Buxton in *Wainwright*, when he recognised that:

> [I]n areas involving extremely contested and strongly conflicting social interests, the judges are extremely ill-equipped to undertake the detailed investigations necessary before the proper shape of the law can be decided. It is only by enquiry outside the narrow boundaries of a particular case that the proper ambit of such a tort can be determined. The interests of democracy demand that such enquiry should be conducted in order to inform, and the appropriate conclusions should be drawn from the enquiry by, Parliament and not the courts.[15]

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[12] For example, Lord Nicholls has suggested that; '[Section 3(1) HRA] is a powerful tool whose use is obligatory…But the reach of the tool is not unlimited. Section 3 is concerned with interpretation…In applying section 3 courts must be ever mindful of this outer limit. The Human Rights Act reserves the amendment of primary legislation to Parliament. By this means the Act seeks to preserve parliamentary sovereignty. The Act maintains that constitutional boundary'; *Re S and Re W (Care Orders)* [2002] 2 AC 291, [37].
[13] *R v Horncastle* [2009] UKSC 14.
[14] G Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law: A Bang or a Whimper?' (1999) 62(6) MLR 824.
[15] [2003] 3 All ER 943, [112].

Lord Bingham, writing extra-judicially, before the enactment of the HRA expressed a similar view; '[m]y preference would be for legislation, which would mean that the rules which the courts applied would carry the imprimatur of democratic approval'.[16] As this thesis demonstrates, however, the impetus of the HRA and lack of government commitment to bring forward legislation,[17] has lead to a strong degree of judicial activism in the development of privacy law. But it may be inferred that these judicial concerns continue to have some impact when the courts decide privacy cases. As Baroness Hale suggested in a public lecture in 2005; '[t]he courts do not act in a vacuum. They are sensitive to the public opinion they detect from the media and from politicians'.[18] Commentators such as Aileen Kavanagh have made similar observations:

> [J]udges have not one but two general tasks when making their decisions: the first is to decide on the substantive merits of the individual case; the second (related) task is to make a decision on the extent and limits of their own institutional role. It would be irresponsible for judges to decide cases whilst remaining oblivious to the possible consequences of their decisions and these include prudential concerns, such as whether a particular judicial decision would produce a backlash in society, whether society is ready for the legal change, whether it might be counterproductive to introduce it at this particular time or whether the legislature or government would then move to curtail the powers of the courts as a result.[19]

Thus Kavanagh's suggestion reflects some of those principles underlying the constitutional constraint model of horizontal effect. The argument, however, has particular force in the privacy context. The press have been hostile to judicial developments in privacy law that are seen to curb their freedom and threaten their commercial success.[20] Their power to disseminate information and ideas to the masses clearly has the potential to sway public opinion against the ECHR, HRA and the judiciary, if they are motivated to do so. It is argued, therefore, that such considerations may well have restricted the courts from interpreting sections 2 and 6 HRA in a way that

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[16] T Bingham, 'Should there be a Law to Protect Rights of Personal Privacy?' [1996] EHRLR 450, 462.
[17] Phillipson, 'Privacy: The Development of Breach of Confidence' (n 5).
[18] B Hale, 'The Sinners and the Sinned Against, Women in the Criminal Justice System' (2005) Longford Lectures <http://www.longfordtrust.org/lecture_details.php?id=10> accessed 12 June 2012.
[19] A Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP 2009) 199. Bellamy has similarly argued that '[d]omestic courts come under greater scrutiny by the media and a broad range of interest groups and, thus, are more aware of public opinion than international courts. As a result, they tend to feel more obliged than their international counterparts to legitimize themselves and gain acceptance of their decisions among the wider public'; R Bellamy, 'Political Constitutionalism and the Human Rights Act' (2011) 9(1) International Journal of Constitutional Law 86, 96.
[20] See P Dacre, 'Speech by Paul Dacre – Editor in Chief of the Dail Mail at the Society of Editors Conference in Bristol' (November 2009) <http://www.societyofeditors.co.uk/page-view.php?pagename=thesoelecture2008> accessed 30 January 2012.

would give stronger effect to Convention principles in domestic law. The effect of this constraint may be most clearly highlighted by the judicial reluctance to protect photographs of celebrities in daily life (arguably required by *Von Hannover (No. 1)*). The likely backlash by the media, and possibly the public, in response to such an extension of the law could be taken to indicate the effect of underlying constraints.

The conclusion of this thesis is, therefore, that while the balance struck in English law, for the misuse of private information, accords with the values underlying privacy to a greater extent than in the pre-HRA era, it currently fails to accord with them fully. It also fails to accord fully with the free speech values considered in chapter 1, in the sense that protection is afforded to media freedom rather than to speech underpinned by the values discussed. Given the controversial nature of privacy law, and the backdrop of constitutional arrangements in the UK, it may be inferred that the courts have been, to some extent, constrained in their development of the tort of misuse of private information, leading to some inconsistency with Strasbourg jurisprudence, particularly in the pre-*Von Hannover (No. 2)/Axel Springer* era, but such disparity has become less significant following the rebalancing of privacy and free speech at Strasbourg.

The Future of Privacy Law

A Bill of Rights Commission, established in March 2011, published its report in December 2012.[21] The Commission's terms of reference were to investigate the 'creation of a UK Bill of Rights that incorporates and builds on all our obligations under the ECHR', and, in addition, to advise on reform of the ECtHR. The political motivation for human rights reform in the UK is, at least in part, a result of the development of privacy law;[22] one aspect of a wider concern to increase Parliamentary autonomy and weaken ties with Strasbourg.[23] In the privacy context, David Cameron has expressed his unease about

[21] Commission on a Bill of Rights, *A UK Bill of Rights? – The Choice Before Us* (2012) <http://www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdf> accessed 20 December 2012.
[22] It is apparent that some Conservative politicians would also like greater executive autonomy on matters such as counter-terrorism policy and prisoner voting rights. See H Fenwick, 'The Human Rights Act or a British Bill of Rights: Creating a Down-Grading Recalibration of Rights Against the Counter-Terror Backdrop?' [2012] PL 468.
[23] H Fenwick, 'The Conservative Anti-ECHR Stance and a British Bill of Rights – Rhetoric and Reality' (UK Constitutional Law Group, 1 November 2011) <http://ukconstitutionallaw.org/blog/> accessed 10 December 2011.

'judges…making the law rather than Parliament', and their use of super-injunctions.[24] While the Attorney General, Dominic Grieve, in a 2011 speech, stated that 'there is no question of the United Kingdom withdrawing from the Convention' and 'the government is not intending to limit or erode the application [of] any of the rights and freedoms in the Convention', it nevertheless aims to 'redress' certain balances made domestically.[25] At the domestic level, Grieve suggested that this might be achieved by better definition of the requirements of section 2 HRA, and possibly a right of rebuttal allowing the Supreme Court to challenge a decision of the ECtHR.[26] The danger for privacy law is therefore that a new provision (similar to section 12(4) HRA) could be enacted, giving greater weight to Article 10. A new version of section 2, possibly compelling the judiciary to depart from Strasbourg jurisprudence in a range of circumstances, could give practical domestic effect to such a rebalancing clause.[27]

The Commission on a Bill of Rights failed to reach a consensus about whether the UK should have a Bill of Rights, but did agree that nothing should be altered until after the outcome of the Scottish referendum on independence in 2014.[28] However, the majority of the panel agreed that Britain should have a new Bill of Rights in principle, with some individual members suggesting that rights could be more clearly defined and the balance adjusted between them. To a large extent, the Commission avoided confronting the likelihood that rebalancing clauses, contained in a British Bill of Rights, would eventually lead to the UK being in breach of its treaty obligations under the ECHR. The Conservative view appears to be that a Bill of Rights, together with reform of the ECtHR, could result in greater Parliamentary autonomy on human rights matters without the need for the UK to withdraw from the ECHR.

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[24] O Bowcott, Privacy law should be made by MPs, not judges, says David Cameron' *Guardian* (21 April 2011) <http://www.guardian.co.uk/media/2011/apr/21/cameron-superinjunctions-parliament-should-decide-law> accessed 30 January 2012.

[25] D Grieve, 'Attorney General: European Convention on Human Rights-Current Challenges' (London, October 2011) <http://www.attorneygeneral.gov.uk/NewsCentre/Speeches/Pages/AttorneyGeneralEuropeanConventionHumanRights%E2%80%93currentchallenges.asp> accessed 25 May 2012.

[26] This suggestion is, no doubt, influenced by the government's continued reluctance to bring forward legislation granting prisoner voting rights, following the ECtHR decision in *Greens and MT v United Kingdom* App no 60041/08 (ECHR 1826, 23 November 2010).

[27] H Fenwick, 'The Human Rights Act or a British Bill of Rights: Creating a Down-Grading Recalibration of Rights Against the Counter-Terror Backdrop?' [2012] PL 468, 477.

[28] The resignation of Commissioner Michael Pinto-Duschinsky in March 2012 was taken as an indication that radical change would not be recommended by the Commission; C Urquhart, 'Bill of Rights Commissioner Resigns over Bypass of Commons' *Guardian* (11 March 2012) <http://www.guardian.co.uk/law/2012/mar/11/uk-bill-of-rights-kenneth-clarke> accessed 11 March 2012.

The Brighton Declaration on reform of the ECHR did not include a 'democratic override' option for Member States and, although the Preamble to the Convention is to be amended to place greater emphasis on subsidiarity and the margin of appreciation,[29] the version adopted is a weaker version than an earlier draft.[30] Thus, the Conservative anti-ECHR and HRA rhetoric is yet to deliver results.[31] While reform may not be imminent, and the Bill of Rights Report failed to deliver concrete recommendations, it is likely that the Conservative Party, in its next election manifesto, will put forward proposals concerning the rebalancing of rights, with the potential to significantly impact upon privacy law in the future if it was to win the election and, for example, repeal or amend the HRA, and grant free speech priority in a Bill of Rights. Thus, depending on which party wins the next general election, the future of domestic privacy protection is somewhat uncertain.

In contrast, questions raised by the Leveson Inquiry about the relationships between politicians and media organisation, in light of the 2011 phone-hacking scandal, might discourage politicians from taking steps to grant greater protections to the media. The public outrage following the 2011 revelations would suggest that there is no public mood in support of enhancing the powers of the press. The Leveson Report,[32] published in November 2012, recommended replacement of the PCC with a new independent, regulatory body, underpinned by legislation, with the power to impose sanctions for breaches of its code of practice. While the implementation of these recommendations is still uncertain, the weight of public opinion supporting full implementation may make available an alternative route for the recognition of privacy rights.[33]

The recent Joint Committee report on privacy and injunctions concluded that, in light of the most recent privacy cases; 'the courts are now striking a better balance between the right to privacy and the right to freedom of expression, based on the facts of the

[29] The precise wording of the amendments to the Preamble remain to be seen.
[30] M Elliott, 'The Brighton Declaration: Where Now for the Human Rights Act and the Bill of Rights Debate?' (UK Constitutional Law Group, 25 April 2012) <http://ukconstitutionallaw.org/blog/> accessed 30 April 2012.
[31] Fenwick, 'The Human Rights Act or a British Bill of Rights' (n 27).
[32] The Leveson Inquiry, *An Inquiry into the Culture, Practices and Ethics of the Press – Report* (2012) <http://www.officialdocuments.gov.uk/document/hc1213/hc07/0780/0780.pdf> accessed 3 December 2012.
[33] See, for example, the petition set up by the 'Hacked Off' campaign; available at <http://hackinginquiry.org/news/sign-the-petition-implement-leveson-support-the-victims/> accessed 15 January 2013.

individual case'.[34] At present, there appears to be no great pressure pushing the judiciary in the direction either of enhanced privacy or speech protection. Therefore, despite the uncertainty about the future of domestic rights protection under a Bill of Rights, the greatest imminent risk to the future of privacy law may be as result of the indirect influence of these debates on the Strasbourg Court.[35] As this thesis has argued, such an influence may have already resulted in an acceptable degree of alignment between the levels of privacy protection achieved by the Strasbourg and domestic courts. However, a significant gulf remains between the way in which the balance between privacy and free speech is struck by English courts and the balance demanded by the justifications underpinning the concept of informational autonomy.

[34] Joint Committee on Privacy and Injunctions, *Privacy and Injunctions* (2010-12, HL 273, HC 1443) [32].
[35] See above at p 108.

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