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## Max Mosley and the English Right to Privacy

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# MAX MOSLEY AND THE ENGLISH RIGHT TO PRIVACY

## INTRODUCTION

On March 30, 2008, the British weekly tabloid *News of the World* published a characteristically scandalous and salacious piece of journalism.<sup>1</sup> Entitled “F1 Boss Has Sick Nazi Orgy with Hookers,”<sup>2</sup> the article described the participation of Max Mosley,<sup>3</sup> then-President of the Fédération Internationale de l’Automobile (“FIA”)<sup>4</sup> in a sado-masochistic orgy with multiple prostitutes.<sup>5</sup> The article was accompanied by images of the alleged orgy, and *News of the World*’s website simultaneously published the print edition’s content along with edited video footage of the sex acts.<sup>6</sup> A follow-up story ran on April 6, 2008, in which one of the women involved in the sex acts was interviewed by the newspaper.

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1. The *News of the World* was notorious for its invasive investigative reports, especially those focused on celebrities. As one of Britain’s “Red Top” tabloid newspapers (so-called for their flashy red mastheads), it focused primarily on entertainment news. And with a circulation around three million people, it was one of the most widely read English newspapers. Mark Sweney, *News of the World Bucks Sunday Red-Top Trend with Slight Rise*, *GUARDIAN* (UK), Oct. 16, 2009, <http://www.guardian.co.uk/media/2009/oct/16/abcs-sunday-mid-market-newspapers>.

2. *Mosley v. News Group Newspapers Ltd.*, [2008] EWHC (QB) 1777, [2] (Eng.).

3. Max Mosley is prominent in his own right as a world sports figurehead. However, his celebrity is magnified by his identity as the scion of one of Great Britain’s most notorious political families. His father, Sir Oswald Mosley, served as the leader of the British Union of Fascists and his mother, Diana Mitford, was one of the infamous Mitford sisters, well-known for their involvement with the luminaries and villains of twentieth century Europe. Mitford was a proud intimate of notable fascist leaders such as Adolf Hitler and General Francisco Franco; indeed, the only guests at her wedding ceremony to Sir Oswald aside from the witnesses were Nazi propaganda minister Joseph Goebbels and Hitler himself. PHILLIP REES, *BIOGRAPHICAL DICTIONARY OF THE EXTREME RIGHT SINCE 1890*, 269–70 (1990). See also Ashling O’Connor & Ed Gorman, *Mosley’s Son Faces Calls to Quit As Formula One Chief After ‘Nazi’ Orgy*, *TIMES* (LONDON), Mar. 31, 2008, at 5. Mosley has largely avoided politics because of his name, but this family history and a past unwillingness to truly distance himself from the views of his parents certainly made the allegations of a “Nazi-theme” orgy all the more damaging to his public reputation. Geoffrey Levy, *Shadow of the Father*, *DAILY MAIL* (UK), Apr. 2, 2008, at 22. See also Caroline Gammell, *Profile Max Mosley*, *DAILY TELEGRAPH* (UK), July 25, 2008, at 4 (reporting Mosley’s court testimony that “[a]ll my life I have had hanging over me my antecedents, my parents.”). The *News of the World* sought to make the most of Mosley’s family history, boasting that the story contained “all that’s decent to print on the episode that disgraced even HIS family’s shame-drenched name.” *Mosley*, [2008] EWHC (QB) 1777, [40].

4. The FIA is the nonprofit organization that operates as the governing body for world motor sport, administering the rules and regulations for Formula One racing. Mosley served as president of the organization from 1993 until October 23, 2009, when Jean Todt won the FIA presidency in a lopsided victory after being backed by the retiring Mosley. Ian Parkes, *Join Me: New FIA Chief Todt Wins Landslide*, *DAILY POST* (LIVERPOOL), Oct. 24, 2009, at 29.

5. *Mosley*, [2008] EWHC (QB) 1777, [4].

6. *Id.* at [2].

After a failed attempt at an injunction,<sup>7</sup> Mosley predictably filed suit for damages against News Group Newspapers Ltd., the publisher of *News of the World*. However, his initial suit was not one for defamation or libel because the allegations in the story were, for the most part, factually correct.<sup>8</sup> Instead, Mosley alleged both “breach of confidence and/or the unauthorised disclosure of personal information,”<sup>9</sup> and claimed the latter offense had infringed his “rights of privacy as protected by Article 8 of the European Convention on Human Rights and Fundamental Freedoms” (“Convention”).<sup>10</sup> For these alleged abuses, Mosley sought exemplary<sup>11</sup> and compensatory damages.<sup>12</sup>

Columnists in the English press were noticeably anxious about the nature of Mosley’s claims. Upon seeing the grounds for the lawsuit, a few commentators went so far as to characterize Mosley’s suit as a major threat to press freedom.<sup>13</sup> The claim of breach of confidence was common enough, but the principal reason for the apprehension was Mosley’s insistence that his “rights of privacy” had been violated. To recognize this claim, journalists opined, would be contrary to the history and spirit of

7. *Mosley v. News Group Newspapers (Mosley Injunction Request)*, [2008] EWHC (QB) 687.

8. Truth, or “justification,” of course, remains a defense for libel under both American and English law. See *Reynolds v. Times Newspapers Ltd.*, [1999] UKHL 45, [1999] 4 All E.R. 609, x (“Truth is a complete defence. If the defendant proves the substantial truth of the words complained of, he thereby establishes the defence of justification.”). Ultimately, Mosley did not dispute the basic truth of the *News of the World*’s claims with this lawsuit. He admitted to engaging in S&M role-playing and that he had paid the women £500 each for their services. Graham Tibbetts, *Mosley Admits Passion for S&M Sex But Denies Nazi Role-Playing*, DAILY TELEGRAPH (UK), July 7, 2008, at 9. However, some of the women involved stated that they often engaged in sexual activity of this kind for free and disputed their characterization as “prostitutes.” *Mosley*, [2008] EWHC (QB) 1777, [121]. The *Mosley* decision also addressed a key factual error in the *News of the World*’s reporting which could have been the basis for a defamation suit. It was determined in the opinion that the orgy might have had a “German military” or prison camp theme, but not the specifically “Nazi theme” alleged by the *News of the World*. *Mosley*, [2008] EWHC (QB) 1777, [161], [170]. Mosley subsequently seized on this factual determination in bringing a libel suit against the *News of the World* on March 30, 2009. Oliver Luft, *Max Mosley Launches Libel Action Against News of the World*, GUARDIAN (UK), Apr. 3, 2009, <http://www.guardian.co.uk/media/2009/apr/03/max-mosley-news-of-the-world>.

9. *Mosley*, [2008] EWHC (QB) 1777, [3].

10. *Id.* Article 8 of the European Convention on Human Rights, incorporated into English law through the Human Rights Act of 1998, provides that “[e]veryone has the right to respect for his private and family life, his home and his correspondence.” European Convention on Human Rights, § 1, art. 8, Nov. 4, 1950.

11. “Exemplary damages” is the commonly used term for punitive damages in the U.K. The two terms are essentially synonymous. See BLACK’S LAW DICTIONARY 418–19 (8th ed. 2004).

12. *Mosley*, [2008] EWHC (QB) 1777, [173].

13. See, e.g., Stephen Glover, *Privacy v Morality*, DAILY MAIL (UK), July 12, 2008, at 16 (“Even accepting the paper’s many failings, I believe [a ruling for Mosley] would be a disastrous outcome for . . . freedom of the Press.”); Giles Hattersley, *Bend Over, Free Speech, This Is Going to Hurt*, SUNDAY TIMES (LONDON), July 13, 2008, at 13 (discussing the potential “chilling effect” of Mosley’s victory and listing stories that would be potentially barred from publication if Mosley were to win).

English law.<sup>14</sup> After all, less than five years had passed since the House of Lords flatly rejected the “previously unknown tort of invasion of privacy” as a cause of action.<sup>15</sup> During the run-up to the decision in *Mosley*, there was thus much discussion of a potential landmark privacy ruling.<sup>16</sup> As the trial progressed, the major theme of the *Mosley v. News Group Newspapers Ltd.* coverage shifted from the salacious facts being tittered about in court<sup>17</sup> to whether the outcome would substantially change English law.<sup>18</sup> Specifically, the issue became how the press could treat private information, especially in the context of a celebrity exposé.

On July 24, 2008, Mr. Justice David Eady<sup>19</sup> of the Queen’s Bench delivered the judgment of the court. The court held that Article 8 of the

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14. See, e.g., Hattersley, *supra* note 13 (“Britain has never had a right to privacy.”); Graham Shear & Alison Green, *Is This the End of the Kiss-and-Tell?*, *TIMES* (LONDON), May 13, 2008, at 1 (“Traditionally, the UK had no separate right of privacy.”). Indeed, there was a great deal of weight to this basic assertion, for as this Note explores below, both Parliament and the English judiciary had repeatedly and explicitly rejected any distinct right to privacy before 2000. Mosley indicated some awareness of this fact by simultaneously filing suit in France, where the laws regarding privacy and defamation were historically more favorable to claimants. Nick Armstrong, *Legal Opinion: Max Mosley Goes Forum Shopping in Paris*, *INDEPENDENT* (UK), June 4, 2008, at 32 (noting that French privacy law is “stricter and more efficient than in England,” offers criminal penalties, and that in France, Mosley “stands a greater chance of [the judgment] being in his favour than in London”).

15. *Wainwright v. Home Office*, [2001] EWCA (Civ) 2081, [2003] 3 All E.R. 943.

16. See, e.g., John F. Burns, *Decision Is Near in Sensational London Trial of Privacy Suit by a Consenting Adult*, *N.Y. TIMES*, July 15, 2008, at A12 (“The outcome of the case is expected to be a legal landmark.”); Ian Burrell, *Ze Fine Line Between Privacy and Free Speech*, *INDEPENDENT* (UK), July 7, 2008, at 12 (characterizing the case as “the frontline in a legal battle for freedom of expression” and quoting a journalism professor’s opinion that “[t]his is a landmark case and journalism has everything to fear—and not just tabloid journalism”).

17. Jenni Murray, *Nothing Beats a Good Sex Scandal*, *OBSERVER* (LONDON), July 13, 2008, <http://www.guardian.co.uk/commentisfree/2008/jul/13/pressandpublishing.privacy> (observing that the female witnesses “could hardly suppress their giggles in the witness box”).

18. See Burrell, *supra* note 16 ([T]here is little laughter in the ranks of the British media, where the realisation of the potential implications of this case is beginning to take hold.”); Hattersley, *supra* note 13 (opining that the trial would “indeed be funny, if it weren’t so serious” and that the real issue was “the right to privacy versus freedom of expression”); see also Shane Hegarty, *Flogging Press Freedom*, *IRISH TIMES*, July 12, 2008, at 2 (“[T]he press’s motivation for reporting the case lies not just in its mix of titillation, prurience and old-fashioned British sex comedy, but because the whippings, Luftwaffe uniforms and bloody bottoms are the ingredients of a trial that could seriously alter British press freedoms and trigger further cases.”); David Rawlinson, *Opinion: David Rawlinson on the Max Mosley Case*, *DAILY POST* (LIVERPOOL), July 29, 2008, at 14 (“[T]he fact that Mr. Mosley pursued an action of breach of privacy has fascinated readers almost as much as the allegations.”).

19. Eady is the most senior High Court judge and hears the majority of the Court’s high-profile libel and confidentiality cases. Having Eady preside over the case added an additional degree of controversy because of the press’s perception of his involvement in the crafting of an English right to privacy. In fact, even before *Mosley*, he had come under some media scrutiny for decisions in high profile libel and confidentiality cases. See Stephen Glover, *Judges’ Decisions Need Careful Scrutiny to Protect a Free Press*, *INDEPENDENT* (UK), May 20, 2007, <http://www.independent.co.uk/news/media/opinion/stephen-glover/stephen-glover-on-the-press-449696.html> (characterizing Justice Eady as “a threat to a free Press” and predicting future controversial decisions from him); Robert Spencer,

Convention mandated the protection of a privacy interest distinct from traditional breach of confidentiality and that *News of the World* violated this right.<sup>20</sup> In its decision, the court relied on a number of recent cases that helped establish this right.<sup>21</sup> It also ruled that the paper's allegations of a Nazi theme were incorrect based on the record, and that there was thus no public interest in the story to overcome protection of Mosley's right to privacy.<sup>22</sup> The court stopped short of awarding exemplary damages, but did award £60,000 in compensatory damages,<sup>23</sup> a record amount for an action asserting a right to privacy, and payment of Mosley's attorneys fees, estimated to be around £450,000.<sup>24</sup>

The announcement of the decision gained the full attention of the press worldwide.<sup>25</sup> Despite the court's assertion that this was not a "landmark"

*Battling Censorship: Speak Up and Speak Out*, WASH. TIMES, July 20, 2007, at A19 (noting in an op-ed that a plaintiff "had the good fortune of having the case heard by Judge David Eady, who has a long history of strange rulings in libel cases - rulings that generally ran in favor of censorship and against free speech"). Due to this role in the expansion of confidentiality and interpretation of the Human Rights Act, Eady received an unusual amount of negative personal attention from the media during the *Mosley* case, much of it characterizing him as the primary architect of modern English privacy law. See, e.g. Frances Gibb, *Lawyer Who Used to Act for the Red-Tops Became Judge Who Championed Privacy*, TIMES (LONDON), July 25, 2008, at 21 ("By his own admission, his rulings have not made him popular and he has 'come in for quite a bit of stick.'"); Profile, *Mr. Justice Eady, Defender of the Nation's Privacy*, DAILY TELEGRAPH (UK), Nov. 13, 2008, <http://www.telegraph.co.uk/news/newsttopics/profiles/3453978/Profile-Mr-Justice-Eady-defender-of-the-nations-privacy.html> ("The judge's critics argue that he has introduced his own 'Eady's law' of privacy by repeatedly ruling against newspapers and building up a formidable body of case law on which public figures can rely when they wish to gag the media."); Quentin Letts, *Mr. Justice Eady Profile: As Cold As a Frozen Haddock, He Hands Down His Views Shorn of Moral Balance*, DAILY MAIL (UK), July 25, 2008, at 6 (arguing in an op-ed piece that these decisions are "too important, surely, to be left in the hands of one distinctly single-minded member of the judiciary"). The grounds for this skepticism were not altogether unfounded, as some of the opinions Eady cited as precedent in his decision were in fact ones he had authored. See Burrell, *supra* note 16 (summarizing Eady's past privacy decisions). Nevertheless, some of the journalism—most notably the Letts piece—is provocatively critical of Eady's jurisprudence in the privacy cases, and also provides a number of details about the judge's own private life. Regardless of one's sentiments on the matter, the irony in publishing a searching inquiry and critique discussing the personal life of a judge who has just presided over a major privacy case should be appreciated.

20. *Mosley*, [2008] EWHC 1777 [99].

21. *Id.* at [9], [14], [18].

22. *Id.* at [134].

23. *Id.* at [236].

24. Helen Pidd, *Punishment That Was Not a Crime: Why Mosley Won in the High Court*, GUARDIAN (UK), July 25, 2008, at 4. Indeed, the total cost of the lawsuit to the *News of the World* was in excess of £900,000 and may have approached £1 million. Stephen Brook, *Max Mosley Privacy Case Cost News of the World Almost £1m, Editor Tells MPs*, GUARDIAN (UK), May 5, 2009, <http://www.guardian.co.uk/media/2009/may/05/max-mosley-colin-myler>.

25. William Lee Adams, *Mosley's Win: No 'Nazis' at the Orgy*, TIME, July 24, 2008, <http://www.time.com/time/world/article/0,8599,1826232,00.html>; John F. Burns, *British Judge Rules Tabloid Report Tying Grand Prix Boss to 'Orgy' Violated Privacy*, N.Y. TIMES, July 25, 2008, at A6; Ben Farmer, Andrew Pierce & Caroline Gammell, *Max Mosley Wins Record Privacy Damages Over*

decision,<sup>26</sup> a great number of stories labeled the ruling as such.<sup>27</sup> Unsurprisingly, much of the coverage and commentary was negative, as vocal journalists, citing concerns for the survival of their industry, complained of a judicially created right that effectively allowed the rich to gag the press at their leisure.<sup>28</sup>

Indeed, *Mosley* marked a landmark moment for the English right to privacy for several reasons, which this Note explores in four sections. Part I illustrates how *Mosley*'s recovery for invasion of privacy is at odds with centuries of English common law and marks the triumph of a movement that has circumvented prior judicial and legislative refusals to recognize such a stand-alone right. Part II explains how, despite England's long history of denying a privacy tort's existence, the last ten years have seen the necessary emergence and evolution of a de facto right to privacy under the influence of the European Convention on Human Rights. Part III analyzes the *Mosley* opinion itself: how it drew upon recent precedent, how it extends that precedent, and how it crystallizes the balancing test for

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*News of the World Nazi Orgy Slur*, DAILY TELEGRAPH (UK), July 24, 2008, <http://www.telegraph.co.uk/news/majornews/2455092/Max-Mosely-wins-record-privacy-damages-over-News-of-the-World-Nazi-orgy-slur.html>; Andrew Pierce, *It May Be Perverted But It's None of Our Business*, NEW ZEALAND HERALD, July 26, 2008, at A28; Hasan Suroor, *In Brown's Britain, No News Is Good News*, THE HINDU, July 28, 2008, at 10; John F. Burns, *Racing Chief Wins British Privacy Trial*, INT'L HERALD TRIBUNE, Jul. 25, 2008, at 3.

26. Recognizing the controversy surrounding his ruling, Eady took great pains to couch his decision as one guided by precedent: "It is perhaps worth adding that there is nothing 'landmark' about this decision . . . . [i]t is simply the application to rather unusual facts of recently developed but established principles." *Mosley*, [2008] EWHC (QB) 1777, [234].

27. See, e.g., Paul Harris, *What Price Morality*, DAILY MAIL, July 25, 2008, at 1 ("The ruling was being seen last night as a landmark in allowing highly restrictive privacy legislation to creep in from Europe, although Mr. Justice Eady said his decision would not inhibit investigative journalism in the public interest."); Suroor, *supra* note 25 (characterizing it as "a landmark judgment which, if it were to become a precedent, could drive many British newspapers out of business"). Indeed, many directly challenged the court's assertion, with *The Times* opining that "Mr Eady was quite wrong to claim that 'there is nothing 'landmark' about this decision' and that in fact "[t]he finding has long-term consequences, both for English law and for British journalism." Comment, *The Mosley Judgment*, TIMES (LONDON), July 25, 2008, at 2.

28. See *The Mosley Judgment*, *supra* note 27, at 2 (suggesting that privacy has surpassed libel and "may prove the bigger hurdle in reporting complicated matters of public interest"); William Underhill, *Sex, Privacy, and Max Mosley*, NEWSWEEK, July 24, 2008, <http://www.newsweek.com/id/148617> (transcribing an interview with Stephen Rigley, News Editor of the *Sunday Express*, in which he calls the decision "a black day for the freedom of the press in Britain"). Perhaps the best and most extreme example of the press outrage sparked by the decision was a public speech given by *The Daily Mail*'s Editor in Chief, Paul Dacre. In an impassioned attack on the *Mosley* ruling, Dacre slammed Eady's privacy decisions as "arrogant and amoral judgments," which were allowing "the corrupt and the crooked to sleep easily in their beds" while "undermining the ability of mass-circulation newspapers to sell newspapers in an ever more difficult market." Oliver Luft, *Daily Mail Editor-in-Chief Paul Dacre Criticises BBC Growth and Privacy Rulings*, GUARDIAN (UK), Nov. 10, 2008, <http://www.guardian.co.uk/media/2008/nov/10/pauldacre-dailymail>.

privacy interests going forward. This section will argue that *Mosley* itself is an atypical “landmark” case because the heavy lifting for the decision had been done in earlier cases. It will also demonstrate that the holding of *Mosley* does not present as grave a threat to the press as the media claimed. Finally, Part IV addresses what may eventually be the lasting legacy of Mosley’s case: his recent failed appeal to the European Court of Human Rights in *Mosley v. United Kingdom*.<sup>29</sup> In this section, I argue that the *Mosley* decision in the English court ought to be the furthest extent of this new right to privacy, and that the Court of Human Rights recognized this in its recent opinion. Part IV concludes by discussing some of the dangers of Mosley’s demand for a system of prior notification and why the court rejected such a requirement.

#### I. THE HISTORICAL REJECTION OF PRIVACY AND RELIANCE ON CONFIDENTIALITY LAW

The *Mosley* opinion relied on precedent in protecting a right to privacy, but even the court admitted that its guiding doctrine was “recently developed.”<sup>30</sup> Indeed, from a more expansive vantage point, the right recognized and protected in *Mosley* is a very novel one. English law historically rejected the recognition of a distinct “right to privacy.”<sup>31</sup> Until recently, this held true for both Parliament and the judiciary.<sup>32</sup> This is not to say that “privacy” as an interest was never protected, it was simply never considered a stand-alone right, especially insofar as the “right to privacy” is understood to be “the interest in controlling the disclosure of public information about oneself.”<sup>33</sup> When faced with allegations of an invasion of personal privacy, English courts traditionally allowed recovery only if the claim came in conjunction with the assertion of a more

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29. *Mosley v. United Kingdom*, App. No. 48009/08, European Court of Human Rights, Statement of Facts (2009), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=857906&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>. For more information about the pending suit, see Steeles Law Firm Press Release, *Max Mosley Application to the European Court of Human Rights*, Oct. 6, 2008, <http://www.steeleslaw.co.uk/news-item.aspx?id=5d0129b9-7300-4df5-a73b-150124e6c507>; Peter Burden, *Revenge of the Named and Shamed*, SUNDAY INDEPENDENT (UK), Jan. 11, 2009, at 26 (discussing Mosley’s plan to sue the government in the ECHR).

30. *Mosley*, [2008] EWHC (QB) 1777, [234].

31. Alec Samuels, *Privacy: Statutorily Definable?*, 17 STAT. L. REV. 115, 115 n.1 (1996).

32. Gerald Dworkin, *The Younger Committee Report on Privacy*, 36 MOD. L. REV. 399, 399 (1973).

33. Helen Fenwick & Gavin Phillipson, *Confidence and Privacy: A Re-Examination*, 55 CAMBRIDGE L.J. 447, 447 n.4 (1996).

established right.<sup>34</sup> These included, but were not limited to, the equitable remedy of breach of confidence, several torts related to intentional infliction of personal harm, and the principles governing the appropriate use of police powers.<sup>35</sup> Of these indirect protections for privacy, confidence was the path most frequently traversed.<sup>36</sup>

The English breach of confidence tort has its foundation in the 1849 case of *Prince Albert v. Strange*.<sup>37</sup> In *Prince Albert*, William Strange came into possession of etchings and drawings that Queen Victoria and her husband, Prince Albert, had made of the royal family.<sup>38</sup> The court enjoined his attempts to sell a catalog based on the etchings under the theory that his possession “originated in a breach of trust, confidence, or contract” by the clerk of the royal printer, and that the duty of confidentiality owed by the clerk to the Queen and Prince extended to subsequent holders of the etchings.<sup>39</sup> Although *Prince Albert* was not actually the first breach of confidence case,<sup>40</sup> its fundamentality to the doctrine has gone unquestioned because it provides perhaps the clearest example of a case relying on a theory of confidence, it involves famous plaintiffs, and it extended the doctrine to cover breaches by third parties.<sup>41</sup>

The modern English confidence tort saw its most lucid articulation in the 1969 case of *Coco v. Clark*.<sup>42</sup> In *Coco*, the court declared three elements necessary for the formulation of a breach of confidence claim: (1) the information had to have “the necessary quality of confidence about it”; (2) it must have “been imparted in circumstances importing an

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34. James K. Weeks, *Comparative Law of Privacy*, 12 CLEV.-MARSHALL L. REV. 484, 484–85 (1963). Weeks categorized a number of cases and concluded that:

Where privacy, which is the right of seclusion as to one’s name, person, or representation of self, is associated with an action for libel or slander, copyright infringement, breach of contract, trespass, assault and battery, or similar type of action, the Anglo-American courts seem perfectly willing as a gratuitous bonus, to grant it protection. It is only where this right to seclusion stands naked and alone that many Anglo-American courts, and particularly the English, have encountered extreme difficulty in bringing themselves to recognize such a right, and allow a remedy for that alone.

35. *Id.*

36. Lauren B. Cardonsky, Note, *Towards a Meaningful Right to Privacy in the United Kingdom*, 20 B.U. INT’L L.J. 393, 399 (2002).

37. (1849) 41 Eng. Rep. 1171 (Ch.).

38. *Id.*

39. *Id.*

40. See, e.g., *Abernethy v. Hutchinson*, (1825) 26 Eng. Rep. 1313 (Ch.); *Yovatt v. Winyard*, (1820) 37 Eng. Rep. 425 (Ch.); *Duke of Queensbury v. Shebbeare*, (1758) 28 Eng. Rep. 924, 924 (Ch.). For a more comprehensive summary of the evolution of the law of confidentiality, see Neil M. Richards & Daniel J. Solove, *Privacy’s Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123, 134–38 (2007).

41. *Id.* at 160.

42. [1969] R.P.C. 41 (UK).



obligation of confidence”; and (3) there must have been “unauthorised use of that information to the detriment of the party communicating it.”<sup>43</sup>

Since then, scholars have praised the adaptability and practicality of protecting privacy interests through confidentiality.<sup>44</sup> Because this approach focuses on the nature of the relationship between the parties and not on the nature of the information itself, it has some distinct advantages over the traditional American or European right to privacy.<sup>45</sup>

However, the unsatisfactory nature of confidence, especially its failure to adequately protect against public disclosure of private facts not imparted to another, has also been long noted and lamented by scholars of English law.<sup>46</sup> Because of confidentiality’s traditional focus on prior

43. *Id.* at 46. As this formulation demonstrates, the breach of confidentiality claim was not designed at the outset to protect private information that was obtained by unfamiliar third parties. While undoubtedly offering protection against the misuse of “private” information, an essential element of the claim was a disclosure of some kind. The tort was not created to protect those who guarded secrets, but those that entrusted them to others. Thus, for the purposes of recognizing a breach of confidentiality, the information was essentially immaterial with regard to content, and the focus of the tort was primarily on whether the information was imparted with an understanding that it be kept in confidence. Richards & Solove, *Privacy’s Other Path*, *supra* note 40, at 166. But just because this is shown and the *Coco* factors are met does not necessarily mean a successful claim has been made; confidences that are contrary to the public interest by virtue of being criminal or tortious or which are already in the public domain will not be enforced. R.G. TOULSON & C.M. PHIPPS, CONFIDENTIALITY 41 (1997).

44. *See, e.g.*, Richards & Solove, *Privacy’s Other Path*, *supra* note 40, at 166; Fenwick & Phillipson, *Confidence and Privacy*, *supra* note 33, at 447.

45. For example, the American right to privacy draws little or no distinction between information imparted to one or several individuals with an expectation of confidentiality and widespread publication of that information. Once others are let in on the information, American courts are reluctant to find it private. In direct contrast, English courts are much less willing to find that information loses its confidential nature simply because a few others may have viewed it. *See* Richards & Solove, *Privacy’s Other Path*, *supra* note 40, at 159–60. In this way, English courts have protected some substantial privacy interests. The most famous is perhaps the court’s protection of the details of a lesbian affair in which one of the parties was the lover of a married woman murdered by her husband after he discovered the two women *in flagrante delicto*. *See* *Stephens v. Avery*, [1988] F.S.R. 510, 518 (holding that when information is “communicated to the world,” it surrenders its confidential status, but “this will not necessarily be the case if the information has previously only been disclosed to a limited part of the public”). More recently, this conception of confidentiality has protected a famous actor’s lawsuit to enjoin the publication of information and letters related to a homosexual affair which were provided by the actor’s lover. *See* *Barrymore v. News Group Newspapers, Ltd.*, [1997] F.S.R. 600, 602 (Ch.)(U.K.) (holding that “the information about the information is for the relationship and not for a wider purpose”).

46. Gerald Dworkin, Notes of Cases, *Privacy and the Press*, 24 MOD. L. REV. 187, 187 (1961) (“Surely it is time it was realised in this country that it is necessary for certain interests in privacy to be protected legally and not confine this protection to parasitic damages arising out of defamation and damage to contract or property rights.”); Brian Neill, *The Protection of Privacy*, 25 MOD. L. REV. 393, 400 (1962) (“It seems remarkable that English law, which in many other fields has kept pace with changes in the public *mores*, should have so far failed to evolve any general concept of privacy.”); T.L. Yang, *Privacy: A Comparative Study of English and American Law*, 15 INT’L & COMP. L.Q. 175, 175 (1966) (“The publication of private and personal affairs, often highly embarrassing and distressing, in

relationships, there was little or no redress in situations where an unknown party came by the information in the absence of such a relationship.<sup>47</sup> This stands in contrast to the traditional American right to privacy.<sup>48</sup> As early as 1963, the English practice of stretching or failing to stretch the confidentiality doctrine to fit clear violations of privacy was viewed by some as impractical.<sup>49</sup> And with the resurgence of tabloid journalism of the same sort decried by Warren and Brandeis in their seminal article,

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the gossip columns of some newspapers is not controlled in any way by our law.”) *But see* Raymond Wacks, *The Poverty of “Privacy”*, 96 LAW Q. REV. 73, 74 (1980) (arguing that “the concept of ‘privacy’ be refused admission to English law”).

47. Richards & Solove, *Privacy’s Other Path*, *supra* note 40, at 166.

48. Protection against the public disclosure of private facts lay at the heart of the American privacy tort at its inception. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 216 (1890) (“[T]he matters of which the publication should be repressed may be described as those which concern the private life, habits, acts, and relations of an individual.”). Of course, Warren and Brandeis conceived of an exception for newsworthiness or matters traditionally believed to be in the public interest, such as when the individual was a public official and the facts pertained to his official duties. *Id.* (noting that to be unlawful, the private facts disclosed must “have no legitimate connection with his fitness for a public office which he seeks or for which he is suggested” and no “bearing upon any act done by him in a public or quasi-public capacity”). This conception was also adopted by William Prosser. *See* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960). In his seminal article “Privacy,” widely considered to be second only to Warren & Brandeis’s piece in its influence, Prosser consolidated several decades’ worth of research and observations on privacy from his casebooks and treatises to argue that the “right to privacy” was in fact four distinct torts: (1) Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs; (2) Public disclosure of embarrassing facts about the plaintiff; (3) Publicity which places the plaintiff in a false light in the public eye; and (4) Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness. *Id.* at 389. This doctrinal understanding of the privacy tort has been embedded into American law through both case law and the Second Restatement of Torts. *See* *Hamburger v. Eastman*, 106 N.H. 107, 206 A.2d 239 (1964); RESTATEMENT (SECOND) OF TORTS § 652A (1977). For a detailed discussion of the evolution of American privacy law, see Neil M. Richards & Daniel J. Solove, *Prosser’s Privacy Law: A Mixed Legacy*, 98 CAL. L. REV. 1887 (2010). Conceivably, Mosley could have brought suit under the intrusion or public disclosure theories of the tort had he been in the United States. One could even make a case for false light because of the “Nazi” characterization of the events. Of course, these claims in an American court, especially coming from a celebrity, would likely be trumped today by the newspaper’s reliance on the First Amendment’s protection of freedom of the press. This is especially true after cases such as *Smith v. Daily Mail*, 443 U.S. 97 (1979), *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), and *Bartnicki v. Vopper*, 523 U.S. 514 (2010), which, while not laying down a bright-line rule, indicate that the state cannot punish the publication of lawfully obtained information of public interest. *See* Neil M. Richards, *The Puzzle of Brandeis, Privacy, and Speech*, 63 VAND. L. REV. 1295, 1345 (2010).

49.

The English Courts have even gone to greater extremes to give protection where they obviously realize protection should exist, and in consequence have bent the existing law considerably in the process. It would appear that the far simpler expedient of calling “a spade a spade” would afford greater protection and give to other hesitant judges throughout the world the courage to forge new paths into the apparent wilderness of privacy.

Weeks, *supra* note 34, at 490.

“The Right to Privacy,”<sup>50</sup> the shortcomings of relying on confidentiality and a patchwork of other rights became all too apparent.<sup>51</sup>

The most notorious judicial rejection of a stand-alone right to privacy in English law occurred in the 1991 case of *Kaye v. Robertson*.<sup>52</sup> In *Kaye*, a celebrity<sup>53</sup> recovering from brain injuries sustained in a car accident was photographed and “interviewed” by a tabloid journalist while only partially conscious. The journalist gained entry to the hospital room through deception, and Kaye vainly sought an injunction to prevent publication of the story and images.<sup>54</sup> In denying the remedy, the court acknowledged that Kaye had experienced “a monstrous invasion of his privacy.”<sup>55</sup> Despite this, the court concluded that by itself, “this invasion of his privacy which underlies the plaintiff’s complaint . . . does not entitle him to relief in English law.”<sup>56</sup> Understandably, there was a great degree of public disappointment in the decision, and it contributed significantly to calls for change in the law.<sup>57</sup>

The holding in *Kaye* was subsequently upheld in another case that highlighted the detrimental results of rejecting a right to privacy. In

50. Warren & Brandeis, *supra* note 48, at 196 (“The press is overstepping in every direction the obvious bounds of propriety and of decency . . . . To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers.”)

51. See Sara Haeggi, *The Right of Privacy Is Coming to the United Kingdom: Balancing the Individual’s Right to Privacy from the Press and the Media’s Right to Freedom of Expression*, 21 Hous. J. INT’L L. 531, 555–57 (1999) (lamenting that “substantial social harm has resulted from invasive journalism in the United Kingdom” and arguing for a statutory or judicial right to privacy).

52. [1991] F.S.R. 62 (C.A.) (U.K.).

53. Actor Gordon Kaye, a well-known British sitcom star. See *id.*

54. *Id.*

55. *Id.* at 70. The court continued its moral condemnation of the journalist’s invasion of Kaye’s privacy in a thinly veiled message to Parliament, insisting that “[i]f ever a person has a right to be let alone by strangers with no public interest to pursue, it must surely be when he lies recovering from brain surgery and in no more than partial command of his faculties,” even as it nonetheless denied the victim his injunction. *Id.* In the end, the only remedy afforded Kaye was one for “malicious falsehood” on the part of the reporter, and this consisted of preventing any inference in the publication of the material that Kaye had given his informed consent to it. *Id.* As one of the frustrated justices lamented, the case “highlights, yet again, the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens.” *Id.*

56. *Id.* In contrast, Kaye’s case most likely could have been addressed through the American privacy torts of intrusion or appropriation. See, e.g. *Barber v. Time, Inc.*, 159 S.W.2d 291, 295 (1942) (holding that the unauthorized photograph taken of a woman in the hospital used for an article about her medical condition was actionable). See also Prosser, *supra* note 48, at 392 (stating that when a plaintiff is “confined to a hospital bed . . . the making of a photograph without his consent is an invasion of a private right, of which he is entitled to complain”); Richards & Solove, *Privacy’s Other Path*, *supra* note 40, at 167 (observing that Kaye’s situation “has traditionally been an easy case for American privacy law to protect.”)

57. See Cardonsky, *supra* note 36, at 398–99; Ben Emmerson, *Human Rights Are No Threat to Parliament*, TIMES (LONDON), July 22, 1997, at 35 (referring to *Kaye* as a “notorious decision”); Bryan Schwartz, *Fifth Column: Law and Society*, GLOBE & MAIL (TORONTO), Sept. 15, 1992, at A24.

*Wainwright v. Home Office*,<sup>58</sup> a woman and her handicapped son visiting a prison were improperly strip-searched by guards looking for drugs.<sup>59</sup> They brought suit, alleging battery and trespass to person.<sup>60</sup> Unlike the court in *Kaye*, the trial judge initially found for the plaintiffs, reasoning that trespass of the person implicated a common law right to privacy which had been violated in this case.<sup>61</sup> However, this was quickly reversed by the Court of Appeals, which reiterated the holding in *Kaye*,<sup>62</sup> finding that the only remedy available to the plaintiffs was battery.<sup>63</sup>

The decision in *Kaye* not only affected public opinion, but also the views of a generation of young lawyers, some of whom are now judges.<sup>64</sup> The decision also sparked a resurgence of scholarly and Parliamentary consideration of an American-style privacy tort.<sup>65</sup> But ironically, it seems as though these scholars were looking in the wrong direction: the seed of an English right to privacy was not to be found across the Atlantic, but across the channel in continental Europe.

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58. [2001] EWCA (Civ) 2081, [2003] All E.R. 943 (U.K.).

59. *Id.*

60. *Id.*

61. *Id.*

62. The decision of the Court of Appeals was ultimately affirmed by the House of Lords. [2003] UKHL 53, [2004] A.C. 406 (U.K.) (opinion of Mummery, L.J.):

This claim fails as there is no tort of invasion of privacy. Instead, there are torts protecting a person's interests in the privacy of his body, his home, and his personal property. There is also available the equitable doctrine of breach of confidence for the protection of personal information, private communications, and correspondence.

*Id.* at 57.

63. *Id.*

64. Basil Markesinis et al., *Concerns and Ideas About the Developing English Law of Privacy (And How Knowledge of Foreign Law Might Be of Help)*, 52 AM. J. COMP. L. 133, 138 (2004) ("We have come across no judicial or academic dicta to suggest other than full condemnation of the unsatisfactory nature of the [*Kaye*] result (reluctantly) reached by a strong Court of Appeal."). Justice Eady was certainly among those affected. Stephen Sedley, *Towards a Right to Privacy*, LONDON REV. OF BOOKS, June 8, 2006; Profile, *Mr. Justice Eady*, *supra* note 19. Eady, then serving as a Recorder, the English title for a Magistrate or Local Judge, described the decision as "a serious gap in the jurisprudence of any civilised society, if such a gross intrusion could happen without redress." *Id.* See also Gibb, *Lawyer Who Used to Act for the Red-Tops Became Judge Who Championed Privacy*, *supra* note 19.

65. See, e.g., Peter Prescott, *Kaye v. Robertson: A Reply*, 54 MOD. L. REV. 451 (1991); Basil Markesinis, *Our Patchy Law of Privacy—Time to Do Something About It*, 53 MOD. L. REV. 802 (1991).

## II. THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE ROAD TO *MOSLEY*

The European Convention on Human Rights (“Convention”) was adopted in 1950 to protect human rights and fundamental freedoms.<sup>66</sup> By 1980, scholars recognized its potential implications for a stand-alone English right to privacy.<sup>67</sup> And by 1983, it was understood that the Convention was capable of providing non-binding guidance that would supply “at least continued consideration of legal protection of privacy.”<sup>68</sup> Article 8 of the Convention protects one’s “private and family life.”<sup>69</sup> The UK, as a signatory to the Convention, was required to respect this right in a general sense, but was under no obligation to give the Convention the force of law.<sup>70</sup>

In 2000, the articles of the Convention ceased to be mere guiding principles and became part of British law under the Human Rights Act (“HRA”).<sup>71</sup> The law was passed by Parliament in 1998, but did not go into effect for two years.<sup>72</sup> Though Parliament consistently rejected specific privacy statutes during the decades preceding the HRA,<sup>73</sup> the new legislation declared it unlawful “for a public authority to act in a way which is incompatible with a Convention right.”<sup>74</sup> Even before it went into effect, both government officials and scholars predicted that the HRA, and its incorporation of the Convention’s Article 8 in particular, might have a significant effect on protections for privacy in England.<sup>75</sup>

66. European Convention on Human Rights, pmbl., Nov. 4, 1950 (characterizing the agreement as one dedicated to “the maintenance and further realization of Human Rights and Fundamental Freedoms”).

67. See Wacks, *supra* note 46, at 74 (speculating that “the catalyst for change may, once again, be the European Convention on Human Rights and Fundamental Freedoms” and presciently envisioning the Convention’s adoption in a sort of “British Bill of Rights”).

68. David J. Seipp, *English Judicial Recognition of a Right to Privacy*, 3 OXFORD J. LEGAL STUD. 325, 351 (1983).

69. European Convention on Human Rights, § 1, art. 8, Nov. 4, 1950.

70. See Seipp, *supra* note 68, at 351.

71. Human Rights Act, 1998, c.42.

72. Basil Markesinis, et.al. *Concerns and Ideas*, *supra* note 64, at 138.

73. See Seipp, *supra* note 68, at 345–51 (detailing the history of failed legislative attempts at protecting privacy).

74. Human Rights Act, 1998, c.42, § 6(1).

75. As the Lord Chancellor noted, with the passing of the act, “the judges are pen-poised to develop a right to privacy.” 583 PARL. DEB., H.L. (5th ser.) (1997) 785. See also Haenggi, *supra* note 51, at 564 (arguing that “protection of the right to privacy in the United Kingdom is inevitable with the passage of the Human Rights Act”). For a particularly prescient analysis of the HRA’s effect, see generally Helen Fenwick & Gavin Phillipson, *Breach of Confidence As a Privacy Remedy in the Human Rights Era*, 63 MOD. L. REV. 660 (2000).

This turned out to be true, as judges faced with invasions of personal privacy suddenly found themselves armed with a new weapon that might help them avoid the widely condemned and inequitable result in *Kaye*.<sup>76</sup> Perhaps unsurprisingly, the vast majority of these new “privacy” cases resulted from attempts by celebrities to prevent or be compensated for publication of information about their private lives.

One of the first cases that the English courts faced after the passing of the HRA involved celebrities perhaps more familiar to an American audience than Gordon Kaye. In *Douglas v. Hello!, Ltd.*,<sup>77</sup> actors Michael Douglas and Catherine Zeta-Jones successfully won an injunction and damages against a tabloid magazine for publishing photographs of their wedding that had already been sold to a rival magazine.<sup>78</sup> On appeal, the Court of Appeals denied the initial injunction as too restrictive on press freedom, but determined that it would allow an action for damages.<sup>79</sup>

At first, it appeared as though this case would be the final word on privacy protection for publication of private facts. Lord Justice Sedley of the Court of Appeals, on the basis of the HRA, laid out a very direct argument for recognition of a right to privacy grounded in, and yet clearly distinct from, confidentiality.<sup>80</sup> However, when the case was returned to the district court, Sedley’s suggestion that privacy be the basis of recovery was rejected, and instead the court determined that confidentiality should

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76. See Kathryn F. Deringer, Comment, *Privacy and the Press: The Convergence of British and French Law in Accordance with the European Convention of Human Rights*, 22 PENN. ST. INT’L L. REV. 191, 209. Indeed, the language of the HRA essentially required judges to expand their understanding of confidentiality law in accordance with the Convention because the HRA defines “public authority” as including “a court or tribunal.” Human Rights Act, 1998, c.42, § 6(2).

77. [2001] Q.B. 967 [hereinafter *Douglas I*].

78. *Id.* Douglas and Zeta-Jones made an exclusive deal with *OK!* Magazine to cover their wedding for a fee of one million pounds. However, a paparazzo somehow gained entrance to the ceremony and less than twenty-four hours later, *Hello!* Magazine possessed several photographs of the wedding. *Id.* After *OK!* failed to obtain an injunction, *Hello!* published its pictures on the same day as *OK!*, ruining what would have been an *OK!* exclusive. The Douglasses sued *Hello!* for breach of privacy while *OK!* sued for the loss of its exclusive right to publish. *Id.*

79. *Id.*

80.

Courts have done what they can, using such legal tools as were on hand, to stop the more outrageous invasions of individuals’ privacy; but they have felt unable to articulate their measures as a discrete principle of law . . . Nevertheless, we have reached a point at which it may be said with confidence that the law recognizes and will appropriately protect a right of personal privacy . . . [T]he law has to protect not only those people whose trust has been abused but those who simply find themselves subjected to an unwanted intrusion into their personal lives.

*Douglas I*, [2001] Q.B. 967, 997 (opinion of Sedley, L.J.).

remain the appropriate basis for any remedy.<sup>81</sup> The opinion made sure to announce that although breach of confidence was affected by the HRA, the courts would most certainly not create a free-standing privacy right under English law.<sup>82</sup>

After this holding, both courts and commentators quickly realized the difficulties in applying an ever more confusing doctrine of confidence to situations where the parties had little to no prior contact and thus no expectation of confidentiality from one another.<sup>83</sup> The next leading case on English privacy sought to address this problem. In *A v. B Plc*,<sup>84</sup> the court attempted to give some further guidelines to the burgeoning doctrine of privacy protection through the language of confidence; ultimately, the court essentially indicated that going forward, it would consider protecting privacy interests without explicitly categorizing them as such.<sup>85</sup>

Arguably the most important case on the road to *Mosley* is *Campbell v. Mirror Group Newspapers Ltd.*<sup>86</sup> Naomi Campbell, the famous

81. The Court applied *Coco v. Clark* and found the three factors were satisfied. *Douglas v. Hello! Ltd.*, [2003] EWHC (Ch) 786, 182–86 [hereinafter *Douglas II*].

82. *Douglas I*, [2001] Q.B. at 1053–54.

83. See Richards & Solove, *Privacy's Other Path*, *supra* note 40, at 170.

84. [2002] EWCA (Civ) 337; [2003] QB 195.

85. Judge Woolf first held that an independent right of privacy was unsupported, and despite the previous language indicating the contrary, in fact unnecessary. However, in so doing, he greatly expanded the doctrine of confidentiality by broadening the definition of “confidence” itself:

[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.

*Id.* However, this expansion of confidence doctrine did little to help “A,” otherwise known as Garry Flitcroft. The court determined that Flitcroft’s fame and status as a “role model” indicated that there was at least some level of public interest in his private affairs. *Id.* at 217. It also gave less weight to his interest in keeping the adultery confidential, holding that such non-marital relationships deserved less protection than “the confidentiality which attaches to what is intended to be a permanent relationship.” *Id.* at 216. Flitcroft’s confidentiality interests thus failed to outweigh the interest of the press in publishing the story, and it was not long before he was named in public. Neil Tweedie, *Footballer Named After Losing Privacy Battle*, DAILY TELEGRAPH (UK), Mar. 30, 2002, at 1. Flitcroft’s status as a “public figure” or “role model” was not apparent to everyone in the press, however, and left some in England asking the same question that will almost certainly puzzle American readers of this Note. Neil Tweedie, *Saga of the ‘Love Rat’ Footballer Leaves One Question: Garry Who?, Midfielder Will Be a Legend Only in the Courtrooms*, DAILY TELEGRAPH (UK), Mar. 30, 2001, at 11 (“Mention of Flitcroft’s name in years to come is more likely to be made by law students than by admirers of the ‘beautiful game.’”)

86. [2004] UKHL 22. Some observers have viewed this decision as marking the decisive point at which the courts realized the right at issue could be openly named and protected under a theory of privacy. See Frances Gibb, *Privacy Law Is Not New—We’ve Had It Since Naomi’s Case*, TIMES (LONDON), Dec. 4, 2008, at 83 (interviewing a distinguished defamation attorney who expresses confusion over the furor surrounding *Mosley* and argues that England has had a right to privacy “at least since the case of Naomi Campbell”).

supermodel, was photographed leaving a Narcotics Anonymous meeting, and the pictures were subsequently published in a tabloid story about her battle with drug addiction. She brought suit, alleging a violation of her privacy. After a series of appeals, the Law Lords<sup>87</sup> again determined that there was no free-standing English right to privacy. However, the court engaged in a fascinating game of semantics, noting that:

The continuing use of the phrase ‘duty of confidence’ and 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.<sup>88</sup>

The Lords held that the initial showing must be “whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy.”<sup>89</sup> If so, then the Article 8 right to privacy and Article 10 right to free expression<sup>90</sup> would have to be balanced against one another.<sup>91</sup>

English courts’ interpretations of Article 8 have not provided the sole impetus for the change in English privacy protection. Section 2 of the HRA requires that all English courts and tribunals take into account the decisions of the European Court of Human Rights (“ECHR”) when interpreting provisions of the Convention.<sup>92</sup> And the ECHR specifically addressed Article 8’s requirements in *Von Hannover v. Germany*.<sup>93</sup> In *Von*

87. Until 2009, the UK’s highest court of appeals was comprised of the Lords of Appeal in Ordinary, commonly known as the Law Lords. *Litigation: All Change At the Highest Court in the Land*, LAWYER (UK), July 20, 2009, at 6. This was a branch of the House of Lords tasked with exercising its judicial functions. In October 2009, however, the Law Lords were replaced with a new Supreme Court of the United Kingdom, comprised of twelve justices. *Id.*

88. [2004] UKHL 22, [14] (opinion of Nicholls, L.J.). The opinion continued by advocating the recognition “that the values enshrined in articles 8 and 10 are now part of the cause of action for breach of confidence.” *Id.* at [17]. However, it made sure to limit the privacy right to disclosure of private facts so as not to expressly overrule *Wainwright*, finding that “[i]n the case of individuals this tort, however labelled, affords respect for one aspect of an individual’s privacy. That is the value underlying this cause of action. An individual’s privacy can be invaded in ways not involving publication of information. Strip-searches are an example.” *Id.* at [15].

89. *Id.* at [21].

90. “Everyone has the right of freedom of expression.” European Convention on Human Rights, § 1, art. 10, Nov. 4, 1950.

91. [2004] UKHL 22, [46] (opinion of Hoffman, L.J.).

92. “A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any . . . judgment, decision, declaration or advisory opinion of the European Court of Human Rights.” Human Rights Act 1998, c.4, § 2.

93. [2004] ECHR 294.



*Hannover*, the ECHR dealt with privacy claims made by Princess Caroline of Monaco.<sup>94</sup> The case was unique because the Princess, as royalty and a celebrity, was very obviously a public figure,<sup>95</sup> and the conduct complained of largely consisted of photography in public places. The German government argued that Article 10 of the Convention safeguarded the ability of the press to publish the pictures. The ECHR rejected this argument, holding that “anyone, even if they are known to the general public, must be able to enjoy a ‘legitimate expectation’ of protection of and respect for their private life.”<sup>96</sup>

Soon after *Von Hannover*, in what would turn out to be an important preview of his decision in *Mosley*, Justice Eady dealt with a case implicating privacy rights in *McKennitt v. Ash*.<sup>97</sup> In that case, the court demonstrated a high degree of deference for the Article 8 privacy right over Article 10 freedom of expression, rejecting Ash’s “public interest” argument.<sup>98</sup> The court noted that *Von Hannover* drew “a fundamental distinction between reporting facts capable of contributing to a debate in a democratic society . . . and reporting details of the private life of an individual who exercises no official functions.”<sup>99</sup> The *McKennitt* court accepted this distinction and held that information does not automatically become of public interest simply because of its attachment to someone famous. *McKennitt* required that English courts—unlike their American counterparts<sup>100</sup>—conduct a searching inquiry into the context and content of the information to determine if it was truly “confidential” and not simply defer to media determinations of newsworthiness.<sup>101</sup>

The most immediate case preceding *Mosley* to extend England’s privacy protection also met with considerable excitement and press

94. *Id.* The Princess’s claims were initially brought against paparazzi that photographed her and her children as she picked them up from school and went about her daily business. *Id.*

95. Under German law, Princess Caroline was considered a “public figure par excellence,” meaning that it was assumed under law that the public had a general interest in learning about how she conducted herself in public, regardless of whether she was serving any official function. *Id.*

96. *Von Hannover*, [2004] ECHR 294.

97. [2005] EWHC (QB) 3003. In *McKennitt*, Canadian singer Loreena McKennitt sought to enjoin the publication of a book a former friend had written. Niema Ash, the book’s author, was an intimate friend of McKennitt until a sudden falling out. The court, with Justice Eady writing the opinion, granted the injunction. *Id.*

98. *Id.*

99. *Id.*

100. In the United States, courts generally defer to the press when considering whether a publication has the requisite degree of public interest to shield its publisher from liability. *See* Richards, *supra* note 48, at 1344. This circular understanding sharply limits the effectiveness of the American privacy tort because information published becomes, by definition, not private. *See id.*

101. *Id.*

coverage. In *Murray v. Big Pictures (UK) Ltd.*,<sup>102</sup> Joanne Murray, better known to the world as J.K. Rowling,<sup>103</sup> brought a privacy claim on behalf of her son after a newspaper published unauthorized pictures of him.<sup>104</sup> After initially being denied injunctive relief,<sup>105</sup> on appeal the court reversed in favor of Murray.<sup>106</sup> As one English attorney noted, “[t]his case puts in place another building block in the gradual construction by the courts of a fully developed law of privacy.”<sup>107</sup>

### III. THE SIGNIFICANCE OF *MOSLEY*

By the time of *Mosley*, English law with respect to privacy had evolved a great deal. This evolution occurred particularly rapidly in the eight-year period that began with the adoption of the HRA. But these changes were halting and somewhat confused, with great uncertainty about what the law actually forbade, especially in light of potentially contradictory precedents.<sup>108</sup> Just as *Prince Albert v. Strange* is looked to as the landmark

102. [2008] EWCA Civ 446.

103. Rowling is the author of the Harry Potter series and one of the richest women in Great Britain. Caroline Wilson, *How Scottish Millionaires Regained Their Midas Touch*, HERALD (GLASGOW), Mar. 21, 2011, at 9.

104. In November 2004 a photograph was taken by Big Pictures, an organization specializing in celebrity photos, of David in a stroller being pushed by his parents in an Edinburgh street. The photograph was subsequently published by the *Sunday Express* on April 3, 2005. [2008] EWCA Civ 446.

105. The trial judge, while sympathetic to the claims, was caught up with trying to “give effect to what I perceive to be the reason of the ECHR in *Von Hannover* where it appears to conflict with the decision of the House of Lords in *Campbell*,” and deferred to what he felt was the precedent of *Campbell*. [2007] EWHC 1908 (Ch). After wrestling with the cases, he determined that “the law does not in my judgment (as it stands) allow [Murray’s parents] to carve out a press-free zone for their children in respect of absolutely everything they choose to do.” *Id.*

106. “If 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.” [2008] EWCA Civ 446. In reaching this decision and weighing the interests involved, the court appeared to be persuaded by several key facts. For one, it was imperative that the action was brought on behalf of David, and was not an action regarding the rights of his parents. *Id.* The court also found it important that the parents had “repeatedly and consistently taken steps to secure and maintain the privacy of the Claimant and their other children in which they have been substantially successful,” even going so far as to make sure they were not in attendance for high-publicity events such as book signings. [2008] EWCA (Civ) 446.

107. Clare Dyer, *JK Rowling Wins Ban on Photos of Her Son*, GUARDIAN (UK), May 8, 2008, <http://www.guardian.co.uk/media/2008/may/08/privacy.medialaw>.

108. Torin Douglas, *Confusion Over Privacy Rulings*, BBC NEWS, Mar. 30, 2002, [http://news.bbc.co.uk/2/hi/uk\\_news/1902279.stm](http://news.bbc.co.uk/2/hi/uk_news/1902279.stm) (“Despite this week’s court cases [of *A v. B* and *Campbell*], newspapers are still no clearer about where privacy starts and ends.”); Sean O’Neill, *Privacy Law Confusion Grows*, TIMES (LONDON), May 31, 2004, at 3 (discussing the different outcomes in *Campbell* and another case where the plaintiff failed to enjoin publication of an extramarital affair); Roy Greenslade, *Confusion As Lords Reject Author’s Right to Appeal*, GUARDIAN (UK), Mar. 30, 2007, <http://www.guardian.co.uk/media/greenslade/2007/mar/30/confusionaslords>

case for English confidentiality law despite the existence of preceding cases touching on the theory, so should *Mosley* be seen as the hallmark case for an English right to privacy.

The *Mosley* opinion begins with a reiteration of the principles established by *Campbell*, asserting that the law now affords protection to information where “there is a reasonable expectation of privacy.”<sup>109</sup> The court could have easily relied on a more traditional theory of confidentiality in its opinion, but made a conscious choice to focus on and enhance the privacy aspect of the case.<sup>110</sup> The court determined that Mosley had made a sufficient showing of “a reasonable expectation,” opining that “one is usually on safe ground in concluding that anyone indulging in sexual activity is entitled to a degree of privacy—especially if it is on private property and between consenting adults (paid or unpaid).”<sup>111</sup> In so doing, the court dismissed the argument that the commission of a crime constituted a *per se* matter of public interest which would trump the Article 8 concerns.<sup>112</sup> It also acknowledged that there could be a public interest if the sexual acts had a Nazi overtone, but rejected that argument in the case at hand for lack of evidence.<sup>113</sup> Although

rejectaath (observing that even the *McKennitt* decision “still leaves the whole business of where to draw the line between a right to privacy and a right to report in confusion”).

109. *Mosley*, [2008] EWHC (UK) 1777, [7].

110. As the court noted early in the opinion, it was alleged that “there also had been a pre-existing relationship of confidentiality between the participants” in the sexual activities. *Id.* at [4]. This meant that the claim was at least partially founded in “old-fashioned breach of confidence by way of conduct inconsistent with a pre-existing relationship, rather than simply of the purloining of private information.” *Id.* at [6] (quoting *McKennitt v. Ash*, [2008] QB 73, Buxton, L.J.). Eady then remarked that “I would be prepared to hold that Woman E had committed an ‘old fashioned breach of confidence’ as well as a violation of the Article 8 rights of all those involved.” *Id.* at [108]. However, the court chose to specifically focus on the private nature of the information and the Article 8 rights at issue, rather than impose liability based on the initial breach of confidence.

111. *Id.* at [98]. Further highlighting the fact that privacy, and not confidentiality, was the right at stake and not confidentiality is *Mosley*’s stark difference from some of the rationale behind the 2002 *A v. B* decision. [2002] EWCA (Civ) 337. In *A v. B*, the court looked at the link between the parties, ultimately determining that one of the reasons the information was not protected from publication was the non-marital relationship between Flitcroft and the two other women. *See supra* note 85 and accompanying text. In *Mosley*, the relationship was arguably much weaker because the woman who initially betrayed Mosley’s confidence was a hired dominatrix and not even a long-term girlfriend. Yet the information and activity *Mosley* was protected because of its inherently private nature. *Mosley*, [2008] EWHC (QB) 1777, [125].

112. *Id.* at [110]–[111]. The court rejects the notion that “it will always be an automatic defence to intrusive journalism that a crime was being committed on private property, however technical or trivial,” with the rhetorical question of whether installing a camera in one’s home to catch him smoking marijuana would be justified. *Id.* at [111]. It also extrapolates from the situation in *Campbell*, where the underlying fact implicit in the disclosure was that Naomi Campbell was using illegal drugs, to demonstrate that “illegal behaviour does not automatically undermine a person’s rights under Article 8.” *Id.* at [119].

113. *See supra* note 8 and accompanying text.

the court refrained from awarding exemplary damages, its calculation of damages was not by any means a hard science, designed as it was “for the purpose of acknowledging the infringement and compensating, to some extent, for the injury to feelings, the embarrassment and distress caused.”<sup>114</sup>

*Mosley* was skillfully grounded in recent precedent, but the court nonetheless managed to work in a few new aspects of privacy law. As an initial matter, the balancing test between Article 8 and 10 rights is now indisputably the means of determining whether there has been an actionable violation of one’s privacy rights. Furthermore, there is now a strong presumption that sex acts, even those involving criminal activity, will tip the scale in favor of Article 8, provided the behavior does not amount to “serious crimes” or sexual conduct involving “any significant breach of the criminal law.”<sup>115</sup> Indeed, *Mosley* may stand not only for a right to information privacy, but for a broader principle of sexual privacy between consenting adults.

Before *Mosley*, one could still make a straight-faced argument that there were some distinctions between how the English courts protected HRA privacy interests and the traditional American privacy tort of public disclosure of private facts. After *Mosley*, the difference has become strictly nominal. Though still technically grounded in “confidence,” the doctrine has evolved to the point where a distinct right to privacy exists; regardless of celebrity status or whether a prior relationship with the discloser exists, anyone with a reasonable expectation of privacy who has private information taken and disseminated without his consent for reasons unrelated to the public interest can successfully sue for damages.<sup>116</sup> And because this right is unchecked by any British equivalent to the First Amendment, England’s privacy protections are now far greater than those of the United States.<sup>117</sup> *Mosley*’s effect was immediate, as other celebrities predictably took advantage of the ruling.<sup>118</sup> Indeed, a member of the royal

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114. *Mosley*, [2008] EWHC (QB) 1777, [235].

115. *Id.* at [118], [127].

116. *Id.* at [12].

117. *See supra* note 48 and accompanying text.

118. Soon after the ruling was issued, Justice Eady was spared the duties of sitting in judgment of another celebrity’s privacy complaints, as Sienna Miller’s claims against News Group Newspapers and Big Pictures UK were quickly settled. Miller brought a claim for invasion of privacy against News Group Newspapers and Big Pictures UK for pictures taken by the latter and published by the former. She alleged that Big Pictures’ photographers harassed and tailed her while she went about her daily business, and took unauthorized pictures of her while on a boat in Italy. News Group, along with *The Sun*, another English tabloid that published the pictures, settled the privacy claims for £35,000. Ben Dowell, *Sienna Miller Paid £35,000 in Damages by Sun and News of the World*, *GUARDIAN* (UK),

family explicitly relied on *Mosley* for a breach of privacy claim only a few months after the decision.<sup>119</sup>

*Mosley* is also properly viewed as a landmark case because it captured the fascination of the public with its bizarre and intimate facts in a way that *Douglas*, *Campbell*, *Murray*, and *McKennitt* did not.<sup>120</sup> Any one of those cases, it could be argued,<sup>121</sup> had a similarly substantial impact in the formative process of the English right to privacy. Indeed, several commentators suggest that the heavy lifting for the decision in *Mosley* was performed as early as *Douglas*.<sup>122</sup> Those cases, though, did not have the salacious and seedy context of *Mosley*, and were more or less straightforward instances of the general annoyance that celebrities endure from the paparazzi on an almost daily basis. Even Justice Eady had to admit the colorful and scandalous facts of Mosley's private life made for interesting reading.<sup>123</sup> Those formative cases also did not provide the comprehensive synthesis of doctrine provided in *Mosley*, and if they did, they were immediately reversed.<sup>124</sup> Most importantly, the other cases did

Nov. 10, 2008, <http://www.guardian.co.uk/media/2008/nov/10/privacy-sun>. Big Pictures settled the claim for £53,000. Mark Sweney, *Sienna Miller Gets £53k for Press Intrusion*, GUARDIAN (UK), Nov. 22, 2008, <http://www.guardian.co.uk/media/2008/nov/22/privacy-privacy>. Other celebrities who brought suits in the wake of *Mosley* and had them quickly settled include Madonna and soccer player Ashley Cole. Afua Hirsch, *Judge in Max Mosley Trial Hits Back at Criticism Over Privacy Cases*, GUARDIAN (UK), Dec. 1, 2009, <http://www.guardian.co.uk/uk/2009/dec/01/david-eady-privacy-trials-media>.

119. Andrew Pierce, *Duke Uses Mosley Sex Case to Protect the Royals Palace, Hopes Media Will Be Banned from Reporting Family's Private Lives*, DAILY TELEGRAPH (UK), Aug. 7, 2008, at 7. The article reports the Duke of Edinburgh's *Mosley*-inspired privacy claim to the Press Complaint Commission after the *Evening Standard* published a story alleging that the Duke was suffering from prostate cancer. One of the article's sources declared that "the Max Mosley ruling made the public interest case clear . . . [i]t made clear that even they [the royals] have a right to privacy." *Id.*

120. See Murray, *Sex Scandal*, *supra* note 17 (commenting on the public's enjoyment of "every gory detail of the Max Mosley versus News of the World sado-masochistic sex scandal"); Rowan Pelling, *A Spanking Good Spectacle*, THE DAILY TELEGRAPH (UK), July 12, 2008, at 23 ("The Mosley trial surely deserves a . . . place in the hallowed halls of British sexual infamy."); Rebecca Winters Keegan, *Welcome to the Top 10 Everything of 2008*, TIME, Nov. 5, 2008, at 47 (listing "Max Mosley's Sex Romp" among the top ten scandals of the year).

121. Indeed, each of these cases has been touted at various times as the next big English privacy case. See generally Markesinis, et al., *Concerns and Ideas*, *supra* note 64, at 138.

122. *Id.*

123. In one of the opinion's lighter moments, Eady drily notes that:

"[I]t is right to acknowledge that some of the young women playing the submissive role also developed a visible coloration of the buttocks. As Woman D accepted, it was painful—'but in a nice way'. Although no doubt interesting to the public, was this genuinely a matter of public interest? I rather doubt it." *Mosley*, [2008] EWHC (QB) 1777, [114].

124. See Andy McSmith, *£60,000 for Mosley's Pain As Newspaper Loses Case*, INDEPENDENT (UK), July 25, 2008, at 8 (noting that the ECHR argument for privacy had "never been used before in a court case as sensational and highly publicised as the Mosley hearing").

not provide a potential stepping stone to a more expansive protection of privacy through prior restraints, which will be discussed in Part IV.

Of course, the decision in *Mosley* has met with numerous detractors, and is perhaps not without some practical ill effects. Already, the editors of major newspapers in the United Kingdom have complained that their ability to run controversial stories and engage in serious investigative journalism has been constrained by the *Mosley* decision.<sup>125</sup> Those who dislike the decision complain of a “European right”<sup>126</sup> that has been thrust upon the unwilling British public by activist judges.<sup>127</sup> This is countered by those who point to the English adoption of the HRA as Parliament’s tacit approval of this development.<sup>128</sup> Others have been more nuanced in their analysis, voicing approval of judicial punishment for the *News of the World* in this particular case while expressing some apprehension about the precedent that has been set.<sup>129</sup> Nonetheless, while many commentators

125. See Brian MacArthur, *Max Mosley Verdict Tightens Chains on the Press*, DAILY TELEGRAPH (UK), July 24, 2008, at 26 (“Max Mosley’s legal victory over the *News of the World* yesterday marks another step towards a body of precedents on privacy law created by judges rather than Parliament which threatens the freedom of the press.”); Chris Tryhorn, *Investigative Journalism Is Under Threat by Legal Actions, Editors Warn MPs*, GUARDIAN (UK), May 5, 2009, <http://www.guardian.co.uk/media/2009/may/05/alan-rusbridger-ian-hislop> (Alan Rusbridger and Ian Hislop, the respective editors of *The Guardian* and *Private Eye*, discussing the detrimental effect of privacy law on publishing stories on large companies and rich individuals.).

126. However, Article 8 of the HRA was drafted and introduced to the European Convention on Human Rights by the British delegation. See Roy Greenslade, *Mosley Part Two: Is the Privacy Judgment a Genuine Threat to Press Freedom?*, GUARDIAN (UK), July 30, 2008. Greenslade takes on the characterization of the ECHR as something wholly foreign to English law, noting that the Convention “was largely a British legal construct, following the second world war, that one could say was foisted on Europe. The man who oversaw its drafting was none other than a Conservative politician, Sir David Maxwell Fyfe. At its heart were English, French, German and American concepts of civil liberties.” *Id.*

127. See *supra* note 27 and accompanying text; see also *Mail Editor Accuses Mosley Judge*, BBC NEWS, Nov. 10, 2008, [http://news.bbc.co.uk/2/hi/uk\\_news/7718961.stm](http://news.bbc.co.uk/2/hi/uk_news/7718961.stm).

128. See Chris Horrie, *A Camy Kiss and Tell*, GUARDIAN (UK), July 28, 2008, <http://www.guardian.co.uk/media/2008/jul/28/mosley.newsoftheworld>. (“[T]he financial penalties are by no means fatal, either for [*News of the World* editor Colin] Myler’s career or for the fortunes of his paper. In short, this is very far from the end of the world for the *News of the World*.”); David Sexton, *Max Bolts the Bedroom Doors*, EVENING STANDARD (LONDON), July 25, 2008, at 12 (“The judgment that Max Mosley had ‘a reasonable expectation of privacy’ in relation to his sex life, however ‘unconventional,’ seems right.”).

129. Roy Greenslade of *The Guardian* has been foremost among those who see irresponsible journalism from tabloids like the *News of the World* as the root of the problem, but are nonetheless concerned about the direction of the law. See, e.g., Roy Greenslade, *Why the News of the World Should Be Caned for Its Scandalous Errors*, GUARDIAN (UK), <http://www.guardian.co.uk/media/greenslade/2008/jul/24/whynewsoftheworldshou> (“A rogue newspaper will go on invading the private lives of people by using ‘the public interest’ as a defence for its intrusions. The loser will be other newspapers because, gradually, judges will develop a law on privacy that might well lead to a genuine denial of press freedom.”); Greenslade, *Mosley Part Two*, *supra* note 126 (expressing a concern about prior restraints through the use of injunctions and blaming “bad journalism without a shred of public interest

in the media are unhappy or unimpressed with the ruling, British public opinion seems largely sympathetic to Mosley's privacy claims.<sup>130</sup> This approval was reflected by Parliament's willingness to hear out Mosley's argument for increased privacy protection.<sup>131</sup> The English right to privacy, despite the best efforts of many in the media, remains popular.

After *Mosley*, the press was far less confused, albeit more alarmed, about what kind of reporting could lead to privacy claims. However, the most dramatic concerns about the muzzling of the press are unwarranted, as several journalists have noted.<sup>132</sup> For one thing, to couch the right protected in *Mosley* as a blanket allowance for public figures to engage in adultery without fear of media exposure is false. Mosley himself has admitted that if sexual activity is intertwined with or has some bearing on that person's public persona, it may well be within the public interest and therefore overcome Article 8's protection.<sup>133</sup>

#### IV. *MOSLEY V. UNITED KINGDOM*

Mosley's unwillingness to settle for victory in the English High Court provides perhaps the best reason why *Mosley* should be recognized as

justification" by *News of the World* for the present confusion). Greenslade's views on the subject have been fairly consistent since he opined on the *McKennitt* decision, admitting that "[t]here have been indefensible invasions of privacy for not good reason," but that the media "must not allow the courts to encroach on rights that prevent us from acting in the public interest." Roy Greenslade, *Mail on Sunday Right to Raise Alarm Over Privacy*, GUARDIAN (UK), June 14, 2007, <http://www.guardian.co.uk/media/greenslade/2007/jun/14/mailonsundayrighttoraise>.

130. Jonathan Coad, *Where is the Law of Privacy After Mosley?*, MONDAQ, Sept. 3, 2008, <http://www.mondaq.com/article.asp?articleid=65690> (noting that over 90% of the public comments on news websites and blogs were supportive of the outcome in *Mosley*); Roy Greenslade, *Mosley Was Right to Sue—But Now I Fear MPs Are Closer to Backing a Privacy Law*, EVENING STANDARD (LONDON), Mar. 11, 2009, at 34 (finding evidence of public support for the right to privacy in the unanimous agreement of over 100 postgraduate journalism students with the *Mosley* holding). Since the *Kaye* decision and the paparazzi's involvement in the 1997 death of Princess Diana, there seems to have been a fairly strong shift in public opinion against the sensational and intrusive tabloid journalism of the "Red Tops." See Haenggi, *supra* note 51, at 555 (noting in 1999 that "[i]t is fair to conclude that the objective and reasonable UK citizen believes there is a need to increase protection of an individual's private life"); *The Crown Tarnished Before Our Eyes*, OBSERVER (LONDON), Sept. 7, 1997, at 7 (opining that the great imbalance in favor of the press at the expense of individual privacy "no longer corresponds to the core values of British society").

131. See Greenslade, *Mosley Was Right*, EVENING STANDARD (LONDON), Mar. 11, 2009, <http://www.thisislondon.uk/standard-business/article23660643-mosley-was-right-to-sue---but-now-i-fear-mps-are-closer-to-backing-a-privacy-law.do> (expressing concern that Mosley's "impressive performance" at a Parliamentary hearing likely "won over many MPs to his point of view").

132. See *Mosley's Libel Manoeuvre Puts Right to Privacy Back in Spotlight*, LAWYER (UK), Aug. 4, 2008, at 32 (echoing Eady's assertion that "it cannot reasonably be suggested that [*Mosley*] will inhibit serious investigative journalism").

133. Linda Pressly, *Max Mosley's Battle for Privacy*, BBC NEWS (Feb. 17, 2009, 1:06 AM), [http://news.bbc.co.uk/2/hi/uk\\_news/7892702.stm](http://news.bbc.co.uk/2/hi/uk_news/7892702.stm).

England's landmark privacy case. *Mosley* has served as the launching pad for multiple legal salvos in a campaign for greater protections of privacy.<sup>134</sup> But the most prominent of these is undoubtedly the complaint that Mosley submitted to the ECHR.<sup>135</sup> With *Mosley v. United Kingdom*, Mosley hoped to impose a legal duty on newspapers and other major media sources to notify subjects of their investigations before going to press with potentially private information.<sup>136</sup> Once notified, those individuals would have the opportunity to seek injunctions restricting or limiting publication. In a country that has a long history of open journalism and a free press, but no equivalent to the sacrosanct American First Amendment, these potential changes raised major alarms in the press and elicited concern even among those untroubled by the privacy protections recognized in *Mosley's* domestic lawsuit.<sup>137</sup>

The ECHR concluded deliberations on the merits of Mosley's appeal after conducting hearings on January 11, 2011.<sup>138</sup> But the issues of prior notification and injunctive relief are not new ones for the English media.<sup>139</sup> For a time, it looked as though *Mosley v. United Kingdom* might prove

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134. Mosley followed his success in his English privacy action with actions against other European papers that had published the story. Burden, *supra* note 29, at 26 (discussing Mosley's lawsuits in Italy, Germany, and France). Some of these suits were settled out of court, most likely because of Mosley's success in England. *Mosley, German Publisher Settle Lawsuit*, USA TODAY, Aug. 7, 2009, [http://www.usatoday.com/sports/motor/formula1/2009-08-07-mosley-lawsuit\\_N.htm](http://www.usatoday.com/sports/motor/formula1/2009-08-07-mosley-lawsuit_N.htm). In addition to this, Mosley seized on the court's determination that there was "no truth" to the Nazi-theme claim in bringing a more traditional suit for defamation against *News of the World*. Oliver Luft, *Max Mosley Launches Libel Action Against News of the World*, GUARDIAN (Apr. 3, 2009, 11:13 AM), <http://www.guardian.co.uk/media/2009/apr/03/max-mosley-news-of-the-world>.

135. See *Mosley v. United Kingdom*, App. No. 48009/08, Statement of Facts, *supra* note 29.

136. The "Questions to the Parties" for the case lists three issues for review. The first is whether Mosley's recovery of GBP 60,000 sufficiently redresses his injury. *Id.* The second is the most controversial. It asks the court to determine whether the British government should have "a positive obligation to protect the applicant's privacy by providing for a legal duty ('notification requirement') on the *News of the World* to warn him in advance of publication in order to allow him to seek an interim objection." *Id.* The court must also decide if such a duty would "strike the correct balance between the interests protected under Article 8 and freedom of expression as guaranteed by Article 10 of the Convention." *Id.* The final question is directly tied to the first two, and asks whether Mosley had "an effective domestic remedy for his complaint" under Article 8 and Article 13. *Id.*

137. See Roy Greenslade, *Why Max Mosley Is Right—and Wrong*, GUARDIAN (UK) (Oct. 20, 2008, 10:38 AM), <http://www.guardian.co.uk/media/greenslade/2008/oct/20/newsoftheworld-pressandpublishing>. ("Once again, it is hard not to reflect that a meretricious piece of journalism could lead to the enactment of a law that, in theory at least, could hobble responsible journalism.")

138. Press Release, European Court of Human Rights, Chamber Hearing (Jan. 11, 2011), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=open&documentId=879773&portal=hbk&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

139. See Simon Carr, *Has He Got News for You About Privacy*, INDEPENDENT (UK), May 6, 2009, at 10 (discussing the increasing frequency of demands from targets of investigative journalism seeking to know the exact content of the pending news story and then procuring preliminary injunctions in a form of "censorship by judicial process").



unnecessary, as judges grew more willing in the wake of *Mosley* and *McKenitt* to grant preliminary injunctions on publication of private facts.<sup>140</sup> However, these cases all involved instances where the plaintiff was notified of publication as a matter of courtesy or discovered the pending publication through affirmative means.<sup>141</sup> In addition, the English judiciary has indicated that it will not simply acquiesce to a de facto system of prior restraints through preliminary injunctions. Recently, a “super-injunction”<sup>142</sup> was lifted by the High Court, allowing the media to break the John Terry scandal that made headlines across Europe.<sup>143</sup> In a repudiation of prior restraints, the court prevented the Chelsea FC and England captain from enjoining the publication of a story detailing his affair with a teammate’s girlfriend.<sup>144</sup> However, the court explained that the primary reason it was lifting the injunction was because Terry had failed to demonstrate that he was actually concerned about his privacy and not merely concerned with losing sponsorship deals.<sup>145</sup>

Nevertheless, what the Terry case demonstrates is that the right to privacy recognized in *Mosley* is one more likely to be protected after the fact of publication, rather than with preliminary injunctions.<sup>146</sup> Though the

140. *Id.*

141. *Id.*

142. “Superinjunctions” or “Super-Injunctions” are injunctions so secret that they prevent the gagged party from even reporting that there has been a court order. Robert Verkaik, *John Terry’s ‘Affair’ with Team Mate’s Girlfriend Revealed*, INDEPENDENT (UK), Jan. 30, 2010, at 2.

143. Unlike Garry Flitcroft, *see supra* note 85, John Terry is an unmistakable soccer star, known by millions around the globe for captaining the high-profile soccer club Chelsea FC and the England National Team.

144. In January of 2010, Terry, who is married with two young children, was revealed to have had an affair with an England and Chelsea teammate’s long-term girlfriend. Verkaik, *supra* note 142. Compounding Terry’s shame and the media’s glee was the footballer’s status as “Dad of the Year” after a contest the year before. Amelia Hill, *Shamed Terry Stands to Lose Millions Over Affair’s Revelation*, OBSERVER (LONDON), Jan. 31, 2010, at 9. A week after the story broke, Terry was stripped of his England captaincy. Owen Gibson & Dominic Fifeld, *Capello Tells Terry: It’s Over*, GUARDIAN (UK), Feb. 6, 2010, at 1. Terry was subsequently reinstated as captain over a year after the scandal. Sam Wallace, *Defiant, Unapologetic and Emotional: Terry Snatches Back England Armband*, INDEPENDENT (UK), Mar. 23, 2011, at 54.

145. *Terry v. Persons Unknown*, [2010] EWHC 119 (QB), [95].

146. This reluctance to impose prior restraints might explain a few of the outlier opinions during the creation of the privacy right. *See, e.g., A v. B Plc.*, [2002] EWCA (Civ) 337; Deborah Orr, *Do Adulterers Have a Right to Privacy*, INDEPENDENT (UK), June 1, 2004, at 33 (discussing the failure of Lord Coe to obtain an injunction to prevent the exposure of his adulterous affair). *Mosley* himself was unable to restrain the initial publication of the *News of the World* story and yet won his action for damages. Nevertheless, Terry will have a difficult road even if he brings an action for damages after publication. The privacy interest he allegedly asserted was not concern for his home and family life, the protection specifically enumerated in Article 8 of the Act, but the fear of losing his many lucrative product endorsement deals (which has since happened). *Terry*, [2010] EWHC 119 (QB), [95]. Moreover, there is a strong argument that the publication was in the public interest (unlike in *Mosley*)

courts have yet to clearly outline a separate standard, in practice it seems as though they have created a system whereby preliminary injunctions receive a form of “heightened scrutiny,” in order to avoid unnecessarily censoring speech before it occurs.<sup>147</sup> Of course, this has not stopped at least twenty of these injunctions from being issued, much to the disgust of the English press.<sup>148</sup>

*Mosley v. UK* offered the ECHR an opportunity to fully embrace injunctive relief as the appropriate remedy for invasions of privacy by requiring prior notification. However, in recognition of the need for judicial discretion and the danger to free speech, the ECHR issued its opinion on May 10, 2011, holding that:

The limited scope under article 10 for restrictions on the freedom of the press to publish material which contributes to debate on matters of general public interest must be borne in mind. Thus, having regard to the chilling effect to which a pre-notification requirement risks giving rise, to the significant doubts as to the effectiveness of any pre-notification requirement and to the wide margin of appreciation in this area, the court is of the view that article 8 does not require a legally binding pre-notification requirement.<sup>149</sup>

The decision dealt only with the issue of prior notification and did not explicitly address the appropriateness or desirability of super-injunctions, other than to recognize their existence as a remedy.<sup>150</sup> Practically, though, the imposition of a system of prior notification would have made injunctive relief the first and natural remedy of choice for invasions of privacy. So though the granting of super-injunctions may continue, the ECHR has now clearly stated that such a system is not required by the Convention, especially in light of its potential “chilling effect.”

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because the affair had potential implications for Terry’s ability to lead England in the World Cup and affected whether his ex-teammate, Wayne Bridge, would be selected for the squad.

147. See *supra* note 127 and accompanying text.

148. See Stephen Glover, *Silenced in Court*, MIRROR (UK), Apr. 5, 2011, at 8 (estimating at least twenty super-injunctions in the eighteen months preceding the article and describing some of the cases); John Kampfner, *The Worrying Rise of the Rich Man’s Weapon of Justice*, INDEPENDENT (UK), Apr. 1, 2011, at 14 (summarizing facts of some of the super-injunction cases without disclosing the protected information); Robin Callendar Smith, *Privacy Law Is Madness*, EXPRESS (UK), Apr. 17, 2011, <http://www.express.co.uk/posts/view/241270/> (arguing that super-injunctions to cover up celebrity scandals are inappropriate because “nearly everyone in the media knows their identities”).

149. *Mosley v. United Kingdom*, App. No. 48009/08, Judgment, May 10, 2011, [132], available at <http://www.bailii.org/eu/cases/ECHR/2011/774.html>.

150. *Mosley v. UK*, *supra* note 140, [119].

In the months before and after the ECHR's decision, there has been spirited debate in the UK over the appropriateness of prior restraints in disclosure cases.<sup>151</sup> Indeed, several commentators persuasively echo Judge Eady's observation in *Mosley* that damages cannot truly compensate an invasion of privacy.<sup>152</sup> But a mandate from the ECHR in *Mosley v. United Kingdom* requiring prior notification would have firmly entrenched a regime of secret prior restraints. Such a decision would have been unnecessary and undesirable at this time. Super-injunctions are hugely controversial, and following Mosley's appeal, a special governmental committee was formed to examine concerns over the practice.<sup>153</sup> Even more recently, super-injunctions awarded to a BBC interviewer<sup>154</sup> and a famous British soccer star<sup>155</sup> have figured prominently in both British and American headlines. In both situations, the existence of the injunction was news in and of itself that almost overshadowed the underlying disclosure of private information.<sup>156</sup> The rise of the twitter or blog exposé has called into question whether privacy injunctions can be enforced in a meaningful way.<sup>157</sup> Finally, the right to prior notification and restraint sought in

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151. See, e.g., Emine Saner, *Sex and the Public Interest: The Conversation*, GUARDIAN (UK), Feb. 12, 2011, at 34 (transcribing a friendly debate between Mosley and journalist Roy Greenslade on the merits of prior notification).

152. For a compilation of the arguments asserting the inadequacy of damages as a remedy for invasions of privacy, see Gavin Phillipson, *Max Mosley Goes to Strasbourg: Article 8, Claimant Notification, and Interim Injunctions*, 1 J. MEDIA L. 73, 74–78 (2009). For the contrary position, see generally Andrew Scott, *Prior Notification in Privacy Cases: A Reply to Professor Phillipson*, 2 J. MEDIA L. 49 (2010). In *Mosley v. UK*, the ECHR straddled both positions. It recognized the obvious fact that privacy itself cannot be restored by damages after an invasion. *Mosley v. UK*, *supra* note 140, [72] (“[I]t is clear that no sum of money awarded after disclosure of the impugned material could afford a remedy in respect of the specific complaint advanced by the applicant.”). But the court also noted its own implicit acceptance “that *ex post facto* damages provide an adequate remedy for violations of Article 8 rights arising from the publication by a newspaper of private information.” *Id.* at [120].

153. MASTER OF THE ROLLS, REPORT OF THE SUB-COMMITTEE ON SUPER-INJUNCTIONS: SUPER-INJUNCTIONS, ANONYMISED INJUNCTIONS, AND OPEN JUSTICE, May 20, 2011, available at <http://www.scribd.com/doc/55877906/Super-Injunction-Report-20052011>.

154. See Rob Hastings, *Marr “Prepared to Walk Away from Gagging Order”*, INDEPENDENT (UK), Apr. 26, 2011, at 22.

155. Despite the widespread availability of overseas reports and internet gossip about Manchester United star Ryan Giggs's extra-marital affair, the British press were prevented from reporting it until a member of Parliament took advantage of parliamentary immunity from the gag order and named Giggs in the midst of committee hearings on the propriety of super-injunctions. Sarah Lyall, *Parliament Joins the Fray As Twitter Tests a Law*, N.Y. TIMES, May 24, 2011, at A4; Patrick Wintour & Dan Sabbagh, *Privacy Laws in Chaos As MP Names Giggs Over Injunction*, GUARDIAN (UK), May 24, 2011, at 1.

156. See Ravi Somaiya, *British Law Used to Shush Scandal Has Become One*, N.Y. TIMES, Apr. 27, 2011, at A4.

157. See *id.* (“[I]n a world where millions converse on Facebook, Twitter, and the like, the law cannot feasibly be enforced online.”). Despite the difficulty of enforcement, though, British courts appear

*Mosley v. United Kingdom* does not appear to enjoy the same degree of popular support as the retrospective right to privacy recognized in *Mosley v. News Group Newspapers*.<sup>158</sup> Ultimately, the ECHR correctly recognized the unsettled role of privacy injunctions and the potential danger they pose to freedom of expression in its decision not to require prior notification. For the time being, Max Mosley's crusade for greater privacy protections has stalled.

CONCLUSION

The *Mosley* court insisted that it was not making new law. But while the doctrinal and interpretive analysis was created in a series of cases leading up to it, *Mosley* marks the furthest extent of the English right to privacy to date. After almost a century of discussion about how such a right might be implemented, an unlikely combination of English common law, European statute, and perhaps even some American theory have coalesced in the last ten years to provide more meaningful protection and control over private information. *Mosley* is the culmination of that movement. Because of its clear articulation of the interests at stake, its colorful and memorable facts, the unprecedented amount of recovery, the issues of prior notification raised in its subsequent appeal to the European Court of Human Rights, and perhaps even because of the panicked response that the case drew from the press, *Mosley* is a true landmark of English jurisprudence.

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to be making an attempt. See Paul Calahan, *Court Forces Twitter to Hand Over User's Details*, INDEPENDENT (UK), May 30, 2011, at 6.

158. One tabloid-sponsored poll found that 79% of 2,004 individuals agreed that "the use of 'super-injunctions' against the Press shows there is one law for the rich, another for the rest of us." Vincent Moss, *Gagging Orders 'Prove There's One Law for Rich'*, SUNDAY MIRROR (UK), May 15, 2011, at 6. A poll on *The Guardian's* website echoes this sentiment, with 68% of respondents asserting that super-injunctions are never justified. *Are Superinjunctions Ever Justified?*, GUARDIAN (UK), Apr. 26, 2011, <http://www.guardian.co.uk/commentisfree/poll/2011/apr/26/superinjunctions-justified>.

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