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The Atlantic Divide on Privacy and Speech

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Introduction

When does a right to privacy become a right of censorship? Conversely, when does freedom of speech become a *carte blanche* to violate the dignity and autonomy of others? Discussions of privacy throughout the world frequently boil down to these questions. Indeed these issues have bedeviled privacy from its earliest recognition in the law. As long ago as 1890 Warren and Brandeis's seminal article framed 'The Right to Privacy' as the right to protect an 'inviolate personality' from the prying and disclosure of the new Yellow Press.[3] Leading legal authorities in both England and the United States continue to reflect this tension. Despite the parallel relationships between privacy and speech, and despite their shared legal heritage, the two legal systems have struck the balance in radically different ways. In the United States, decisions balancing privacy and the First Amendment have invariably favoured the free speech interest, at least where a press defendant published lawfully-obtained 'newsworthy' content. Thus, the publication of names of rape victims or the transcripts of illegally intercepted phone conversations have been protected against privacy claims as 'matters of public concern.'[4] By contrast, numerous English cases under the Human Rights Act have protected privacy interests against press disclosure even when the facts alleged constituted front-page news.[5]

Our purpose in this paper is to make some sense of this divergence. How could two similar legal systems apply rules sharing a common origin and reach such different results? Our methodology is explanatory and comparative. We conclude that the divergence is a function of at least two factors. First, the cultural power of the First Amendment in the United States as it has emerged from defamation law has meant that American judges have been particularly reluctant to trust themselves in ruling in ways

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[3] S Warren and L Brandeis, 'The Right to Privacy' (1890) 4 Harv. L. Rev. 193; see also Neil M. Richards, 'The Puzzle of Brandeis, Privacy and Speech' (2010) 63 Vand. L. Rev. 1295 (hereinafter Richards, 'The Puzzle of Brandeis'); Neil M. Richards, *Intellectual Privacy: Rethinking Civil Liberties in the Digital Age* (Oxford: Oxford University Press, 2015) Chapters 1–3.

[4] See, e.g., *Bartnicki v. Vopper*, 532 US 514, 526–8 (2001) (holding that a radio station cannot be prohibited from publishing newsworthy information of public concern, even where such information had been illegally obtained by a third party); *Fla. Star v. BJF*, 491 US 524, 526 (1989) (holding that a state statute prohibiting the publication of the name of a rape victim was unconstitutional as applied to a newspaper that had obtained the name from a 'publicly released police report'); *Smith v. Daily Mail Publ'g Co.*, 443 US 97 (1979) (holding the First Amendment prohibits a state from punishing a newspaper for publishing the name of a juvenile murder suspect because the press lawfully obtained the information); *Okla. Publ'g Corp. v. Okla. County Dist. Court*, 430 US 308 (1977) (holding the First Amendment prevents a state court from prohibiting the media from publishing the name of a juvenile in a proceeding that a reporter attended); *Cox Broad. Corp. v. Cohn*, 420 US 469 (1975) (holding the name of a rape victim obtained by the press from public records cannot be prevented from being published by statute or made the basis for liability under the nondisclosure tort).

[5] See for example the protection offered to supermodel Naomi Campbell, prohibiting photographs of her outside a Narcotics Anonymous clinic and details of her drug rehabilitation treatment, in *Campbell v Mirror Group Newspapers* [2004] UKHL 22 ('*Campbell*'); Max Mosley, President of the Fédération Internationale de l'Automobile, protecting details of his sado-masochistic sex life, in *Mosley v News Group Newspapers* [2008] EWHC 1777; and footballer Ryan Giggs, protecting details of his extra-marital affair, in *CTB v News Group Newspapers* [2011] EWHC 1326.

which might infringe on freedom of speech. This reluctance is especially pronounced when the press is before the court as a defendant. By contrast, English judges are required by legislation to actively engage in balancing the two rights under the Human Rights Act 1998 and the European Convention on Human Rights. Ironically enough, the English approach is much truer to the method Warren and Brandeis suggested 125 years ago as the best way to manage this tension.

Second, we find that the two jurisdictions diverge on what privacy means, and in how the privacy interest is framed. In the United States, the right to privacy is often conceptualized as a tort right protecting little more than hurt feelings. By contrast, whilst English law protects privacy as a tort (through the law of misuse of private information), the structure and content of that tort is grounded upon the fundamental human right protected by Article 8 of the European Convention of Human Rights. The nature of this framing affects the ways courts approach speech-privacy cases. In the United States, the constitutional primacy and cultural power of the First Amendment makes it supreme over most private-law interests. Under such a framing, only weakened free speech interests (like private, non-mainstream press expression) or compelling privacy injuries (like the disclosure of sex videos) are regularly capable of withstanding the power of the First Amendment. By contrast, when privacy is framed in England as a human right protecting the universal dignity of all human beings, it is much better able to withstand a free speech challenge, as the cases reflect.

Some qualifications are in order at this point. First, whilst there are important differences we should be careful not to overlook the many similarities, even on the substantive question of the balance between privacy and free speech. Both are common-law jurisdictions, both have largely judge-made traditions of privacy and free speech law, and both consider privacy and free speech to be important values, and the line between them to be a difficult one.

In this paper, we do not ultimately recommend which way the law should evolve in each jurisdiction, nor which of the two approaches is superior. In full disclosure, we disagree on some of these normative questions, which may be a reflection of our professional acculturation in American (Richards) and English (Hughes) law. But we maintain that there is value to be had in exploring the points of disagreement as well as those of similarity. If any trans-Atlantic or global conversation on privacy is to be fruitful, it will depend on first carefully identifying the variables and points of contention. It is in this spirit that we present this piece of scholarship.

We develop our argument in three parts. First, we show how the American position is a function of political commitments made initially in the context of defamation cases involving issues of racial equality in the 1960s. Second, we show how the position in English law is a product of involvement with European Human Rights Law. Third, we examine these differences through a series of case studies mapping out how each jurisdiction deals with the publication of stories involving (i) government officials; (ii) celebrities; (iii) private individuals; and (iv) video footage and photographs. We conclude by considering the ramifications of those differences. We argue that bridging the divide is essential as international conversations about privacy in a wide variety of contexts take on an increasing critical political and economic importance, however if any progress is to be made such movements must be premised on a clear understanding of why and how these different approaches emerged.

Part I – The American Approach

1. The Development of American Privacy and Free Speech Law

The American approach to the right to privacy is conventionally traced back to the *Harvard Law Review* publication of 'The Right to Privacy' by Louis Brandeis and Samuel Warren in December of 1890.[6] Although there were many English and American antecedents to the tort the two men proposed, it was the publication of 'The Right to Privacy' and the star power of Brandeis that led to the recognition of the tort in its modern form.[7] But although the article inspired many different conceptions of privacy, its core argument was squarely one that targeted the press. The proposed tort captured *press defendants* publishing *true facts* that caused *emotional harm*.[8] Recognizing that this tort would run into claims of infringing a free press, the authors suggested that courts could separate matters of public concern from those of private matters that were not fit to print through well-established principles of common-law balancing. Judges, in their view, could be trusted with the job of keeping the press focused on its role of informing the public and not straying into lucrative but inappropriate matters of salacious gossip.[9]

Although the United States is famed for the protectiveness of its First Amendment free speech guarantee, strong protection for free speech is newer than the right to privacy. When Warren and Brandeis penned their article in 1890, American notions of free speech were far less developed than they are today. The United States was bound by the First Amendment, but there was essentially no First Amendment jurisprudence at the Supreme Court level until after the First World War.[10] Even then, American free speech law remained much less protective of expression for most of the twentieth century, as the right to privacy and freedom of speech and press developed together over the decades. It became clear only after the landmark decision of *New York Times v. Sullivan* (1964) that speech and privacy would assume their now familiar position when they conflict over matters of public interest, with free speech dominant and the right to privacy subordinate.[11]

First Amendment law did not develop until its evolution was spurred by the persecution and prosecution of leftist dissidents during the First World War. Before the war (and for some time afterwards) American free speech law could be summed up by three basic principles. First, relying on Blackstone,[12] the First Amendment was little more than a protection against prior restraints, and did not prevent the government from punishing 'bad' speech once it was uttered. Second, the standard for government punishment of 'bad' speech was highly deferential to the state. And third, though implicit in the cases, the First Amendment only restrained the government in acting as censor, and did not restrain private parties from using civil law to seek liability based upon speech.[13]

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[6] (1890) 4 Harv. L. Rev. 193 [hereinafter Warren and Brandeis].
[7] Neil M. Richards & Daniel J. Solove, 'Privacy's Other Path: Recovering the Law of Confidentiality' (2006) 96 Geo. L.J. 123. For the original suggestion of the 'star power' thesis, see Harry Kalven Jr., 'Privacy in Tort Law — Were Warren and Brandeis Wrong?' (1966) 31 Law & Contemp. Probs. 326, 327.
[8] Richards, *Intellectual Privacy*, above n 3, at 18.
[9] Warren and Brandeis, above n 3.
[10] David M. Rabban, *Free Speech in its Forgotten Years, 1870-1920* (Cambridge: Cambridge University Press, 1997).
[11] Richards, *Intellectual Privacy*, above n 3, at 46–7.
[12] 4 William Blackstone, *Commentaries on the Laws of England* (1765-69) *151–52 (U. Chi. Press facsimile edition 2002).
[13] Rabban, above n 10.

These principles were illustrated well by *Patterson v. Colorado* (1907), involving a newspaper editor who had committed the grave error of 'reflecting upon the motives and conduct of the Supreme Court of Colorado in cases still pending' and been cited for contempt of court.[14] In upholding the conviction, Justice Oliver Wendell Holmes also said two very interesting things that revealed the state of First Amendment law at the time. First, he stated, referring to the protections of the First Amendment that 'the main purpose of such constitutional provisions is 'to prevent all such previous restraints upon publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare'.[15] This, of course, is the standard principle from Blackstone about the prohibition on prior restraints but not subsequent punishments. Second, Holmes concluded that courts had an interest in prohibiting interference with the 'course of justice'.[16] He explained that 'if a court regards, as it may, a publication concerning a matter of law pending before it, as tending towards such an inference, it may punish it'.[17] This is a statement of the general view of the judiciary on the freedom of speech in the nineteenth century through the First World War, which scholars have termed the 'bad tendency test'.[18] Under this principle, government had the power to punish speech that had any tendency, however remote, to bring about violations of law that it had the power to prevent. This principle is also flatly inconsistent with the subsequent course of American free expression law.

Holmes, of course, famously changed his mind about free speech.[19] In this conversion, he was joined by Louis Brandeis. In a series of dissents after the First World War, the two men outlined a more protective theory of First Amendment law that required a 'clear and present danger' before the state could regulate expression.[20] Most notable were Holmes's dissent in *Abrams v. United States* (1919),[21] which justified special protection for free speech in terms of the search for truth and Brandeis' concurrence in *Whitney v. California* (1927), which justified it in terms of its relationship to democratic self-government.[22]

The Holmes-Brandeis theory of special protection for free expression was outlined in dissents and separate opinions, and took several decades to be adopted by a majority of the Court. Yet throughout the middle years of the twentieth century, both privacy and free speech were evolving simultaneously in the lower courts. An important recent study of these cases by Samantha Barbas has demonstrated that lower court cases from the end of the First World War through the beginnings of the Cold War were grappling with privacy and free speech, often at the same time, as they sought to reconcile the two rights in a modern society that was beginning to tie free expression and the notion of 'the public interest' to basic commitments of democratic self-governance.[23] As Barbas puts it well, judges in these cases were recognizing an

> expansion of the definition of "the news" to encompass a wide variety of

[14] 205 US 454 (1907) ('*Abrams*').
[15] *Ibid* 462.
[16] *Ibid.*
[17] *Ibid.*
[18] *Ibid.*
[19] Rabban, above n 10. See also Gerald Gunther, 'Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History' (1975) 27 Stan. L. Rev. 719, 720.
[20] G. Edward White, 'The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America' (1996) 95 Mich. L. Rev. 299, 313.
[21] 250 US 616 (1919).
[22] 274 US 357 (1927).
[23] Samantha Barbas, 'The Death of the Public Disclosure Tort: A Historical Perspective' (2010) 22 Yale J. L. & Hum. 171, 173.

> information, including private facts, and a reassessment of the significance of the news media to modern social life. We see the emergence of the concept of "the public's right to know" about the world through the news media, and the ideas that the purpose of the news is not only to inform citizens about the complex workings of modern society but to generate public discourse. For the news media to achieve this function, there must be robust legal and constitutional protection for a free press, and news content must be as extensive as the public's interests and concerns.[24]

Privacy scholars were also affected by the cultural ascendancy of free speech. In his seminal 1960 article 'Privacy', William Prosser, the dean of American tort law announced his four privacy torts of intrusion, disclosure, appropriation and false light.[25] Each of these torts was defined in terms of emotional harm that was 'highly offensive to a reasonable person'. At the same time, Prosser strongly hinted that disclosure and false light were probably unconstitutional due to the First Amendment. Prosser finally brought the privacy torts into the mainstream of American tort law, but did so while suggesting their basic inconsistency with the rising tide of protection for free expression, especially truthful expression by the establishment press.[26] He tamed and marginalized them at the same time.

Prosser's suggestions of privacy's unconstitutionality were prophetic. Just four years later, the Supreme Court decided the seminal case of *New York Times v. Sullivan* (1964), which laid down the foundations for First Amendment law in general, and the conflict between privacy and the media in particular.[27] *Sullivan* transformed the landscape upon which the torts like privacy interacted with the First Amendment, and adopted an interpretation of both free speech and the role of judges in free speech cases that has much to do with the transatlantic divide on privacy and the press.

Sullivan involved a libel suit brought by L.B. Sullivan, the Alabama state police commissioner, against the Times for running an inaccurate political advertisement by civil rights leaders. The ad sought financial support from Times readers for the legal defence of Martin Luther King, Jr., against persecution by the Alabama authorities, and it described the tactics of racial persecution that the Alabama authorities had levied against King and his supporters. While the charges made in the advertisement against the State of Alabama were substantially true, they contained several factual inaccuracies. Sullivan brought suit for defamation in his capacity as a private citizen and won a large award of damages in the Alabama state courts. The U.S. Supreme Court understood the case to be one of a state official using the civil tort system as a tool of political censorship and reversed the decision.

Two aspects of the holding in *Sullivan* are significant for present purposes. First, is the frequently overlooked holding that the First Amendment applies to tort lawsuits between private parties that impose liability on the basis of spoken or printed words. Commissioner Sullivan had argued, consistent with over a century of American case law, that civil suits between private parties could not possibly implicate the First Amendment's restriction on government power. The court rejected this argument, noting that

> Although this is a civil lawsuit between private parties, the Alabama courts have

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[24] *Ibid.*
[25] William L. Prosser, 'Privacy' (1960) 48 Cal. L. Rev. 383.
[26] Neil M. Richards & Daniel J. Solove, 'Prosser's Privacy Law: A Mixed Legacy' (2010) 98 Calif. L. Rev. 1887.
[27] 376 US 254, 270 (1964) ('*Sullivan*').

> applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been exercised but, whatever the form, whether such power has in fact been exercised.

Thus, because Alabama's liability rule in defamation cases was being used to chill political dissent and organization, it was 'state action' within the meaning of the First Amendment and needed to be assessed for its compatibility with that constitutional guarantee.

That assessment formed the second dimension of *Sullivan's* holding; its famous rule that a government official suing in defamation must prove that the defendant acted with 'actual malice'. 'Actual malice' does not mean animus or hatred towards the defendant but rather spoke to the defendant's state of mind about the truth of the allegedly defamatory speech. The rule requires the plaintiff to prove that the defendant printed defamatory falsehoods knowing that they were false or at least printed them with a reckless disregard for the truth. But the importance of actual malice is not its doctrinal formulation, however protective of false political speech, but rather the background assumptions about free speech on which the holding rested. These were fundamental assumptions about the importance of public debate in a democracy and the requirement that such debate be 'uninhibited, robust, and wide-open'. This proposition that public speech must receive substantial protection and deference lest it chill public debate has become the core of American First Amendment law. Writing shortly after the *Sullivan* opinion, Harry Kalven termed it 'the central meaning of the First Amendment',[28] while more recently Lee Bollinger has called it the 'The First Pillar' of American free speech law; its 'extraordinary protection from censorship'.[29] Under this theory, developed from the theories of Holmes, Brandeis, and others, and developed in the common law cases from the 1920s to the 1960s, the fragility of public debate in a democracy means that judges must be especially hesitant in censoring or imposing liability for speech involving public matters, lest they chill it and deprive listeners and readers of its insight.

Sullivan was a defamation case rather than a privacy case, but its two central principles applied directly to the privacy torts, especially the tort of the disclosure of private facts. This was a logical extension of the holding in *Sullivan* made even easier because Warren and Brandeis themselves had closely modelled their proposed tort on defamation.[30] Yet privacy had one additional problem that defamation did not – while defamation law punished falsehoods, the privacy torts impose liability for publicly-circulated truth. Thus, in *Time v. Hill* (1967), the Court largely gutted the 'false light' tort, an offshoot of tort privacy remedying publications that place a defendant in a 'false light' in an offensive way.[31] The Court reasoned that because false light suits raise many of the same threats to public debate that defamation does, false light plaintiffs in cases on matters of public concern must also prove actual malice.[32] Similar constitutional limitations (though not always actual malice) have been placed on disclosures of true but newsworthy facts that are offensive to a reasonable person, as well as on infliction of emotional distress cases in which newsworthy speech is the alleged legal wrong.[33]

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[28] Harry Kalven, Jr., 'The New York Times Case: A Note on "The Central Meaning of the First Amendment"' (1964) Sup. Ct. Rev. 191, 208.
[29] Lee C. Bollinger, *Uninhibited, Robust, and Wide-Open: A Free Press for a New Century* (New York: Oxford University Press, 2010).
[30] Richards and Solove, 'Privacy's Other Path', above n 7.
[31] American Law Institute, Restatement (Second) of Torts (1977) § 652E.
[32] 385 US 374, 390–1 (1967).
[33] E.g., *Cox Broadcasting Corp. v. Cohn*, 420 US 469, 495–6 (1975) (disclosure); *Hustler Magazine v. Falwell*, 485 US 46, 56 (1988).

2. American Free Speech Methodology

With this background in mind, it is possible to understand not only *how* American cases approach the balance between public disclosures of private facts, but also *why*. Such cases ask courts to decide whether the imposition of tort liability based upon words is constitutional. The basic approach is to measure the tort interest in preventing emotional harm against the paramount constitutional interest from *Sullivan* of ensuring that public debate remains 'uninhibited, robust, and wide-open'.[34] Courts thus do not really balance the two interests, at least not in the sense of anything resembling proportionality analysis in European cases. The American approach is much more of a measuring of the theory of liability in the case against a fixed constitutional yardstick, with any verdicts that do not measure up thrown out as unconstitutional. In practice, this is likely to be most verdicts.

Further driving the analysis in favour of the First Amendment interest is an ethic of judicial self-doubt in free speech cases. Because of the cultural and legal power of the First Amendment guarantee, American judges are by and large reluctant to create new categories of exemption from the First Amendment,[35] or to skirt too close to press regulation in close cases. American judges err on the side of free speech because they doubt their ability to police the line between acceptable and unacceptable speech without infringing *Sullivan*'s foundational commitment to unregulated and unrestricted public discussion. At least where there is a colourable claim that the disclosure at issue involves a matter of public concern, courts (even the Supreme Court) are reluctant to find liability except in the most outrageous of cases. This epistemic doubt has a long pedigree. In the most important section of his seminal dissent in *Abrams*, Justice Holmes explained that

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power, and want a certain result with all your heart, you naturally express your wishes in law, and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas[36]

Justice Holmes' historical warning is still a central pillar of modern First Amendment law. In its most recent free speech and privacy case, the funeral protest case of *Snyder v. Phelps* (2011),[37] the Court accepted the argument dubious to many that a military funeral protest involving signage including 'God Hates You' and 'You're Going to Hell' was a matter of public concern because it was surrounded by other signs such as 'God Hates the USA'. The Court's abiding concern in that case was that tort liability (including privacy liability) not be used to chill public debate, even public debate that most people would find distasteful or offensive. In so doing, the Court (which seemed to believe that the speaker's arguments were nonsense) steadfastly refused to act on that belief in case the speaker was right. As we will see in Part III, in practice this means that the First Amendment is highly likely to prevail unless we have private figures, private speech, sex

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[34] *Sullivan,* 376 US 254, 270 (1964).
[35] *United States v. Stevens*, 559 US 460 (2010).
[36] *Abrams* 205 US 454, 630 (Holmes, J, dissenting) (1907).
[37] 562 US ___ (2011) (No. 09-751) ('*Snyder*').

tapes, or a theory of liability sounding not in tort privacy but in confidentiality.

Part II – The English Approach

(1) The development of privacy law and the relationship with human rights

Although Americans might think of English law as pro-privacy, the right to privacy in the United Kingdom is a relatively recent development. Traditionally English law had no right to privacy. Indeed as recently as the 1990s, the courts had very little to offer privacy claimants. This is illustrated by the case of *Kaye v Robertson.*[38] Gordon Kaye was a well-known actor from the BBC television sitcom *'Allo 'Allo!* He suffered a serious head injury after a piece of wood fell through his car windscreen during a storm. Kaye was in hospital following extensive brain surgery when journalists gained access to his room, interviewed him and took photographs. Shortly afterwards Kaye had no recollection of the 'interview'. A notorious tabloid newspaper called 'The Sunday Sport' sought to publish the interview and photographs and an injunction was sought on Kaye's behalf. The case went to the Court of Appeal but although the Judges plainly wished to halt publication, they were powerless to do so. Under the law at the time there was no right to privacy, no general tort of privacy, and unlike American law, not even a tort of intrusion into solitude. All the Court could offer was an injunction through the law of malicious falsehood prohibiting the newspaper from publishing material that implied that Kaye had voluntarily permitted the photographs to be taken and/or participated in the interview. The injunction could not preclude the publication of the story, or the photographs, nor could the Court award damages for what was regarded by the judges as a 'monstrous invasion of privacy' – namely the initial intrusion into the hospital room.[39] At that time English law simply did not protect these interests.

The judges in *Kaye* were so concerned about the gap in legal protection that they requested legislative intervention to protect privacy.[40] However, no legislation was forthcoming. On a number of occasions committees considered the possibility of introducing various statutory privacy laws, but none of these proposals resulted in legislation.[41] At the same time the courts refused to develop a general tort of privacy.[42]

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[38] [1991] FSR 62 (CA)

[39] *Ibid* per Bingham LJ p.70.

[40] *Ibid* per Glidewell L.J. p.66; Bingham L.J. p.70; and Leggatt L.J. p.71.

[41] For example, in 1972 the Younger Committee decided against the introduction of a tort of disclosure of unlawfully acquired information (Kenneth Gilmour Younger, Report of the Committee on Privacy, Cmnd. 5012 (1972)). The first Calcutt Committee also decided against recommending a new tort (David Calcutt, Report of the Committee on Privacy and Related Matters, Cmnd. 1102 (1990)), whilst the second Calcutt Committee decided that the Government needed to consider the issue further (David Calcutt, Review of Press Self-Regulation, Cmnd. 2135 (1993)). In the same year the National Heritage Select Committee recommended the introduction of a tort (Privacy and Media Intrusion, Fourth Report (1993 HC 291), while the Lord Chancellor's Green Paper recommended a wider tort encompassing 'infringement of privacy causing substantial distress' (Infringement of Privacy: consultation paper (1993)). In 2003 a select committee again recommended that the Government reconsider its position (House of Commons Culture, Media and Sport Select Committee, Privacy and Media Intrusion, Fifth Report (2003 HC 458)).[41]

[42] The House of Lords was asked to develop a general tort of privacy in *Wainwright v Home Office* [2003] UKHL 53; [2004] 2 AC 406, but they declined to do so. See A. Johnston, 'Putting the Cart Before the Horse? Privacy and the Wainwrights' (2004) 63(1) C. L. J. 15. It should be noted that Tugendhat J recently suggested in *Goodwin v NGN Ltd* [2011] EWHC 1437 (QB) at [85]–[87] and [113]–[130], that intrusion is part of English law. This discussion appears to be limited to cases which involve the publication of private information. In other words, the courts may issue an injunction to prevent disclosure of information where although the information itself is not strictly private, the disclosure of information is an intrusion into private life. This is desirable, but it is not a full-blown privacy tort. Moreover, this is only a first instance decision and is currently on appeal. It should be noted that the United States has a tort of seclusion and a number of Canadian states have statutory torts of invasion of privacy.

Thus there was no right to privacy and no general tort of privacy.

The vehicles for development of the law in this area were the law of breach of confidence and the introduction of the Human Rights Act 1998. Whilst the courts were developing breach of confidence the law was ambiguous and the courts had not yet provided protection for the sort of personal information that the courts now routinely protect under the law of misuse of private information. Commentators at the time noted that pre-HRA there were very few cases concerning personal as opposed to commercial information.[43]

This background is important for a number of reasons. First, it highlights the fact that up until the 1990s English law provided less protection for privacy than American law. It provided less protection not because the balance between free speech and privacy was struck differently but rather because there was no cause of action even remotely resembling a right to privacy. Second, that position changed largely because of the introduction of the Human Rights Act 1998.

Unlike the right to privacy, freedom of expression has long been recognised in English law. As noted earlier, freedom of the press had been a concern of Blackstone, as it had been for John Milton and John Stuart Mill.[44] By the twentieth century, as in the United States, freedom of expression was regarded as a common law constitutional right[45] and the courts advocated the role of free speech in a democracy. This was evident in *R v Secretary of State for the Home Department ex parte Simms*, in which Lord Steyn could assert that

> *freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.*[46]

Post Human Rights Act 1998 freedom of expression is protected by Article 10 ECHR, although some scholars have suggested that the impact on cases is often a cosmetic one.[47] Yet one should be cautious about the extent to which freedom of expression was embedded in and protected by the common law as Lord Bingham stated in a later case following the enactment of the Human Rights Act 1998 '[t]he approach of the … common law to freedom of expression … was hesitant and negative'.[48] Whilst the courts often asserted that the common law and the Convention protected the same values,[49] this did not prevent the European Court of Human Rights finding violations of Article 10

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[43] Gavin Phillipson and Helen Fenwick, 'Breach of Confidence as a Privacy Remedy in the Human Rights Act Era' [2000] 63 Modern Law Review 660. Fenwick and Phillipson were only able to identify one case at the interlocutory stage *Francome* — in which an obligation of confidentiality was imposed without an express or implied promise of confidentiality and without a pre-existing relationship between the claimant and the defendant. Apart from *Francome* all of the surreptitious takings of information were commercial cases. They offered two reasons for why the HRA was needed: (i) provide an organizing principle around which uncertainties in the cause of action may be addressed; and (ii) normative impetus for the consolidation of the pre-HRA developments — whilst confidence had the potential to be applied in privacy cases the developments were tentative and insecure.

[44] See John Milton, *Areopagitica* (1644); John Stuart Mill, *On Liberty* (1869).

[45] See for example Browne-Wilkinson LJ dissent in *Wheeler v Leicester City Council* [1985] AC 1054, 1065.

[46] [2000] 2 AC 115, 126.

[47] Eric Barendt, *Freedom of Speech* (Oxford: OUP, 2007) p. 39.

[48] *R (Laporte) v chief Constable of Gloucestershire* [2006] UKHL 55 at [34].

[49] *Attorney General v Guardian Newspapers Ltd (No.2)* [1990] 1 AC 109, 283, *Derbyshire County Council v Times newspapers Ltd* [1993] AC 534, 551; *Rantzen v Mirror Group Newspapers* [1994] QB 670, 691; and *R (Wagstaff) v Secretary of State for Health* [2001] 1 WLR 292, 316–17.

ECHR.[50] Certainly freedom of expression did not receive unrestricted protection in English law, there were a number of pieces of legislation that substantially limited the extent to which individuals could express offensive or harmful speech, including the Public Order Act 1986, Race Relations Act 1976 and the law against blasphemy. Thus freedom of expression has never had the status in English law that the First Amendment has in US law: under the common law freedom of expression was often used as a defence or to qualify other rights; whilst freedom of expression under Article 10 ECHR is expressly framed as a qualified right which means that it has to be balanced against other competing rights and interests. In other words the right to freedom of expression is a right which must be balanced against privacy rather than a fixed measure to which the right to privacy must be fitted.

Disclosures of private information are litigated in England under the law of misuse of private information and it involves a mixture of private law and human rights. The courts have to apply and balance both freedom of expression and privacy. Both are regarded as fundamental rights, and neither right automatically trumps the other. The impact of these developments is such that if *Kaye* came before the courts now, they would be able to issue an injunction to prevent the publication.

The law of misuse of private information evolved out of breach of confidence. Traditionally there were three limbs to the law of breach of confidence as set out in *Coco* v. *AN Clark*:

> *The information itself ... must "have the necessary quality of confidence about it" …*
> *[It] must have been imparted in circumstances importing an obligation of confidence …*
> *[T]here must be an un-authorised use of the information to the detriment of the party communicating it.*[51]

It was the second limb that was seen as a restriction upon the extent to which breach of confidence could be used in media privacy cases. Historically the second limb required a pre-existing relationship e.g. employer and employee or husband and wife, although even prior to the enactment of the Human Rights Act 1998 the courts were developing a more flexible approach to breach of confidence.[52] The second requirement had been developed to accommodate the imposition of confidentiality as a matter of conscience induced by the circumstances of receiving information. Nevertheless it was also the case that the courts did not systematically apply breach of confidence to personal privacy cases until after the enactment of the HRA 1998.[53]

The leading case post HRA is the House of Lords decision in *Campbell* v. *MGN* where the Lords took the opportunity to develop the common law to provide a means of protecting individuals against the disclosure of personal information.[54] *Campbell* concerned the *Daily Mirror's* publication of the details of supermodel Naomi Campbell's drug treatment at Narcotics Anonymous. Whilst it was conceded that the newspaper could legitimately reveal the fact that Ms Campbell was a drug addict (she had previously declared that unlike other supermodels she did not take drugs) and that she was receiving treatment the House of Lords by a majority of 3:2 found the newspaper liable for publishing a photograph of supermodel Naomi Campbell outside a Narcotics

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[50] *Sunday Times v United Kingdom* (1979) 2 EHRR 245; *Observer and Guardian v United Kingdom* (1991) 14 EHRR 153.
[51] *Coco v A N Clark* [1969] RPC 41, 47.
[52] Phillipson and Fenwick, above n 43.
[53] *Ibid.*
[54] *Campbell* [2004] UKHL 22.

Anonymous meeting and details of her treatment.[55] Ms Campbell was awarded £3500 damages. The House of Lords took the opportunity to affirm that the law had developed a separate cause of action known as misuse of private information which had 'firmly shaken off' the need for a confidential relationship. It was clear following that decision that celebrities are entitled to some privacy even if the story will sell papers. But how do the courts reconcile the claimant's right to privacy with the defendant's right to freedom of expression?

(2) Method for balancing the right to privacy and freedom of expression

There are two stages to the courts' analysis. First, the court considers whether the claimant had a reasonable expectation of privacy. Unlike the law of breach of confidence the courts look at whether the information was private rather than whether there should be an obligation of confidentiality. The reasonable expectation of privacy test can be answered in one of two ways, either the information itself is obviously private, or in the circumstances the individual had a reasonable expectation of privacy.[56] Examples of types of information that have been regarded as private include details of medical conditions and treatment and details of one's sex life. The bar for the reasonable expectation of privacy test is set lower in English law than the test for the disclosure of private facts tort in the United States, which requires that the disclosure be 'highly offensive to a reasonable person'.[57] In *Campbell* the House of Lords expressly rejected a requirement that the disclosure of personal information be 'highly offensive'. [58] Thus the scope of the English tort is significantly broader.

If the answer to the reasonable expectation of privacy test is positive, then the court must balance the Article 8 right to privacy[59] against the Article 10 right to freedom of expression.[60] In striking the balance the courts are guided by the principles laid out in European case law. Under the European Convention on Human Rights freedom of expression and privacy are granted equal status. In 1998 the Council of Europe, responding to the death of Princess Diana in a paparazzi chase in Paris, issued a

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[55] *Ibid.*

[56] For discussion see Kirsty Hughes, 'A Behavioural Understanding of Privacy and its Implications for Privacy Law' (2012) M. L. R. 806.

[57] American Law Institute, Restatement (Second) of Torts (1977) §652D.

[58] *Campbell* [2004] UKHL 22.

[59] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221, in force 3 September 1953, art 8 ('ECHR'): Right to respect for private and family life

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

[60] ECHR art 10, Freedom of expression

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

Resolution asserting the relationship between the two Convention rights.

> *It is often in the name of a one-sided interpretation of the right to freedom of expression, which is guaranteed in Article 10 of the European Convention on Human Rights, that the media invade people's privacy, claiming that their readers are entitled to know everything about public figures.*
>
> *Certain facts relating to the private lives of public figures, particularly politicians, may indeed be of interest to citizens, and it may therefore be legitimate for readers, who are also voters, to be informed of those facts.*
>
> *It is therefore necessary to find a way of balancing the exercise of two fundamental rights, both of which are guaranteed in the European Convention on Human Rights: the right to respect for one's private life and the right to freedom of expression.*
>
> *The Assembly reaffirms the importance of every person's right to privacy, and of the right to freedom of expression, as fundamental to a democratic society. These rights are neither absolute nor in any hierarchical order, since they are of equal value.*[61]

The European Court of Human Rights has applied the Resolution in subsequent cases and the Court has developed a set of criteria for balancing the Convention rights. These criteria were established in a series of cases relating to the publication of details of the private lives of celebrities beginning with the first *Von Hannover* v. *Germany* decision.[62] In *Von Hannover (No.1)* the Court concluded that Germany had failed to protect Princess Caroline of Monaco's privacy by allowing magazines to publish photographs of the Princess engaging in everyday activities in public places. The Court asserted that 'the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest' as the photographs in question did not contribute to a debate of general interest the publications violated the right to privacy. The decision of the Strasbourg Court was controversial, in part because it was felt by some that the European Court should have given a wider margin of appreciation to the reasoning of the German courts that had sought to strike a balance between the two rights.[63] The European Court of Human Rights revisited its approach in the later *Von* Hannover v. *Germany (No.2)* proceedings and *Axel* Springer v. *Germany* in which the Court identified a number of factors that the courts should take into consideration in determining where the balance should be struck between the two Convention rights.[64] Those criteria are: (a) whether the information or photographs contribute to a debate of general interest; (b) how well known is the person concerned and what is the subject of the report; (c) prior conduct of the person concerned; (d) content, form and consequences of the publication; (e) and circumstances in which the photographs were taken. The first three of those factors can all be used to curtail the right to privacy of those who are in the public eye. When considering an interference with the right to freedom of expression under Article 10 ECHR the Court will also consider (a) the method by which the information was

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[61] *Right to Privacy*, Council of Europe Parliamentary Assembly, Res 1165, 24th sitting (26 June 1998) http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta98/eres1165.htm.

[62] (2005) 40 EHRR 1.

[63] Rainer Grote, 'The ECHRs rulings in *Von Hannover v Germany (No.2)* and *Axel Springer AG v. Germany*: Rebalancing Freedom of the Press with the Respect for Privacy' (2012) 55 *German Yearbook of International Law* 639.

[64] *Von Hannover v Germany (No.2)* (2012) 55 EHRR 15; *Axel Springer v Germany* (2012) 55 EHRR 6.

obtained and its veracity and (b) the severity of the sanction imposed.[65]

Applying the Strasbourg jurisprudence the domestic courts have frequently recognised since the HRA 1998 that people's sex lives are essentially their own business[66]. Provided the participants are consenting adults, there is no question of exploiting the young or vulnerable[67], and the situation does not give rise to favouritism or advancement through corruption[68], there is no legitimate public interest in the disclosure of the existence of a sexual relationship, less still salacious details or intimate photographs. In many cases the defendant newspaper has offered no public interest argument at all and has not even attempted to justify the publication.[69] However, the courts have sometimes allowed one party to a sexual relationship who wishes to sell the story of the relationship to the press, to do so, provided the identity of the claimant is protected. Thus the courts directly determine the very issue that American courts are reluctant to engage with, namely the importance of speech.[70]

(3) Remedies

Perhaps the biggest difference between American and English law is the approach to remedies. English law is more open to prior restraint, whereas American law has long been opposed to such measures. Remedies are controversial because the choice of remedy itself has implications for the protection of privacy and free speech. An injunction as a form of prior restraint precludes disclosure and therefore acts as complete fetter on free speech, whereas damages may not necessarily act as a complete fetter on free speech. The defendant is allowed to disclose the information, but needs to pay. Clearly the greater the level of damages the more likely that the prospect of damages will have a chilling effect on free speech. Thus those that favour free speech generally oppose injunctions and also caution against large awards of damages. Conversely, from a privacy perspective damages are an inadequate. Once the information is disclosed the harm is done. Unlike defamation an award of damages cannot restore reputation as the information is true. Thus from the perspective of the claimant – an injunction is the preferable remedy as it prevents the information from being disclosed in the first place.

In English law both damages and injunctions are available. In order to obtain an interim injunction the claimant must not only establish that his or her right to privacy is engaged, but also that the requirement set out in section 12(3) of the HRA is satisfied. Section 12 (3) HRA provides that 'no such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed'. In *Cream Holdings* v. *Banerjee* the House of Lords

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[65] *Ibid.*

[66] See, in this regard, Tugendhat J's decision in *TSE v News Group Newspapers Ltd* [2011] EWHC 1308, at [24]: 'For decades, both the English courts and the European Court of Human Rights have recognised a reasonable expectation of privacy in relation to sexual relationships, with sexual conduct being regarded as 'an essentially private manifestation of the human personality' (*Dudgeon v United Kingdom* (1981) 4 EHRR 149, at [52] and [60]). It is sometimes forgotten that, ten years before the HRA, the court in *Stephens v Avery* [1988] Ch 449 afforded protection to information concerning an adulterous lesbian relationship. Sir Nicolas Browne-Wilkinson said: 'To most people the details of their sexual lives are high on their list of those matters which they regard as confidential'.

[67] *Mosley v News Group Newspapers Ltd* [2008] EMLR 20, at [100].

[68] *Campbell v MGN* [2004] 2 AC 457, at 475, where Lord Hoffmann gave the example of a sexual relationship between a politician and someone she has appointed to public office.

[69] For further discussion of this issue see 'Kirsty Hughes and Lord Grabiner QC — Written Evidence on privacy and Injunctions' in Joint Select Committee on Privacy and Injunctions, 'Privacy and Injunctions: Oral and Written Evidence (UK Parliament, November 2011) 37.

[70] The jurisprudence of the European Court of Human Rights has long determined that there is a hierarchy of expression with political expression at the apex, followed by artistic expression, which is afforded lesser protection, and commercial speech which is regarded as the lowest form of expression.

determined that: likely means 'more likely than not' in this context.[71] The Court will also consider whether damages would be an adequate remedy, and where the balance of convenience lies between article 8 and article 10 ECHR. Thus it is not the case that claimants can advance spurious claims to block the publication of any news story. Two sub-categories of injunctions have been the subject of controversy and confusion and they have been misunderstood in both the United Kingdom and the United States in part due to some dubious press coverage. They are super-injunctions and anonymity orders. A super-injunction can properly be defined as follows:

> An interim injunction which restrains a person from: (i) publishing information which concerns the applicant and is said to be confidential or private; and, (ii) publicising or informing others of the existence of the order and the proceedings (the 'super' element of the order).[72]

An anonymised injunction is:

> An interim injunction which restrains a person from publishing information which concerns the applicant and is said to be confidential or private where the names of either or both of the parties to the proceedings are not stated.[73]

As both are forms of interim injunction they must satisfy the criteria for an interim injunction set out above. Thus, as a matter of law, it is not the case that super-injunctions and anonymised injunctions are automatically, or indeed readily, granted. In 2011 super-injunctions were headline news and there was a press myth that the courts were readily giving out 'super-injunctions' to celebrities. But, whilst there was a rise in the number of cases in which interim injunctive relief was sought, and the courts granted injunctions, these generally took the form of anonymity orders or injunctions prohibiting the publication of specific details. They were not, as the *Report of the CMS* confirmed, super-injunctions.[74] Further, following clarification of the court's approach to granting super-injunctions in *Donald v Ntuli* [2011] 1 WLR 294, the circumstances in which that type of injunction can properly be made for anything other than a short period of time are extremely limited. Since 2011 the Ministry of Justice has published statistics on privacy injunctions, in January – June 2014 there were no privacy injunction proceedings.[75]

The reality is that in many cases in which a privacy injunction is sought, the defendant advanced no public interest argument. This does not, however, relieve the court of its obligation to consider the matter: section 12(4) of the HRA requires the court to have regard to whether publication is in the public interest, regardless of whether it is raised by the defendant or not. Nevertheless, this practice has been starkly highlighted by the *Guardian's* analysis of applications for privacy injunctions, which has revealed that, between 2007 and 2011, a public interest argument was advanced in only seven cases; 21 out of the 38 cases identified in the *Guardian's* survey did not involve a

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[71] [2005] 1 AC 253 at [22]–[23].

[72] *Report of the Committee of Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice*, (Master of the Rolls, May 2011) paragraph 2.14 ('*Report of the CMS*').

[73] *Ibid* paragraph 2.14.

[74] *Ibid* page iv. The report dispelled the myth that the courts were issuing significant numbers of super-injunctions. It confirmed that only two known super-injunctions have been issued by the courts since the case of *Terry v Persons Unknown* [2010] EMLR 16. One of those injunctions was set aside on appeal (*Donald v Ntuli* [2011] 1 WLR 294), and the other was granted for a period of 7 days for anti-tipping-off reasons (*DFT v TFD* [2010] EWHC 2335).

[75] Ministry of Justice, 'Statistics on privacy injunctions: January to June 2014' (25 September 2014) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/358274/privacy-injunctions-statistics-january-june-2014.pdf.

public interest argument at all; and in the remaining cases, it is not clear whether a public interest argument was put forward.[76] It is rare for a defendant to advance a public interest argument, and even rarer for a defendant to support such an argument with credible evidence.

Part III – Comparing the Cases

There are thus real and meaningful differences between how the English misuse of private information tort and the American disclosure of private facts interact with constitutional protections for free expression. England balances two equally weighty constitutional rights, whereas under the American tort notions of privacy are curtailed by the dominance of the First Amendment. These differences are best illustrated by a series of comparative examples, (i) disclosures of information relating to government officials; (ii) disclosures of information relating to celebrities; (iii) disclosures of information relating to private individuals; and (iv) the dissemination or publication of photographs or video footage. Analysis across these core areas highlights a number of important differences, but also some points of similarity.

(i) Government officials and Heads of States

Under American free speech law, it should be unsurprising that privacy and defamation cases involving government officials receive the greatest scrutiny under the First Amendment. Questions relating to the fitness of women and men for public office are at the core of the concept of a *matter of public concern*. *Sullivan*, of course, held that the greatest level of First Amendment protection was warranted when tort law was being used to deter discussion about the behaviour of public officials, and thus acting as a private law substitute for the old crime of seditious libel.[77] This idea was at the heart of the Warren and Brandeis theory as well, under which the proposed tort would not reach matters of public interest, such as those relating to the fitness of a candidate for public office.[78]

Under American law, the mere involvement of a public official in the litigation can render an entire set of facts newsworthy and immune from tort liability resulting from press reports. For example, in *Bartnicki v. Vopper*, the Supreme Court protected the disclosure of an intercepted telephone conversation by the press because the press had not participated in the interception, and the recording related to a matter of public import, a public school teacher's strike.[79] More controversially, in the leading case of *Sipple v, Chronicle Publishing Co.,* a state court ruled that the disclosure tort could not be used to bar the *San Francisco Chronicle* from reporting that the plaintiff, Oliver Sipple, was gay. Sipple had saved the life of President Ford by thwarting an attempted assassination, and the court held that Sipple could not recover from being outed in press reports because his sexual orientation was relevant to dispelling 'the false public opinion that gays were timid, weak, and unheroic figures and to raise the equally important political question whether the President of the United States entertained a discriminatory attitude or bias against … homosexuals'.[80] Ford had not thanked Sipple publicly, and because there had been speculation that Ford might have done this out of homophobia, the court

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[76] Available online at the *Guardian:* http://www.guardian.co.uk/law/datablog/2011/aug/05/superinjunctions-gagging-orders-injunctions-list#data

[77] *Sullivan,* 376 US 254 at 297 (1964).

[78] Warren and Brandeis, above n 3, at 214–16.

[79] *Bartnicki v Vopper*, 532 US 514 (2001).

[80] 201 Cal. Rptr. 665 (Cal. Ct. App. 1984).

ruled that Sipple's outing was protected by the First Amendment. (It later turned out that Ford had thanked Sipple with 'heartfelt appreciation' in a personal letter signed 'Jerry Ford'.[81]).

Yet to say that all matters involving public officials are insulated by the First Amendment under American law would be significantly overstating things. Even under American law, First Amendment protection has important limits. The disclosure by the press of even newsworthy private facts by the press can be regulated, at least when there is something like a duty of confidentiality in the case. Thus, in *Cohen v. Cowles Media*, the Supreme Court upheld a judgment against a newspaper for breaking a promise to withhold a source's name from a story, even though the story involved a scandal about a candidate for government, and the source was connected to the candidate's campaign.[82] And in *Boehner v. McDermott*, the D.C. Circuit Court of Appeals held that a Member of Congress could be held liable for sharing an illegally-recorded tape of other Members plotting because it violated an internal House ethics confidentiality rule, even though the disclosing Member had not participated in the illegal interception and the disclosure was highly newsworthy.[83]

The Strasbourg jurisprudence on the rights of government officials to privacy is also mixed. At first glance it appears that the position is relatively simple, namely that politicians are entitled to less privacy than other individuals. The Court has repeatedly stated in both defamation and privacy cases that the limits of permissible criticism are wider as regards politicians than other individuals. The Court recognises that the press plays an important role as 'public watchdog' and that press coverage of the activities of politicians is crucial to democracy. Yet whilst politicians are entitled to less privacy they are entitled to some semblance of a private life. Indeed in *Axel Springer* the Court noted that

> *A fundamental distinction needs to be made between reporting facts capable of contributing to a debate in a democratic society, relating to politicians in the exercise of their official functions for example, and reporting details of the private life of an individual who does not exercise such functions. Whilst in the former case the press exercises its role of "public watchdog" in a democracy by imparting information and ideas on matters of public interest, that role appears less important in the latter case. Similarly, although in certain special circumstances the public's right to be informed can even extend to aspects of the private life of public figures, particularly where politicians are concerned, this will not be the case – even where the persons concerned are quite well known to the public – where the published photos and accompanying commentaries relate exclusively to details of the person's private life and have the sole aim of satisfying the curiosity of a particular readership in that respect.*[84]

The rationale for this is clear, but it is difficult to discern where those limits will be drawn in practice and how this compares to the level of privacy offered to other public figures. In *Editions Plons* v *France* the European Court of Human Rights held that an injunction prohibiting the disclosure of the former French President's terminal illness whilst head of state violated Article 10 ECHR, although it should also be noted that the Court found that a temporary injunction prohibiting the disclosure of the information shortly after his

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[81] Dan Morain, 'Sorrow Trailed a Veteran Who Saved a President's Life and Then Was Cast in an Unwanted Spotlight' L.A. Times (13 February 1989) at Part 5, 1.
[82] 501 US 663, 665 (1991).
[83] 484 F.3d 573 (D.C. Cir. 2007).
[84] *Axel Springer v Germany* (2012) 55 EHRR 6, [91] citing *Von Hannover v Germany (No.2)* (2012) 55 EHRR 15.

death was justified.[85] The principles were applied in *Ruusunen v Finland*.[86] *Ruusunen* was the former girlfriend of the former Prime Minister of Finland. She published an autobiography which described a period of their life together including details of their sex life. Finnish law criminalises the dissemination through mass media (or otherwise by making available to many persons) of information, insinuation or images of the private life of another person conducive to causing that person suffering or contempt. Enforcing these provisions the public prosecution office brought criminal proceedings against the applicant and the publishing company for disclosing information about the private life of the Prime Minister. The Appeal Court convicted the applicant and sentenced her to a 300 euro fine, the Court also ordered the forfeiture of the proceeds of the crime 4,270 euros to the state. The Supreme Court upheld the conviction but quashed the forfeiture order. The applicant complained to the European Court of Human Rights. The Court found that there was no violation of Article 10 ECHR.[87]

The Court reiterated that 'the limits of permissible criticism are wider as regards a politician than as regards a private individual' because the former 'inevitably and knowingly lay themselves open to close scrutiny of their words and deeds by journalists and the public at large, and they must consequently display a greater degree of tolerance', in doing so the Court seemed to elide politicians and other 'persons in the public eye' noting that similar considerations apply to both.[88] Yet whilst emphasising that politicians and public figures must expect a greater degree of scrutiny the Court also asserted that '[i]n certain circumstances, even where a person is known to the general public, he or she may rely on a "legitimate expectation" of protection of and respect for his or her private life'.[89] The Court then went on to balance the two convention rights applying the principles that it had set out in *Von Hannover (No.2)* and *Axel Springer*. In applying those criteria the Court acknowledged that the former Prime Minister could be expected to tolerate a greater degree of public scrutiny. Yet the Court refused to scrutinise the analysis of the domestic courts, instead the Court concluded that as the domestic court had applied the *Von Hannover (No.2)* principles the European Court should afford a margin of appreciation to the state in striking the balance between the competing interests. This demonstrates why the Court should be cautious about determining that a wide margin of appreciation should inevitably follow when the state authorities are striking a balance between competing rights. The Court's mechanical analysis offers no sense of insight into the significance of the issues at stake. In particular the fact that these were not civil proceedings between the former Prime Minister and the applicant, but were criminal proceedings in which the state's criminal justice was mobilised against the applicant to protect the Prime Minister. The Court depressingly trivialised this issue by regarding the fine as reasonable and emphasising the fact that there was no entry on the applicant's criminal record. Yet this approach does not appear to be in line with the Court's own analysis in *Axel Springer* in which the Court asserted that the severity of the sanction imposed was one of the criteria for determining whether an appropriate balance had been struck between the Convention rights. Whilst the authors of this article may

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[85] *Editions Plons v France* (2006) 42 EHRR 36.

[86] *Ruusunen v Finland* (App. No. 73579/10, 14 January 2014) ('*Ruusunen*'), available on HUDOC: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-139989.

[87] As noted above we find the use of criminal law to protect the private life of a politician particularly troubling. It may be counter- argued that the use of criminal law may provide a faster and cheaper remedy than civil law proceedings, however even if this is the case (and we do not know that it necessarily is true) this does not justify the use of the state prosecution system to protect the private life of politicians against citizens. The use of criminal law strikes at the heart of free speech and the democratic rationale for freedom of speech.

[88] *Ruusunen* (App. No. 73579/10, 14 January 2014) n. 86 at [41].

[89] *Ibid.*

disagree as to the question of whether politicians can ever restrict the publication of details of their private lives, we are both of the view that the criminal justice system is not an appropriate mechanism for protecting such interests.

In a subsequent case currently under appeal to the Grand Chamber, the Court held that an award of damages following the revelation of a member of the aristocracy's secret son constituted a violation of Article 10 ECHR. In *Couderc and Hachette Filipacchi Associés v. France* a newspaper had published a story disclosing the fact that Prince Albert of Monaco had secretly fathered a son.[90] The French courts had awarded 50,000 Euros in damages for invasion of privacy and the publisher appealed to the European Court of Human Rights. The Court emphasised that the Prince was entitled to have his private life protected but that this needed to be 'weighed against the interests of open discussion of political issues, since exceptions to freedom of expression must be interpreted narrowly'.[91] In this case some aspects of the article were part of a debate of general interest, but others were not. As a Head of State the Prince was clearly a public figure and the story raised issues concerning his hereditary function as Head of State. As the domestic courts had failed to distinguish between information forming part of that general debate and other details, there had been a violation of Article 10 ECHR.

(ii) Celebrities

What about celebrities, loosely defined as people in the public eye who do not perform official functions? Under American law, celebrities are treated as 'public figures', and the publication of information about them receives essentially the same protection as that relating to public officials. Shortly after *Sullivan*, the Supreme Court decided the case of *Curtis Publishing Co. v. Butts*, which involved a defamation suit brought by a famous football coach against a national sports magazine.[92] The Court held that the full protection of the *Sullivan* actual malice standard applied to public figures because 'many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large'.[93] Moreover, celebrities could respond to false statements about them easily because, 'as a class, these "public figures" have as ready access as "public officials" to mass media of communication, both to influence policy and to counter criticism of their views and activities'.[94] The broad protection of speech about celebrities under defamation law has been extended to disclosure tort cases as well. As early as 1940, the Second Circuit held in the famous *Sidis* case that a 'Where Are They Now?' feature on a reclusive former child prodigy was not actionable under the disclosure tort. The court explained, in reasoning that reflects American law to this day, that '[r]egrettably or not, the misfortunes and frailties of neighbors and 'public figures' are subjects of considerable interest and discussion to the rest of the population. And when such are the mores of the community, it would be unwise for a court to bar their expression in the newspapers, books, and magazines of the day'.[95]

The Strasbourg Court has held that celebrities are entitled to less privacy than private individuals, but more privacy than those exercising official functions. However, as the same principles apply to both politicians and celebrities it is difficult to determine

[90] (App. No. 40454/07, 12 June 2014) available on HUDOC: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145084.
[91] *Ibid.*
[92] 388 US 130 (1967).
[93] *Ibid* at 164.
[94] *Ibid.*
[95] *Sidis v F-R Pub. Corporation*, 113 F.2d 806, 809 (2nd Cir. 1940). See generally, Samantha Barbas, 'The Sidis Case and the Origins of Modern Privacy Law' (2012) 36 Colum. J.L. & Arts 21.

the implications of these different categories. As discussed above the Court has held that even politicians are entitled to keep private those details of their lives that do not relate to their official role. Thus in practice it is not clear what the sphere of privacy afforded to celebrities amounts to, and how it relates to the level of protection offered to politicians and ordinary individuals. What is apparent from the case law is that Article 8 ECHR may protect both anodyne and salacious stories. *Von Hannover (No.1)* exemplifies the anodyne end of the spectrum the Court held in that case that photographs of Princess Caroline of Monaco carrying out ordinary activities such as shopping, dining in a restaurant and visiting a beach club were protected by Article 8 ECHR. At the salacious end of the spectrum the Court acknowledged in *Mosley v United Kingdom* that details of a sado-masochistic sex romp involving the President of the Fédération Internationale de l'Automobile were protected by Article 8 ECHR; commenting that the publication of these details constituted a 'flagrant and unjustified invasion into the applicant's private life'.[96] Yet the Court has also asserted that the news worthy nature of the story and the prior conduct of the applicant may also alter the balance which is struck between the celebrity's privacy right and freedom of expression. Thus in *Von Hannover (No.2)* the Court held that the magazines were entitled to publish a set of photographs of the Princess on holiday when they were published in connection to a story concerning the illness of her father and who was looking after him whilst she was on holiday.[97] In *Axel Springer* the Court held that the anonymous celebrity in question had courted publicity and therefore his privacy should be curtailed.[98] These findings were in spite of the fact that the Regional Court had found that the personal disclosures were limited and did not amount to waiver of his privacy. Even more bizarre was the Court's conclusion that there was a greater public interest in the story (the revelation of the arrest of a celebrity for possession of cocaine) because the celebrity in question played a detective in a police drama 'whose mission was law enforcement and crime prevention'.[99] If that analysis is followed to its logical conclusion it would mean that actors who play criminals or drug addicts are entitled to greater privacy than those who portray police officers and priests.

The Court also declined to protect the privacy of celebrities in *Lillo-Stenberg and Saether v Norway.*[100] This case concerned the publication of photographs of the arrival and departure of a bride and groom (a famous Norwegian actress and musician) at a private wedding ceremony conducted outdoors on an islet. The photographs were published in a weekly magazine as part of a two page article. The couple were unsuccessful in the proceedings in the Norwegian courts and subsequently brought proceedings to the European Court of Human Rights. The Court found no violation of Article 8 ECHR. There are two issues which stand out from the judgment. First, the Court was very deferential to the decisions of the Norwegian courts.[101] Second, the Court's analysis of what constitutes a debate of general interest requires closer examination. The Court followed the reasoning of the Norwegian courts that a wedding has a public element, the Court then added of its own initiative that 'the publication of an article about a wedding cannot itself relate exclusively to details of a person's private life and have the sole aim of satisfying public curiosity'[102] and that therefore 'there was an element of general interest

[96] Mosley lost the pre-notification argument but it was accepted in the proceedings that the publication itself violated Article 8 ECHR. The domestic courts had awarded £60,000 damages.
[97] *Von Hannover v Germany (No.2)* (2012) 55 EHRR 15.
[98] *Axel Springer v Germany* (2012) 55 EHRR 6.
[99] *Ibid* [99].
[100] *Lillo-Stenberg and Saether v Norway* (App. No. 13258/09, 16 January 2014) available on HUDOC: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-140015.
[101] *Ibid*[44].
[102] *Ibid* [37].

in the article about the applicant's wedding'.[103] The Court's analysis here seems utterly implausible; it is hard to discern how the publication of photographs of a wedding does anything other than satisfy public curiosity. The very point of the publication is to show what the wedding looked like; there was no suggestion that it formed part of any broader debate. Thus it seems doubtful that there was 'an element of general interest in the article'. The old adage 'what is interesting to the public is not necessarily in the public interest' is apt.

Examining across the cases it is not possible to draw a general rule about the balance which is struck between privacy and freedom of expression when the court is faced with cases concerning celebrities. Each case will be context specific and will depend upon the application of the full set of criteria developed by the Court. There are cases concerning trivial details of the life of a celebrity that have been protected (*Von Hannover (No.1)* and cases in which similar details have not been protected (*Von Hannover (No.2)*). Likewise there have been front page news stories which were protected by Article 8 ECHR (*Mosley v UK* and *MGN v UK*) and other scandalous stories in which Article 10 ECHR has outweighed Article 8 ECHR (*Axel Springer v Germany*). What is increasingly apparent is that the Court will defer to the state provided the state has employed the framework of principles set out in *Von Hannover (No.2).*[104] This could lead to some very different results in each jurisdiction depending on how much weight the domestic courts decide to give to each criterion.

In England and Wales the courts have dealt with the issues raised by celebrities under a number of different guises: (i) in some cases the courts have held that where a celebrity is a role model he or she may legitimately be the subject of public interest where he or she fails to live up to that role model status;[105] (ii) the courts have held that a celebrity has waived any expectation of privacy by courting publicity, although note here that the courts have rejected the argument that entire zones of a celebrity's life will be fair game and has held instead that this must be a fact sensitive inquiry;[106] and (iii) where a celebrity has made some sort of false statement, or false projection of their image the press is entitled to rectify this on grounds of hypocrisy.[107]

(iii) Private individuals

While the First Amendment robustly protects publications about public officials and public figures, it sweeps with much less force when private figures are the subjects of speech. As in other areas of privacy law, Supreme Court defamation cases have marked out the basic contours of the law, and privacy law has followed suit. Thus, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, a splintered Court suggested very strongly that 'private speech', in this case the issuance of a credit report to a small number of subscribers, received substantially lesser First Amendment protection than speech on matters of public concern, and that tort law imposing liability for speech of this sort would be subject to much lower First Amendment regulation.[108] Thus, in the case of *Lake v. Wal-Mart Stores*, the disclosure tort was found to apply when nude photographs of two young women were circulated in the community without their consent.[109] Nevertheless, such lower protection applied only when the speech at issue is not on a matter of public concern. If the speech or publication is a matter of interest to the

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[103] *Ibid.*

[104] See for example *Lillo-Stenberg and Saether v Norway* (App. No. 13258/09, 16 January 2014) at [44].

[105] *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB) ('*Ferdinand*'); *Terry v Persons Unknown* [2010] EMLR 16.

[106] *Rocknroll v News Group Newspapers Ltd* [2013] EWHC 24 (Ch)

[107] *Ferdinand* [2011] EWHC 2454 (QB) and *Campbell* [2004] UKHL 22.

[108] 472 US 749, 758–9 (1985). The Court reaffirmed this principle in *Snyder*, 562 U.S.__ (2011) (No. 09-751).

[109] 582 N.W. 2d 231 (Minn. 1998).

community, then the full protection of the First Amendment applies.[110] Thus, in a line of cases striking down prohibitions on the publication of the names of rape victims, the Supreme Court has repeatedly noted the public interest in the operation of the courts, or the identities of the victims of high-profile crimes.[111]

It is clear from the European Court of Human Rights's analysis that the Court intends to give greater protection to the private life or ordinary individuals. There are a few cases in which the Court has been faced with such circumstances. Perhaps the most notable is the case of *Armoniene v Lithuania* in which the Court held that the publication of the HIV status of the applicant's husband violated Article 8 ECHR.[112] In fact in that case the domestic courts had already concluded that the disclosure violated Article 8 ECHR but the level of damages awarded by the domestic courts was so low that the Strasbourg Court found that this did not protect the right and therefore the state had violated the Convention right by failing to provide an appropriate remedy. Moreover in *K.U. v Finland* the Court held that Finland had failed to protect Article 8 ECHR right of a twelve year old boy that had been the subject of an advertisement of a sexual nature on an Internet dating site. The boy's father had sought to sue the anonymous poster of the advertisement but under Finnish law the operator of the Internet server could not be compelled to disclose the identity of the poster. The European Court of Human Rights held that Finnish law failed to provide a framework for striking an appropriate balance between the competing rights and interests at stake.[113]

(iv) Video footage and Photographs

If discussions of public officials' fitness for office is the most-protected type of expression under American law, the nonconsensual publication of sexual images and videos receives substantially less protection. American law on this point is underdeveloped and sometimes contradictory. For example, in the case of *Michaels v. Internet Entertainment Group*, a federal court enjoined the distribution of a sex tape involving celebrities Pamela Anderson and Bret Michaels, though an unpublished opinion of the court subsequently allowed the publication of a news report with brief excerpts of the sex tape.[114] Yet in the United States at present, the best understanding of the law is that the nonconsensual disclosure of sex videos and images of even celebrities can be regulated consistent with the First Amendment.[115] There is even more of a rising consensus that for ordinary people, the distribution of nonconsensual pornography is a serious social problem that does not raise serious First Amendment issues,[116] and states are starting to pass laws criminally punishing the distribution of such images.[117]

The Supreme Court has not ruled on this precise question, but it recently suggested that explicit sexual videos and images would not be matters of public concern.

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[110] *Snyder*, 562 US __ (2011) (No. 09-751).

[111] *Fla. Star v. B. J. F.,* 491 US 524, 541 (1989); *Smith v. Daily Mail Publ'g*, 443 US 97, 103–4 (1979); *Okla. Publ'g Corp. v. Okla. County Dist. Court*, 430 US 308, 311–12 (1977); *Cox Broad. Corp. v. Cohn*, 420 US 469, 494–5 (1975).

[112] *Armonienė v Lithuania* (App. No. 36919, 25 November 2008) available on HUDOC: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-89823.

[113] (2009) 48 EHRR 52.

[114] See *Michaels v. Internet Entertainment Group, Inc.*, 5 F.Supp.2d 823 (C.D. Cal.1998); *Michaels v. Internet Entm't Grp., Inc.*, 1998 WL 882848, at 10 (C.D.Cal. 1998).

[115] Richards, *Intellectual Privacy*, above n 3, at 52–4.

[116] Neil M. Richards and Danielle Citron, 'Regulating Revenge Porn Isn't Censorship', Al-Jazeera America, (11 February 2015) http://alj.am/1Mb8pZo.

[117] Danielle Keats Citron and Mary Anne Franks, 'Criminalizing Revenge Porn' (2014) 49 Wake Forest L. Rev. 345. See also Mary Anne Franks and Danielle Citron, 'It's simple: criminalize revenge porn, or let men punish women they don't like' the *Guardian* (18 April 2014) http://www.theguardian.com/commentisfree/2014/apr/17/revenge-porn-must-be-criminalized-laws.

In *Snyder*, as noted previously, the Court determined that the Westboro Baptist Church's funeral protest should be understood as involving a matter of public concern. The court found that under the circumstances of that case the dominant theme of the church's protest was that God hates America for its sexual permissiveness and was punishing it as a result. If the church were correct and God was in fact punishing the United States, this would undoubtedly be a matter of public concern. Yet in making this finding, the Court once again noted that the balance between privacy and free speech must be a careful one, and that only speech on matters of public concern could trump the tort interests in protection from severe emotional distress. The court cited two examples of truly private speech – the economic speech in Dun & Bradstreet, and a sexually-explicit video by a government employee in the government employee speech case of *San Diego v. Roe.* As the *Snyder* Court described the sex video case, 'in the context of a government employer regulating the speech of its employees, videos of an employee engaging in sexually explicit acts did not address a public concern; the videos "did nothing to inform the public about any aspect of the [employing agency's] functioning or operation."'[118]

The origins of English breach of confidence can be traced back to the protection of Prince Albert and Queen Victoria's private etchings in *Prince Albert v Strange,* so it should be no surprise that images have a particularly special role in the law of confidence.[119] Yet despite this long history it is also apparent that the level of protection offered to photographs and video footage has been shifting in English law under the influence of the Convention.

It has long been clear that very strong protection is afforded to footage or photographs of a sexual nature in English law, even if there is a public interest in the story in question. Thus even in *Theakston v MGN Ltd* a case in which Ouseley J refused to recognise sexual relations between a man and a prostitute as confidential, the judge held that photographs were different as they 'can be particularly intrusive'.[120] He refused to allow the publication of a photograph inside the brothel and held that the only freedom of expression at stake was the newspapers which was 'outweighed by the peculiar degree of intrusion in to the integrity of the Claimant's personality which their publication would entail'.[121]

The strong level of protection afforded to sexual footage and images was considered in more detail in *Mosley v MGN* a case concerning the dissemination of video footage and photographs of Formula 1 boss Max Mosley engaging in sado-masochistic orgies. The defendant argued that there was a public interest in the dissemination of the material as there was a Nazi theme to the orgies, this was particularly important as the claimant's father was involved with the Nazis and the claimant had publicly renounced Nazism. However, Eady J held that even if there had been a public interest in the story (in fact the Nazi element was not established by the defendant) this 'objective [could] be achieved effectively without displaying the edited footage of bottoms being spanked'.[122] In other words public interest in the substance of the story will not necessarily mean that the images themselves need to be revealed, a description may suffice. Yet it should be noted that ultimately Eady J refused to order an injunction prohibiting the further dissemination of the material on the basis that the material was already so widely accessible that an order to prohibit it would make very little practical difference.[123] He acknowledged that this is particularly problematic where the defendant has released the

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[118] *Snyder*, 562 US ___ (2011) (No. 09-751) at 7*,* quoting *San Diego v. Roe*, 543 US 77, 84 (2004) (per curiam).
[119] (1849) 18 LJ Ch 120.
[120] [2002] EMLR 22.
[121] [2002] EMLR 22 at [79].
[122] [2008] EWHC 687 (QB) at [32].
[123] *Ibid* [33]–[37].

material and then seeks to take advantage of the fact that it is available to defend an application for an injunction, but nevertheless he concluded that when the 'dam has effectively burst' an injunction would be a 'futile gesture'.[124] Thus English law provides strong protection for intimate footage and photographs provided that the images are not already in the public domain. Although on this latter point see *Contostavlos v Mendahun* a case in which there was no public interest argument for the dissemination of the sex tape. The background to that case was that the rogue ex-boyfriend of X Factor judge Tulisa Contostavlos had been selling a sex tape featuring himself and Tulisa. There was nothing more to the story than prurient interest. In that case Tugendhat J issued an injunction and because the footage was 'particularly personal and intrusive' he refused to include a public domain proviso, thus there could be no justification for the continuing disclosure of material that was already in the public domain.[125]

Thus under both traditional breach of confidence tort and the post-HRA 1998 misuse of private information tort sexual images receive a strong degree of protection. The level of protection afforded to photographs and video footage has been bolstered by the Convention. The European Court has developed strong protection for the right to one's image which it has applied to a number of cases concerning photographs since the first *Von Hannover* decision.[126] The extensive protection offered to individuals captured in anodyne photographs (*Von Hannover*) means that it is beyond doubt that the Court would protect the privacy of those featured in sex tapes. It is likely that this would be the case even if the individual in question was a politician given the strong protection afforded to descriptions of the Finnish Prime Minister's sex life in *Ruusunen.* Although it should be noted that the Court's matrix of principles leaves open the possibility of concluding in exceptional circumstances that the disclosure of a sex tape is justified under Article 10 ECHR. For example, if a sex tape had emerged during the Bill Clinton and Monica Lewinksy allegations it would be feasible for the Court to find that such a disclosure was justifiable applying the principles set out in *Von Hannover (No.2)* and *Axel Springer.*

Where the European Court has pushed ahead has been in cases concerning the publication of relatively trivial photographs. Since *Von Hannover* it has been apparent that the Court offers strong protection to the right to one's image. This went far beyond anything in English law, as Baroness Hale noted in *Campbell*:

> Unlike France and Quebec, in this country we do not recognise a right to one's own image: cf *Aubry v Editions Vice-Versa Inc* [1998] 1 SCR 591. We have not so far held that the mere fact of covert photography is sufficient to make the information contained in the photograph confidential. The activity photographed must be private. If this had been, and had been presented as, a picture of Naomi Campbell going about her business in a public street, there could have been no complaint. She makes a substantial part of her living out of being photographed looking stunning in designer clothing. Readers will obviously be interested to see how she looks if and when she pops out to the shops for a bottle of milk. There is nothing essentially private about that information nor can it be expected to damage her private life. It may not be a high order of freedom of speech but there is nothing to justify interfering with it.[127]

Yet in *Von Hannover* it was precisely those sorts of activities that were protected by the Court. There have been two developing concerns here (i) protecting claimants from

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[124] *Ibid* [36].
[125] [2012] EWHC 850.
[126] See Kirsty Hughes, 'Photographs in Public Places and Privacy' (2009) 2 *Journal of Media Law* 159.
[127] [2004] UKHL 22 at [154].

harassment by the paparazzi, implicit in *Von Hannover* and explicit in Council of Europe Resolution 1165 of 1998 and (ii) the broader protection of image rights. In a number of cases post-*Von Hannover* the Court has expanded the level of protection offered to claimants captured in photographs that were taken without their consent.[128] The domestic courts have only very recently been required to set out their position on the issue.[129] In *Weller v Associated Newspapers* held that the children of musician Paul Weller had a reasonable expectation of privacy when out on family day out in Los Angeles.[130] The Court then applied the balancing factors set out in *Von Hannover (No.2)* and held that the balance came down in favour of Article 8 ECHR, in particular because the photographs concerned children and they did not contribute to a debate of general interest. £10,000 in damages was awarded to the children. From a comparative perspective the case is particularly interesting because the Court held that the publication of the photographs in England was unlawful even though the taking of the photographs was lawful in Los Angeles.

Part 4 – Is it Problematic to have Different Approaches?

Our analysis thus far has revealed real differences, but perhaps more subtle differences than may be commonly thought. Contrary to the assumption by both Americans and Europeans that the First Amendment eliminates liability in privacy tort cases, a closer reading of the opinions and their rationales suggests that in practice things are a little more complicated. American courts undoubtedly take a strong position against torts imposing liability in privacy and other tort cases of emotional harm. But this position is far from absolute. Where the speech is particularly harmful, where the speech is not on a matter of public concern (even though this is a broad category), or where the theory of liability sounds not in tort but in contract or confidentiality, the protections of the First Amendment slacken and ordinary principles of tort law apply once more.

Conversely English law, which is heavily governed by the European Convention on Human Rights, uses a balancing methodology which in practice affords strong protection to details of even famous people's sex lives, medical information, and photographs. A core part of the European and English courts' analysis is whether or not the story contributes to a debate of general interest, an analogous but by no means identical concept to the American idea of 'matters of public concern'. This is a double-edged sword as far as the protection of privacy is concerned. On the one hand, the fact that there is no harm requirement means that it is easier to protect privacy. But on the other hand, the fact that the test is so strongly grounded in the public interest in the story could give freedom of expression the upper hand depending on how public interest is interpreted. In many of the cases that have been brought before the English courts the defendant has not in practice advanced a public interest defence. At Strasbourg what constitutes a public interest defence may be shifting in some of the European cases as the Strasbourg Court is returning control over balancing the two rights to the member states provided that they use the Strasbourg methodology.

It is important to note then that 'public interest' means very different things in the United States and England. In the United States, 'public interest' or 'public concern' can mean little more than a factual inquiry in practice, which sometimes boils down to whether the public is interested in a story or piece of information. Riddled with epistemic

[128] See Kirsty Hughes, above n 126.
[129] This issue was at the heart of *Murray v Big Pictures Ltd* [2008] EWCA Civ 446; [2008] EMLR 12, but that was only an application for summary judgment and was eventually settled without a definitive ruling by the court.
[130] [2014] EWHC 1163 (QB).

doubt, American judges often defer to journalistic judgments on whether something will sell. By contrast, 'public interest' in England requires a more normative inquiry by the court. In Europe this is a complex matter with layers of deference between both the European Court of Human Rights and domestic courts (reflecting state sovereignty), and between the Strasbourg and domestic courts and journalists (reflecting the importance of press freedom and editorial latitude). In some cases the courts adopt a more nuanced approach and are willing to rule that additional details and images are unnecessary, in others the courts are more willing to afford editorial latitude to the press.[131] This depends on the nature of the story and the nature of the details included.

There is probably no real difference in outcome between English and American courts when it comes to politicians and stories directly relating to their public functions, although what is brought within the scope of public functions may vary. There are real differences when it comes to details of the sex lives of politicians as Europe gives far greater weight to privacy. There are also differences in approach when it comes to gossip about the sex lives of celebrities and photographs of celebrities engaged in everyday activities.

Despite the moral and cultural flavour of these differences they arise from important features of the constitutional framework in which each system has evolved. Whilst freedom of speech is protected under the Constitution in the United States, the two rights are placed on an equal footing by the European Convention on Human Rights. It is therefore unrealistic to argue that the US should adopt a more equally balanced approach or that the English courts should give dominant protection to free speech. Both are shackled by their constitutional frameworks, whether the primacy of the First Amendment or the status of privacy and freedom of expression speech in the European Convention on Human Rights. One solution to these differences is simply to accept that these are the product of different constitutional frameworks. In many cases disclosures in the United States may be of limited relevance to England and Europe more generally and *vice versa*. Provided that the population of each jurisdiction is content with the balance struck in their own system then perhaps we should simply accept that we each do things differently.

However, in a global media landscape we cannot be as insular as we may have been in the past. Disclosures are not limited to a single jurisdiction or continent, but take place on the global stage. After all, it was the *Guardian* (UK) that broke the Edward Snowden revelations, while American media covers many British musicians, actors, and other celebrities. We thus need a system that can work better in that global context.

A handful of cases in Europe are already beginning to test these matters. The *Weller* case highlights how even photographs lawfully taken in the US may be prohibited from publication in the UK.[132] Given the extent to which parts of the UK media rely upon paparazzi photography from outside the UK this decision could have significant repercussions. Moreover, in *OPO* v *MLA* the Court of Appeal granted an injunction based on the tort of intentional infliction of emotional harm to prohibit the publication of an autobiographical book in the UK, which could emotionally harm the author's son who resided outside the UK.[133] There was evidence that the book would not be prohibited in the country in which the child resided, but this did not preclude the injunction as the 'threat to cause harm emanated from this jurisdiction'.[134] The case has prompted concerns about possible forum shopping, and the case is being appealed to the

[131] Compare for example *Von Hannover* v *Germany (No.2)* (2012) 55 EHRR 15 and *Couderc and Hachette Filipacchi Associés v. France* (App. No. 40454/07, 12 June 2014).
[132] [2014] EWHC 1163 (QB).
[133] [2014] EWCA Civ 1277.
[134] *Ibid.*

Supreme Court. The problems posed by digital media are far greater. Some of these matters have been the subject of contentious legal proceedings in Europe. In *Delfi* v *Estonia* the European Court of Human Rights held that there was no violation of Article 10 ECHR when the Estonian courts required an internet news portal to adopt a system of prior monitoring of third party comments on news stories, this could include comments posted from outside Europe.[135] That decision is currently being appealed to the Grand Chamber. Moreover the European Court of Justice ruling in *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* requires Google to operate a system which allows individuals to request deindexing of stories from Google searches, this was despite the fact that the actual indexing occurred in the United States.[136] All of these cases highlight the complex global issues that arise from data sharing and the potential difficulties of operating different legal frameworks in different jurisdictions. The globalization of the press brought on by modern digital technology means that interoperability between the constitutional regimes on either side of the Atlantic is essential. Interoperability of some sort is also inevitable, even if it is the product of a messy compromise rather than a formal reconciliation. The days of journalists and constitutional lawyers on each side of the Atlantic sniffing at each other's seemingly bizarre systems are drawing to a close. But if a reconciliation (or modus vivendi) is inevitable, its form is not, and we should ensure that whatever form reconciliation takes, it respects the important constitutional commitments of both systems to both freedom of expression and privacy. Although these commitments vary on opposite sides of the Atlantic, we hope to have shown not only that some agreement already exists, but also the places where there is conflict in the hope that future discussions will be more fruitfully if revolve around a clearer understanding of the points of disagreement. If any progress is to be made on these matters then it is important to understand the different constitutional frameworks within which each is operating.

[135] (2014) 58 EHRR 29.
[136] Case C-131/12.