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PRIVACY, CONFIDENCE AND HORIZONTAL EFFECT: "HELLO" TROUBLE

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THE long wait for a privacy law in England might appear finally to be over. The Lord Chancellor predicted that his Human Rights Bill, on enactment, would usher one in.[1] Some two months after the resulting Act came into force the Court of Appeal seemed, with remarkably little fuss, duly to recognise an action for invasion of privacy in *Douglas & Zeta-Jones* v. *Hello!*[2] Moreover, this was achieved by employing (it was said) only the existing action for breach of confidence, and so the court could avoid frightening the horses, by appearing not to be doing anything new (or noteworthy) at all. Further, the court deftly avoided the contested quicksands of the horizontal effect (or not) of the Human Rights Act 1998.[3]

It is, however, the purpose of this article to criticise that feat of *elegantia juris*. It will be argued that breach of confidence (and other existing actions) regrettably cannot, contrary to the arguments of some commentators, provide a wholly satisfactory basis for a law of privacy infringement.[4] Accordingly, the courts will, after all, eventually have to face up to the issue of horizontal effect in this context—and will be required to subscribe to the direct application of Convention rights if full protection is to be afforded against media intrusion. First, however, it is necessary to consider the exact meaning of "privacy", and in particular the protection of a person's image under Article 8 of the European Convention on Human Rights and Fundamental Freedoms.

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[1] See HL Deb. Vol. 583 col. 785 (24 November 1997).

[2] [2001] Q.B. 967. Sedley L.J. stated that the H.R.A. "arguably gives the final impetus to the recognition of a right of privacy in English law", at p. 998. Noted M. Elliott [2001] C.L.J. 231.

[3] Leading combatants include: M. Hunt, "The 'horizontal effect' of the H.R.A." [1998] P.L. 423; Sir R. Buxton, "The H.R.A. and private law" (2000) 116 L.Q.R. 48; Sir H.W.R. Wade, "Horizons of horizontality" (2000) 116 L.Q.R. 217; N. Bamforth, "The true effect of the H.R.A." (2001) 117 L.Q.R. 35; D Beyleveld and S.D. Pattinson, "Horizontal applicability and horizontal effect" (2002) 118 L.Q.R. 623.

[4] Contrast H. Fenwick and G. Phillipson, "Breach of confidence as a privacy remedy in the H.R.A. era" (2000) 63 M.L.R. 660.

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I. Privacy, Image, and Article 8

Several initial points should be made, to limit the scope of the discussion which follows. Because the concern here is to examine privacy in relation to the horizontal effect of the Human Rights Act, the analysis will be limited to privacy infringements by other "individuals" (normally the media). The availability of a remedy against public bodies is of course no longer in doubt.[5] By limiting the discussion to the "horizontal", the need to discuss wider questions of freedom and autonomy, and government encroachment thereon, with all the controversy of definition and extent involved, can be avoided. Obviously, therefore, "privacy" as used in this article has a considerably narrower meaning than "private life" under Article 8. The gravamen of invasion by the media is non-consensual dissemination of information about individuals. It can be noted at the outset, however, that infringements of privacy can be divided into two camps: infringement by intrusion; and infringement by publication. These are frequently related, but should be kept distinct. Examples of intrusion would be gaining access to someone's bedroom; reading a private diary; "peeping tom" activities. Often, then, media invasion (by publication) will follow on from intrusion, the gathering of the personal information in the first place. But not necessarily—intimate secrets revealed by a former lover have not initially been obtained in a way which is other than consensual and proper; it is their publication alone which is an invasion of privacy. Where intrusion results in the recording of information (*e.g.*, by photography), remedies will need to address the "publication aspect", to pre-empt possible dissemination. Publication, but not intrusion as such, raises the problem of balancing privacy against free speech. The focus here (as in *Douglas* v. *Hello!*) will be on a particularly controversial area, namely making use of a person's image, such as through the publication of photographs.

Privacy has proved notoriously hard to define.[6] Professor Wacks, indeed, has argued strenuously against the admission of the concept into English law, on the grounds that the confusions in the "sterile and, ultimately, futile" debate as to its definition meant that "the currency of privacy has been so devalued that it no longer warrants if it ever did serious consideration as a legal term of art".[7] Descending, as seems advisable, to the specific issue of the use of

[5] Human Rights Act 1998 ("H.R.A."), ss. 6(1) and 8.
[6] For some attempts see R. Wacks (ed.), *Privacy* (Aldershot 1993), Volume 1, pp. 1–278.
[7] R. Wacks, *The Protection of Privacy* (London 1980), p. 10. It is hardly very convincing to rejoin that "most constitutional rights are drafted in general terms"—E. Barendt, "Privacy as a constitutional right and value" in P.B.H. Birks (ed.), *Privacy and Loyalty* (Oxford 1997), p. 12.

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photographs without the consent of those depicted, however, there is a high degree of consensus in various legal systems that this is a "misappropriation of personality", which properly falls under the aegis of privacy law. Such a conclusion would seem uncontroversial and obvious when the complainant was in a private place at the time (*e.g.*, at home). The more difficult question is whether there is a free-standing right in one's image *per se*, such as might be asserted when photographed even in a public place.

Some would maintain that such a situation falls outside the sphere of privacy. So one commentator on the infamous decision in *Kaye* v. *Robertson*[8] suggested that a remedy in that and future cases could be found in the law of trespass. Anticipating that this would not avail one whose similar misfortune was photographed in the public street, the author was content to assert that this was not a privacy issue at all: "It is precisely the fact that the Gorden Kaye outrage happened on private premises which made the conduct outrageous".[9] But this is position is questionable, given the distress and "outrage" which can just as readily be caused by the recording and dissemination of misfortunes befalling individuals in *public places*. Consider the facts of *Kelley* v. *Post Publishing Co.*, where the plaintiff sought to restrain publication of photographs of the mangled body of his daughter, taken immediately after her fatal car accident.[10] Thus, Professor Feldman has argued that privacy rights can be asserted in public. *Any* non-consensual photography or surveillance is a compromise of dignity (and secret surveillance can, logically, never be consensual). Further, simply because we venture into public, in order to further our private lives, we do not *ipso facto* relinquish all claims to a private sphere. Even tacit consent to being *observed* by others cannot automatically extend to their taking and, *a fortiori*, publishing photographs.[11] This has real importance in the United Kingdom, the world leader in video surveillance of both public and private spaces.[12]

Professor Feldman's approach has received judicial support in Canada. There, a newspaper was found to be in breach of the right to privacy under Article 5 of the Quebec Charter of Rights, for publishing a photograph of the plaintiff sitting on the steps of a

[8] [1991] F.S.R. 62. See further Section III B, below.

[9] P. Prescott Q.C. "*Kaye* v. *Robertson*: A Reply [to Professor Markesinis]" (1991) 54 M.L.R. 451, 454.

[10] (1951) 98 N.E. 2d. 286, Massachusetts. The Press Complaints Commission rejected a complaint about a somewhat similar situation in England (case of Mr. William Salisbury, P.C.C. Report 51, 2000).

[11] D. Feldman, "Privacy as a civil liberty" (1994) 47(2) C.L.P. 41.

[12] It has been estimated that there are some 200,000 CCTV cameras nationwide, with spending on surveillance running at £150–300 million *per annum*. House of Lords Science and Technology Select Committee, Fifth Report "Digital images as evidence" (London, 3 February 1998).

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public building.[13] The Canadian Supreme Court held that privacy protects individual autonomy and the control of each person over his identity, which includes the use made of his image. The fact that the photograph was in a public place (and that it might be difficult to obtain the consent of everyone photographed there) was expressly stated to be irrelevant.[14] The Court relied on the following florid passage to explain the "moral prejudice" suffered by the plaintiff:

> The camera lens captures a human moment at its most intense, and the snapshot "defiles" that moment ... A person surprised in his or her private life by a roving photographer is stripped of his or her transcendency and human dignity, since he or she is reduced to the status of a "spectacle" for others .... The "indecency of the image" deprives those photographed of their most secret substance.[15]

German law also recognises a personality right (*Persönlichkeitsrecht*) enforceable against individuals, founded upon Articles 1 and 2 of the Basic Law of 1949, which guarantee the inviolability of human dignity, and the free development of the personality.[16]

All of this may possess persuasive authority for an English court considering the scope of privacy. A direct source of law, however, is Article 8, ECHR, and its interpretation by the European Court and (formerly) Commission of Human Rights.[17] The matter is not entirely clear-cut, for the scope of "private life" has been left somewhat unexplored by the Strasbourg bodies, relatively speaking; the question received no discussion in the *travaux préparatoires* for the Convention.[18] Recent developments, however, have indicated that the personality-based privacy right described above is within the scope of Article 8.[19] Following a debate upon the death of Diana, Princess of Wales, the Assembly of the Council of Europe

[13] *Les Editions Vice-Versa Inc.* v. *Aubry* [1998] 1 S.C.R. 591. See, for the implications and possible limits of the decision, M. Russell in M. Colvin (ed.), *Developing Key Privacy Rights* (Hart: Oxford 2002).

[14] *Ibid.*, para. 59, *per* L'Heureux-Dubé and Bastarache JJ. French law similarly: see E. Picard, "The Right to Privacy in French Law" in B. Markesinis (ed.), *Protecting Privacy* (Oxford 1999), p. 91.

[15] J. Ravanas, *La protection des personnes contre la realisation et la publication de leur image* (Paris 1978), pp. 388–389 (as translated in Canadian Supreme Court Reports). Marginally less orotund in the original French. Cited at para. 69.

[16] See H. Stoll, "The general right to personality in German law" in B.S. Markesinis (ed.), *Protecting Privacy* (Oxford 1999) and B.S. Markesinis and N. Nolte, "Some comparative reflections on the right of privacy of public figures in public places" in P.B.H. Birks (ed.), *Privacy and Loyalty* (Oxford 1997).

[17] H.R.A., ss. 1 and 2.

[18] L. Doswald-Beck, "The meaning of the right of respect for private life under the E.C.H.R." (1983) 4 H.R.L.J. 283.

[19] An early, comprehensive consideration of Article 8 concluded that photography even in a public place should fall within its scope: J. Velu, "The E.C.H.R. and the right to respect for private life, the home and communications" in J. Robertson (ed.), *Privacy and Human Rights* (Manchester 1973), pp. 54–55.

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adopted a Resolution emphasising that the duties in Article 8 extend to private individuals, including the mass media.[20] The Commission of Human Rights accepted, in principle, that long lens photographs taken by the media of someone walking in the grounds of a private clinic could amount to an infringement of Article 8.[21] Very recently, the Court has held that disseminating images of an individual taken in a public place—the acid test for a "personality right" as such—constituted a breach. In *Peck* v. *UK*, the applicant was recorded by local authority CCTV in a public street, brandishing a large knife with which he had attempted to commit suicide. The footage was later broadcast, and still images disseminated through the press. The Court found this to be a serious interference with the applicant's right to respect for his private life.[22] The Government had submitted that, given the location of the episode in the street, the applicant's actions were already in the public domain: "Disclosure of those actions simply distributed a public event to a wider public and could not change the public quality of the applicant's original conduct and render it more private".[23] The Court rejected the argument. Moreover, the United Kingdom was found in breach of the duty under Article 13 to provide an effective remedy for that violation: the broadcasting and press regulatory bodies did not provide such, nor did judicial review. The Court also held that breach of confidence was unlikely to have assisted the applicant.[24] The case certainly contains aggravating features—the sensitive position of somebody in the aftermath of a suicide attempt is obvious. It is not clear, therefore, whether Article 8 would extend to public photographs in a situation lacking the air of personal tragedy—the girl sitting on the steps in *Les Editions Vice-Versa Inc.* v. *Aubry*, for instance. But it must be, at lowest, arguable that infringement of personality as recognised in Canadian, French and German law will come to be included within the concept of "private life" in Article 8, ECHR.

Indeed, such a conception has received oblique recognition in England. A company complained that undercover filming in one of its shops was an infringement of privacy. The Broadcasting Standards Commission upheld this complaint. On application for judicial review, Forbes J. quashed the Commission's determination, on the basis that there was no infringement of privacy by filming in

[20] Resolution no. 1165 (1998).
[21] *Earl and Countess Spencer* v. *UK* (1998) 25 E.H.R.R. C.D. 105.
[22] Decision of 28 January 2003. See also *P.G.* v. *UK*, decision of 25 September 2001 (covert recording of prisoners' voices).
[23] Para. 43.
[24] See paras. 105–111. For judicial doubts that breach of confidence could apply to photographs of a person in the street see *Campbell* v. *M.G.N.* [2002] EWCA Civ 1373 [2003] 2 W.L.R. 80, para. [33].

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a public place lacking seclusion and that, anyway, a corporation could not enjoy rights to privacy;[25] the Court of Appeal allowed the appeal against both grounds of that decision.[26] This does not mean that filming in a public place has been recognised *ipso facto* as actionable. Rather, in exercising its supervisory function, the court found that the B.S.C. acted within its discretion in finding a breach of its Broadcasting Code. Nonetheless, the decision shows that privacy is not *a priori* limited so as to exclude invasions in a public place—if it were, as a matter of law, the Commission's decision would have been in error.[27]

Finally, it is pertinent to consider objections that this "personality right" is in fact no more than a new, and lucrative, form of commercial intellectual property. So United States tort law recognises appropriation of name or likeness as one form of invasion of privacy.[28] But the Restatement Commentary admits that "although protection of [the individual's] personal feelings is an important factor leading to recognition of the rule, the right created by it is in the nature of a property right, for the exercise of which an exclusive licence may given to a third person".[29] In sum, this aspect of privacy in American law is basically commercial in its orientation and utility. Professor Cornish has cautioned against English law's taking the same path.[30] The Calcutt Report on invasion of privacy concluded that there was no "pressing social need" to provide a remedy for those whose images or voices are appropriated without their consent for advertising or promotional purposes.[31]

With respect, there is a danger here of throwing out the baby with the bathwater. While including unauthorised use of images under the rubric of privacy would, of course, avail those who make money from product endorsements, it would be entirely mistaken to

[25] *R.* v. *Broadcasting Standards Commission*, ex parte *B.B.C.*, *The Times*, 14 September 1999.

[26] [2001] Q.B. 885. It has been pointed out that by giving a company rights, the "personality" view of privacy is undermined: C. Munro, "Aspects of privacy" [2001] P.L. 1. This, however, turned *in casu* on the particular wording of the statute (see Broadcasting Act 1996, s. 111(1)), and both Hale L.J. and Lord Mustill were at pains to leave open the question of corporations' privacy rights in the wider context: [2001] Q.B. 885, 899–901.

[27] See T.A.O. Endicott, "Questions of law" (1998) 114 L.Q.R. 292, for the argument that a "question of fact and degree" (as here) becomes a "question of law" when the law requires a particular answer to it, positive or negative. Dr. Endicott's central authority *Edwards* v. *Bairstow* [1956] A.C. 14 is followed in *ex parte B.B.C.* [2001] Q.B. 885.

[28] *Restatement of Torts (Second)*, para. 652C.

[29] *Ibid.*, Comment (a).

[30] Noting that it has refused to do so, hitherto: *Lyngstrad* v. *Annabas* [1977] F.S.R. 62; *Re Elvis Presley Trade Marks* [1999] R.P.C. 567. See W.R. Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (4th edn., London 1999), pp. 335 and 642–643. The Press Complaints Commission has ruled that the privacy sections of its Code of Practice cannot be used to protect the commercial value of images, in rejecting Mr. Michaelangelo Attard's complaint (Report 55, 2001).

[31] Cm. 1102 (1990), para. 12.8. Accordingly, the restriction on freedom of expression entailed was thought not to be justified.

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conclude that the right would have no relevance for "ordinary people". Thus, a popular magazine recently had cause to alert its readers to the dangers of their finding themselves displayed *déshabillé* on the Internet, courtesy of hidden cameras (along with the accurate statement that there was no privacy law to prevent this).[32] Therefore, as Professor Cornish himself has recognised: "There may be a case for affording somewhat greater protection to personal privacy than at present. That, however, is itself a much more limited thing; and it is the obverse of a right to annexe all value flowing from publicity".[33] Hence two discrete interests, commercial and dignitary, are aspects of the same legal concern (protection of image), but crucially, they are separable. One way in which the law could protect the personality-based interest without creating new intangible property would be to recognise an action only when substantial distress was caused by the use of the claimant's image,[34] and to award damages only for the intangible damage to feelings and personality. An injunction, however, would naturally place the protected party in a position to exploit his image commercially—by negotiating payment to release it.

II. Privacy and Breach of Confidence

In *Douglas* v. *Hello!* Mr. Michael Douglas and Ms. Catherine Zeta-Jones (and the magazine with whom they had an exclusive publicity deal) sought an interlocutory injunction to prevent the defendant magazine publishing unauthorised photographs of their wedding. The injunction was discharged by the Court of Appeal, on the grounds that interference with the freedom of the press was not justified when monetary compensation (an account of profits) would adequately compensate the claimants, in the event of an ultimately successful action.[35] For present purposes the interest of the decision is in the finding that there was (arguably) a breach of confidence—and that this action protected the claimants' privacy. So Keene L.J. could comment that in this case, "whether the resulting liability is described as being for breach of confidence or for breach of a right to privacy may be little more than deciding what label is to be attached to the cause of action".[36] In another

[32] *Cosmopolitan*, May 1999, p. 69ff. See also the facts of *Kelley* v. *Post Publishing Co.* and *Peck* v. *UK*, cited above.

[33] Cornish, *op. cit.* at p. 642.

[34] As suggested in *Infringement of Privacy: Consultation Paper* (Lord Chancellor's Department 1993).

[35] [2001] Q.B. 967. For the trial, see now [2003] EWHC 786 (Ch.).

[36] [2001] Q.B. 967, 1012. Likewise Sedley L.J. at 1001: recognising a strongly arguable privacy claim "is in my belief to say little, save by way of a label, that our courts have not said already over the years [in cases on breach of confidence]".

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recent case, Lord Woolf C.J. has similarly stated that "in the great majority of situations, if not all situations, where the protection of privacy is justified, relating to events after the Human Rights Act came into force, an action for breach of confidence now will, where this is appropriate, provide the necessary protection".[37]

All of which is rather surprising. The Law Commission in its (unimplemented) Report on breach of confidence was clearly of the view that confidence and privacy were essentially separate concepts, and sought to pre-empt criticism by stating that "it is not our task in this Report to make recommendations for the protection of privacy as such".[38] Professor Wacks has repeatedly drawn attention to the mismatch between privacy and confidence.[39] At a basic level, confidence is about disclosure of secrets reposed in trust, and privacy about intrusion upon sensibilities and feelings—"they are separate species".[40] Specifically, the species differ in two fundamental respects. First, in the matter of *who* may be required to respect the interest. Secondly, over the question of *what* is protected by the concepts of the "confidential" and the "private".

The first of these differences has received the most attention. Historically, the action for breach of confidence required a pre-existing relationship of confidence between the parties (typically a contract). The leading case on protection of personal (as opposed to commercial) confidences, *Argyll* v. *Argyll*, has been explained on the basis of protecting the integrity of the marital relationship—within the common law's traditional concern to support the institutions of society.[41] Privacy, however, is not relationship-based in the same way as confidence. Anyone might invade an individual's privacy, whether or not there has been any previous contact—let alone a relationship of trust and confidence—between them. Clearly, such a requirement would be fatal for the employment of confidence to secure any more than the adventitious protection of privacy.

Since the Law Commission's Report, however, there has been a strengthening trend in the case-law to relax (if not jettison) the requirement of a pre-existing relationship. This was described in an

[37] *A* v. *B* [2002] EWCA Civ 337, [2003] Q.B. 195, para. [11(vi)].

[38] Law Com. Report 110 (1981), paras. 2.4. See generally paras. 2.2–2.6; 5.12; 6.69. This was despite the fact that the Law Commission's examination was a direct consequence of the Younger Committee on Privacy's having noted that breach of confidence had an underrated potential for the protection of privacy (see Cmnd. 5012).

[39] See, for a summary of his arguments, R. Wacks, *Personal Information, Privacy and the Law* (Oxford 1989), pp. 132–134.

[40] R. Wacks, "Breach of confidence and the protection of privacy" (1977) 127 N.L.J. 328. In his judgment after the trial in *Douglas*, Lindsay J. treated the case as one turning on breach of confidence, and declined to rule on privacy. See [2003] EWHC 786 (Ch.), para. [229].

[41] [1967] Ch. 302. See W. Wilson, "Privacy, confidence and press freedom: A study in judicial activism" (1990) 53 M.L.R. 43. Cf. *Barrymore* v. *News Group Newspapers* [1997] F.S.R. 600.

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important article in this Journal by H. Fenwick and G. Phillipson.[42] The new approach is to ask whether, objectively, it would have been obvious that the information in question was intended to be confidential: the move is away from the relationship between the parties towards the nature of the information itself. The catalyst for the development seems to have been a dictum of Lord Goff of Chievely, in "*Spycatcher 2*".[43] This approach has received so much support in subsequent dicta and (interlocutory) decisions that the Court of Appeal in *Douglas* v. *Hello!* was no doubt justified in adopting it. Sedley L.J. went so far as to state: "The law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy".[44] Brooke L.J. seemed, however, to subscribe to the older "relationship" view of breach of confidence.[45] At any rate, *Douglas* would seem to set the final seal of approval upon the developments outlined by Fenwick and Phillipson.[46]

Much more significant, however, is the distinction between "confidential" and "private" information, which has been somewhat neglected in comparison with the question of who owes a duty of confidence. The contention here is that these are radically different qualities, and in particular, *much private information is not confidential*. Accordingly, the action for breach of confidence (even as expanded) cannot protect the whole sphere of privacy. The root of the distinction is that information in the public domain cannot, of course, be confidential, but it may properly attract protection from a personality-based law of privacy. True stories (or unflattering photographs) which have already appeared in the press, however widely, may yet occasion an equivalent amount of distress, and affront to dignity, on re-publication.[47] Accordingly, French privacy law prohibits the publication of (distasteful) particulars of an individual's life, which had nevertheless already been published

[42] "Confidence and privacy: A re-examination" [1996] C.L.J. 447. See cases cited therein, and *Creation Records* v. *News Group Newspapers* [1997] E.M.L.R. 444. In December 2000, however, the same authors still felt able to describe the new approach as only "somewhat inchoate" and with "as yet a relatively slight and insecure grounding in authority": see n. 4 above, at p. 673.

[43] *A.-G.* v. *Guardian Newspapers (No. 2)* [1990] 1 A.C. 109, 281.

[44] [2001] Q.B. 967, 1001. See, more cautiously, Keene L.J. at p. 1012.

[45] *Ibid.*, at pp. 984 and 988.

[46] *Douglas* was followed in *Venables* v. *News Group Newspapers* [2001] Fam. 430 (Butler-Sloss P. granting injunctions *contra mundum*, to prevent disclosure of notorious young offenders' true identities, on basis of law of confidence). At the trial of *Douglas*, the High Court held that there was a duty of confidence—whether properly personal or commercial in nature—which the defendants had breached. [2003] EWHC 786 (Ch.).

[47] Thus, even if a "relative" approach is taken to the public domain, as advocated by Fenwick and Phillipson, n. 4, above (and followed in *A.-G.* v. *Times Newspapers* [2001] 1 W.L.R. 885), there can still be information which is private but indubitably non-confidential.

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elsewhere (with his explicit or tacit consent).[48] Furthermore, as has been argued above, non-consensual photography of an individual in a public place may infringe privacy. Yet such information in the public domain cannot be protected by an action designed to preserve *confidentiality*.[49]

Professor Tettenborn, however, has argued that this orthodoxy is mistaken. He suggests that the reason why the law refuses to protect disclosure of notorious information is "not that there is any magic in publicity as such, but rather that equitable intervention in such cases would be in vain: preventing disclosure of such information can ex hypothesi do no good to anyone".[50] The corollary being that if further disclosure *will* cause additional harm, the obligation of confidence remains enforceable.[51] He cites *Schering Chemicals* v. *Falkman*, in which a television broadcast was restrained, even though the relevant information was within the public domain. Shaw L.J. stated:

> Though facts may be widely known they are not ever present in the minds of the public. To extend the knowledge or to revive the recollection of matters which may be detrimental or prejudicial to the interests of some person or organization is not to be condoned because the facts are already known to some and linger in the memory of others ... It is not the law that where confidentiality exists it is terminated or eroded by adventitious publicity.[52]

This "argument from futility" might also seem to underlie the debate whether to continue interlocutory injunctions in the first *Spycatcher* case.[53] Once the defendant's book had been published outside the jurisdiction, Browne-Wilkinson V.-C. considered that the injunctions against publication should be discharged, on the grounds of futility, described in a variety of metaphors.[54] The Court of Appeal and a majority in the House of Lords, however, took the

[48] *Société Press-Office* v. *Sachs* Cass. Civ. 2e, 6 janvier 1971 (*Cour de cassation*). Translation in W. van Gervan and J. Lever, *Tort Law* (Oxford 2000), p. 185.

[49] With respect, it is difficult to see how it can be brought within the scope of confidence by pointing to the (no doubt) unauthorised use of the information: Fenwick and Phillipson, note 4 above, at pp. 676–677. It simply lacks the necessary quality of confidence about it. The authors in fact talk of the information being "personal" and "private", thus eliding the distinct concepts (*ibid.*). The distinction between the personal and the confidential is emphasised in Law Com. Report 110 (1980), para. 5.12.

[50] A.M. Tettenborn, "Breach of confidence, secrecy and the public domain" (1982) 11 Anglo-American L.R. 273, 274.

[51] As in disclosure of even widely know intimate secrets: *ibid.*, at p. 275.

[52] [1982] Q.B. 1, 28.

[53] *A.-G.* v. *Guardian Newspapers (No. 1)* [1987] 1 W.L.R. 1248.

[54] Equity should not act in vain; nor like King Canute; nor like the little Dutch boy putting his finger in the dyke as it collapses altogether (*ibid.*, at pp. 1269–1270). Judges seen "beating the air"; "homely metaphors about empty stables or escaping cats" (*per* Lord Oliver of Aylmerton, *ibid.*, at p. 1321). Cf. Bingham L.J. in "*Spycatcher 2*" [1990] 1 A.C. 109, 223: Equity should not imitate the Pope who issued a Bull against Halley's comet.

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contrary view that it would *not* be futile to continue the injunctions, even with copies of the book available from America. Benefits of the injunctions accruing to the Attorney-General (to whom the obligation of confidence was owed) were said to include: maintaining security service morale; preserving the confidence of overseas allies in the British security services; a prophylactic "Admiral Byng" effect against future diarists.[55] Lord Templeman held that there was all the difference between mass newspaper circulation and individual copies of the book being imported from the USA.[56]

One explanation of the divisions in *Spycatcher 1* is simply that the judges disagreed over whether any (or sufficient) benefit obtained from continuing the injunctions. The prevailing majority admitted, of course, that in the changed conditions it was no longer possible to preserve the absolute secrecy of Wright's allegations. But that did not render the injunctions entirely pointless.[57] This approach seems to harmonise well with that proposed by Professor Tettenborn. However, it has not gone unchallenged. In *O. Mustad & Son* v. *Dosen* the House of Lords unanimously discharged injunctions after the relevant information had entered the public domain in a patent application.[58] As Lord Buckmaster said, "it was impossible for the [plaintiffs] to get an injunction restraining the [defendants] from revealing what was common knowledge. The secret, as a secret, had ceased to exist".[59] This reasoning was expressly approved and relied-upon by Lord Goff in *Spycatcher 2*.[60] The orthodox approach does not, therefore, lack weighty judicial support.

Close reading of the majority judgments in *Schering Chemicals* and *Spycatcher 1* in fact makes it difficult to isolate the "non-futility" principle as their sole ratio decidendi. In both cases, the courts were concerned not to allow defendants to benefit from their own wrong, *i.e.*, their breach of confidence. The strong words of Shaw L.J. in *Schering Chemicals* leave little doubt as to its influence on his decision:

> The law of England is indeed, as Blackstone declared, a law of liberty; but the freedoms it recognises do not include a licence

[55] Voltaire, *Candide*, Chapter 23: "*Dans ce pays-ci il est bon de tuer de temps en temps un amiral pour encourager les autres*".
[56] [1987] 1 W.L.R. 1248, 1298.
[57] Contrast the unanimous view as to the futility of final injunctions in *Spycatcher 2* [1990] 1 A.C. 109.
[58] (1928) [1964] 1 W.L.R. 109n.
[59] *Ibid.*, at p. 111. See also Lord Denning M.R. (dissenting) in *Schering Chemicals* [1982] Q.B. 1, 22, approved by Lord Oliver of Aylmerton (also dissenting) in *Spycatcher 1* [1987] 1 W.L.R. 1248, 1319.
[60] [1990] 1 A.C. 109, 285–286.

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> for the mercenary betrayal of business confidences ... [It is asserted that] no principle of confidentiality can apply to matters which have become notorious ... It is an argument which is at best cynical; some might regard it as specious. Even in the commercial field, ethics and good faith are not to be regarded as merely opportunist or expedient ... [The burden of secrecy] is not to be sloughed at will for self-interest.[61]

It is clear that Shaw L.J.'s decision was squarely based upon a moralistic conception of the duty of confidence, from which the confidant is not to be "adventitiously" released. Similar reasons moved the judges who decided that the interlocutory injunctions should continue in *Spycatcher 1*. Lord Brandon looked askance at the "startling, and indeed anarchic, conclusion" that Wright might be released from his duty of confidence by the publication of the book,[62] and Lord Ackner said that if the injunctions were discharged before trial "your Lordships would have established a 'Charter for Traitors' to publish on a massive scale in England whatever they have managed to publish abroad".[63]

Professor Tettenborn stresses the importance of distinguishing the source of the publication, when deciding if it has destroyed the duty of confidentiality. He argues that "breach of confidence liability is not concerned with secrecy as such but rather with the respective equities of plaintiff and defendant".[64] Thus, he argues, the obligation remains enforceable when there has been publication by third parties or, *a fortiori*, by the confidant himself (as in *Spycatcher*). He explains *Mustad* v. *Dosen* on the ground that the *plaintiffs* had been responsible for the initial publication, through their patent application, and should not be permitted to "blow hot and cold" in restraining further publication by the defendants. It is submitted, however, that this approach can no longer be valid.

Spycatcher 2 was the trial of the breach of confidence action. The Attorney-General sought, inter alia, a permanent injunction against the *Sunday Times*, which had been granted exclusive serialisation rights for Wright's book. Again, the case ended up in the House of Lords, who decided that the injunction should be discharged. Lord Griffiths was the lone dissenter, on the ground that to discharge the duty against Wright would "make a mockery of the duty owed by members of the Security and Intelligence services", and that the *Sunday Times* could be in no better position, for it had encouraged the publication and "its conscience was

[61] [1982] Q.B. 1, 27–29. Shaw L.J. went on to mention the reasons given above.
[62] [1987] 1 W.L.R. 1248, 1289.
[63] *Ibid.*, at p. 1305. Lord Templeman (who had been the other majority judge in *Schering Chemicals*) refers continually to the "treachery" of Wright, throughout his concurring speech in *Spycatcher 1*.
[64] (1982) 11 Anglo-American L.R. 273, 280.

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affected by its action in so doing".[65] By contrast, however, Lord Brightman considered that where a security service agent breaches his lifelong duty of confidence, "thereafter such duty is incapable of existing *quoad* the matter disclosed ... the matter is no longer secret and there is therefore no secrecy in relation to such matter remaining to be preserved by the duty of confidence".[66] It followed that the *Sunday Times* was in a similar position. Lord Goff expounded similar reasons, at some length.[67] After commenting that the principle that "no man may profit from his own wrong" was too general to provide any sure guidance, his Lordship relied upon *Mustad* v. *Dosen* for the conclusion that once the subject matter of the obligation has been destroyed the obligation must be discharged, even if the destruction was the wrongful act of the person under the obligation.[68]

Now, it is submitted that despite the absence of a clear, binding opinion on the matter,[69] the approach of Lord Goff and Lord Brightman is the correct one, in the light of subsequent developments in breach of confidence. As has been described above, the older view of the action, based on the trust inherent in particular relationships, has been supplanted by an approach where the nature of the information alone is decisive.[70] There is no difficulty in an obligation arising to bind perfect strangers. But as a result, it becomes impossible to employ the trust-based rhetoric—and reasoning—of cases like *Schering Chemicals*. The courts have chosen to latch onto part of Lord Goff's speech in *Spycatcher 2* to liberate breach of confidence from the requirement of a pre-existing relationship. To be consistent, they must also accept the working through of his Lordship's reasoning, which entails rejection of the "continuing obligation" approach in favour of the objective question: "does the information remain confidential?" The source of the disclosure no longer matters.

To summarise a lengthy argument, while proponents of using breach of confidence have succeeded in overhauling the requirement of a pre-existing relationship, the action still cannot protect privacy

[65] [1990] 1 A.C. 109, 271, 276–278. Lord Jauncey of Tullichettle agreed that Wright would still be under the obligation, but thought that the Sunday Times was no longer sufficiently connected with him. *Ibid.*, at pp. 293–294.

[66] *Ibid.*, at p. 265.

[67] *Ibid.*, at pp. 285–289.

[68] *Ibid.*, at pp. 286–287. Lord Goff rejected the interpretation of *Mustad* v. *Dosen* put forward by Professor Tettenborn (and also the reasoning in *Schering Chemicals*, by implication). *Ibid.*, at pp. 285–286.

[69] Lord Keith of Kinkel seemed to leave open the question of Wright's obligation, *ibid.*, at p. 259; Lord Goff expressed his view to be provisional, *ibid.*, at p. 289; all of the views are necessarily obiter, *vis-à-vis* Wright, who was not a party to the case.

[70] It has been suggested that the growing tendency to refer to the "tort" of breach of confidence reflects this shift: M. Tugendhat Q.C. and I. Christie, *The Law of Privacy and the Media* (Oxford 2002) p. 199.

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when the information in question is not confidential.[71] Once confidential and private information has been disclosed, it no longer seems tenable to say that the obligation of confidence may persist on the basis of continuing duties of trust and good faith (when these are immaterial to the *creation* of the obligation in the first place). It might perhaps be possible to prevent further dissemination where this would cause further damage (highly probable with private information), but the authority here is rather doubtful, given its close association with the "relationship" argument. It is further suggested that such an approach is flawed in principle, because by its very nature confidential information ceases to exist as such, on general disclosure. Finally, breach of confidence can never protect publication of images taken of an individual in a public place, however distressing, since such information cannot "have the necessary quality of confidence about it".[72]

An obvious additional point against confidence forming a comprehensive privacy law is that it is solely concerned with publication; breach of privacy by intrusion is wholly beyond its reach. This was illustrated in *Wainwright* v. *Home Office*, where the claimants had been strip-searched when visiting a relative in prison. The claim succeeded at first instance, but the appeal was allowed on the basis that there was no tort of privacy (although there would have been a breach by the prison authorities of Article 8, has the events occurred after the H.R.A. came into force).[73] Having referred to dicta in *Douglas*, suggesting that the H.R.A. simply gives the "final impetus" to a right of privacy, Buxton L.J. was at pains to stress that all the cases seen as providing the germ for that right were on breach of confidence.[74] Thus, his Lordship continued: "These cases therefore do nothing to assist the crucial move now urged, that the courts in giving relief should step outside the limits imposed by a requirement of a relationship of confidence, artificial or otherwise".[75]

[71] For further scepticism about confidence providing an adequate privacy law: R. Singh Q.C. and J. Strachan, "The right to privacy in English law" [2002] E.H.R.L.R. 129.
[72] The first of Lord Greene M.R.'s requirements in the leading case, *Saltman Engineering Co. Ltd.* v. *Campbell Engineering Co. Ltd.* [1948] R.P.C. 203, 215. For this reason, the Government's arguments in *Peck* v. *UK* while unconvincing as to the scope of "private life" are indeed fatal for any action for breach of confidence. Cited above, n. 23.
[73] [2001] EWCA Civ 2081, [2002] Q.B. 1334.
[74] *Ibid*, para. [87] and [98].
[75] *Ibid.*, para. [99].

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III. Privacy and Other Existing Remedies

A. Common Law

Responding to a proposed amendment designed to prevent a law of privacy developing out of the Human Rights Act (as it became), Lord Irvine of Lairg L.C. reminded the House of Lords that: "I have often said, the judges are pen-poised, regardless of incorporation of the Convention, to develop a right to privacy to be protected by the common law". He continued:

> In my view, the courts may not act as legislators and grant new remedies for infringement of Convention rights unless the common law itself enables them to develop new rights or remedies. I believe that the true view is that the courts will be able to adapt and develop the common law by relying on existing domestic principles in the laws of trespass, nuisance, copyright, confidence and the like, to fashion a common law right to privacy.[76]

In fact, as will be outlined here, these (and other) common law actions cannot form the stock for a satisfactory privacy law, any more than breach of confidence.[77]

Defamation, although not mentioned by Lord Irvine L.C., is the closest English tort to the Roman *actio iniuriarum*, in which the gist "consisted in outrage, or insult or wanton interference with rights; any act, in short, which shewed contempt for the personality of the victim".[78] Reputation is closely related to the personality. However, it is in important respects narrower, particularly as protected by the English tort. The common law action was from the beginning concerned with tangible, financial loss, as seen in the requirement of special damage—although this has been seen as the exception, not the rule, since libels in permanent form became actionable *per se*.[79] The tort(s) are still focused on the claimant's public reputation, and not his personal honour or dignity. So there must be publication to a third party. And it is not enough that the claimant feels the indignity, however keenly, in his own breast—to be defamatory, words must "tend to lower [him] in the estimation of right-thinking members of society generally".[80] Also, justification (truth) is a complete defence. Only a "deserved" reputation is protected. This, in particular, poses acute problems for a privacy-

[76] See HL Deb. Vol. 583 col. 784–785 (24 November 1997).
[77] See further Sir B. Neill, "Privacy: A challenge for the next century", in B.S. Markesinis (ed.), *Protecting Privacy* (Oxford 1999).
[78] W.W. Buckland (P. Stein ed.), *A Textbook of Roman Law From Augustus to Justinian* (3rd edn., Cambridge 1963), p. 590.
[79] Itself an historical accident: *King* v. *Lake* (1667) Harl. 470; *Thorley* v. *Lord Kerry* (1812) 4 Taunt. 355. See J. M. Kaye, "Libel and slander—two torts or one?" (1975) 91 L.Q.R. 524.
[80] *Sim* v. *Stretch* (1936) 52 T.L.R. 668, *per* Lord Atkin.

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based claim, where the basis of the complaint will invariably be publication of truthful but sensitive matters. In short, the basis of defamation in English law is just too far removed from protection of the personality. Its limitation for development into a privacy tort can be seen in cases of appropriation of image, where it has provided a remedy, if at all, only with great difficulty.[81]

Copyright is equally limited, for it protects only that which (however minimally) is a product of human artistic creation. Privacy, of course, is concerned with *facts*—whether personal information as such, or images (the "fact" of the individual's appearance). These lie firmly outside the realm of copyright. Copyright in photographs normally rests with the photographer, and in letters with the author. Thus, an individual might have an action for infringement of copyright when unauthorised use is made of a letter or diary of his own, or photograph taken by himself. But where there is no direct quotation, merely communication of the facts, there would be no infringement. And the *paparazzi*, not their quarry, possess the copyright in the resulting pictures.[82] As for the tort of passing off, this exists to protect business goodwill.[83] Thus, while it has recently been used to protect the commercial value of a celebrity's endorsement,[84] this is far removed from protection of the personality as such, which is our concern here. Any overlap is merely adventitious.

The Lord Chancellor also mentioned trespass and nuisance. Despite earlier suggestions to the contrary,[85] nuisance would seem to have little potential for the protection of privacy, following the House of Lords' decision in *Hunter* v. *Canary Wharf*.[86] The restatement of private nuisance as a tort protecting the capital and amenity value of land would prevent even the landowner for suing for breach of his privacy. Admittedly, if there was to be constant surveillance which might be said to affect the amenity value of the premises, damages could be awarded *for that lost value*—but this is quite different from compensating the invasion of privacy in itself.

[81] See *Tolley* v. *Fry* [1931] A.C. 333 and *Charleston* v. *News Group Newspapers* [1995] 2 A.C. 65. Contrast *Ettingshausen* v. *Australian Consolidated Press* (1991) 23 N.S.W.L.R. 443: nude photograph of rugby footballer libellous (an example of privacy distorting common law principles, according to D. Lindsay, in M. Colvin (ed.), *Developing Key Privacy Rights* (Oxford 2002)).

[82] Cf. *Pollard* v. *Photographic Co.* (1886) 40 Ch.D. 345 (professional photographer employed to take plaintiff's portrait restrained from subsequently using her image on Christmas cards, on grounds of breach of contract and also his "gross breach of faith" in shocking the lady's feelings).

[83] See the classic definition by Lord Diplock in *Erven Warnink* v. *Townend* [1979] A.C. 731.

[84] *Irvine* v. *Talksport* [2002] EWHC (Ch.) 367, [2002] 1 W.L.R. 2355. Laddie J. stated that the right to one's image as such, whether at common law or under the H.R.A., was irrelevant to the case: paras. [44]—[45].

[85] See *Lord Bernstein* v. *Skyviews* [1978] Q.B. 479, 489.

[86] [1997] A.C. 655

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It may be, of course, that the landowner could get an injunction restraining future intrusion, but this would be useful only in the case of continuing surveillance, rather than the more typical case of one-off, long lens photography, etc. Again, any overlap in remedies will be purely coincidental, for the interest protected by the tort is essentially different from the personality basis of privacy.

Trespass was suggested as the solution for courts trying to protect privacy, in the wake of the Court of Appeal's failure to do so in *Kaye* v. *Robertson*.[87] Although the tort is defined in terms of a direct physical invasion of the protected interest (land, for present purposes), it is actionable *per se*. Thus, once there has been such an invasion, it can be argued that all consequent damage (*e.g.* to feelings) should be compensated, to vindicate the right infringed.[88] Therefore, the tort is rather wider in its protection than nuisance, which, being an action on the case, has its limited category of actionable damage as part of the definition of the action itself. Yet trespass shares other, inherent limitations with the tort of indirect interference. It will only really prove useful when privacy is infringed by entry onto the victim's own land. If there is incursion onto land owned by another, the victim will depend, at best, upon the other's willingness to sue, which will quite naturally often not be in his interest. It is not good enough to state: "By accepting hospitality I place myself under the protection of my host, a concept understood even in the most backward of societies".[89] It is difficult to accept that one injured in a motor accident willingly delegates the protection of his privacy by "accepting the hospitality of his host", the casualty department.[90] Both nuisance and trespass are, of course, useful primarily against the "intrusion" infringement of privacy not protected by confidence, defamation, and so on. But on the other hand, there can be no protection by either tort if the victim is in a public place.[91]

[87] [1991] F.S.R. 62. See P. Prescott Q.C., "*Kaye* v. *Robertson*: A Reply" (1991) 54 M.L.R. 451.

[88] See Buxton L.J. in *Home Office* v. *Wainwright* [2001] EWCA Civ 2081, [2002] Q.B. 1334, para. [70]: "Once the defendant [commits trespass], without justification, he is not only liable for damages even if no quantifiable loss results; but also liable for any loss that is in fact caused by the interference". Thus, Mr. Prescott argues that a wide range of remedies can be granted by the court, including delivery up for destruction of photographic negatives obtained during the trespass. *Ibid.* Cf. *A.B.C.* v. *Lenah Game Meats* (2001) 208 C.L.R. 199 (High Court of Australia).

[89] Prescott, *ibid.* at p. 454.

[90] The situation in *Kaye* v. *Robertson* [1991] F.S.R. 62.

[91] *Quaere* whether public nuisance might here be available. Unlikely (in the absence of obstruction of the highway), since intrusion is typically "victim-targeted" rather than general (CCTV cameras *aliter*?).

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B. Actio iniuriarum?

It is also appropriate to consider the argument, perhaps surprising, of Professor Birks, that there is an *actio iniuriarum* lying immanent but unrecognised in English law.[92] He focuses not upon the tort of defamation but on the phenomenon of aggravated damages in tort actions generally—*i.e.*, the enhanced damages awarded when a claimant has suffered distress through the tortfeasor's contumelious disregard of his rights.[93] Professor Birks argues that the current approach, where such damages are parasitic on the establishment of an "ordinary" tort, tends to obscure the point that they are awarded for a reason wholly different from the underlying tort (be it libel, trespass, or whatever)—namely, contemptuous failure to treat the claimant with respect, the very heart of the Roman *iniuria*. He says that in a well-ordered law of torts, such a remedy for contempt would not be seen as parasitic but independent; it protects a distinct interest, and thus there is a distinct tort. This re-classification certainly, with respect, possesses great analytical force. However, it is submitted that the final stage of Professor Birks's argument, which requires the complete decoupling of "aggravated damages" from the underlying torts, so as to constitute an independent English *actio iniuriarum*, faces formidable difficulties. He states that "this is within easy interpretive reach, since it only requires the common law to do in relation to this [new] tort what it has done in relation to others throughout its history".[94] On the contrary, however, it would take a very great step indeed for the courts to recognise a new and explosive tort, protecting the intangible idea of "self respect". Certainly, the precedents cited from the general area do not bear out Professor Birks's bold statement.[95]

Kaye v. *Robertson* was, on the contrary, the classic example of a court imprisoned by the narrowness of existing actions in trying to protect privacy. Having rejected libel, passing off and trespass to the person as bases for the action, the Court of Appeal, straining to grant a remedy for the "monstrous invasion of privacy", eventually settled on malicious falsehood.[96] Even here, the basis of the action meant that only a limited injunction could issue, Bingham L.J. commenting that "we cannot give the Plaintiff the

[92] P.B.H. Birks, "Harassment and hubris, The right to an equality of respect" (1997) 32 Irish Jurist 1.
[93] *Rookes* v. *Barnard* [1964] A.C. 1129; *Cassell & Co.* v. *Broome* [1972] A.C. 1027.
[94] (1997) 32 Irish Jurist 1, 33.
[95] *Ibid.*, at pp. 34–35.
[96] [1991] F.S.R. 62. The plaintiff sought an injunction against publication of photographs and an "interview" which the defendant newspaper had gained through unauthorised access to his hospital room.

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breadth of protection which I would, for my part, wish".[97] Professor Birks's praise for the creative enlargement of *locus standi* in private nuisance in *Khorasandjian* v. *Bush*[98] provides weak support for his argument when, subsequent to his lecture, that development has been overruled as heretical by the House of Lords.[99] The tort of harassment so imaginatively relied upon in *Thomas* v. *National Union of Mineworkers*[100] has been repudiated by judiciary and commentators alike.[101] It would be akin to outright legislation for the courts to recognise an *actio iniuriarum* as part of the common law; it remains far out of normal "interpretive reach".

C. Statute

Two recent Acts of Parliament have potential to afford remedies for infringement of privacy. It should be recalled that all statutes are to be construed "so far as possible" in accordance with Convention rights, including those in Article 8.[102]

The Protection From Harassment Act 1997 is a masterpiece of laconic drafting. Pursuing a course of conduct which (with knowledge or imputed knowledge) amounts to harassment of another is a criminal offence and a statutory tort.[103] "Harassment" is left undefined, save that: "References to harassing a person include alarming the person or causing the person distress".[104] This would apparently encompass the whole range of (non-trivial) invasions of privacy—excluding those based purely on loss of commercial endorsement, which are outside our concern. Thus, a statute enacted to deal with the specific problem of "stalkers" has potential to render unlawful invasions of privacy—and much else besides. But one might well have reservations about treating the concept of harassment in an expansive way when criminal liability is in question. Creative interpretations would virtually amount to retroactive punishment—a grave breach of the rule of law. It has now been established that the Act does apply, in principle, to articles in the press.[105] The court seemed broadly to accept the argument of the defendant journalist

[97] *Ibid.*, at p. 70. This proved prescient, for the paper in its next issue ran the story anyway, under the headline "PHOTOS HE TRIED TO BAN—Bedside shots taken without consent—Amazing sneak pictures". This removed the (enjoined) innuendo that the plaintiff had consented to the interview. *Sunday Sport*, 4 March 1990.

[98] [1993] Q.B. 727.

[99] *Hunter* v. *Canary Wharf* [1997] A.C. 655.

[100] [1986] Ch. 20.

[101] *Wong* v. *Parkside Health N.H.S. Trust* [2001] EWCA Civ 1721. J. Conaghan and W. Mansell, *The Wrongs of Tort* (2nd edn. London 1999), p. 142.

[102] H.R.A., s. 3.

[103] Protection From Harassment Act 1997, s. 2 (up to six months' imprisonment); s. 3.

[104] *Ibid*, s. 7(2).

[105] *Thomas* v. *Hughes* [2001] EWCA Civ 1233, [2002] E.M.L.R. 78.

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that the Act should be applied cautiously in this context, to guard against the issue of injunctions against any allegedly distressing publication which the defendant could not prove to be reasonable,[106] which would be "anathema to the concept of freedom of expression". Nor would simple foreseeability of distress be enough, in itself, to bring publication of articles within the Act. Lord Phillips M.R. emphasised that "before press publications are capable of constituting harassment, they must be attended by some exceptional circumstance which justifies sanctions and the restriction on the freedom of expression that they involve".[107] Nevertheless, on the facts the court refused to strike out the claim.[108]

Another source of difficulty in using the Act of 1997 against invasions of privacy lies in the requirement of "a course of conduct". This is simply defined as "conduct on at least two occasions".[109] It might seem that a one-off publication of photographs (etc.), however widely, could not therefore amount to a course of conduct.[110] On the other hand, might the taking, developing, printing, distribution and sale of the photograph be divisible into "conduct on several occasions"? The answer is not obvious, although the narrower view seems the more natural. Conversely, what if a certain newspaper were to threaten to reprint intimate photographs, perhaps some years after an initial publication—would this instance of conduct on two separate occasions amount *per se* to a "course of conduct"? The courts have considered this problem, concluding that harassing conduct on two separate occasions is not necessarily, in itself a "course".[111] What positively amounts to a "course of conduct" is rather less certain—the only guidance being that the fewer (and further apart) the incidents the less likely that they can be construed together as a "course" (*Lau*), and that links between the incidents might be broken by conduct in the interim.[112] It is hard to demur to the conclusion that the Act's drafting is defective and needs tightening up, and prosecutors should approach it with caution in the meantime.[113] Similar caution should be shown by the courts in civil

[106] A defence in Protection From Harassment Act 1997, s. 1(3)(c).
[107] Para. [34].
[108] It was arguable that the defendant's conduct amounted to racial harassment, and that this was sufficiently "exceptional".
[109] Protection From Harassment Act 1997, s. 7(3). "Conduct" includes speech: s. 7(4).
[110] The *Wilkinson* v. *Downton* tort may consist of a one-off distress-inducing action: [1897] 2 Q.B. 57. However, it would apparently require actual physical harm to be shown—like a stress-induced illness. See now *Wainwright* v. *Home Office* [2001] EWCA Civ 2081, [2002] Q.B. 1334.
[111] *Lau* v. *D.P.P.* [2000] Crim. L.R. 580, *R.* v. *Hills* [2001] Crim. L.R. 318.
[112] *Hills*, above (the defendant had had consensual sexual intercourse with the complainant in the six months between the two incidents).
[113] D. C. Ormerod, commentary on *Hills*, above, *ibid.*

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proceedings. In conclusion, the Protection From Harassment Act can offer a remedy only for certain types of privacy violation.

The Data Protection Act 1998, "a cumbersome and inelegant piece of legislation" originating in Brussels,[114] imposes duties on persons who control and process personal data, and gives rights to the subjects of those data. The first Data Protection Principle is that data be processed fairly and lawfully.[115] This includes a balancing test, and showing that "the processing is necessary for the purposes of legitimate interests pursued by the data controller ... except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject".[116] More stringent conditions have to be met to process "sensitive personal data", which include a person's "sexual life".[117] Data subjects have the right to prevent processing likely to cause substantial damage or distress,[118] and there is provision for compensation when violations of the Act cause such damage or distress.[119] There is, however, a broad exception where the data are processed for journalistic purposes, and the data controller reasonably believes that their publication would be in the public interest. Such processing is exempt from the relevant Data Protection Principles and the power to prevent publication.[120] If a data controller argues that the data are being processed for journalistic purposes, any action to restrain publication must be stayed pending the determination of this question by the Information Commissioner.[121] The proper interpretation of these provisions has given rise to judicial disagreement in the first case upon the Act, *Campbell* v. *Mirror Group Newspapers*.[122] The Court of Appeal held that the exemption applies to the publication itself (and that this included physical printing), and was not limited to the period prior to publication, as Morland J. had held at first instance.[123] The court commented that "it would seem totally illogical to exempt the data controller from the obligation, prior to publication, to comply with provisions

[114] *Campbell* v. *M.G.N.* [2002] EWCA Civ 1373, [2003] 2 W.L.R. 80, para. [72].
[115] Data Protection Act 1998, Schedule 1, Part I, Para. 1(1). "Fairness" explicitly includes the way in which the data were obtained: Schedule 1, Part II, Para. 1(1).
[116] *Ibid.*, Schedule 2, Para. 6(1). Note Para. 6(2): "The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied".
[117] *Ibid.*, s. 2.
[118] *Ibid.*, s. 10.
[119] *ibid.*, s. 13.
[120] *Ibid.*, s. 32(1) and (2).
[121] *Ibid.*, s. 32(4) and (5). For the determination, see s. 45(1). The then Data Protection Registrar criticised this provision as enabling delay for months or even years, possibly as a purely tactical manoeuvre: Briefing Paper, cited in I.J. Lloyd, *A Guide to the Data Protection Act 1998* (London 1998), p. 85.
[122] [2002] EWCA Civ 1373, [2003] 2 W.L.R. 80 (noted D. Howarth [2003] C.L.J. 17).
[123] See [2002] EWHC (QB) 499. Also, Lloyd *op. cit.* para. 6.9.

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which he reasonably believes are incompatible with journalism, but to leave him exposed to a claim for compensation under s. 13 the moment that the data have been published".[124] It might, however, be questioned whether Morland J.'s interpretation was as "absurd" as the Court of Appeal thought;[125] confining section 32 narrowly so as to exempt journalists from prior restraints—but not from awards of damages following publication—would be entirely consistent with the hallowed "publish and be damned" approach to interlocutory injunctions in libel.[126] The House of Lords has given leave to appeal.[127] The section 32 exemption aside, the prevalence of computerisation in both broadcast and printed media would mean that the Act must bite upon much journalistic activity, although it may be that some restructuring of working practices could be undertaken to avoid this. Taking photographs (using traditional film) would fall outside the Act, although their electronic storage would bring it into play, as now would the use of a non-electronic cuttings library.[128]

D. Non-legal Regulation

The press regulates itself through the Press Complaints Commission. Its Code of Practice includes a section on privacy, which is, however, limited to occasions where "there is a reasonable expectation of privacy".[129] On this basis, a complaint when long lens photographs were taken of a family on a public beach was dismissed by the Commission; the complainant's application for judicial review of this determination failed too.[130] It could be argued that the P.C.C. is itself a public body which should comply with the ECHR, and thus that, insofar as Article 8 embodies a personality right, the Code should do likewise.[131] Even so, the

[124] [2002] EWCA Civ 1373, [2003] 2 W.L.R. 80, para. [120].

[125] *Ibid.*, para. [129]. The court also said that Morland J.'s approach had opened a Pandora's Box, and if correct would mean that the Data Protection Act had created a law of privacy: paras. [92] and [94].

[126] *Bonnard* v. *Perryman* [1891] 2 Ch. 269. It is, however, the case that s. 12, H.R.A. applies to awards of damages as well as to prior restraint: *Douglas* v. *Hello!* [2003] EWHC 786 (Ch.), para. [203].

[127] [2003] 1 W.L.R. 740. It might also be noted, for the purposes of the following section, that Miss Campbell did not feel it worthwhile to complain to the Press Complaints Commission before launching her ground-breaking legal action against the Daily Mirror.

[128] If a "relevant filing system" within Data Protection Act 1998, s. 1.

[129] Clause 3 (as amended, January 1998).

[130] *R. (Anna Ford)* v. *Press Complaints Commission* [2001] EWHC Admin 683, [2002] E.M.L.R. 95. For similar P.C.C. rulings see *e.g.*, Ms. Alex Kingston's complaint (Report 55, 2001), but contrast that of Mr. Hugh Tunbridge (Report 58, 2002): Dorking Advertiser in breach of Code for photographing complainant without his knowledge, eating a butterscotch tart in a café(!)

[131] Thus, it is submitted, the court in the *Anna Ford* case should have gone considerably further than the "light touch review" which was adopted, especially given the concession, *arguendo*, that the P.C.C. was a public authority. For further discussion, M. Tugendhat Q.C. and I. Christie, *The Law of Privacy and the Media* (Oxford 2002) pp. 558–560.

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P.C.C.'s remedial powers are seriously inadequate. In *Spencer* v. *UK*, the applicants had received a P.C.C. determination in their favour, yet no-one thought to argue that this satisfied the United Kingdom's duty to provide an effective remedy for the breach of privacy.[132] As the European Commission of Human Rights noted, "the P.C.C. has no legal power to prevent publication of material, to enforce its rulings or to grant any legal remedy against the newspaper in favour of the victim". There are also lingering doubts as to whether self-regulation is an effective way to ensure responsible journalism generally.[133]

The B.B.C. will be required to act compatibly with the ECHR, as a public authority. Independent television and radio are regulated by statute. The Independent Television Commission maintains a Programme Code, and ensures compliance with it by the licensed broadcasters.[134] This, too, contains a section dealing with privacy.[135] Again, this is based on the view, criticised above, that filming in a public place does not infringe privacy. However, as it acknowledges in the Code, the I.T.C. is also a public authority bound to follow Article 8, ECHR—and so it may be required to adopt a wider conception of privacy, accordingly. While the I.T.C. has an array of statutory powers to enforce compliance, these do not include the award of damages or restraint of material in advance of broadcast.[136] Its remedies, therefore, are not comprehensive. Finally, there exists a separate Broadcasting Standards Commission.[137] It, too, publishes a Code dealing with privacy, but its feeble remedies replicate all the weaknesses of the Press Complaints Commission,[138] and it is difficult to see what the Broadcasting Standards Commission adds to the sanctions of the I.T.C. and Radio Authority.

[132] (1998) 25 E.H.R.R. C.D. 105. See now *Peck* v. *UK* (Judgment of 28 January 2003), para. 109. For "effective remedy" see Article 13, ECHR.

[133] The Calcutt Review of Press Self Regulation (H.M.S.O. 1993) and the National Heritage Committee ("Privacy and Media Intrusion", H.C. 294, 1993) recommended that an independent body be set up. The Government rejected this (see Cm. 2918, 1995). But for a spirited defence of the P.C.C. by its then chairman, see Lord Wakeham, "Press, privacy, public interest and the Human Rights Act" (speech on 23 January 2002).

[134] Broadcasting Act 1990, s. 7(1). A similar regime exists for the regulation of independent radio services by the Radio Authority: *ibid.*, Part III.

[135] I.T.C. Programme Code, s. 2.2 (April 2001).

[136] Broadcasting Act 1990, ss. 40–42. The Radio Authority has similar powers: *ibid.*, ss. 109–111.

[137] Established by Broadcasting Act 1996, s. 106, replacing the Broadcasting Complaints Commission and the Broadcasting Standards Council.

[138] See *ibid.*, s. 119.

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IV. Privacy and the Horizontal Effect of the Human Rights Act 1998

Whether, and to what extent, the Human Rights Act 1998 is applicable in disputes between private parties is a hotly disputed question about the Act. Such "horizontal effect" would perhaps have its greatest impact in the field of privacy. In *Wainwright* v. *Home Office*, the Court of Appeal reaffirmed that there had been no English privacy tort prior to the H.R.A.[139] This was, according to Buxton L.J., the first ever case in which there had been recovery (at first instance) for breach of privacy;[140] but the trial judge had erred in recognising such an action, and the defendant's appeal was allowed. Given this sketchy common law protection and the absence of a statute covering the general field,[141] privacy will be the real testing-ground for horizontal effect.

The present author concurs with the simple logic of Sir William Wade's arguments in favour of full, direct horizontal effect.[142] For many articles of the Convention, including Article 8, Strasbourg jurisprudence recognises not just a negative obligation upon States not to infringe the relevant rights, but a positive obligation to protect those rights from infringement by other individuals.[143] Accordingly, since the courts are expressly designated public authorities by section 6(3)(a), H.R.A., they have an obligation to protect Convention rights, by affording a legal remedy when an individual's right is breached by another individual.[144] This paper will conclude by criticising a different position around which consensus has been building, *viz.* a half-way house in which Convention rights may influence the "development" and "interpretation" of the common law, without, however, being applied directly between individuals. The assumption that a

[139] [2001] EWCA Civ 2081, [2002] Q.B. 1334. The fullest consideration of authorities is by Buxton L.J. at paras. [96]–[107].

[140] *Ibid.*, para. [87].

[141] It is accepted that all statutes, even those regulating private disputes, must be interpreted in line with the Convention so far as possible: H.R.A., s. 3. See, *e.g. Ashdown* v. *Telegraph Group* [2001] EWCA Civ 1142, [2002] Ch. 149.

[142] Sir H.W.R. Wade, "The UK's Bill of Rights", in Cambridge University Centre of Public Law, *Constitutional Reform in the UK: Practice and Principles* (Oxford 1998), "Horizons of horizontality" (2000) 116 L.Q.R. 217, and Wade & Forsyth, *Administrative Law* (8th edn., Oxford 2000), p. 983. See J.E. Morgan, "Questioning the True Effect of the H.R.A". [2002] L.S. 259. For the many other views, see n. 3, above.

[143] Although this jurisprudence has been described as "incoherent and arbitrary": see references in M. Colvin (ed.), *Developing Key Privacy Rights* (Hart: Oxford 2002), pp. 22–23.

[144] As Lindsay J. observes: "The recent judgment in *Peck -v- United Kingdom* in the ECHR, given on the 28th January 2003, shows that in circumstances where the law of confidence did not operate our domestic law has already been held to be inadequate. That inadequacy will have to be made good and if Parliament does not step in then the Courts will be obliged to". *Douglas* v. *Hello!* [2003] EWHC 786 (Ch.), para. [229(iii)].

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satisfactory privacy law will emerge in this way is a questionable one, to say the least.

The Court of Appeal's (first) decision in *Douglas* v. *Hello!* was interlocutory; the court had to decide only if there was a serious issue to be tried. On the other hand, having announced their decision immediately at the end of the hearing, the court then took the time to prepare detailed and carefully-reasoned written judgments, which have naturally proved most influential in this rapidly developing area of the law.[145] The case was necessarily argued with some haste, and as Sedley L.J. said, "this is not the place, at least without much fuller argument, in which to resolve such a large question [as horizontal effect]".[146] This did not, however, relieve Sedley L.J. of the need to take some attitude as to the submissions on that point. He concluded that:

> if the step from confidentiality to privacy is not simply a modern restatement of the scope of a known protection but a legal innovation—then I would accept [counsel's] submission ... that this is precisely the kind of *incremental change* for which the Act is designed: one which *without undermining the measure of certainty which is necessary to all law* gives substance and effect to section 6 [of the Human Rights Act].[147]

Keene L.J. took a similar view.[148] Both of the learned Lords Justices seem firmly of the view that the "developmental" approach is permissible—even desirable—and, moreover, is all that is required for the provision of a remedy.

Brooke L.J was more circumspect, preferring to express no conclusion, following an erudite comparative survey of horizontal effect.[149] Nonetheless, a majority of the court clearly favoured the developmental approach, which has been enthusiastically followed in subsequent cases.[150] It is submitted that this is not, however, the

[145] For analysis, see I. Hare, "Private parties, privacy and the H.R.A." [2001] E.H.R.L.R. 526. *Douglas* has been applied in *Venables* [2001] Fam. 430, *Theakston* [2002] EWHC (QB) 137, [2002] E.M.L.R. 398, *A* v. *B* [2002] EWCA Civ 337, [2003] Q.B. 195.

[146] [2001] Q.B. 967, 1001.

[147] *Ibid.*, at p. 1002. On s. 6, see Sedley L.J. *ibid.*, at p. 998: "the courts of this country must not only take into account jurisprudence of both the Commission and the European Court of Human Rights which points to a positive institutional obligation to respect privacy; *they must themselves act compatibly with that and the other Convention rights*. This ... arguably gives the final impetus to the recognition of a right of privacy in English law". (All emphasis added.)

[148] *Ibid.*, at pp. 1011–1012.

[149] *Ibid.*, at pp. 986–994.

[150] See Lord Woolf C.J. in *A* v. *B*: "the court, as a public authority, is required not to act 'in a way which is incompatible with a Convention right'. The court is able to achieve this by absorbing the rights which Articles 8 and 10 protect into the long-established action for breach of confidence. This involves giving a new strength and breadth to the action so that it accommodates the requirements of those articles". [2002] EWCA Civ 337, [2003] Q.B. 195, para. [4]. See also *Theakston* v. *MGN* [2002] EWHC (QB) 137, [2002] E.M.L.R. 398, para. [28], *per* Ouseley J.

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best way to ensure the proper protection of privacy in English law, and it would be much better to recognise a new right of privacy *per se*.[151] While *Douglas* did not rule this out, all three judges preferred not to countenance such a major development, on the basis that confidence provided a satisfactory remedy.[152] That may be true on the facts of the case itself, but it has been argued above that there is a serious mismatch between the idea of confidentiality, the basis of the existing action, and the concept of privacy. To turn confidence into a full-scale privacy law would in fact require the fundamental basis of that action to be altered in a way far exceeding the "incremental". The same is true for the other actions suggested as a basis for privacy protection—none of them has protection of the inviolate personality as its basis and, accordingly, none can protect privacy in a way which is more than incidental. It has also been argued that the recognition of a common law *actio iniuriarum*, based on aggravated damages, would constitute an extension far beyond "increment".[153] Now it could be argued that, taken together, the various existing remedies will protect nearly the whole of privacy. Gaps may still remain (images are a particularly difficult area, for example), but the overall protection will be satisfactory—and moreover can be developed incrementally, from case to case. In effect, this is to argue for the status quo, in which the courts exercise ingenuity in combining together diverse actions, to fashion some sort of privacy remedy.[154] Mr. Bagshaw has neatly criticised this way of proceeding, observing that "development from existing torts may lead to complexity, inconsistency and distortion. In particular, it would be difficult to develop common defences and a coherent approach to remedies".[155] The different rules applying to the grant of interlocutory injunctions in defamation and breach of confidence cases provide but one example.[156]

[151] See, likewise, Lord Scott, "Confidentiality" in J. Beatson and Y.M. Cripps (eds.), *Freedom of Expression and Freedom of Information* (Oxford 2000); J. Wright, *Tort Law and Human Rights* (Oxford 2001), pp. 178–182; R. Singh Q.C. and J. Strachan, "The right to privacy in English law" [2002] E.H.R.L.R. 129.

[152] See, likewise, *A* v. *B* para. [11(vi)].

[153] Section III B above, discussing P.B.H. Birks, "Harassment and hubris, The right to an equality of respect" (1997) 32 Irish Jurist 1.

[154] *Kaye* v. *Robertson* [1991] F.S.R. 62 is the classic example. The protection was, however, less than complete—see above, Section III B. *Semble* there would today be a breach of confidence action: *per* Keene L.J. in *Douglas* [2001] Q.B. 967, 1012. Contrast the unrepentant views of Sir Thomas Bingham, "Should there be a law to protect rights of personal privacy?" [1996] E.H.R.L.R. 450, 457.

[155] R. Bagshaw, "Obstacles on the Path to Privacy Torts" in P.B.H. Birks (ed.), *Privacy and Loyalty* (Oxford 1997). Some coherence has recently returned to the law on exemplary damages: *Kuddus* v. *Chief Constable of Leicestershire* [2001] UKHL 29, [2002] 2 A.C. 122, overruling *A.B.* v. *South West Water* [1993] Q.B. 507.

[156] See *e.g. Service Corpn. International* v. *Channel Four* [1999] E.M.L.R. 83; M. Tugendhat Q.C. and I. Christie, *The Law of Privacy and the Media* (Oxford 2002) pp. 284–292; *Cream Holdings* v. *Banerjee* [2003] EWCA Civ 103.

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Proponents of an incremental approach to horizontal effect in fact rely upon certainty as one of its cardinal virtues. So Lord Lester and Mr. Pannick argue that it is "important to weave the Convention rights into the principles of the common law and of equity so that they may strengthen rather than undermine these principles, *including the principle of legal certainty*".[157] Sedley L.J. relies upon similar reasoning in *Douglas*.[158] Their argument seeks to draw a reassuring parallel with the courts' time-honoured function of developing the common law. Presumably, however, there might well be *some* difference between the approaches—else why should the courts not ignore horizontal effect altogether, and develop a tort of privacy through the traditional common law process? The meaning of this H.R.A. "obligation to develop" is, in truth, unclear. At its narrowest, the obligation would add nothing to the existing practice of common law development. The outer limit—how far "development" can legitimately go before it turns into legislation (said to be impermissible, on this approach)—is a matter of considerable uncertainty. In *Douglas*, Keene L.J. drew a distinction between creating new causes of action and developing the scope of an existing action.[159] This, with respect, provides no touchstone for distinguishing development from legislation. If the scope of an existing action was "developed" so as to alter its fundamental basis, it is submitted that there would, in effect, be judicial legislation. In substance if not in form, a new cause of action would be created. It would be disingenuous to try to justify this as simple, common law development—in reality there would be a direct horizontal application of the European Convention, which should be acknowledged openly, and not smuggled in under the disguise of existing law. To re-iterate, exactly how far the courts are permitted or required to go by this approach is vague in the extreme.

Whatever the uncertainties of the developmental method, it could be pointed out, in response, that privacy is a notoriously uncertain concept and, therefore, to create a new action for invasion of privacy, as advocated here, would lead to disastrous legal uncertainty. Although an enthusiastic advocate of protecting personality rights, the German Supreme Court has admitted that "the notion of the general *Persönlichkeitsrecht* has the breadth of a general clause and is ill-defined. Just as the dynamic nature of personality cannot be kept within fixed limits, in the same way the

[157] Lord Lester & D. Pannick, "The impact of the H.R.A. on private law: The knight's move" (2000) 116 L.Q.R. 380, 383 (emphasis added). They cite "promoting legal certainty" as the main advantage of the approach over direct application of the Convention.
[158] Cited above, at n. 147.
[159] [2001] Q.B. 967, 1012.

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substance of the general *Persönlichkeitsrecht* eludes definitive determination".[160] Professor Picard describes privacy as a "kaleidoscope right", speaking of the "extraordinarily complex if not confused situation" surrounding its protection in France.[161] Mr. Bagshaw has questioned the legitimacy of the English courts trying to map out privacy tort(s) against such a background of theoretical uncertainty.[162] Fears of such uncertainty led the Younger Committee on Privacy to recommend against a general tort of invasion of privacy.[163]

Certainly, there are many difficult outstanding issues. Two such were raised in *Douglas* v. *Hello!*, namely the balance between privacy and freedom of the press,[164] and the extent to which commercialisation by the individuals themselves destroys privacy.[165] But a fallacy lies in assuming that such undoubted difficulties will arise *only if there is a full-blown privacy tort—i.e.*, direct horizontal application—and not if protection is left to the pragmatic development of the common law.[166] Whereas, in fact, the "developmental solution" does not avoid any of the difficulties and, on the contrary, serves to compound them with further difficulties of its own. *Whenever* there is infringement of privacy by publication, the conflict with freedom of speech will arise, and must be resolved, even if an existing action has been "incrementally developed" to protect the privacy interest. The same goes for the commercialisation problem, and all other issues about the proper scope of privacy. Having a straightforward privacy tort makes the solution of these problems considerably easier—because there is no superadded distraction by the form and limits of an existing action, with an entirely different basis. As an American commentator observed long ago, "the attempt to compress a developing doctrine within the conservative confines of prior concepts often stunts its natural growth".[167]

[160] Judgment of 2 April 1957 (Disclosure of Medical Record) B.G.H.Z. 29, 72, translation by N. Sims.

[161] E. Picard, "The Right to Privacy in French Law" in B. Markesinis (ed.), *Protecting Privacy* (Oxford 1999).

[162] *Op. cit.* For recent judicial reservations about the vagueness of the privacy concept, see *Wainwright* v. *Home Office* [2001] EWCA Civ 2081, [2002] Q.B. 1334, para. [60] *per* Mummery L.J., and *Theakston* v. *MGN* [2002] EWHC (QB) 137, para. [27], *per* Ouseley J.

[163] Cmnd. 5012 (1972)

[164] As enshrined in Article 10, E.C.H.R. (freedom of expression) and H.R.A., s. 12. See *per* Sedley L.J. at [2001] Q.B. 967, 1002–1005.

[165] Discussed above, Section I. Cf. Brooke L.J. *ibid.*, at p. 995, Sedley L.J. at pp. 1006–1007, and Keene L.J. at pp. 1012–1013.

[166] See Mummery L.J. in *Wainwright* v. *Home Office* [2001] EWCA Civ 2081, [2002] Q.B. 1334, para. [60].

[167] Nizel, "The Right of Privacy: A Half Century's Developments" (1941) 39 Mich. L.R. 526. For criticism of Irish attempts to protect human rights through established torts (in spite of the recognition of direct horizontal effect of Constitutional rights in principle) see W. Binchy,

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The only way in which these problems can be avoided altogether is, of course, to deny a right of privacy—for present purposes, denial of horizontal effect—*in toto*. Buxton L.J. has warned of the immense difficulty of delimiting a right to privacy, and of holding the balance with freedom of speech, concluding that in such an area of political controversy, it would be inappropriate for the courts to create the new right; Parliament is better equipped and democratically qualified to perform the necessary calculations.[168] In reality, however, this approach will mean permanent denial of a right of privacy. Parliament, fearful of media disapproval, will never in the foreseeable future enact such a law.[169] Buxton L.J.'s approach is, presumably, influenced by his extrajudicial arguments against any horizontal effect for the H.R.A.[170] It is not appropriate to consider in detail the objections to that position again here.[171] But we may note that while denial of horizontal effect may absolve the courts from controversial definitional choices, it will mean the perpetuation of English law's "signal shortcoming" in failing to protect privacy.[172]

No doubt, the political sensitivity of the area is the explanation for the manifest judicial caution. The courts might well feel wary about rushing in where Parliament has feared to tread. The unhappy result, however, is an apparent desire to duck the central (and undoubtedly difficult) issues—of the scope of privacy; of horizontal effect. Sir Stephen Sedley confesses that his "sanguine prognostication" of a right of privacy in *Douglas* has been proved over-optimistic, by the subsequent (timid) judicial approach.[173] Is there not something disturbing in the Lord Chief Justice of England warning that: "It is most unlikely that any purpose will be served by a judge seeking to decide whether there exists a new cause of action in tort which protects privacy ... at first instance it can be readily accepted that it is not necessary to tackle the vexed question of whether there is a separate cause of action".[174] On the contrary, the privacy question and the intimately connected issue of horizontal effect require urgent consideration, which they have not hitherto received, tentative dicta aside. Precisely who *is* going to

"Constitutional Remedies and Tort Law" in J. O'Reilly (ed.), *Human Rights And Constitutional Law* (Dublin, 1992).

[168] *Wainwright* v. *Home Office*, *loc. cit.*, paras. [108]–[112].

[169] Although the House of Commons Culture, Media and Sport Committee is currently Inquiring into privacy and media intrusion. Lindsay J. has predicted that if Parliament does not act soon, the courts will be obliged to create a privacy law: *Douglas* v. *Hello!* [2003] EWHC 786 (Ch.), para. [229(iii)].

[170] "The H.R.A. and private law" (2000) 116 L.Q.R. 48.

[171] See J.E. Morgan [2002] L.S. 259, 266–270.

[172] *Kaye* v. *Robertson* [1991] F.S.R. 62, 71, *per* Leggatt L.J.

[173] Foreword, in Tugendhat and Christie, n. 156 above, p. vii. For the prediction, see n. 2 above.

[174] [2002] EWCA Civ 337, [2003] Q.B. 195, para. [11(vi)].

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tackle those vexed questions, and when?[175] The comfortable shelter of breach of confidence, in which difficult issues can be avoided and from which prohibitions of engagement with hard questions can be issued, should now be recognised as less than secure. Neither it nor any other existing action has the protection of privacy as its basis, and any attempt to "extend" it to do so is doomed to failure unless the courts will, disingenuously, recognise confidence as a privacy action under another name. It would be vastly better to do this openly, by recognising direct horizontal effect and so ensuring the full protection of human rights, as eloquently advocated by Sir William Wade. The current approach of incremental development is at best timorous, at worst intellectually dishonest, and in practice it means incomplete protection, and the most disastrous uncertainty in an area of law central both to "the stuff of people's souls" and the freedom of the press. In Utopia, Parliament would grasp the nettle and provide a democratically approved solution, but until that fabulous day the best we can hope for is a bold and open engagement with the questions by the courts. Distraction from the task by the form and limits of a host of ancient actions would be downright harmful. We must not, once again, pass up the opportunity—this unique opportunity—to recognise privacy as a full part of the laws of England.

[175] The Court of Appeal granted permission to appeal in *Wainwright* v. *Home Office*, n. 166 above, as did the House of Lords in *Campbell* v. *MGN*, n. 127 above.

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