A More Principled Approach to the Conflict between Privacy and Freedom of Expression in the Law of Misuse of Private Information

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[T]he ends of men are many, and not all of them are…compatible with each other…, the possibility of conflict…can never be wholly eliminated from human life.[1]

Privacy and freedom of expression are rights enshrined in the European Convention on Human Rights. The duty of English courts to protect these rights is complicated by the fact that in many cases the two rights come into conflict with each other. The tort of misuse of private information forces the courts to confront this problem, when one person tries to prevent another from revealing private information. The courts' current approach to the second stage of this tort lacks sufficient consistency, transparency and principle. This risks undermining the credibility and reliability of English law in dealing with rights, necessitating a thorough examination of the relationship between these two rights as it appears in the tort, and how judicial reasoning in relation to it can be improved.

The rights to privacy and freedom of expression are locked in a genuine rights-conflict in the tort's second stage, where one right must give way to the other. Private information either may or may not legally be disclosed; either privacy or freedom of expression can be upheld – but not both, and not neither. This unavoidable loss of rightholding entitlement is a serious implication that means the court's choice between these two rights must be based upon clear and principled justification. Yet current doctrine in the tort's second stage is critically wanting. Poor justificatory reasoning is rooted in a judicial preoccupation with 'public interest', which minimises the rights-conflict and its implications, and marginalises the two rights and their normative ends. A utilitarian economy of rights underlies the doctrinal scaffolding of 'rights-balancing', and fails to give full force to the rights' normative underpinnings and to provide principled, rights-focused justification when one right must be suspended as a result of the conflict.

In order to re-orientate the common law to the very rights which it purports to protect in the tort of misuse of private information, English courts should adopt a **tailored proportionality-optimality** method in that tort's second stage. While ensuring the courts remain within the boundaries set by precedent, this new method of reasoning forces the courts to recognise and confront the rights-conflict and its implications, and to justify their resolution of that conflict in terms of the rights themselves and their normative import, and not the 'public interest'. This method incorporates the two context-based theories of resolving rights-conflicts that are best suited to the normatively complex rights of privacy and freedom of expression: proportionality and optimality. Tailored to the specific conflict between these two rights, these theories are merged to ensure the tort's inevitable suspension of one right is justified on the basis that it entails, on the facts, the least possible frustration of rights, *combined with* the greatest possible furtherance of rights. The court must uphold that right whose normative underpinnings are overall furthered (by the right being upheld) to a greater extent than the normative underpinnings of the other right are overall frustrated (by the right being suspended). The overall degree of furtherance of the upheld right must always be greater than the overall degree of frustration of the suspended right.

[1] I Berlin, *Liberty* (OUP 2002) 214.

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Jelena Gligorijević

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CONTENTS

Table of Abbreviations

The following abbreviations are used in this thesis:

'DPA'	Data Protection Act (both 1998 and 2018) (UK)
'ECHR' or 'Convention'	Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4.XI.1950); or European Convention on Human Rights
'ECtHR' or 'Strasbourg'	European Court of Human Rights
'FOE'	Freedom of expression
'HRA'	Human Rights Act 1998
'MOA'	Margin of appreciation
'REP'	Reasonable expectation of privacy

CHAPTER 1. INTRODUCTION

(a) Rationale

For solitude sometimes is best society,
And short retirement urges sweet return.[1]

Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties.[2]

John Milton, recognised most readily as a champion of FOE, knew that *both* privacy *and* FOE were crucial values to a flourishing human society. Today, both values are considered so important to individual liberty and democratic society that they are given the protection of law. In England, privacy and FOE are fundamental rights.[3] Disclosure of private information, therefore, poses a problem not only for the individual anxious to maintain his "solitude" by preventing publication of his private information, and for the journalist wishing to "utter and to argue freely according to conscience" by publishing her story, but also for the law of rights. As the private individual and the journalist look to the law to decide whether the information may be disclosed, the law must be well-equipped to provide a just solution.

The English law of misuse of private information is currently not in the best position to meet that expectation, because it is not based upon principled, explicitly rights-focused judicial reasoning.. This dissertation explores the relationship between the rights to privacy and FOE in this context, and how the courts navigate this relationship in the tort of misuse of private information. It argues that the root cause of current deficiencies is the courts' focus upon 'public interest', explains why this creates a utilitarian economy of rights that undermines the law's capacity to adjudicate in this context, and posits a new method for judicial reasoning to resolve problems of disclosing private information: **tailored proportionality-optimality**. That method redirects courts' attention to how disclosure and suppression in the particular case would affect the normative ends of both privacy and FOE. By prioritising rights over 'public interest', tailored proportionality-optimality better equips the law to resolve cases in misuse of private information.

In exploring how privacy and FOE operate in this context, this dissertation explains why the relationship between privacy and FOE in English common law is a genuine rights-conflict, what this implies, and why this is critical to the courts' ability to adjudicate well in these cases. Rights-conflicts involve hard decisions and must be confronted with that in mind. Before that, they must be recognised for what they are, and what they entail: a legal demand that one party lose entitlement to their right. Only when that inevitable loss is recognised can a court tasked with resolving a rights-conflict begin to approach its task honestly and methodically, and to justify its final decision credibly.

Given this inevitability of loss of rightholding entitlement, that method and justification must unambiguously be grounded in the normative purpose and practical operation of the rights themselves. This is currently missing from

[1] J Milton and AW Verity, *Paradise Lost (1674)* (CUP 1910) ll 249–250 (Book IX).
[2] J Milton, *Areopagitica (1644)* (2nd edn, Dent 1907).
[3] ECHR, articles 8 and 10, applicable in English law through the HRA.

the English courts' adjudication of misuse of private information, which is focused singularly upon a concept sitting outside the normative sphere of either right: the 'public interest'. Currently, whether private information may be disclosed in any case does not depend upon how privacy and FOE would be affected, one of which must be suspended, but upon a fluid understanding of the 'public interest'. Tailored proportionality-optimality is intended to improve judicial reasoning by explicitly and substantively elevating rights above 'public interest'.

The inevitability of loss of rightholding entitlement also renders it more important that the court show clearly *how* it reached its decision on which right to uphold and which to suspend, than that everyone agree the court suspended the 'correct' right. After all, reasonable people, including reasonable judges, will disagree about the substantive rectitude of given outcomes. That distinction between method of choosing between rights, and final choice made, may be a fine one, but it is important. It signifies the importance of everyone knowing what to expect of the courts in reaching hard decisions, and being able to locate good, *rights-focused*, reasons for the courts' decisions, more so than everyone agreeing all judicial decisions are perfectly correct. Before we can discuss or disagree about difficult decisions about rights-conflicts, we must understand how they were reached, and that loss of rightholding entitlement was inevitable. Then, although we might not *agree* with the substance of a judicial decision, we can at least *accept* its authority. This is the rationale and impetus behind improving the courts' approach to the conflict between privacy and FOE in the law of misuse of private information.

(b) Scope

This dissertation explores the courts' approach to the second stage of the English cause of action for misuse of private information.

i. Informational privacy

Given that we are concerned with the *relationship* between the privacy and FOE rights, and given the centrality of expression – speech, publication, dissemination of information – to the latter, this dissertation focuses upon situations where privacy is contained in *information*, the *disclosure* of which challenges privacy. It does not extend to privacy as protection from surveillance, or seclusion from intrusion *per se*, without the additional element of disclosure of private information. Therefore, the paradigmatic situation for this dissertation involves Person A's private information having been, or about to be, disclosed by Person B, where Person A opposes that disclosure.

ii. English law

This dissertation focuses upon the deficiencies in judicial reasoning in one jurisdiction: England and Wales. It suggests an improved approach to adjudication in informational privacy cases. This does not, however, preclude further exploration, beyond this dissertation, into whether these problems appear in other jurisdictions with similar remedies, and whether the method suggested here could be applied in such jurisdictions.

English law is influenced by the law of the ECHR. The ECHR and relevant jurisprudence of the ECtHR therefore must be a part of this dissertation. This does not, however, include a comprehensive assessment of ECHR law, or a comparative assessment of English and European informational privacy law.

iii. Common law tort

The focus within English law is upon common law protection of informational privacy, rather than equitable or legislative remedies. The courts have confirmed the cause of action for misuse of private information as a tort.[4] Although the courts, in confirming this category of actionable wrong, have not undertaken a comprehensive assessment of exactly how a *tortious* action for misuse of private information evolved in the common law, and why misuse of private information *should* now be served by tort law,[5] this cause of action has been accepted as a "tort"[6] and will be called a tort throughout this dissertation.

Although this tort evolved from an adjusted version of the equitable action in breach of confidence,[7] and although the courts therefore sometimes apply breach of confidence jurisprudence in cases of misuse of private information, the tort is a separate, distinct cause of action,[8] now pleaded and adjudicated as such, not depending upon the elements of breach of confidence. This applies even when claimants in misuse of private information seek injunctive relief (*equitable* relief), alongside or instead of damages (a common law remedy): injunctions, against publication of the information, can be granted to serve the tortious claim,[9] and the structure of the judicial inquiry and reasoning employed are in all material ways the same for injunction applications and damages claims: both involve the disclosure of private information, putting privacy in opposition to FOE, forcing the court to choose between the two.

The tort is distinct from breach of confidence even if a case of misuse of private information, pleaded in tortious terms, *involves* a breach of confidence.[10] This dissertation focuses upon the tort, rather than breach of confidence *per se*. Nevertheless, in view of the presence of breach of confidence in the historical pathway to the current tort, this dissertation must cover relevant breach of confidence jurisprudence, including judgments where misuse of private information was pleaded and decided in terms of breach of confidence (in its traditional or adjusted form).[11] However, the distinct equitable cause of action in breach of confidence in its own right remains outside the scope of this dissertation.

Nor does this dissertation cover remedies for privacy breaches under the DPA. In England, the tort is the most jurisprudentially developed and preferred way of dealing with informational privacy claims. Claimants routinely plead the tort, rather than the DPA, even where the latter would be possible. Where claimants also plead the DPA, the courts have prioritised common law, confirming any DPA claim stands or falls depending upon whether the tort has been established, and have therefore not engaged as much with the statutory framework for adjudicating

[4] *Vidal-Hall v Google Inc* [2015] 3 WLR 409, [43]-[51].
[5] The courts were never required to engage in such a comprehensive assessment, in the cases in which they have confirmed the cause of action is a tort.
[6] *PJS v NGN Ltd* [2016] AC 1081, [32]-[44] (*PJS*).
[7] *Campbell v MGN Ltd* [2004] 2 AC 457 *(Campbell)*.
[8] *Douglas v Hello! Ltd (No 3)* [2008] 1 AC 1, [255], per Lord Nicholls.
[9] For example: *PJS*.
[10] For example: *ZXC v Bloomberg LP* [2019] EWHC 970 (QB) (*ZXC*).
[11] For example: *Campbell*; *Douglas v Hello! Ltd (No 1)* [2001] QB 967.

these cases.[12] Therefore, the law on the common law (tortious) action is more developed and has more substance than the law on the DPA.

iv. Second stage of the cause of action

The tort has two stages. The first requires the claimant establish a REP over the information.[13] If that stage is passed, the second stage requires the court 'balance' the claimant's privacy right against the defendant's FOE right, to decide whose right to uphold, and in whose favour to give judgment.[14] This dissertation focuses upon the second stage only, because the privacy-FOE conflict arises only in the second stage; the first stage is concerned exclusively with privacy.[15] That would imply that the first stage will be addressed by the court on the basis of the normative underpinnings of the privacy right, without reference to external matters. For the avoidance of doubt, this dissertation does not engage with the first stage of the tort, and it necessarily assumes that that stage has been passed, and that the court has been satisfied that its requirements have been met. This is because it is *if and only if*[16] that first stage is passed that the court has reason to consider the second stage.

Although this dissertation is not concerned with how the courts approach the first stage of the tort, and although it assumes that that stage has adequately been met and the court has moved on to the separate 'balancing' stage, it should be noted that the courts have sometimes blurred the lines between the two stages, even though the Court of Appeal has held they are separate stages.[17] That is, the courts have not always treated the first stage as concerned exclusively with privacy, and addressed on the basis of the normative underpinnings of the privacy right. It has been held that part of the considerations involved in the first stage would be "the nature and purpose of the intrusion", and "the purposes for which the information came into the hands of the publisher".[18] It is beyond the scope of this dissertation to provide a comprehensive critique of how the courts decide whether a REP has been established, and whether their reasoning is adequately and exclusively concerned with the privacy right, and not factors that are relevant to the *relationship* between privacy and FOE.[19] One observation that may be made in the context of judicial treatment of the rights to privacy and FOE is that it detracts from the robustness and transparency of judicial reasoning if the issue of REP (the issue of whether the claimant is entitled to the right to privacy in the first place) is determined by reference to interests underpinning a right that is *not* privacy, such as FOE. Such an approach would also see the courts treat the privacy right, and how it operates on particular facts, as *defined by* or *conditional upon* another right, FOE. That would be a significant limitation upon the autochthony of the right to privacy, as a right which is defined by the courts, and identified as justiciable on certain facts, in accordance only with the philosophical justifications upon which it has been juridified.

[12] For example: *Campbell*; *PJS*; *Richard v BBC* [2018] 3 WLR 1715 (*Richard*); *ZXC*.
[13] *Murray v Big Pictures Ltd* [2008] 3 WLR 1360, [36] (*Murray*).
[14] *Re S (A Child)* [2005] 1 AC 593, [19] (*Re S*). See Chapter 2.
[15] Or at least in the first stage courts should not be considering FOE, given the focus is on REP. See: *McKennitt v Ash* [2007] 3 WLR 194 (*McKennnitt*), [11], since applied in more recent cases, for example: *Bull v Desporte* [2019] EWHC 1650(QB), [75].
[16] *McKennitt*, [11]: "If 'no' [there is no REP], that is the end of the case."
[17] *McKennitt*, [11].
[18] *Murray*, [36].
[19] A valuable critique has already been made in: NA Moreham, 'Unpacking the Reasonable Expectation of Privacy Test' (2018) 134 LQR 652; NA Moreham, 'The Protection of Privacy in English Common Law' (2005) 121 LQR 628; K Hughes, 'A Behavioural Understanding of Privacy and Its Implications for Privacy Law' (2012) 75 MLR 806.

Given that a more fulsome discussion of this issue is beyond the scope of this dissertation, the two rights are presumed in this dissertation to have already been established *as rights*: they arise as legally cognisable entitlements on the particular facts, and are justiciable on those facts. This dissertation is not concerned with defining whether the privacy and FOE rights are legal rights at all, and whether they have arisen as such on the particular facts: given the ECHR framework, and given the tort's first stage must be passed before embarking upon the second stage,[20] both privacy and FOE are taken to be legal rights applicable as such on the particular facts.

(c) Structure and findings

Chapter 1 explains the rationale, scope, structure and findings, justifies the dissertation in terms of deficiencies in current law, and explains the methodology adopted.

Chapter 2 provides a logical analysis of the tort's second stage, demonstrating the relationship between privacy and FOE is a genuine rights-conflict entailing an unavoidable loss of rightholding entitlement in every case.

Chapter 3 evaluates the normative underpinnings of privacy and FOE, including human dignity, liberty, and democratic legitimacy, illustrating each right's normative complexity.

Chapter 4 scrutinises different theories of rights-conflict resolution, according to the nature and implications of rights-conflicts established in Chapter 2 and the normatively complex nature of the rights discussed in Chapter 3.

Chapter 5 undertakes a critical doctrinal inquiry into the English courts' current approach to the tort's second stage, applying the preceding logical and theoretical findings to assess how the courts resolve the privacy-FOE conflict, and what the root cause is of current deficiencies.

Chapter 6 posits a new method of reasoning in the tort's second stage, tailored proportionality-optimality, which accounts for the nature and implications of the rights-conflict, the rights' normative complexity, the best theoretical approaches to resolving this particular rights-conflict, and the root cause of current doctrinal deficiencies. These factors are combined to make judicial reasoning more transparent, principled and normatively engaged. The new method is applied to a hypothetical situation involving the disclosure of private information, to demonstrate its viability and strength in ensuring the courts reason with more principle and rights-focus.

Chapter 7 provides an overall conclusion to this dissertation.

The central findings presented in this dissertation are:

(1) The relationship between privacy and FOE in the tort's second stage is, as a matter of logic, a **genuine rights-conflict**, entailing that in each case one party must suffer **loss of rightholding entitlement**.

[20] See Chapter 2.

(2) The **root cause** of current doctrinal deficiencies is the **focus upon 'public interest'**, which undermines the credibility of rights-adjudication in two ways: it distracts courts from engaging with the rights-conflict, the rights' normative underpinnings, and the proportionality assessment; and it imports into the law a **utilitarian economy of rights**, in which the purpose and importance of privacy and FOE are distorted, so that these rights are commodified in the name of some undetermined 'public interest'.

(3) A new method to improve judicial reasoning in the tort's second stage is **tailored proportionality-optimality**. This method stimulates more transparent, principled and normatively-engaged reasoning. It frames the inquiry in terms of resolving a rights-conflict, and justifies the loss of rightholding entitlement in terms of the most optimal and proportionate outcome, given how the particular facts affect the rights' normative underpinnings. The courts must compare the side-effects that both publication *and* suppression of the information would have on *only* those normative underpinnings that are *rationally connected* to the particular facts. This involves assessing how far the alternative factual consequences in the particular case *frustrate* and *further* the relevant normative underpinnings of each right, and suspending the right whose normative underpinnings are *least frustrated* by that outcome and *least furthered* by the alternative outcome.

This dissertation concludes that proclaiming a decision is in the 'public interest' is not much more than proclaiming that decision is correct. That is insufficient to justify a judicially sanctioned loss of rightholding entitlement. The courts must go further and demonstrate how they reach their decisions in accordance with the rights' normative underpinnings, applying their method consistently across all cases. **Tailored proportionality-optimality** centres upon the *rights-conflict*, and forces the courts to reach their decision by comparing the intensity of the effects that the alternative factual consequences would have on the relevant normative underpinnings of each right. Every suspension of privacy or FOE has the authority and legitimacy of being both *necessary* and *justified on the rights' own terms*. The court is asked to compare the degree of furtherance of each right with the degree of frustration of the other right for each of the two alternative outcomes (publication and non-publication). The individual suffering the loss does not do so for some fluid, utilitarian ends. He suffers the loss because, on the facts, his right is normatively *frustrated to a lesser extent* than would be the other individual's right, were her right to be suspended instead. Equally, he suffers the loss because his right would be normatively *furthered to a lesser extent* than is the other individual's right, were his right to be upheld instead. If only *one* of these two consequences obtains on the facts, then the court must examine the conflict further still: whichever outcome generates the *greatest difference or gap* between the degree of furthering and the degree of frustrating of *each* right, is the outcome the court should choose to resolve the rights-conflict.

Only when such a rights-focused justification is clearly set out in judicial reasoning should we be confident that the law of misuse of private information is well-equipped to resolve the conflict between the rights to privacy and FOE.

(d) Justification

Problematic tendencies apparent in the current judicial approach to the English tort's second stage necessitate a critical and comprehensive analysis of this area of law. The lack of consistency, transparency and principle in judicial reasoning about the privacy-FOE relationship justify the inquiry into how to improve this reasoning, to

ensure English informational privacy law is – and clearly appears to be – internally coherent and grounded in a cognisance of juridified rights.

i. Inconsistency

Case law on the tort's second stage evidences some inconsistency in how the courts adjudge certain factual circumstances in the privacy-FOE conflict. One example lies in the lack of judicial agreement on exactly what 'proportionality' is and how it is applied. In *London Regional Transport* Sedley LJ explained proportionality as a relatively complex structure for reasoning about the operability of rights,[21] and in *Campbell* and *Re S* the House of Lords confirmed proportionality must be applied to both privacy and FOE,[22] suggesting an elaborate, complex methodology must be applied in 'mirror' form in every case. However, few if any decisions contain reasoning extending beyond paying lip-service to the need to 'do proportionality', with most cases essentially decided on 'public interest'[23] or specific criteria.[24]

Another example is the treatment of public figure claimants whose private information reveals moral culpability. While some judges (explicitly or implicitly) have treated public figures as 'role models', the facts about whose nefarious behaviour therefore ought to be exposed,[25] others have treated as immaterial both the social role that such claimants voluntarily or involuntarily occupy and the immorality indicated in the information.[26] Recent reasoning even suggests being a public figure might strengthen claimants' protection from exposure, even where the alleged culpability is criminal wrongdoing.[27] There is little explicit judicial appeal to the rights' normative underpinnings, and why some normative underpinnings are relevant and others not, across such decisions in a way that can unite the divergent approaches underlying these judgments, which all remain authorities in law. The fact that a pattern might be gleaned from how the courts have treated some public figure claimants in privacy tort cases, and the fact that the courts do provide reasons for their treatment of public figures in particular ways, should not deflect from the lack of explicit appeal to the rights in question, and their normative underpinnings, in such cases: that lack of consistent and explicit reference to the rights' normative underpinnings is the missing ingredient which makes judicial treatment of public figure claimants whose private information reveals moral culpability problematic.

For example, even though reasons may be given for why a public figure may have a less weighty expectation of privacy or that there is greater 'public interest' in the life of public figures, and even though these reasons may be applied across several cases,[28] the inconsistency remains when other decisions involving public figures are

[21] *London Regional Transport v Mayor of London* [2003] EMLR 4, [57].
[22] *Campbell*; *Re S*.
[23] One example out of many: *PJS*, [21]-[26], [31]-[36]; 'public interest' is discussed in Chapter 5.
[24] For example: *Rocknroll v NGN Ltd* [2013] EWHC 24 (Ch), [31]; *ABC v TMG Ltd* [2018] EWHC 2177 (QB), [34]; *Hannon v NGN Ltd* [2015] EMLR 1, [85]; proportionality is discussed in Chapter 5.
[25] *A v B plc (Flitcroft v MGN Ltd)* [2002] 2 All ER 545 (*Flitcroft*); *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB) (*Ferdinand*); *McClaren v NGN Ltd* [2012] EMLR 33 (*McClaren*); *Theakston v MGN Ltd* [2002] EMLR 22.
[26] *Mosley v NGN Ltd* [2008] EMLR 20 (*Mosley*); *PJS*; *CTB v NGN Ltd* [2011] EWHC 1326 (QB) (*CTB*); *CC v AB* [2007] EMLR 11 (*CC*).
[27] *Richard*.
[28] For example, because members of the public look up to them as 'role models' (for example: *Flitcroft; McClaren*), or simply because they have a public role whether that be in sport, politics or commerce (for example: *Spelman; Browne v Associated Newspapers Ltd* [2007] EMLR 19*; Goodwin v NGN Ltd* [2011] EMLR 27), or because they have courted publicity about the

examined, where the courts do not, *in their reasoning about the facts of the case,* treat the claimant in the same way,[29] and, crucially, do not employ reasoning that explicitly invokes the rights' normative underpinnings to explain the different approach.

The relevant inconsistency here is not in the ultimate outcomes of cases, those that uphold the public figure claimant's privacy right versus those that do not, but, rather, in how the courts *reason* in these cases. For example, some judgments which did *not* uphold the public figure claimant's privacy right appear to be based upon inconsistent lines of reasoning, without being saved by consistent, meaningful reference to the normative underpinnings of the two rights: while in such cases as *Goodwin* and *Browne* the Court reasoned that the sensitive private information about the claimant should nevertheless be disclosed because the public figure occupied a position of power and the information revealed the way in which that claimant behaved while in that position of power, in cases such as *Spelman* and *Ferdinand* the Court found sufficient justification for the disclosure of private information in the fact that the public figure claimant occupied a public role (in a national sports team). It is unclear why the Court in the latter type of case did not apply the higher, more exacting, standard of 'bad behaviour in positions of power' gleaned from the former type of case. The courts did not engage sufficiently with the normative underpinnings of the rights to assuage concerns about inconsistency. This also prevents readers of these cases subsequently and with confidence to point to a philosophical justification for the rights in a way that can explain and unite these diverging approaches, for example, the 'truth' justification or the 'check on power' justification for the FOE right: while it might usefully explain such reasoning as is observed in *Goodwin* and *Browne*, it cannot in the same way explain such reasoning observed in *Spelman*.[30]

Inconsistency can also be observed in the treatment of children's privacy interests. While some authorities contain reasoning demonstrating particular concern for children, precipitating in an outcome where privacy is upheld,[31] other authorities contain reasoning where children's interests are either not considered at all or not considered as material to how the privacy-FOE conflict is approached.[32] The overarching proposition that children's specific privacy interests are important but not decisive in the 'balance'[33] neither rationalises nor unifies the differing judicial opinions proffered in response to particular fact situations. There may be consistency in the courts' acknowledging, at the outset of their judgments in these cases, the special weightiness of child claimants' interests, but this does not consistently permeate judicial reasoning in these cases, which appears sometimes to be conditioning these weighty interests on parental wishes and control.[34]

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particular subject-matter of the information in question (for example: *Campbell*; *Ferdinand*), or because there is an implied right to criticise publicly those who hold themselves out publicly in a particular light (*Campbell*; *Flitcroft; McClaren; Goodwin*).

[29] For example: *Mosley; PJS; CTB; CC;* and *Richard.* It was open to the court in these cases to treat the public figure claimants in the same way as was done in some of the cases cited, by way of example, in fn 28, but, in these cases, the court did not do so, and, in not doing so, did not appeal to the rights' normative underpinnings to explain why, for example, the fact that members of the public look up to the claimant, or the implied right to criticise, did not feature in the same way in such judgments.

[30] The normative underpinnings of the rights to privacy and FOE are explored in Chapter 3.

[31] *Murray*; *Weller v Associated Newspapers Ltd* [2016] 1 WLR 1541 (*Weller* CA); *ETK v NGN Ltd* [2011] 1 WLR 1827; *PJS*; *Bull v Desporte* [2019] EWHC 1650 (QB).

[32] *In re JR 38* [2015] 3 WLR 155; *Spelman v Express Newspapers* [2012] EWHC 355 (QB); *AAA v Associated Newspapers Ltd* [2013] EWCA Civ 554; *Ferdinand*.

[33] *Weller* CA.

[34] J Gligorijevic, 'Children's Privacy: The Role of Parental Control and Consent' (2019) 19 HRLR 201.

Inconsistency is further visible in how courts adjudge reportage of law-enforcement involving private information. One acute instance of divergent judicial reasoning appears in the difference between the High Court and Court of Appeal judgments in *Ali*, involving the defendant's broadcast of footage of the claimants being evicted from their house: Arnold J at first instance reasoned the privacy infringement went beyond justification based upon editorial discretion,[35] while the Court of Appeal reasoned that, given the 'public interest' was sufficiently high to justify publication, the "court must give full weight to editorial knowledge and discretion", which meant not interfering with a decision to broadcast.[36] The Court of Appeal, however, invoked the principle of non-interference with first-instance judgments on the evidence, satisfied that Arnold J had, albeit in an "atomised" way, accounted for the relevant factors:[37] the finding of liability was upheld and the quantum of damages awarded was also left undisturbed. However, the appellate Court's extensive disagreement with the specific approach taken and conclusions reached by Arnold J remains palpable. The inconsistency here pertains to how courts treat reportage of law-enforcement activities, how they interpret 'public interest' in this context, and exactly which normative underpinnings of the rights to privacy and FOE are in operation here. Even though the Court of Appeal's decision not to disturb Arnold J's judgment in upholding the privacy right may be explained as consistent with previous decisions that uphold the privacy right,[38] its palpable disagreement with Arnold J's reasoning, and its failure *explicitly* to appeal to the *relevant normative underpinnings of the rights in question*, do not cure the inconsistency that exists between its reasoning about 'public interest' in this context, and the undisturbed reasoning of Arnold J on the same matter. Where does this leave informational privacy law in the context of reporting law-enforcement activities? What is the status of the Court of Appeal's dicta when neither liability nor damages are overturned on appeal? On whose judicial approach should journalists and broadcasters rely, and whose approach should inform individuals, faced with law-enforcement, of their entitlement to privacy?

There is also inconsistency in how certain overarching propositions of law are applied. For example, the courts have disagreed on whether and how to apply the ECtHR's *Axel Springer* criteria:[39] two High Court decisions, both concerned with media coverage of individuals subject to criminal investigation, took divergent approaches, with Mann J in *Richard* reaching his judgment based upon those criteria,[40] while less than one year later Nicklin J in *ZXC* stated he did "not derive much assistance from the factors identified in *Axel Springer*", opining that English law already accommodated those matters.[41] The day before Nicklin J's judgment was issued, the Court of Appeal, in a similar case, handed down a judgment that applied the *Axel Springer* criteria, "as conveniently digested in *Richard*".[42]

Another example is the courts' variable understanding and application of 'public interest'. Many decisions evidence divergent judicial opinions on what 'public interest' means, and how to apply it to the privacy-FOE conflict. Chapter 5 explores this in depth, though the very presence of disunity of reasoning in this dominant aspect of the doctrine

[35] *Ali v Channel 5 Broadcasting* [2018] EWHC 298 (Ch), [195]-[197].
[36] *Ali v Channel 5 Broadcasting* [2019] EWCA Civ 677, [92] (*Ali* CA).
[37] *Ali* CA, [93]-[94].
[38] Such as *Weller* CA, which counsel adduced before the Court of Appeal in *Ali* in support of the argument that contribution to a debate of general interest should not be determinative of whether private information should be disclosed and the privacy right suspended in favour of the FOE right: *Ali* CA, [68].
[39] *Axel Springer v Germany* [2012] EMLR 15, [89]; see Chapter 5.
[40] *Richard*, [290]-[315].
[41] *ZXC v Bloomberg LP* [2017] EMLR 21, [134].
[42] *Ali* CA, [69],[87].

is an instance of problematic inconsistency which needs addressing. The inconsistency between the High Court and Court of Appeal in *Ali*, discussed above, arose from a deeper disagreement about 'public interest': the Court of Appeal criticised Arnold J's approach on 'public interest' as being "too narrow", yet refused to overturn his judgment,[43] demonstrating how fluid the 'public interest' concept is in the judicial psyche.

ii. Lack of transparency

Decisions on the tort's second stage are often based upon an opaque sense of what outcome is 'balanced' and 'proportionate' on the particular facts. Given the second stage is a justificatory inquiry, its purpose being to *explain and justify* the necessary choice between privacy and FOE, this under-detailed reasoning risks failing that purpose.

It is often unclear exactly why, *in terms of the rights' normative underpinnings*, either privacy or FOE is ultimately upheld, and not the other right instead. The reasoning in individual judgments might be lengthy and habitually include references to the proper, overarching approach to resolving cases (whether 'proportionality' or 'public interest' or applying Strasbourg criteria), but this provides little concrete insight into *why* the particular decision was reached, and how it is *justified*, in terms of the rights' normative underpinnings. The missing element in current jurisprudence is a deeper engagement with the relationship between facts, overarching judicial methodology, and relevant norms crystallised (or yet to crystallise) in law. Relying in effectively every judgment upon the language of 'balance', 'proportionality', and 'public interest', without explaining in terms of the rights themselves *why* an outcome is 'balanced', proportionate or in the 'public interest', the courts are not often explicit about *how* they are reasoning by analogy, which involves explaining *why* they choose to draw upon propositions made in some judgments on similar facts, and not to draw upon propositions made in other judgments which were also delivered on similar facts. This is connected with the problem of inconsistency, and especially in the context of public figure claimants, discussed above. They are not explicit about why, given the rights' normative underpinnings, a particular proposition of law is applicable to those particular facts, and why that legal proposition marshals the facts towards a particular outcome.

Why, in *Campbell*, did the House of Lords when reasoning about FOE apply the proposition that speech-content has high or low value, arranged in hierarchical form,[44] and how did that proposition yield the outcome that details about a celebrity's drug-addiction treatment was of insufficiently high value to justify suspending privacy? What does 'value' mean here and who decides? How did this proposition feature in judicial reasoning in a case about the publication of the truth about a well-known man's adultery?[45] Why was that proposition not applied in a case involving publication of the truth about a well-known individual's morally upright behaviour?[46] Why in another case was this speech-hierarchy proposition applied so as to rank low publication of the truth about a well-known woman's adultery?[47] The missing ingredient in these judgments is a transparent reference to germane normative underpinnings of the rights in question.

[43] *Ali* CA, [90].
[44] *Campbell*, [148].
[45] *Flitcroft*; *Ferdinand*; *McClaren*.
[46] For the purpose of clearing her name in the press: *HRH Prince of Luxembourg v HRH Princess of Luxembourg* [2018] 2 FLR 480.
[47] *CC*.

Again in *Campbell*, why, in terms of the rights' normative underpinnings, did the House of Lords apply the proposition that courting publicity *may* affect the strength of an individual's privacy right,[48] and exactly how did that proposition affect the outcome that some (not all) of the private information was justifiably published? Why did the High Court appear to apply that proposition to support its decision that facts about adulterous behaviour of a footballer and self-promoting 'family man' should be published,[49] but why was the same proposition not applied where another media-courting celebrity was alleged to have exploited a vulnerable woman for his own gratification?[50]

The relevant judgments do not provide answers to these questions in terms of the rights' normative underpinnings. If the answer to these questions is that it is the 'right balance', or it is in the 'public interest' or 'proportionate' to reason in that way, then we must interrogate exactly what 'balance', 'public interest' and 'proportionality' mean.[51]

Opaque reasoning in rights adjudication can have a chilling effect on rights. *Vis-à-vis* the tort, this chill affects *both* FOE *and* privacy. A lack of insight into how the courts will treat these rights when they come into conflict, and how they will justify the inevitable suspension of one of those rights, makes these rights a potentially less secure and reliable source of legal protection. For example, if a journalist is unsure whether he will be liable for writing a critical story about a celebrity's behaviour, he may opt not to write that story at all or may write a less critical story or adjust his tone: that is a classic instance of the chilling of speech when the operability of the FOE right is unclear. If a celebrity is unsure whether she will be able to use her privacy right to prevent newspapers publicly documenting and potentially embellishing her love-life, and exactly what it would take to justify the court suspending her privacy in such circumstances, she might adjust her behaviour and be cautious, even afraid, to form relationships with others, solely on the basis of the potential for publicity.[52] Thus the privacy right's protective capacity is chilled.

iii. Unprincipled reasoning

Judicial reasoning in the tort's second stage often lacks serious, *explicit*, engagement with the two rights, and a clear and consistent articulation of how those *rights*, as *legal* constructs with important normative foundations, dictate the outcome of a particular arrangement of facts. Yet in rights-adjudication, legal principle stems from a continual, explicit engagement with the moral-philosophical underpinnings of the rights concerned.

'Principled reasoning', therefore, means reasoning that is tethered, and explicitly tethered, to the rights' normative and philosophical underpinnings, clearly identified in each particular case. Judges may be giving *reasons* for their decisions, and they may be reasoning by analogy and drawing upon propositions made in cases that are, at a high level of abstraction, similar to the one presently before them. Jurists may be able to decipher patterns of such propositions in developing case law, accounting for outliers. However, these features of common law reasoning, though they be *necessary* features, are not *sufficient* features, to make common law reasoning *principled*. Such

[48] *Campbell*, [66].
[49] *Ferdinand*.
[50] *CDE v MGN Ltd* [2011] 1 FLR 1524.
[51] See Chapter 5.
[52] Such fear of exposure and behavioural adjustment arising from the lack of privacy was demonstrated in the Leveson Inquiry victim testimonies: Lord Justice Leveson, 'An Inquiry into the Culture, Practices and Ethics of the Press, Report' (2012) Witness Statements of: Gerald Patrick McCann; Sally and Bob Dowler; and Hugh Grant.

judicial reasoning is not tethered, and not explicitly tethered, to the normative underpinnings and philosophical justifications of the rights in question. This *insufficiency* is problematic because the courts are making decisions that necessarily suspend one right, to which a party had been recognised in law to be entitled, without a clear, consistent application of a method for resolving rights-conflicts, which explicitly connects judicial treatment of the facts to the rights' normative underpinnings. This dissertation argues that 'public interest' reasoning in rights-conflict adjudication inherently exposes judicial decisions to qualification and justification based upon factors *not* connected with the rights themselves, or not *relevantly* connected with these rights, or only connected in a *superficial* way.

The case law is not wanting for sweeping references to normative propositions about the two rights: FOE is important for democracy,[53] and privacy protects individual dignity.[54] Undoubtedly true though they may be, these propositions are so abstract as to be effectively redundant. The courts do not always clearly demonstrate how they are, *if they are*, drawing rational links between the rights' normative importance and the factual ramifications displayed in the case before them. Without anchoring the rights in the facts, in a *germane* and *meaningful* way, the courts fall short of demonstrating *legal principle* is at work in the adjudication of the rights. The space created by the lack of principled justificatory reasoning on upholding one right over the other, and the lack of foundational *rights-orientated* reasoning for a proposition, is often filled by judicial invocation of 'public interest'.[55] The omnipresence of 'public interest' indicates this has become *the* principle of the second stage: the right on whose side the 'public interest' falls will be upheld, and the justification for preferring that right lies in the 'public interest'. That a principle (or dogma in disguise of principle) of 'public interest' is centre-stage does not render judicial reasoning principled. On the contrary, it might steer the courts *away from* principled discussion about precisely how the rights *should* operate on the facts, based upon reasons directly informed by the *rights' own* legal-normative imperatives, which the courts examine *afresh* for each new set of facts. Instead, a single, all-purpose, all-covering concept, like 'public interest', might encourage the courts subconsciously to abdicate their responsibility to undertake in-depth, rights-focused and precedent-driven principled reasoning.

Patterns in judicial reasoning might currently be gleaned from how the courts approach the tort's second stage (which is explored in Chapter 5), but this does not translate into *principled* reasoning: the fact remains that, as will be established in Chapter 2, this tort imposes upon the court a rights-conflict which necessitates the suspension of a legally cognisable right. This obliges the court to *do more* than provide utilitarian reasons as a way of making the overall, ultimate decision 'good', even where such decisions might make an implicit nod towards some theoretical aspects of the rights in question, and might be part of a pattern for dealing with particular circumstances, including public figure claimants, and child claimants. The burden is on the *courts* to be transparent and consistent in their rights-focused reasoning, and *not* on subsequent readers of their decisions to draw the links between the final decision, the judicial treatment of the facts, and the two rights' normative underpinnings. That is a critical distinction, and it means that the responsibility of courts in resolving rights-conflicts is *not* adequately discharged because subsequent interpreters of their decisions can connect propositions made in such decisions with the rights' normative underpinnings. The courts must themselves draw those connections, and do so explicitly, in order to ensure their reasoning is principled. The privacy tort action, and the FOE-based 'defence' within it, exist in

[53] For example: *Campbell*, [20], [107], [110], [117].
[54] For example: *Campbell*, [51].
[55] See Chapter 5.

English common law not to maximise the 'public interest' in circumstances of disclosure of private information, but, rather, to ensure that the right that ought to be upheld on the facts *is* upheld, and to provide rights-focused reasons for why it was that right, *and not the other*, that ought to be upheld.[56]

Currently, judicial reasoning in the second stage, although it may allow readers to trace patterns in how fact-situations of a particular character are dealt with by the courts, does not employ a *sufficiently* disciplined and robust *rights-focused* methodology, to *every* privacy tort case that arises. The tailored proportionality-optimality method is intended to put the English law of misuse of private information in a better position than is currently the case, and to enable the courts more adequately to discharge their responsibility in adjudicating rights-conflicts.

In such an adjudicative process, reaching a solution in every rights-conflict case does not mean the solution is always right:[57] the best way for testing the rectitude of such difficult judicial decisions is to ask how the court has deciphered the relevant legal principles, interpreted them, and applied them to the specific facts. Judicial reasoning in the tort betrays a lack of principle. This not only hinders scrutiny of the evolving common law (asking whether the 'right' outcomes have been reached according to the 'best' interpretation of the law); it also risks preventing access to the common law, and to the rights it seeks to vindicate. Legal principle, clearly articulated in terms of the rights according to which it operates, and consistently applied, gives individuals confidence in the law and the courts, security that courts will treat their legally protected interests seriously and fairly, and assurance that, whatever vicissitudes of life befall them, their legal interests, especially those protected by rights, will be observed in law in a rational and predictable way.

Principled adjudication does not mean suffocating judicial minds in a narrow, immovable formula to be applied robotically to every fact-situation giving rise to particular legal rights. The common law's longevity and efficacy lies in the breathing-space it affords judges to interpret the law and apply it to novel fact-situations, in a way that adheres to precedent but is also morally conscientious and aware of contextual, cultural and societal sensitivities.[58] This dissertation does not constrict the law of misuse of private information to a magical, algorithmic formula, which will allow certainty: that would be impossible, and an unwise endeavour. But judicial over-discretion is an ever-present risk. Common law's flexible, evolutionary nature does not legitimise judicial reasoning and decisions *wholly* and *absolutely* dictated by the variety of facts to which they are applied; 'case-by-case' does not mean 'fact-not-principle'. Improving judicial reasoning in the tort's second stage is not intended to add complexity but, rather, *sophistication*,[59] to the adjudication of these cases, by bringing judicial reasoning closer to the underlying philosophical justifications for protecting the two rights, thereby anchoring adjudication in legal principle.

Difficult rights-conflicts do not place a black box over judicial reasoning. On the contrary: the inevitable loss of rightholding entitlement demands judicial reasoning be *constrained* by rights-focused legal principle, and that the courts be honest and open about *how* they resolve the conflict. The rhetorical effect of the 'balance' metaphor[60]

[56] This much is clear from how the underlying purpose of the action, and the second-stage framework, was explained in leading cases including *Re S* and *Campbell*, with emphasis on the *rights* underpinning the action, and not with emphasis on 'public interest'.
[57] L Zucca, *Constitutional dilemmas* (OUP 2007) 5.
[58] TRS Allan, 'Principle, Practice, and Precedent' (2018) 77 CLJ 269.
[59] TRS Allan, *The Sovereignty of Law* (OUP 2013) 14.
[60] R Moosavian, 'A Just Balance or Just Imbalance?' (2015) 7 JML 196.

can be blinding: simply describing the exercise as 'balancing' can create an impression of certainty and an unchecked confidence that the process and outcome are morally sound and justified, detracting from the need to point to legal principle in that exercise. That convenient 'balancing' metaphor has been used in effectively all cases.[61] That might foster the moral appeal of judicial decisions on the privacy-FOE conflict by alluding to notions of justice and equilibrium,[62] but that is just a veneer of justice if such decisions do not clearly rest upon legal principle. Legal principle requires something deeper than the communication tools of metaphors and rhetorical flourish, just as it requires something more than a pragmatic, instinctual reaction to novel fact-situations. It requires *moral reasoning*.

Law is not independent from the moral philosophy upon which it rests.[63] This mandates a judicial awareness of the moral reasons justifying the protection of the rights concerned, and "an appreciation of [their] significance in the constitution as a whole".[64] Legal pragmatism as a theory of legal interpretation is an empty theory, because it adds no moral authority to the binding decisions of common law judges. A superior perspective is that of the sovereign importance of moral principle in legal interpretation.[65] Such an approach leaves no political, legislative or personal discretion for judges when they decide cases, including hard cases of rights-conflicts: there is always a determinative, 'right' answer, a correct interpretation, which is based upon principle, reached through collaborative moral reasoning, and embedded in existing, instituted law.[66] This is Cokean "artificial reason",[67] developed through "long study, observation and experience" of the law and adjudication. Legal principles in rights cases develop out of long and deep judicial engagement with rights' moral underpinnings, as they apply in different ways to different facts, and not out of dogmatic reliance upon a single concept or useful metaphor. Reliance upon the latter prevents judges from "min[ing] [the law's] moral resources to counter any threat to the fundamental rights",[68] including the threat of one right being suspended in a conflict without sufficient moral justification; that is, of suspending the *wrong* right in that conflict.

The very function of judicial decisions, which are constituted of, and derive their authority from, a conscientious commitment to moral principle, is to help to answer the requirement that a political community act in a coherent and principled manner towards all its members, so that the rule of law conveys equal citizenship, rather than just the robotic application of law in the same way to everyone.[69] To achieve that, judges must reason beyond pure pragmatic considerations and dogmatic repetition of precedent.[70] They must justify their decision-making with more rigour, with reasoning more dedicated to relevant moral convictions, than is offered by merely asserting that a particular view on social facts or a particular vision of the 'public interest' is best served if the law were to be applied in any particular way – especially when there are consequences for recognised rights.

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[61] See Chapter 5.
[62] Moosavian (n 61).
[63] R Dworkin, *Taking Rights Seriously* (Bloomsbury Academics 2013) 183.
[64] E Barendt, *Freedom of Speech* (2nd edn, OUP 2005) 3.
[65] R Dworkin, *Justice in Robes* (Belknap 2006).
[66] TRS Allan, 'Interpretation, Injustice, and Integrity' (2016) 36 OJLS 58; R Dworkin, *A Matter of Principle* (HUP 1985); This view is contrary to the externalist, positivist viewpoint in HLA Hart, *The Concept of Law* (3rd edn, OUP 2012).
[67] *Bonham's Case* (1610) 8 Co Rep 107; 77 Eng Rep 638.
[68] Allan, 'Interpretation, Injustice, and Integrity' (n 67) 59.
[69] Allan, *The Sovereignty of Law* (n 60) 93–96.
[70] R Dworkin, *Law's Empire* (2010 Reprint, Hart 1998).

iv. Implications of the problematic status quo

In addition to closing off judicial reasoning to necessary scrutiny, the lack of principle, transparency and consistency in current English informational privacy law, as it has been described in the preceding paragraphs, detracts from the credibility of rights-adjudication in England, and raises the question of whether the operation of the rights to privacy and FOE in the tort's second stage meets basic rule-of-law standards. Any perceived lack of morally conscientious engagement with the rights, of consistency, and of transparency in these cases might well be symptomatic of apparently cloudy or unanchored reasoning and potentially arbitrary solutions; if that is the case, it would be unpalatable in this rights context. It would risk trivialising the substantive rights, decreasing accessibility to justice, and undermining the rule of law in informational privacy cases.

As discussed above, part of securing the legitimacy and authority of law involves ensuring the courts are accounting for the moral principles and philosophical arguments underpinning the rights with which they are faced.[71] More specifically, and drawing upon a Fullerian vision of the rule of law, where judicial reasoning and legal doctrine lack principle, clarity and consistency, they might be of questionable *legality*. Two of Fuller's principles of legality, which give law its authority, are that law be publicly promulgated to a relevant degree of specificity, and that it be relatively constant.[72] These two principles risk being unfulfilled where the reasoning that underpins judicial orders (not to publish or express certain information, or to pay compensation, or to tolerate an invasion of informational privacy) lacks transparency and consistency.

The status quo of English informational privacy law has serious implications for that area of law and for the common law's capacity to adjudicate rights. This both necessitates and justifies a comprehensive, critical inquiry into how judicial reasoning can be improved.

(e) Methodology

The following methodological structure is used for this inquiry:

i. Step 1: Logic

The logical analysis of the tort's second stage, and the relationship between the rights within that framework, justifies subsequent preferences for particular theoretical approaches to rights-adjudication, and ensures the new method of reasoning proposed for this stage is fit-for-purpose. 'Logic' here involves analytical philosophy of rights, their nature, entailments and interactions *inter se*, based upon the Hohfeldian axiom of correlativity of jural positions. This is discussed in Chapter 2.

Such logical analysis is the first methodological stage, rather than a substantive theoretical evaluation of the rights, because the dictates of logic in the tort's second stage must be ascertained before current doctrine can be critiqued or potential improvements to judicial reasoning can be explored. Misunderstanding the logical parameters of the

[71] Dworkin, *Taking Rights Seriously* (n 64) 163–183.
[72] L Fuller, *The Morality of Law* (YUP 1976).

second stage would distort and render redundant any subsequent critical analysis and proposal for adjustment. The logic of the second stage dictates which theories are best suited to the problem in question, and the theoretical-normative assessment of the two particular rights must be accompanied by an appreciation of how they interact, as a matter of logic, in that stage.

Only with the basic foundation of logic is the rest of the methodological structure strong enough to produce credible and effective results, in the form of a new method for judicial reasoning.

ii. Step 2: Theory

Following logical analysis, and before undertaking a critical doctrinal inquiry, there must be an established and justified theoretical preference for the lens through which this critical inquiry is conducted.

The theoretical inquiry ensures any new method of reasoning proposed is grounded in a credible, morally defensible approach accounting for each right's philosophical justifications and the philosophically soundest method of resolving a conflict between these two rights. This is necessary if the new method is to be plausible and dependable. A sound theoretical foundation for judicial reasoning can have substantive benefits for the law generated by such reasoning: "an examination of the theories underlying the free speech principle [as well as the privacy right] may suggest solutions to the problems which confront…courts".[73] And, more broadly, "although theories are not designed to *decide* cases, greater theoretical clarity is indispensable".[74]

Setting the theoretical parameters of this research involves: (1) exploring the theoretical foundations of the two rights, to evaluate their normative complexities and underpinnings, which should permeate judicial reasoning about these rights (Chapter 3); and (2) evaluating a representative pool of theories for resolving rights-conflicts, to identify the best approach for the particular task at hand (resolving a genuine rights-conflict between privacy and FOE) (Chapter 4). That task is itself justified according to the logic of the tort's second stage, and the normative dimension of the particular rights in question.

iii. Step 3: Doctrine

Critical awareness of doctrine is elemental to any attempt to improve current judicial reasoning. Framing this doctrinal inquiry in accordance with the outcomes of the preceding logical and theoretical steps ensures the inquiry is directed at, and produces, findings that are germane to the overall objective (improving judicial reasoning), accounts for the factors that matter in this instance of judicial reasoning, and reveals the root cause of current problems with this instance of judicial reasoning (Chapter 5). Uncovering this root cause, which is crucial to providing a *genuinely* improved approach, can only be achieved through a close, critical assessment of existing case law.

iv. Step 4. Application

[73] Barendt (n 65) 2.
[74] M Dan-Cohen, *Normative Subjects* (OUP 2016) 209 (emphasis added).

This step combines the fruits of the three previous steps by applying the findings of the logical, theoretical and doctrinal elements to a practical suggestion for improving current judicial reasoning. The new method suggested is **tailored proportionality-optimality**, which prioritises the rights to privacy and FOE, the conflict between them, and the implications of disclosure or non-disclosure of the information on the rights' normative underpinnings, *over* any 'public interest' considerations. This method is then applied to hypothetical facts to demonstrate its viability and strength in rectifying current deficiencies and amplifying principle in judicial reasoning in the tort's second stage (Chapter 6).

v. Overall methodological structure

Each methodological layer bleeds into the next as Step 1 advances to Step 4. This ensures comprehensiveness and unity within the overall dissertation, each step being a foundation for the next, and each part making a meaningful contribution to the result.

CHAPTER 2. THE SECOND STAGE OF THE TORT OF MISUSE OF PRIVATE INFORMATION: A GENUINE RIGHTS-CONFLICT

(a) Introduction

In an inquiry into how to improve the judicial approach to the second stage of the tort of misuse of private information, it is necessary to begin by analysing exactly what occurs in that second stage. Only after gaining an analytical, as opposed to normative or doctrinal, understanding of that stage, can improvements to the courts' current approach be considered. What happens to the rights in the second stage? What is already assumed or achieved by the time the court reaches the second stage? What is the result of resolving the second stage? These questions must be answered, and a solid analytical conception of the tort's second stage must be gained, if the courts' current approach is to be critiqued and improvements are to be suggested. The starting point for this logical analysis is the established purpose and framework of the second stage. Accounting for important contextual aspects of the tort's second stage, including that it is concerned with two codified Convention rights, and that it comes after the first stage has successfully been completed, it can be ascertained what, as a matter of logic, that second stage involves.

This chapter demonstrates the tort's second stage involves a genuine conflict between the rights to privacy and FOE. It begins by explaining why this is the case and what this entails, as a matter of logic as opposed to normative preference. It then considers arguments denying, minimising and ignoring rights-conflicts generally. These arguments seek to undermine any interpretations of rights-interactions as conflicts. Such arguments are analytically unsound and misconstrue occurrences of oppositional rights coming into contact with each other, and they are often, if not always, based upon normative preferences as opposed to logical reasoning, albeit claiming to be concerned with objective truths about rights-interactions. The reasons given for denying, minimising or ignoring rights-conflicts, which incorporate a fear of conflicts, are, from a normative perspective, misguided. It is, in fact, dangerous to deny, minimise or ignore rights-conflicts, because such a stance fails to treat rights seriously by weakening the foundations of rights in a system of justice.

The rights-conflict in the tort's second stage must be recognised because that is the logical analysis of what occurs in that stage, and because doing otherwise endangers the protective capacity of the two rights involved. The principal implication of recognising the tort's second stage as a genuine rights-conflict is that any approach to resolving that stage must incorporate, and treat as centrally important, the actuality and entailments of rights-conflicts. That will be fundamental to the critique of different theories of resolving rights-conflicts (in Chapter 4), and the critique of how the courts currently approach the second stage (in Chapter 5). Subsequently, any suggestions for improvement to that current approach must integrate the analysis of the tort's second stage as a genuine rights-conflict (as done in Chapter 6).

(b) The purpose and framework of the tort's second stage

In order to evaluate, from an analytical as opposed to doctrinal perspective, exactly what occurs in the tort's second stage, the established purpose and framework of this stage must first be ascertained. This is not a doctrinal inquiry

into how the courts approach the second stage. Rather, it is an acknowledgement of the legislative and common law parameters of the tort, which gives rise to and defines, at the most basic level, the second stage of that tort.

The tort encompasses two stages. The first involves establishing the claimant has a REP on the facts.[1] If the claimant proves she has a REP in respect of the particular information, the court must recognise her entitlement to the right to a private and family life under article 8 of the ECHR, in respect of that information. The defendant will then raise his right to FOE in respect of publication of that information, under article 10 of the ECHR. These two rights are cognisable in English law, before the English courts, by virtue of the HRA, which obliges and empowers English courts to apply, and adjudicate in accordance with, Convention rights.[2] The HRA, binding the courts in this way, is the reason why Convention rights, as rights held against the state, are an integral part of the private law (tort) action in misuse of private information:[3] "the invasion of privacy now involves a direct application of Convention values in English law".[4]

The second stage follows this establishment of the justiciability, on the facts, of the two Convention rights. It involves that which the courts have termed a "balancing"[5] of the two rights, predicated upon a recognition of the claimant's REP,[6] and the defendant's FOE right, which the HRA explicitly protects in the context of applications for censorial judicial remedies.[7] The courts must choose between the two Convention rights in order to resolve the case, in favour of either the claimant or the defendant. If the court holds in the claimant's favour, a remedy may be granted that suppresses the information (injunction) or compensates the claimant for harm done by publication of that information (damages).[8] If the court holds in the defendant's favour, publication of that information will remain uninhibited (or uncompensated). The purpose of the tort's second stage, therefore, is to guide the courts to a decision, based upon the relevant Convention rights, either that the information should be (or should have been) suppressed, or that it should be (or was right to be) published.

(c) The second stage involves a genuine conflict between two Convention rights

In the tort's second stage, there is a genuine conflict between the Convention rights to privacy and FOE. The interaction between these two rights, culminating in the 'balancing' exercise undertaken to decide the case, is, from a logically analytical perspective, a genuine conflict. A genuine conflict entails a rightholder's loss of entitlement under one right, while the other right is enforced and vindicated.[9] There is no other solution: in order to resolve a genuine conflict, the court must choose which right to uphold and enforce, and which not to uphold and enforce. The corollary of upholding, enforcing or vindicating one right is the loss of entitlement of the rightholder of the other right.

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[1] *Campbell v MGN Ltd* [2004] 2 AC 457, [21], [24], [25] (*Campbell*); *Murray v Big Pictures Ltd* [2008] 3 WLR 1360 (CA), [36].
[2] HRA, ss 2, 3, 4, 6, 8 and 12.
[3] *Campbell,* [86]; *PJS v NGN Ltd* [2016] AC 1081, [11] (*PJS*).
[4] *Mosley v NGN Ltd* [2008] EWHC 2341 (QB), [21] (*Mosley* 3).
[5] *Campbell,* [85]; *Re S (A Child)* [2005] 1 AC 593*,* [17]; *Mosley v NGN Ltd* [2008] EWHC 687(QB), [28].
[6] *Campbell*, [134].
[7] HRA, s 12.
[8] In addition to compensatory damages, the court may award aggravated damages (*Campbell*), but not exemplary damages (*Mosley* 3, [21]-[22].)
[9] Discussed in (e), below.

A genuine conflict exists between two rights when the duties correlative to these rights are in conflict. Two duties are in conflict when both cannot be performed, discharged or fulfilled simultaneously. It is possible to discharge one or the other at some time or in some circumstances, but not both together. The two duties exist (arise on the facts and bind the duty-bearer) together and simultaneously, but it is impossible to discharge both of them together and simultaneously.

The tort, as discussed, is concerned with two Convention rights: privacy and FOE. The nature of Convention rights is that they are held by individuals against the state. The duty correlative to a Convention right is borne by the state, and, in the context of the ECHR, that duty is twofold: it is both negative, prohibiting state interference with rightholders' lives in accordance with the right, and positive, mandating protection of rightholders in accordance with the right.[10] This positive duty extends to an obligation to protect rightholders in the private sphere, against the actions of private persons that are inconsistent with or interfere with the protection contained in that right.[11] Convention rights are, therefore, not mere side-constraints upon actions, and are not limited to prohibiting interferences with rightholders' lives in a negative, Nozickian, sense.[12] The privacy right, codified in Convention article 8(1), provides that "Everyone has the right to respect for his private and family life, his home and his correspondence". The correlative duty binds the state prohibiting it from interfering with rightholders' private and family lives, home and correspondence, and also binds the state mandating it to protect rightholders' private and family lives, home and correspondence, including against intrusions by private persons.

Under the ECHR, the 'state' has the broad meaning of 'government', covering all three branches, rather than 'Government' as the executive. Therefore, the duty correlative to Convention rights binds the legislature, judiciary and executive. Under the ECHR, actions of these branches of government, within their respective functions, must be in accordance with the duties correlative to Convention rights. The duty to protect rightholders in accordance with the rights means the state, in its executive, legislative and judicial functions, must provide municipal laws protecting these rights (or direct application of the ECHR at the domestic level). This might involve Parliament passing legislation prohibiting activities inconsistent with the rights, and the executive enforcing those laws.[13] It might also involve (in a common law system) courts recognising causes of action to vindicate or enforce Convention rights, and adjudicating in accordance with those rights. The positive duty on the state to protect rightholders translates into a duty on courts to enforce a right, in adjudication involving that right.

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[10] In respect of the article 10 right to FOE: *Ozgur Gundem v Turkey* (2001) 31 EHRR 49; *Verein Gegen Tierfabriken Schweiz (VgT) v Switzerland (No 2)* (Application no. 32772/02) Grand Chamber (30 June 2009). In respect of the article 8 right to privacy: *Earl Spencer v UK* (Application no. 28851/95) Commission (16 January 1998); *Delfi AS v Estonia* [2015] ECHR 586 (*Delfi*). Generally regarding Convention rights: *Dickson v UK* (Application no. 44362/04) Grand Chamber (4 December 2007), [69]-[70]. DJ Harris and others, *Law of the European Convention on Human Rights* (3rd edn, OUP 2014) ch 11.

[11] S Smet, 'On the Existence and Nature of Conflicts between Human Rights at the European Court of Human Rights' (2017) 17 HRLR 499, 512. See: *Delfi* and *Dosamantes v Spain* (Application no. 20996/10) Third Section (21 February 2017) (protecting privacy against the effects of upholding the FOE right), and *Phil v Sweden* (Application no. 74742/14) Third Section (9 March 2017) (protecting FOE against the effects of upholding the privacy right).

[12] R Nozick, *Anarchy, State, and Utopia* (Blackwell 1974) 30–33.

[13] In some member States of the Council of Europe, the legislature is not bound by a positive duty at the domestic level to pass laws in accordance with the Convention rights, even though the absence of legislative protection for Convention rights could well be a ground for an application by a citizen of that State to the ECtHR against that State for breach of a Convention right in failing to discharge the duty to protect. For example, the Parliament of the United Kingdom is not bound by a domestic positive duty to pass such legislation: HRA, s 6(6).

In the United Kingdom, the HRA incorporates the ECHR into domestic law; it is the mechanism for realising in domestic law the state-binding duty correlative to each Convention right. It is unlawful for a public authority to act in ways incompatible with Convention rights.[14] The courts' role in adjudicating and enforcing Convention rights, as part of the state bound by the positive duty to protect Convention rights, is codified in section 6(3), under which courts and tribunals are public authorities for the purposes of that provision. Section 12 provides special protection for the article 10 right to FOE, by prohibiting courts from granting judicial relief that might affect the exercise of that right unless satisfied of certain factors, and by obliging courts to have particular regard to that right's importance. That is effectively an acknowledgement of the duty binding courts, as an arm of the state, to protect (or not to interfere with) the FOE right.

In this context, allowing causes of action in the tort of misuse of private information is one way English courts have, in private law, sought to protect the Convention right to privacy: by providing a remedy (damages) for intrusions upon privacy by private persons that contravene the claimant's article 8 right, and by providing relief (injunction) to stop intrusions upon privacy by private persons that would contravene that right.[15] The defence within this tort is also the way that courts have sought to protect (or not to interfere with) the Convention right to FOE, by allowing defendants to argue against damages or injunctive relief on the ground that such orders contravene their FOE right. This is the basis for the evolution in the English courts of the equitable cause of action of breach of confidence, which was adjusted to give better recognition of and protection for the Convention rights, and which has culminated in a separate cause of action in tort.[16] Under this tort, the claimant's statement of claim will refer to article 8, the defendant's statement of defence will refer to article 10, and the courts will incorporate these rights in their reasoning. The tort's second stage, as indicated, involves what has been called "balancing" between these two rights. The second stage, therefore, involves the courts attempting to discharge their positive duty to enforce (or negative duty not to interfere with), in a private law context, the parties' respective Convention rights to privacy and FOE. Deciding in the claimant's favour is the way in which the court discharges its duty to enforce the privacy right, while deciding in the defendant's favour is the way in which the court discharges its duty to enforce (or not to interfere with) the FOE right.

In the second stage, the court cannot discharge its duty to enforce *both* the privacy right *and* the FOE right. This results in a genuine conflict between these two rights. It is impossible to enforce or uphold both rights simultaneously. If the court decides in the claimant's favour, it will have upheld or enforced the privacy right, and, as a necessary implication, will *not* have upheld or enforced the FOE right. If the court decides in the defendant's favour, it will have upheld or enforced the FOE right, and, as a necessary implication, will *not* have upheld or

[14] HRA, s 6(1).

[15] This state of affairs in English law, resulting from the nature of the relevant Convention rights and the operation of the HRA (and sometimes called the 'horizontal effect'), has been confirmed by the English courts: *A v B plc (Flitcroft v MGN Ltd)* [2002] 2 All ER 545, [4]; *Campbell*, [123]; *Douglas v Hello! Ltd (No 6)* [2005] 3 WLR 881, [53]; *McKennitt v Ash* [2007] 3 WLR 194, [9]-[11]. For a thorough discussion on the horizontality of Convention rights in English privacy law, see: J Morgan, 'Privacy, Confidence and Horizontal Effect' (2003) 62 CLJ 444.

[16] *Campbell*; *Vidal-Hall v Google Inc* [2015] 3 WLR 409, [43]-[51]; *PJS*, [32]-[44]. As mentioned in Chapter 1, in acknowledging the 'tort' label for the cause of action in misuse of private information, the courts have not actually passed judgment upon the legitimacy, desirability or workability of developing a common law tort to protect informational privacy; that is assumed for the purposes of categorising this cause of action, but a debate remains on the normative and doctrinal validity of common law judges deploying tort law to protect informational privacy: M Tilbury, 'Privacy: Common Law or Human Right' in N Witzleb and others, *Emerging Challenges in Privacy Law* (CUP 2014); S Beswick and W Fotherby, 'Commonwealth Privacy Torts' (2018) 84 SCLR 225; J Gligorijevic, 'Privacy at the Intersection of Public Law and Private Law' [2019] PL 586.

enforced the privacy right. The court has no other options: it cannot elect to enforce neither right, and, as a matter of logic, it cannot enforce both rights together and at once; having acknowledged the tort's first stage has been passed, it must in the second stage decide which of the two rights to uphold.[17] The genuine conflict between the two rights afflicts the court, as an arm of the state, in its adjudicative function, in the context of a private law mechanism that may protect one right and may interfere with the other right.

i. First apparent problem: FOE is an Hohfeldian liberty, and there is no conflict between a right and a liberty

One analytical (as opposed to normative) argument against construing the tort's second stage as a conflict is based upon the fact that the FOE 'right' is an Hohfeldian liberty, and, because of that, it cannot logically conflict with the privacy right, which is an Hohfeldian claim-right. The preceding explanation of Convention rights (as entailing a correlative duty on the state to protect the rightholder in accordance with the right) addresses this argument. This argument should be explored in order to explain in greater depth why it fails to show there is no genuine rights-conflict in the second stage.

The argument rests upon Hohfeld's correlativity axiom, the purpose of which was disambiguation between different jural positions (often erroneously equated with each other), and to confirm the logical relationship between those distinct positions.[18] Hohfeld's axiom is purely analytical, and analytically purificatory: he was not concerned with how a legal system chooses to label particular legal positions (for example, 'rights'), but, rather, with the precise description of jural positions. A 'right' might well be an Hohfeldian liberty or an Hohfeldian immunity rather than an Hohfeldian claim-right. Hohfeld's increased analytical precision enables a more accurate analysis of the behaviour of 'rights' in a legal system, or, indeed, within a particular tort or stage within a tort.

Hohfeld's correlativity axiom, composed of eight distinct jural positions, can be presented in simple form thus:

Claim-right	Liberty	Power	Immunity
Duty	No-right	Liability	Disability

Figure 1: Simple presentation of Hohfeldian correlativity axiom

That which is labelled a 'right' within a particular legal system might, in an Hohfeldian sense, actually be a claim-right, a liberty, a power or an immunity, or a bundle of any combination of these jural positions.

According to the axiom, the relationship between a claim-right and a duty is one of correlation, so that one cannot exist (bind) without the other. A liberty and a no-right are likewise jural correlatives. A liberty and a duty, however, are jural opposites,[19] so that one cannot exist on the same facts and at the same time as the other: the relationship is one of negation. A claim-right and a no-right also have a relationship of opposition. Following this logic, Hohfeld concluded that a right and a liberty cannot ever be in conflict: where one exists (binds), the other simply does not

[17] If the court decides to permit publication but also award damages, that does not mean both rights are suspended, or both rights are upheld. In that situation, because compensation has been awarded for the publication, it is the privacy right that is upheld and the FOE right that is suspended: the defendant loses his entitlement to *free* expression, while the claimant's privacy right is vindicated through damages.

[18] W Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 YLJ 16.

[19] Being inverse opposites.

exist (bind), so that no conflict arises at all. Thus, if I have a claim-right that you not publish my birth-date, you have a duty not to publish my birth-date. Through the relationship of opposition between claim-rights and liberties, you do not have a liberty to publish my birth-date. As you have no liberty to publish my birth-date (on account of my claim-right), there cannot be a conflict between my claim-right and your liberty – the latter simply does not exist.[20] A genuine conflict can only exist between two claim-rights (and their correlative duties).

While privacy is an Hohfeldian claim-right giving rise to the claimant's private law cause of action in the tort, FOE is an Hohfeldian liberty, giving rise to the defendant's defence (that the claimant has a no-right in respect of preventing the defendant's publication of the information). This is because, in this *private law* context, where interactions between private persons are regulated, there is no correlative duty *vis-à-vis* FOE, which would render private persons duty-bearers who must either facilitate another's expression or refrain from inhibiting another's expression. The correlative of FOE in the *private law* context is a no-right (as to the stopping of another expressing himself). While I, as a private person, have no right to stop you from speaking, I do not bear a duty not to stop you from speaking. On this logic, and within Hohfeld's strict framework, in the private law context of the tort, privacy and FOE are not in conflict, but, rather, only one of them arises in the first place.

This logic does not apply where two Convention rights interact with each other, even within a private law claim. Hohfeld's framework was designed to apply to jural positions only as between individuals, in the private law sphere.[21] At the time when it was first put forth, Hohfeld's correlativity axiom was never intended to be applied to rights held against the state, in a public law context. As discussed, Convention rights are special, because they are enforceable against the state, involving a correlative (positive) duty on the state. So, even where a Convention right is described as an Hohfeldian liberty in a narrow, purely private law context, it is in fact a liberty *coupled with a claim-right* (against the state) to non-interference or to protection of that liberty.[22] That is entirely consistent with Hohfeld's axiom: that 'rights' as they are labelled or conceived of in particular legal systems are in fact bundles of different jural positions, which might or might not include claim-rights.[23] Such rights have indeed been described as complex rights composed of several Hohfeldian jural positions.[24] Therefore, the FOE right, as a Convention right that arises in the tort, is an Hohfeldian liberty *as well as* an Hohfeldian claim-right (against the state). In the tort's context, recalling that the court is an arm of the state and is 'balancing' two Convention rights through the operation of section 6 of the HRA, the state, bearing both a duty to protect the claimant's privacy and a duty to protect the defendant's FOE, faces a genuine conflict between two Hohfeldian duties.

It is possible, therefore, for two Convention rights to conflict, even though one involves an Hohfeldian liberty. Privacy and FOE, even though they arise in the private law sphere (in the context of a tort), are state-facing rights

[20] Hohfeld (n 18) 37.
[21] L Zucca, *Constitutional dilemmas* (OUP 2007) 32; S Smet, *Resolving Conflicts between Human Rights* (Routledge 2017) 59; Smet, 'On the Existence and Nature of Conflicts between Human Rights at the European Court of Human Rights' (n 11) 517.
[22] Smet, *Resolving Conflicts between Human Rights* (n 21) 60; the normative case that FOE is a straightforward right was already being made by Schauer in the early 1980s: FE Schauer, *Free Speech* (CUP 1982) 12–14.
[23] M Kramer, 'Rights Without Trimmings' in M Kramer, N Simmonds and H Steiner, *A Debate Over Rights* (Clarendon 1998) 111.
[24] Smet, 'On the Existence and Nature of Conflicts between Human Rights at the European Court of Human Rights' (n 11) 518; Zucca, *Constitutional dilemmas* (n 21) 55; C Wellman, *The Moral Dimensions of Human Rights* (OUP 2011) 24; J Waldron, 'Introduction' in J Waldron (ed), *Theories of rights* (OUP 1984) 10.

codified in the ECHR, and they *remain* Convention rights throughout the tort's resolution, including the second stage. Throughout the tort's adjudication, claimant and defendant remain entitled to their respective Convention rights, held against the state, which, in this instance, means the court is duty-bound to enforce or uphold those rights. The court faces a genuine conflict.

Hence, *in the context of the ECHR and the tort*, we do not have not a classic private law situation in which the jural positions of two individuals are in tension, but, rather, we have a specific and special private-public law situation in which the jural position of the individuals is inextricably linked to the *state* through their entitlement to *Convention rights*. In such a situation, genuine conflicts are not limited to *pure* claim-rights.[25] Where the decision has to be made between a Convention right that behaves as a claim-right in the private law context, and a Convention right that behaves as a liberty in the private law context, a genuine conflict arises between the two, by virtue of their being Convention rights with correlative duties binding the state.

Indeed, the conclusion that there is no genuine conflict between two Convention rights – that only one and not the other arises – is troubling, for it would mean the rightholder of a Convention right that is a claim-right would *always* be preferred to the rightholder of a Convention right that is an Hohfeldian liberty. On a strict Hohfeldian construction, taking a liberty and a claim-right, and leaving aside, for the moment, the ECHR context and the state's role, where you have the liberty to publish my birth-date and I have a claim-right that no one publish my birth-date, you will always be under a duty not to publish my birth-date, whereas I am under no duty to allow you to exercise your liberty to publish my birth-date. Returning to the ECHR context, given that a claim-right always displaces a liberty, any Convention right that involves an Hohfeldian liberty would simply not arise whenever the Convention right that is a claim-right is established. That is "drastically out of line" with Convention rights theory and practice, in which none of the qualified rights (including privacy and FOE) have such conclusive normative superiority over the others,[26] and in which the ECtHR has often ruled in favour of FOE when it has come into conflict with Convention rights that are claim-rights, including property rights and physical integrity rights.[27]

ii. Second apparent problem: absence of breach, and there is no conflict without a breach

In the context of the tort, the failure of the court to enforce or vindicate one of the rights does not culminate in a breach of that right; the rightholder suffering the loss of entitlement under that right does not have a remedy against the court (the state) for that loss of entitlement. That absence of breach puts into question the existence of a genuine conflict, because a failure to discharge a duty, as entailed in a genuine conflict, means a breach of that duty, and that normally leads to a right of remedy (such as compensation).[28] That is not present in the context of the tort. How, then, is the tort's second stage still a genuine rights-conflict? Is it not, rather, a decision that one

[25] Smet, *Resolving Conflicts between Human Rights* (n 21) 59; Smet, 'On the Existence and Nature of Conflicts between Human Rights at the European Court of Human Rights' (n 11) 517–519.

[26] Smet, *Resolving Conflicts between Human Rights* (n 21) 60. There are numerous ECtHR cases in which the FOE right (an Hohfeldian liberty) is upheld at the expense of the privacy right (an Hohfeldian claim-right), and numerous English cases with the same result: two examples, respectively, are: *Axel Springer v Germany* [2012] EMLR 15 and *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB).

[27] D Voorhoof, 'Freedom of Expression versus Privacy and the Right to Reputation' in S Smet and E Brems (eds), *When human rights clash at the European Court of Human Rights* (OUP 2017) 148–149.

[28] A view espoused by *inter alia* JJ Thomson, *The Realm of Rights* (HUP 1990); J Feinberg, 'Voluntary Euthanasia and the Inalienable Right to Life' (1978) 7 Philosophy & Public Affairs 93, 102–104.

party's presumed right was actually not a real, conclusive right on the facts, but, rather, merely the appearance of a right, and that the right upheld was the only right that actually arose as a real, conclusive and justiciable right on those facts? Only the successful party was a genuine rightholder entitled to protection under that Convention right. Let us explore why this proposition is erroneous in the context of the tort's second stage, and why a genuine conflict exists even in the absence of a breach of right.

In rights adjudication, a Convention right (being a state-binding right) cannot be a presumed or apparent right. It either arises on certain facts as a real, conclusive and binding right, or it does not arise on those facts. You cannot be *presumed* to be entitled to a Convention right (on facts on which the right would arise). This matter is separate from the question whether that real and conclusive right is an absolute right, and must in all circumstances be upheld to protect the rightholder, or whether that real and conclusive right is a qualified right, which in some circumstances ought not to be upheld and ought not to protect the rightholder. The question whether the right arises at all, whether an individual is entitled to that right on the particular facts, is the vital precursor to the decision to uphold or not to uphold the right. These different questions, of whether the right arises at all, and, if so, whether it should be upheld, are also clearly separate from the question of breach and entitlement to remedy.

That a Convention right obtains on certain facts means there is a real and conclusive entitlement to that right on those facts, and a real and conclusive correlative duty on the state to protect the rightholder in the way mandated by that Convention right (or not to interfere with the rightholder's life in the way mandated by the right). Whether or not that real and conclusive right ought to be upheld on those facts, and, if so, whether the correlative duty has been breached, are questions that are separate from the initial question of whether the right obtains at all as a real and conclusive right, to which the rightholder is entitled on those facts. This means that the acknowledgement by a court that an individual is entitled to a particular Convention right on certain facts does not always automatically mean that this individual will ultimately be protected by that right (on such facts), or will receive a remedy under that right (on such facts). The question of justiciability (whether there is a real and conclusive entitlement to a right on certain facts) is separate from the question of enforceability (whether that right on such facts will ultimately be upheld by the court). This, in turn, means that there may be reasons why a justiciable and binding right is nevertheless *not* upheld at the resolution of a case before the courts.

Thus, the *extent* to which the state protects the rightholder is a different question from whether there is a real and conclusive duty binding the state to protect the rightholder in accordance with the right: "[a] person's possessing a right is not always dispositive of the issue of how he ought to be treated".[29] If the right is absolute, such as the article 3 right not to be subjected to torture, protection would involve court enforcement of the right in any and all circumstances in which the right arises. Taking that absolute article 3 right, on any and all sets of facts involving torture or potential torture, the state must ensure that torture is not committed, and if it does not do that, it has not discharged its duty to protect the rightholder against torture, and that right is breached.[30]

For example, that duty under article 3 means the police, on the state's behalf, may never, under any circumstances, torture a rightholder. The duty also means absolute court enforcement of that right in any and all

[29] H Bedau, 'The Right to Life' (1968) 52 The Monist 567, 569.

[30] Triggering the article 13 right to an effective remedy and a correlative duty on the national authority to provide such a remedy.

circumstances. A court, as an arm of the state, is duty-bound to uphold and enforce that right in any and all circumstances. It will have discharged its duty only if it enforces that right on facts on which it arises. There is no leeway for the court, *vis-à-vis* an absolute right, not to uphold that right, based upon some justification. There is no justification for failing to uphold or enforce an absolute right, because it is binding everywhere and all the time: it binds the state to protect the rightholder regardless of circumstances, and if it is a court acting on the state's behalf, then protection means a court enforcing that right, regardless of circumstances.

If the Convention right is qualified rather than absolute, then the real and conclusive duty to protect the rightholder in accordance with the content of the right is a *pro tanto* duty,[31] that is, a duty to protect the rightholder in accordance with the right *to the extent that* a qualification on the right does not apply, or *to the extent that* there is no acceptable justification for not protecting the rightholder.

Qualified Convention rights are *pro tanto* rights.[32] The acceptable justification for not protecting the rightholder is normally contained within the right's definition, as a clause explaining the right may be suspended where necessary in a democratic society on certain grounds. Therefore, whenever the right arises on certain facts, such that it is acknowledged to cover those facts, it arises or exists in a real and conclusive (as opposed to presumed) sense, and it binds the state with a real and conclusive duty to protect the rightholder in the way the right mandates. However, that duty to protect the rightholder is a *pro tanto* duty, rather than a duty to protect the rightholder in any and all circumstances. The state will have discharged its duty to protect the rightholder in accordance with the right *pro tanto* or *to the extent that* it can justify not protecting the rightholder in accordance with the qualifications on the right. A failure to protect the rightholder where there *are* such justifications is *not* a breach of that right to protect the rightholder. But *nor* does that mean the right did not arise in the circumstances or on those facts.

Where a qualified right arises, binding the state with a real and conclusive *pro tanto* duty to protect the rightholder, and the state does *not* protect the rightholder to the extent there *is* a justification in accordance with the qualification on the right, the rightholder will *not* have suffered a breach, but, rather, a *suspension*, of his right. The concept of suspension, here, is akin (but not identical) to Feinberg's "justified infringement", "justified invasion" and "justified injustice",[33] in the sense that a suspension is not a breach in the same way that infringement (or invasion or injustice) is not unjustified. There will have been "circumstances which limit the application of that right and require its suspension",[34] and these circumstances will have fulfilled the requirement for justification in accordance with the qualification on the right. In this context, Feinberg states that a justified infringement of a right means that it is justified for the correlative duty-bearer not to discharge his duty.

A suspension can, therefore, be described in Feinbergian terms as a correlative duty binding the state *pro tanto* or *to the extent that* there is no justification. The duty will, *pro tanto*, have been discharged on account of the right being qualified rather than absolute, and on account of the justification for not protecting the rightholder being made out; so there is no breach. Were the duty not a *pro tanto* duty, but, rather, an absolute duty, it would not

[31] Smet, *Resolving Conflicts between Human Rights* (n 21) 16–23; Smet, 'On the Existence and Nature of Conflicts between Human Rights at the European Court of Human Rights' (n 11) 508.
[32] Smet, 'On the Existence and Nature of Conflicts between Human Rights at the European Court of Human Rights' (n 11) 508. Smet calls qualified rights "relative" rights, and similarly asserts that they are *pro tanto* rights.
[33] Feinberg (n 28) 101.
[34] ibid 98.

have been discharged, and there would in that case be a breach (justification immaterial). The Feinbergian distinction between a justified and unjustified breach is essentially the same distinction between a suspension and a breach. Feinberg's concept of justification can be used to pinpoint the difference between a suspension and a breach: where justification is present, there is a suspension; where it is not, there is a breach. Thus, a justified suspension is not a breach, whereas an unjustified suspension is a breach.

This illustrates why the absence of a breach does *not* mean there is no loss. The justified suspension of a qualified Convention right is a loss of entitlement under that right, and the rightholder will have suffered a real loss, regardless of justification. The distinction between, on the one hand, suspension and loss of entitlement, and, on the other, straightforward breach of a right, is materially similar to Thomson's distinction between an infringement and a violation of a right.[35] Schauer has echoed that distinction by maintaining only an *un*justified infringement is a violation of a right.[36] In the Convention rights context, *both* a suspension *and* a breach are a type of loss. For Thomson, both an infringement and a violation are a type of breach. The justification for the suspension *does* mean that the loss is not a breach (giving rise to a right of remedy), but it does *not* mean that there is no loss at all. Likewise, for Thomson, an infringement *does* mean that the breach was justified, but it does not mean there was no breach. The justification does not nullify or eliminate the loss (or the Thomsonian breach); rather, it renders the loss acceptable so as not to give rise to a need for a remedy, as is the case *vis-à-vis* a breach (or a Thomsonian violation). Both Feinberg's and Thomson's visions of when rights 'stop' illustrate the point that, just because there is no breach (in the sense there is no Feinbergian unjustified breach or no Thomsonion violation) does not mean there is no *loss*: there may still be a *suspension* (Feinbergian justified breach or Thomsonian infringement). A real and conclusive right has 'stopped', and that involves a real loss to the rightholder.

Imagine there is a qualified state-binding right to privacy, codified thus: "a rightholder has the right that no one publish that rightholder's private information", where that right is qualified "as is necessary in a democratic society". If the state decides not to protect the rightholder in accordance with the right, allowing another to publish the rightholder's private information, on the basis that publication is necessary in a democratic society, the rightholder's loss is not a breach of that right, but, rather, a loss of entitlement that no one publish their private information. The (justified) lack of protection culminates in that loss of entitlement. It is not a breach, but a justified loss of entitlement, or a (justified) suspension of the right. A judicial decision not to enforce the right is the (justified) suspension of that right, or the justified loss of entitlement. The decision to uphold or enforce one right and not the other does not entail a breach of a right, because the duty to enforce the right is *pro tanto*. The conflict, which the court faces, between its two duties to enforce is still a genuine conflict because the court cannot enforce the two rights both at the same time. However, not enforcing one right is *not* a breach of the duty to enforce it, because the duty is *pro tanto*, and the decision not to enforce the right is justified. (If the decision not to enforce the right is *not* justified in accordance with the qualification on the right, then the *pro tanto* duty is not discharged and the right is indeed breached.)

The *pro tanto* duty does *not* mean there is *no* duty to enforce the right (protect the rightholder) on the facts on which the right arose, if there is a justification not to protect the rightholder in accordance with the qualification on

[35] Thomson (n 28).
[36] F Schauer, 'A Comment on the Structure of Rights' (1993) 27 Georgia Law Review 415.

the right; there *is indeed* such a duty, but the duty is *pro tanto* and thus allows the right to be suspended on justification in accordance with the qualification on the right. That is neither an elimination of right nor a breach of right. It is, however, a real loss suffered by the rightholder: a loss of entitlement under a right, on account of that right being a qualified right.

Therefore, the tort's second stage is a genuine conflict between privacy and FOE, even though the court's inevitable failure to discharge its duty to enforce one of the rights is not a breach of that duty, but, rather, a suspension. This process of justified suspension does *not* involve the elimination of one right or the redrawing of boundaries between the two rights according to which right arises on the facts and which does not at all arise on the facts. The second stage does *not* yield a judicial decision that the right, in whose favour the case is resolved, is the only right justiciable on the facts, while the other right is not justiciable at all, its boundaries having been circumscribed, as if it never arose as a right on those facts. The resolution of the second stage involves a judicial decision that one right is upheld and the other not upheld. The court will have already recognised, as a matter of law, that both rights are justiciable on the facts, as a necessary precursor to the tort's second stage.[37] The first stage, establishing a REP, obliges the claimant to establish a real, conclusive and justiciable privacy right on the facts. Accepting the claimant has proven as much on a balance of probabilities involves a judicial acknowledgement that the boundaries of that right *do* cover the particular facts. It is not just a putative or *prima facie* right to privacy, a right that is merely apparent or alleged; it is a real and conclusive *pro tanto* right. In respect of the FOE right, the boundaries of that right will cover the facts insofar as those facts involve publication of information: therefore, in every case of this tort, at the outset of the second stage, the FOE right will be acknowledged to arise on the facts as a justiciable *pro tanto* right.

At the outset of the tort's second stage, therefore, the court will already have 'drawn' the boundaries of the two rights. It will have decided that both rights' boundaries cover the facts. That is the purpose of the first stage, especially *vis-à-vis* the privacy right. At the end of the first stage, the rights' boundaries are set. In the second stage, the court is faced with two defined rights that are *pro tanto* in respect of their being upheld, or in respect of their capacity to protect the rightholder. Their *pro tanto* nature does not entitle the court to redraw the rights' boundaries. It simply mandates the court decide which right, on the facts, ought to be upheld and thereby ought actually to protect its rightholder.

Instead of a redrawing of rights' boundaries, therefore, the second stage involves a conflict between *pro tanto* rights resulting in enforcement of one and not the other. A genuine conflict is not a process of definition or specification of rights.[38] It is a process of choosing which out of two real and conclusive rights to enforce and which not to enforce. Both parties have established entitlement to a conclusive *pro tanto* right on the facts. Both of those rights cover those facts. Because of that, those *pro tanto* rights are in conflict. The court ultimately decides, to resolve the conflict, that one party must suffer a loss of entitlement under their right on those facts. What is the

[37] Smet, 'On the Existence and Nature of Conflicts between Human Rights at the European Court of Human Rights' (n 11) 508. Smet makes the same acknowledgement in the context of rights adjudication in the ECtHR, where that Court recognises that a right (or two conflicting rights) arise as real, as opposed to *prima facie*, rights, on the facts of the case, and then moves on to resolving the conflict between those two real and existing rights.
[38] Smet, *Resolving Conflicts between Human Rights* (n 21) 17.

nature of that 'loss of the right'? As discussed, the loss involved in the tort is not a breach. The loss is, rather, a suspension. That is a real loss, and it entails a "sacrifice" of that right for the sake of upholding the other right.[39]

(d) Denying, minimising or ignoring rights-conflicts

We have established that a genuine conflict persists between the Convention rights to privacy and FOE in the tort's second stage. This is despite the Convention right to FOE being composed of an Hohfeldian liberty, and despite the resolution of the second stage not involving a breach (and duty to remedy that breach). The existence of an Hohfeldian liberty and the absence of a breach do not, in this context, negate the existence and persistence of a genuine conflict, and the ensuing loss to one rightholder.

Nevertheless, some theorists seek to deny, minimise, avoid or ignore rights-conflicts and the loss entailed in conflicts.[40] They insist the legal system is "composed of harmoniously compatible rules", where rights resemble those rules, so if on some facts two rules (rights) are mutually incompatible, one of them must be invalid: it does not arise on those facts at all.[41] Thus there are no genuine conflicts. The court's task is not to resolve a conflict and declare one right suspended, providing a justification for that loss of entitlement. Rather, its task is carefully to stipulate the scope of applicability of each right, delineating, defining and specifying its exact extent, in each new case that comes before the court, with the explicit aim of avoiding overlap.[42] This is the specificationist view,[43] and has already been alluded to in terms of redrawing rights' boundaries in each new case in which they are alleged to arise. This view draws upon the Kantian ideal of a coherent scheme of rights where each individual's freedom is part of a system of equal freedom for all.[44] Insisting upon such coherency and equality forces a denial of conflicts, which threaten that coherency by implying an inequality between the right upheld and the right suspended.

Other reasons propel theorists to insist upon specificationism and to deny conflicts exsist. Consequentialist traditions (especially the act-utilitarian tradition) inherently claim any and all problems are resolved in favour of the greater benefit to the greater number. Several theorists have argued moral conflicts do not genuinely exist, because what really occurs is the extinguishing of the purported right *A* (and its correlative duty), by the other right *B* (and its correlative duty).[45] *A* is extinguished as soon as it challenges *B*, meaning *A* never really entailed a moral

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[39] ibid 40.

[40] *Inter alia*, L Cariolou, 'Circumnavigating the Conflict between the Right to Reputation and the Right to Freedom of Expression' in S Smet and E Brems (eds), *When human rights clash at the European Court of Human Rights* (OUP 2017); P Bobbitt, *Terror and Consent* (Allen Lane 2008); O Gross, 'Are Torture Warrants Warranted' (2004) 88 Minnesota Law Review 1481; E Posner and A Vermeule, 'Should Coercive Interrogation Be Legal?' (2006) 104 Michigan Law Review 671; A Preda, 'Are There Any Conflicts of Rights?' (2015) 18 Ethical Theory and Moral Practice 677; P Hughes, 'The Reconciliaton of Legal Rights' in S Azmi, L Foster and L Jacobs, *Balancing competing human rights claims in a diverse society* (Irwin Law 2012).

[41] Smet, 'On the Existence and Nature of Conflicts between Human Rights at the European Court of Human Rights' (n 11) 502–503.

[42] F Schauer, 'Freedom of Expression Adjudication in Europe and the United States' in G Nolte (ed), *European and US Constitutionalism* (CUP 2005) 57–59.

[43] Smet, 'On the Existence and Nature of Conflicts between Human Rights at the European Court of Human Rights' (n 11) 503.

[44] ibid 500.

[45] Bobbitt (n 40) 363–365; H Curzer, 'Admirable Immorality, Dirty Hands, Ticking Bombs, and Torturing Innocents' (2006) 44 The Southern Journal of Philosophy 31, 45; Gross (n 40) 1498; RM Hare, 'Rules of War and Moral Reasoning' (1972) 1 Philosophy & Public Affairs 166; RM Hare, *Moral Thinking* (OUP 1981) chs 2, 3; K Himma, 'Assessing the Prohibition against

duty, but, rather, always just entailed an epistemically *prima facie* duty (the appearance of a duty and its correlative right), which is no real duty or right at all. Such theorists, being consequentialists, deny the existence of any deontological duties, which are persistent, regardless of consequences. Every duty is measured according to the consequences of its being discharged, and the duty carrying the best consequences will always be upheld: any exhortation to the contrary is no duty at all.

Such consequentialist denials of moral conflicts should be rejected, for they entail the conclusion that absolutely any policies are morally permissible so long as the consequences (or the utility-promotive considerations) of those policies are favourable or strong enough.[46] Conflicts (and hard decisions) never arise because the most utility-promotive right will always be upheld, and, in the particular factual situation, anything incompatible with that right is no right at all. In the same vein, it would be legally permissible to publish *any* personal information whatsoever, as if no legal duty existed to protect privacy. Likewise, it would be legally permissible to inhibit *any* publication of personal information whatsoever, as if no duty existed to protect FOE.

This analysis agrees with the above assertion that, in the tort's second stage, the two conflicting Convention rights (privacy and FOE) are recognised as real, conclusive, legally cognisable rights, with one being suspended, rather than extinguished, as a result of the conflict. This is why we should say, in the context of legal rights-conflicts, that rights are "overtopped", rather than "overridden".[47] The former better communicates the displaced right still exists on the facts as a real, conclusive and legally cognisable (though suspended) right, with a place in the system of justice, and does not lose the value which justifies it occupying the status of a legal right.

Some theorists, rather than subscribing to a particular model of rights within a legal system (whether Kantian or utilitarian) and from there analytically exposing why conflicts do not exist, seek to avoid conflicts, or minimise their inevitable consequences, on normative grounds. Such theorists prefer the specificationist approach, and typically assert it is normatively important to avoid having to sacrifice one right for the sake of the other, so that, instead of locating a winner or tipping the scales to one side (as is inevitable in conflict resolution), we should find a compromise or an equilibrium, or we should level the scales.[48] These theorists avoid the adversarial connotations of 'conflict' and 'competing', deliberately using mollifying phrases, including 'rights in tension' and 'reconciliation of rights'.[49]

Torture' in S Lee (ed), *Intervention, terrorism, and torture* (Springer 2007) 240–241; B Paskins, 'What's Wrong with Torture?' (1976) 2 British Journal of International Studies 138, 143; Posner and Vermeule (n 40) 676–677; E Posner and A Vermeule, *Terror in the Balance* (OUP 2007) 187; W Sinnott-Armstrong, *Moral Dilemmas* (Basil Blackwell 1988) 74–81; M Kramer, *Torture and Moral Integrity* (OUP 2014) 11–20.

[46] Kramer (n 45) 14.

[47] ibid 10–11; Kramer (n 23).

[48] S Smet, 'Introduction' in S Smet and E Brems (eds), *When human rights clash at the European Court of Human Rights* (OUP 2017); E Brems, 'Evans v UK' in S Smet and E Brems (eds), *When human rights clash at the European Court of Human Rights* (OUP 2017); R Sandberg, 'The Future of Religious Freedom' in S Smet and E Brems (eds), *When human rights clash at the European Court of Human Rights* (OUP 2017).

[49] Hughes (n 40).

However, in cases of genuine rights-conflicts, such preferences for compromise or "circumnavigation",[50] in the hope of arriving at a "happy ending",[51] in which neither party suffers a loss, ignore the reality that compromise is unavailable: it is impossible to accommodate both rights, and loss (sacrifice) cannot be avoided.[52] Once it is established that both rights do arise on the facts, that both cover the same facts, so that upholding either right entails interfering with the other (as in the tort's second stage), it becomes logically impossible to find compromise or accommodation. There is no principled way to reconcile a genuine conflict,[53] because there simply is no *possibility* of reconciling a genuine conflict.

Therefore, it is misleading to state "when we say rights conflict, what we really mean is that the duties they imply are not compossible".[54] This implies the two rights cannot exist in conjunction with each other. Indeed they can coexist. They just cannot jointly be discharged or fulfilled or enforced. Preda has also inaccurately described rights-conflicts as begetting the conclusion that the suspended right is "not that important after all".[55] Preda argues rights-conflicts eliminate any reason to appeal to rights, for the conflict entails an "overriding" of one right by the other, and, resultantly, we might as well do away with rights as the yardstick of justice. Their being overridden "weakens the role they are meant to play in…a theory [of justice]".[56] In order to sustain rights, Preda posits, we should seek to deny the existence of genuine conflicts.[57] This argument rests upon a misconceived view of conflicts (that they extinguish one of the rights), and perpetuates that view by injecting a normative exhortation into a logical reality (that conflicts genuinely exist), attempting thus to change the path of that logic.

Employing misleading, inaccurate, or less adversarial language ignores and neglects conflicts, and their demand that a hard choice be made between two rights. Using imprecise terms such as "tension", "reconciliation", and "accommodation"[58] to make the not-so-happy reality of conflicts *sound* happy does not lead to a more "nuanced"[59] way of dealing with rights – on the contrary, it misses the point of why we are 'dealing' with rights in the first place: they *are* sometimes "competing" and one *will* have to "triumph" over the other.[60] Using softer language, like denying conflicts exist, avoids the duty to face the problem dispassionately and suggest a useful and effective solution to it – one that is as close to justice as possible in light of the problem faced in the first place.

The fear of conflicts is widely and deeply felt. It has driven theorists to seek analytical and normative pathways to denying or avoiding conflicts. Quite apart from the fact it is impossible to wish away a phenomenon which you fear, or to demonstrate a phenomenon does not exist simply by highlighting its disadvantages, the reality is that acknowledging that rights-conflicts do arise and persist (and entail loss of entitlement under one right) does not give us licence to create conflicts where they genuinely do not arise. Facing the reality of rights-conflicts, and

[50] Cariolou (n 40).
[51] L Zucca, 'Law, Dilemmas and Happy Endings' in S Smet and E Brems (eds), *When human rights clash at the European Court of Human Rights* (OUP 2017).
[52] D Morondo Taramundi, 'To Discriminate in Order to Fight Discrimination' in S Smet and E Brems (eds), *When human rights clash at the European Court of Human Rights* (OUP 2017).
[53] Contrary to Cariolou's assumption and objective in Cariolou (n 40).
[54] J Waldron, 'Rights in Conflict' (1989) 99 Ethics 503, 506.
[55] Preda (n 40) 687.
[56] Preda (n 40).
[57] Preda does so in respect of putative conflicts between negative rights, and between positive and negative rights: ibid.
[58] Hughes (n 40) 273–274.
[59] ibid 293.
[60] ibid.

dealing with them adequately, will not result in the proliferation of rights-conflicts. We should use the language of rights-conflicts with great care, being strict about how we define conflicts. Although we need to incorporate the recognition of conflicts as a fundamental aspect of any rights system that generates credible and defensible outcomes, we must prevent the ideological use of rights-conflicts, to make the decision look more difficult than it actually is, and thereby legitimise increased intuitive discretion (and decreased principled reasoning) in the resolution of such cases.[61]

We should also be careful before equating the 'rights and freedoms of others' (which normally form part of the qualification on some Convention rights) with a tangible claim-right against the state. Instead, the court could apply a reversibility test to ascertain whether, if it were to hold in favour of one party to the case, the resulting factual scenario would entitle the other party to an admissible claim under the ECHR.[62] Therefore, instead of denying genuine conflicts or creating bogus ones, we should adhere to a strict definition of rights-conflict and apply it dispassionately to the case at hand. We have done as much in respect of the tort's second stage, in which it is impossible for the court to enforce, simultaneously, both the claimant's Convention right to privacy and the defendant's Convention right to FOE.

Specificationists and deniers of rights-conflicts nevertheless insist problems involving mutually incompatible rights are solved by definition or specification of the rights so that only one of the rights actually arose on those facts; the other never existed as a real right on those facts, and the person claiming that right never really was a rightholder on those facts. This exposes the reductionist and eliminatory tendencies of denying rights-conflicts. The 'unsuccessful' right is not even acknowledged as a right, and the conclusion is that one party had no such right. Rights become an endangered species, and rightholding a rare experience; it becomes difficult to avail oneself of the protection of rights. Such reductionism arising out of the act-utilitarian tradition is dangerous, because it denies individuals their *entitlement* to rights, whenever an inconsistent right can be shown to have favourable effect. Recalling Preda's refusal to recognise conflicts (because they 'eliminate' rights), we see how the cycle of denial and avoidance is perpetuated. It is actually denying rights-conflicts that reduces the value of rights in a system of justice. Acknowledging rights-conflicts, conversely, means that "all persons get to 'keep' their rights".[63] The 'unsuccessful' right remains a real right, whether *pro tanto* or absolute. The rightholder is acknowledged to be a rightholder, and the suspension of his *pro tanto* right (or the breach of his absolute right) is acknowledged as a real loss. That rightholder was able to access the protective capacity of his right, and that protective capacity is not extinguished. In the case of a breached absolute right, that protection is translated into the obligation to provide a remedy for the breach. In the case of a suspended qualified (or *pro tanto*) right, that protection is translated into the obligation to provide a robust, principled and transparent justification.

In exploring how best to resolve the privacy-FOE conflict, we should reject outright denial, reductionism, and linguistic mollification, and instead take heed of Berlin's realisation that[64]

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[61] L Zucca, 'Conflicts of Fundamental Rights as Constitutional Dilemmas' in E Brems (ed), *Conflicts between fundamental rights* (Intersentia 2008).
[62] I Leigh, 'Reversibility, Proportionality and Conflicting Rights' in S Smet and E Brems (eds), *When human rights clash at the European Court of Human Rights* (OUP 2017) 219.
[63] Smet, 'On the Existence and Nature of Conflicts between Human Rights at the European Court of Human Rights' (n 11) 509; FM Kamm, *Morality, Mortality (Volume I)* (OUP 1993).
[64] I Berlin, *Liberty* (OUP 2002) 214.

> the ends of men are many, and not all of them are…compatible with each other…, the possibility of conflict—and of tragedy—can never be wholly eliminated from human life.

Zucca echoes this sentiment in saying, simply, that "life is full of great setbacks and great disappointments".[65] Buckingham describes this reality as the polarising nature of rights-conflicts: conflicting rights are "like oil and water, incapable of emulsifying".[66] Indeed, the protection of privacy and FOE are two "ends" of liberal society, and they are often incompatible, like oil and water. The task is to engage with this inevitable incompatibility, seek to understand the roots of the conflict and the nature of the rights, and thereby propose approaches to resolution "that will not polarise our societies".[67] Instead of denying or ignoring this reality, and the reality of the tragedy that one right must be suspended in order to resolve the conflict, jurists and judges should work with this reality, towards a clearer and more principled rationale for how to resolve such a conflict.

Therefore, in the context of state-binding Convention rights, where the need to treat rights seriously by recognising and upholding them as far as possible is particularly acute given the state's role in the process, the superior approach is to acknowledge, rather than to deny, rights-conflicts.[68] Denying rights-conflicts, and opting for a specificationist approach involving redefining and redrawing the boundaries of incompatible rights, is a reductionist approach that is eliminatory of rights.

Furthermore, denying-conflicts and insisting upon specifying, in each new case, the circumstances in which the right arises at all, encounters the same problems as the "method of full factual specification", under which the court applies and adheres to an already existing "elaborately complex statement defining a right", which accounts for all the circumstances in which that right does arise.[69] This assumes it is possible to have a single, correct and sufficiently precise definitional statement. That would be an erroneous assumption, given the wide range of contending moral perspectives on the outer limits of rights, and the different moral systems in which the same rights are acknowledged. The lowest common denominator *vis-à-vis* the definition of a right would, therefore, never be so precise as to be indicative, let alone exhaustive, of the right's application in varying circumstances.

Resultantly, any court attempting to define the boundaries of a right in each new case, purportedly in accordance with some concrete statement fully specifying the right, or in accordance with some concrete set of moral principles fully providing for every circumstance in which the right might arise, would, in reality, fall short of applying a transparent, consistent and principled method of reasoning to resolve the case. There is no such concrete statement or concrete set of moral principles, which everyone accepts and to which everyone adheres. The very definition of a right would be subject to contention, in each case in which the right is brought up. This problem is apparent in Strasbourg jurisprudence on the article 10 right to FOE, in which the Court decides on an *ad hoc* basis whether certain speech or publication is within the scope of that right. Sometimes that delineation of FOE depends simply upon whether speech or publication is involved in the case, and sometimes it depends upon whether it

[65] Zucca, 'Law, Dilemmas and Happy Endings' (n 51) 111.
[66] J Buckingham, 'Oil and Vinegar' in S Azmi, L Foster and L Jacobs, *Balancing competing human rights claims in a diverse society* (Irwin Law 2012) 144.
[67] Zucca, 'Conflicts of Fundamental Rights as Constitutional Dilemmas' (n 61) 37.
[68] Smet, *Resolving Conflicts between Human Rights* (n 21) 16.
[69] Feinberg (n 28) 99–100. Feinberg here discusses Judith Jarvis Thomson's preference for this method: Judith Jarvis Thomson "Self-defense and rights" *The Lindley Lecture* (1976, University of Kansas).

encroaches upon other rights, such as reputational or privacy rights. Sometimes the Court flexibly invokes other moral reasons to support its decision on the boundaries of that right, and whether the particular speech-content in question deserves that right's protection. The reasoning and outcomes in such FOE cases are unreliably unprincipled and inconsistent.[70]

On an approach based upon such a high degree of definitional precision, there will always be a debilitating degree of uncertainty as to whether a right's boundaries stretch to cover any given circumstances. An individual would never be sure whether he is entitled to a right, and his assertion that he is would effectively resemble a gamble in each new case. It is little consolation to an individual to say that "the limits of freedom of expression lie where protection of the right to reputation [or privacy] begins".[71] And yet it would be open to the court to maintain that it is defining the boundaries of the right in accordance with a constant, settled and identifiable definition or rationale, giving its decision on whether the right arises or not the legitimacy that is required of a such judicial decision. But that legitimacy is hollow given there is no such constant, settled and identifiable definition or rationale.

There is greater legitimacy in a judicial decision, on whether a right arises at all on certain facts, which applies a general, abstract definition of that right, because there will be greater consensus and greater transparency on the matter. The moral orientation, motivation and personal beliefs and preferences of the judge in any given case will not be brought into question, because the basis on which that judge's decision is made is identifiable and identified. It is more transparent and principled to decide the FOE right arises on certain facts simply because those facts involve expression, dissemination or publication of information, than it is to decide that right arises on those facts because they involve certain highly detailed circumstances. When would I ever be able to say with confidence that I am entitled to the right to FOE, if my very entitlement to that right – that right's very definition, scope and boundaries – depends upon the presence or absence of infinitely variable, minutely detailed circumstances? Such an approach would make a mockery of Convention rights and remove all credibility from rights adjudication. It is, therefore, unpalatable and unacceptable. It is better to acknowledge that Convention rights, defined conclusively at a high level of abstraction, will conflict with each other, and to face these conflicts with a robust and principled way of resolving them.

(e) Implications of a genuine rights-conflict between privacy and FOE

Having established it is both erroneous and dangerous to deny, minimise or ignore rights-conflicts when they do genuinely arise, and having established the tort's second stage involves a genuine privacy-FOE conflict, that conflict must be incorporated into the pursuit of an improved judicial approach to the tort's second stage. Because a genuine conflict involves a real loss, and, therefore, the tort's second stage involves a real loss (in the form of suspension of the right that is not upheld), the judicial approach to resolving that conflict must ensure the final decision, on which of the two rights to uphold, is properly justified using a principled, transparent and consistently applied method. Any improved judicial approach to this matter must genuinely examine the conflict from the

[70] This is evident in Cariolou's exposition of some ECtHR decisions on the FOE right, where Cariolou seeks to demonstrate the workability of the specificationist approach: Cariolou (n 40) 177–184.
[71] ibid 191.

perspective of both rights,[72] and also take into account the broader, normative consequences of finding in favour of one right and not the other.

The need for robust, principled reasoning and credible, defensible decisions on privacy-FOE conflicts is becoming increasingly pressing given the growing number of contexts in which these rights come into conflict with each other in contemporary society. Indeed, conflicts between individuals' privacy and other individuals' FOE will only become more frequent in the future, because media are creating an ever expanding public sphere within which private information can be disseminated, while individuals are increasingly sharing parts of their own and others' private lives through online platforms; overall, individuals' actions are becoming more accessible to others and without their control.[73]

The nature of human behaviour *vis-à-vis* information, and fast-paced technological development of information creation and dissemination, means the privacy-FOE conflict, quite apart from entailing a loss of entitlement to a Convention right, has concrete, as opposed to just normative, significance in an individual's life. It is true that "taking the special normative force of human rights seriously requires the development of a distinct framework for the resolution" of conflicts between them;[74] but the everyday occurrence and practical effects of the privacy-FOE conflict also makes it imperative that judicial reasoning inspires the utmost confidence in resolutions of that conflict.

(f) Conclusion

The second stage of the tort of misuse of private information involves a genuine conflict between the Convention rights to privacy and FOE, which entails a suspension of, and a real loss of entitlement to, one of those Convention rights. This is true as a matter of logic which takes the Convention rights to be *pro tanto* rights, qualified to the extent there is justification for suspending the rights in accordance with provisions codifying those rights. The matters of FOE being an Hohfeldian liberty and of the absence of breach do not undermine that logic.

In spite of the logical reality that rights, including Convention rights, can and do conflict, as in the case of the tort's second stage, many scholars continue to deny, minimise, ignore or avoid the occurrence and consequences of rights-conflicts. While some posit an alternative logic of rights and rights-interactions, others are motivated by normative positions. Either way, such arguments are erroneous as a matter of logic, and from a normative perspective on the value and operation of rights in a system of justice. Denying or minimising rights-conflicts is a reductionist view, as it devalues rights and is eliminatory of their protective capacity.

Therefore, it is crucial that we recognise, as a matter of logical analysis, the tort's second stage as a genuine conflict between two Convention rights, and, equally, the dangers of *not* recognising, or actively denying, that that stage involves a genuine rights-conflict. The occurrence and consequences of the rights-conflict in the second stage must be integral to any transparent, consistent and principled judicial approach to resolving that second stage. The nature and entailments of rights-conflicts are, therefore, central to any attempt at improving that judicial approach.

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[72] Smet, *Resolving Conflicts between Human Rights* (n 21) 145.
[73] Voorhoof (n 27) 151–156.
[74] Smet, *Resolving Conflicts between Human Rights* (n 21) 16.

CHAPTER 3. PRIVACY AND FREEDOM OF EXPRESSION

(a) Introduction

Having established the second stage of the tort of misuse of private information involves a genuine conflict between privacy and FOE, we must now closely examine these two rights, and the philosophical justifications for their being protected by law. Increasing the consistency, transparency and principle of the judicial resolution of this rights-conflict (including how the necessary suspension of one right is justified), demands a thorough understanding of these rights, their nature and underpinnings, because these rights are central to that adjudicative process. It is the peculiar normative nature and underpinnings of these rights that dictate how different theories of rights-conflict resolution are evaluated in Chapter 4, how current doctrine is critiqued in Chapter 5, and what form the improved method of reasoning will take in Chapter 6.

This chapter evaluates FOE, and then privacy, given that FOE was conceived of, theorised and juridified as a 'right' before privacy was, in most common law jurisdictions. Both privacy and FOE are normatively complex, resting upon numerous and varied normative underpinnings or justifications. Full legal protection for each right is predicated upon multiple justifications all being available at all times. This is because none of the underpinnings of these rights provide a single comprehensive justification for upholding either right in any and all circumstances. Whatever the facts, it is presumed in the abstract that any combination of the philosophical justifications for each right can be invoked to demonstrate why that right should be upheld on those facts. This makes it difficult to ascertain the constant normative strength of each right. That normative strength, and the strength of justification for favouring one right over the other, will ultimately depend upon the particular circumstances in which the rights arise, and can never be pinpointed in an abstract or predetermined way. This complex normative dimension of each right has significant implications for how courts should approach the privacy-FOE conflict in the tort's second stage: they must in each case navigate the difficult normative terrain to reach a principled, properly justified decision to uphold one right and suspend the other.

(b) Freedom of expression

i. Classic philosophical justifications for protecting FOE as a legal right

The classic philosophical justifications for FOE are truth-discovery, democratic participation, individual autonomy, and suspicion of governments.[1] No single theory *comprehensively* justifies FOE. None of these justifications provide a sufficiently coherent or broad basis for legal protection of FOE,[2] given each is susceptible to strong criticism. Nevertheless, these justifications are still considered the principal underpinnings of FOE.

[1] E Barendt, *Freedom of Speech* (2nd edn, OUP 2005).

[2] L Alexander, *Is There a Right of Freedom of Expression?* (CUP 2005); L Alexander, 'Freedom of Expression as a Human Right' in T Campbell, J Goldsworthy and A Stone, *Protecting Human Rights* (OUP 2003) 39; SE Fish, *There's No Such Thing as Free Speech, and It's a Good Thing, Too* (OUP 1994).

1. *Truth-discovery and marketplace of ideas*

Originating in Milton's 17th Century objections to licensing laws,[3] this justification for FOE posits that uninhibited expression enables the discovery of truth. Focusing upon licensing laws, this argument was not intended as a comprehensive theory and holistic account of FOE. It remains unclear, therefore, whether 'truth' resembles 'God' as the ultimate arbiter of reality and norms, or whether truth-discovery resembles an infinite task. The argument has nevertheless instilled in literature and political expression a sense of value to social progress towards further enlightenment.

Mill subsequently connected FOE directly with the pursuit and realisation of truth:[4] if everyone except one person were of one view, society would be no more justified in silencing that single person than it would be in silencing everyone else. All opinions mattered, and 'truth' (a coherent concept, and an autonomous and fundamental good capable of discovery and justification) could only be ascertained through the contest of different ideas. Suppression of any idea inherently limits truth-discovery, and any government determining the pathway for discovering truth (by selecting which speech can be heard) must not be trusted. Only when opponents of policies can challenge their wisdom can government (and the governed) be confident public policies are right. FOE ensures opinions are challenged, and, by shaking people out of their complacency with established wisdom, FOE enhances social progress and governmental legitimacy.

Mill's thesis then evolved into the theory of 'marketplace of ideas',[5] that a free market of expression and ideas is necessary for social progress. The concept of truth entails the development of the best policies, through constant challenge and improvement by the free contest of an unlimited pool of ideas.

This justification for FOE is not unflawed. The coherence, discoverability and justifiability of 'truth' remains disputed,[6] while Mill has been criticised for overvaluing and overestimating intellectual discussion in society.[7] Furthermore, in not distinguishing incoherent speech and unfalsifiable claims, and in not separating fact from opinion, this justification does not envisage intellectually defensible arguments that one proposition is stronger than another.[8] This justification also erroneously assumes equal opportunity to participate in the marketplace,[9] and that contributions to the marketplace necessarily represent their proponents' views: in reality, for instance, media might espouse ideas to increase their readership, rather than contribute to an intellectual discussion critiquing established ideas.[10] Another erroneous assumption undermining this justification is that speakers communicate, and speech-recipients think about, expressed ideas in a necessarily rational way.[11] This justification fails to account for cognitive dissonance, as expression might never be free from speakers' or recipients' personal

[3] J Milton, *Areopagitica (1644)* (2nd edn, Dent 1907).
[4] JS Mill, *On Liberty (1859)* (CUP 2011).
[5] Most significantly: *Abrams v US* 250 US 616 (1919), per Holmes J; *Whitney v California* 274 US 357 (1927), per Brandeis J (*Whitney*); *Kovacs v Cooper* 336 US 77 (1949), per Frankfurter J.
[6] Barendt (n 1) 8.
[7] S Ingber, 'The Marketplace of Ideas' [1984] DukeLJ 1, 4,17.
[8] Barendt (n 1) 12.
[9] Ingber (n 7); CE Baker, 'First Amendment Limits on the Copyright' (2002) 55 Vanderbilt Law Review 891.
[10] Barendt (n 1) 12.
[11] Ingber (n 7) 38–39.

prejudices. This FOE-justification has therefore been judged[12] as being "fundamentally unsound both normatively and descriptively".[13]

2. *Democratic participation*

A more fashionable[14] FOE-justification in liberal democracies is that it enables citizen participation in democracy. FOE generates public discussion which is a condition for (and political duty in)[15] democracies. Uninhibited speech and openness of ideas and arguments produces an informed electorate and ensures citizens vote wise decisions.[16] FOE protects citizens' interests in understanding political issues and participating effectively in democracy, and is considered the lifeblood of democracy.[17]

This justification is undermined by its failure to account for expression not credibly contributing to political discussion, or unconnected with voting, such as artistic expression. Furthermore, on the majoritarian view of democracy, the justification struggles to explain how a majority can decide to regulate or suppress certain speech. A broader conception of democracy, like Dworkin's constitutional democracy where political institutions respect all citizens' rights equally,[18] might be more amenable: all citizens' speech rights must be equally protected, so that all citizens can speak and hear about all policies and ideas, and make the most informed political decisions.[19]

3. *Autonomy and self-realisation*

A more individual-centric FOE justification is based upon autonomy and self-realisation.[20] FOE allows individuals to realise their autonomy and facilitates their self-development, self-fulfilment and flourishing, enabling them to reach their full potential. Legal protection of self-expression means society prioritises individual autonomy and respects each individual's inherent dignity, understood in the Dworkinian sense of living well, where it is objectively important that each person's life go well, and that each person is responsible for identifying what success means in their own life.[21]

FOE is essential to both individual self-realisation (of what 'success' or 'living well' entails) and societal recognition of the individual's innate worth. FOE is uniquely valuable to intellectual self-development, allowing individuals to reflect upon their options: state powers are "limited to those that citizens could recognise while still regarding

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[12] Barendt (n 1) 13.
[13] Baker, 'First Amendment Limits on the Copyright' (n 9) 897.
[14] See Barendt (n 1) 18–21 for an account of the case law demonstrating that this argument has been the most influential one in the development FOE doctrine.
[15] *Whitney*.
[16] A Meiklejohn, *Political Freedom* (Harper 1960) 19-28,79; A Meiklejohn, 'The First Amendment Is an Absolute' [1961] SCR 245.
[17] *Whitney*.
[18] R Dworkin, *Sovereign Virtue* (HUP 2002).
[19] Barendt (n 1) 19.
[20] T Scanlon, 'A Theory of Freedom of Expression' (1972) 1 Philosophy & Public Affairs 204; MH Redish, 'Value of Free Speech' (1982) 130 University of Pennsylvania Law Review 591; DA Strauss, 'Persuasion, Autonomy, and Freedom of Expression' (1991) 91 Columbia Law Review 334; CE Baker, *Human Liberty and Freedom of Speech* (OUP 1992); SJ Brison, 'The Autonomy Defense of Free Speech' (1998) 108 Ethics 312; GE Carmi, 'Dignity' (2007) 9 UPJCL 957.
[21] R Dworkin, *Justice for Hedgehogs* (HUP 2011).

themselves as equal, autonomous, rational agents".[22] An individual is truly autonomous only if he is free to weigh the various arguments for different courses of action open to him. Such individual autonomy gives government its legitimacy as part of the social contract: citizens are free to criticise and change the government.[23]

This justification assumes individuals have inherent value, and demands society respect each individual's views, as part of equal respect for their dignity (and autonomy) as a good in itself.[24] FOE has therefore been labelled a "strong right", because of its connection with the Kantian categorical imperative that certain aspects of persons and their lives should be insulated by legal rights from the demands of society's aggregate welfare: FOE secures respect for an individual's dignity by protecting the fundamental aspects of personhood vital to her sense of self-worth.[25] Resultantly, this justification mandates expression must never be regulated based solely upon its intended meaning, even if such regulation aims to contain intolerant expression.[26] In this context, this justification has been criticised for assuming too quickly that individuals *can* exercise real autonomy,[27] or that they never, upon reflection, surrender their autonomy for the state to determine which types of speech are too harmful to tolerate.[28]

4. Suspicion of government

This justification posits government is inherently suspicious because of its power, and FOE is the most effective check on that power. This encompasses the "legitimate fear"[29] that statutory regulation of expression might eventually be used to cover up political scandals and stifle political debate.[30] On this view, content-based speech regulation could be a dangerous bequest of power from individuals to government, which always has the potential to abuse its power.[31]

The shortcomings of this justification include its failure to explain why government can never be trusted, and why expression in particular is the only credible check on governmental power. Indeed, it fails to justify why government should not regulate the expression of entities as powerful as or even more powerful than government itself.

ii. Beyond classic justifications: fundamental values and moral principles

Where the classic justifications fall short, fundamental values and moral principles might be useful in elucidating why FOE should be protected. For example, FOE is a public good, to be protected by law because of its societal value, not because a particular speaker, recipient or group has a particular interest in it being protected.[32] FOE is therefore integral to the public good as it validates diverse ways of life which may be incompatible with each other,

[22] Scanlon (n 20) 215.
[23] Barendt (n 1) 16.
[24] CE Baker, 'Autonomy and Hate Speech' in I Hare and J Weinstein (eds), *Extreme speech and democracy* (OUP 2009).
[25] M Dan-Cohen, *Normative Subjects* (OUP 2016) 120.
[26] See J Waldron, 'Dignity and Defamation' (2010) 123 HarvLR 1596 for an argument that offensive hate speech should be regulated.
[27] FE Schauer, *Free Speech* (CUP 1982) 68–71.
[28] ibid 73-86,189-200.
[29] A Lester, *Five Ideas to Fight For* (Oneworld 2016) 151.
[30] As occurred in the 17th Century, when Milton wrote *Areopagitica*.
[31] Schauer, *Free Speech* (n 27); F Schauer, 'Must Speech Be Special' (1983) 78 NwULR 1284.
[32] J Raz, 'Free Expression and Personal Identification' (1991) 11 OJLS 303, 309.

but which, when permitted in equal measure to be freely expressed, can tolerate each other: FOE cultivates an open, pluralistic society, where individuals can achieve equal fulfilment in their diverse ways of life,[33] and develop a strength and stamina that allows them to tolerate others' ways of life.[34] The underlying fundamental value and moral principle is that pluralistic society can survive only when all of its individuals receive (and feel they have received) equal recognition for who they are.

Another perspective sees FOE promote equal opportunity (rather than equal treatment) to participate meaningfully in democratic society.[35] This focuses upon democracy and self-governance, rather than pluralism and tolerance. The moral principle here is political legitimacy in democracy, based upon equal opportunity for all individuals in such a society. Legitimated democratic self-governance encapsulates the normative value to which virtually everyone in a liberal democracy adheres: the importance of giving all individuals the opportunity to participate in the speech by which they govern themselves, thereby legitimating the government's existence and actions.[36] Democratic competency is the fundamental value that justifies FOE.

Such FOE-justifications are broader than the classic justifications because they combine societal and individual concerns, arguing FOE protects individual dignity, autonomy and well-being while also cultivating a liberal, pluralistic and legitimately self-governed society. Individual benefit is directly connected with societal benefit: FOE fosters societies that treat their individuals well, and, simultaneously, individuals who build cohesive and legitimately-governed societies.

iii. Impact of the complexity of FOE on its justifiability

The complexity of FOE affects how well it can be justified. Speech acts, effects and interests can sometimes frustrate the FOE-justifications. A particularly loud or powerful speaker might drown out other participants in a marketplace of ideas, thwarting any quest for truth-discovery through the contest of ideas. 'Low-level' speech not contributing to public policy might hinder public discourse, which might justify limiting it.[37] This necessitates a more detailed analysis of the various interests served by upholding FOE: how do these interests connect with the normative justifications for FOE?

Given this importance of speaker and recipient interests, judges considering whether to uphold FOE in any given case should identify exactly which interests would be served in the particular case, and exactly which normative justifications for FOE they implicate. This complexity means judicial reasoning about FOE requires more than broad, abstract and generic statements about why FOE is important: it requires advertence to the specific purpose and impact of the expression in question, and a critical understanding of speaker and recipient interests.

[33] Raz (n 32).
[34] LC Bollinger, *The Tolerant Society* (OUP 1988).
[35] Dworkin (n 18).
[36] J Weinstein, 'Participatory Democracy as the Central Value of American Free Speech Doctrine' (2011) 97 Virginia Law Review 491, 491.
[37] J Lichtenberg, 'Foundations and Limits of Freedom of the Press' in J Lichtenberg (ed), *Democracy and the mass media* (CUP 1990) 107; Barendt (n 1) 18–21; Weinstein (n 36) 497.

1. *Speaker interests and detachment*

Given the FOE-justifications discussed above, a speaker might have the following interests: testing current 'truths'; participating in democratic institutions; intellectual self-development, autonomous decision-making and uninhibited self-expression; communicating a particular way of life and being respected by society; and equal opportunity to contribute to policy development. Speakers interests are twofold: meaningfully being an active member of society (and being acknowledged as such), and realising one's innate self-worth (and being recognised as such).

However, speech might not always further a particular normative underpinning of FOE. A speaker's interests might not align with those normative underpinnings, meaning speaker interests will not always justify upholding FOE. Dan-Cohen has assessed the deeper interests behind expression, relating them to FOE's normative underpinnings, thus providing a more detailed and critical analysis of when FOE should be upheld. He has invoked Goffman's notion of role distance (between a speaker's intention and the intention behind his utterance),[38] and Searle's notion of sincerity (linking state of mind with speech content).[39] Dan-Cohen's typology of speech rights[40] derives from a greater focus upon speaker character, objectives, effects, and due entitlements, than do any of the classic or philosophical FOE-justifications, which rely upon *assumed* character, objectives and effects. His more finely-grained approach would enable jurists more accurately, credibly and realistically to evaluate when to uphold FOE, which is integral to the second stage of the tort of misuse of private information. Different considerations bear upon the kind and level of protection due in any circumstance,[41] calling for a closer focus upon speech objectives and effects, and how they vary according to who is speaking.

A speaker might not possess any interests that FOE is normatively understood to protect (like societal participation, autonomy and self-realisation). His genuine intention might be different from the purported intention behind his utterance. Such role distance occurs, for example, when media corporations publish viewpoints reflective not so much of their organisational stance as of their market's appetite. The genuine intention, to generate profit, differs from the purported intention, perhaps to inform the community about a celebrity's affair.[42] A critical understanding of speaker interests and role distance enables jurists to recognise the hypocrisy of any media corporations, which, clamouring for legal 'human rights' protection for FOE, want that protection for commercial advantage in ways that might be vituperative of 'human rights' and harm the interests reflected in FOE-justifications. When media claim injunctions 'chill' speech, jurists should be aware that it might not be the normative underpinnings of FOE that would be chilled, but, rather, the profit-flow of media corporations.

This disconnection between the self and the speech fundamentally problematises FOE-justifications based upon individual autonomy and flourishing, the Razian value of equal recognition, and the Dworkinian value of equal opportunity. Detached speech is too distant from the speaker to further her dignity or autonomy. Detached speech also problematises FOE-justifications based upon truth-discovery, democratic participation and suspicion of government: the speaker's genuine intention might be detached from these societal benefits secured by FOE. To

[38] M Dan-Cohen, *Harmful Thoughts* (PUP 2002) 252; E Goffman, *Encounters* (Bobbs-Merrill 1961) 85–152.
[39] Dan-Cohen (n 38) 247; JR Searle, *Speech Acts* (CUP 1969); JR Searle, *Expression and Meaning* (CUP 1979).
[40] Dan-Cohen (n 25) 231.
[41] ibid 209.
[42] G Phillipson, 'Press Freedom, the Public Interest and Privacy' in AT Kenyon (ed), *Comparative Defamation and Privacy Law* (CUP 2016) 138–141; G Phillipson, 'Leveson, The Public Interest and Press Freedom' (2013) 5 JML 220.

be valid, those justifications must therefore incorporate interests of recipients of that detached speech. But because recipient interests are separate from the speaker, they might prove less able to justify upholding FOE in the face of conflicting deontological or stronger utilitarian arguments. A commercial (media) corporation's speech is not protected by speaker-centric, autonomy-based interests that can easily displace conflicting societal interests, like ensuring a level playing-field for contenders for political office.

A speaker may also be insincere, when intention and utterance do not correspond.[43] She means one thing, but says another. Her speech is not an adequate expression of her state of mind – her intention is not reflected in her speech. Yet sincerity is central to how FOE is normatively justified: [44]

> speech, that is the public articulation of a thought, is a canonical way of owning up to the thought, taking responsibility for it, and so constituting it as one's own.

Sincerity involves unity of judgment and attitude behind an utterance,[45] and almost all FOE-justifications depend upon this: truth-discovery, marketplace of ideas, democratic participation, individual autonomy, and respect for individual dignity. *In*sincere speakers have little interest in using speech to test 'truths'; partake meaningfully in democratic institutions; challenge policies shaping their society; and gain social recognition for their ways of life. Such speakers have no "original active right"[46] – a right based upon a concern for their interests in self-expression and self-realisation. Upholding FOE, therefore, is better justified in terms of others', not the speaker's, interests.

2. Recipient interests and derivation

When a speaker's detached role or insincerity reveal that speaker interests cannot justify upholding FOE in accordance with recognised normative grounds, justification must rely upon recipient interests instead. Jurists must, however, be as attentive to the different manifestations and implications of recipient interests as they are to those of speaker interests.

Recipients all have a "passive" FOE right,[47] which protects reception rather than expression of speech. However, not all recipients are the same. A deliberate and attentive recipient is interested in informing herself and developing her own views, consistent with FOE-justifications of truth-discovery, democratic participation, and self-realisation. An accidental or inattentive recipient ("bystander"),[48] on whom speech has been imposed, has different interests. On a paternalistic and utilitarian view, the bystander's interest in informing himself and developing his views is not his own: it is his society's interest. Unrestricted speech is accessible to all, including bystanders, because free-flowing speech has the *potential* to inform and influence recipients, and a progressive, pluralistic, tolerant, democratic, self-governing, or equal society relies upon its members being informed and articulate. This is consistent with FOE-justifications of truth-discovery, democratic participation, suspicion of government, and legitimate self-governance. The difference between deliberate recipients and bystanders lies in where their

[43] Searle, *Speech Acts* (n 39); Searle, *Expression and Meaning* (n 39) 4–5, 62–64, 172.
[44] Dan-Cohen (n 25) 222.
[45] ibid.
[46] ibid 210.
[47] ibid 211.
[48] Barendt (n 1) 27–29.

interests in FOE originate. Bystanders, whose FOE interests do not originate from within, have a "*derivative*" passive right in FOE rather than an "original" right,[49] because that right derives from strong societal interests in preserving people's ability to receive information, whether on the basis of marketplace of ideas or democratic participation.

Derivation enables jurists to make meaningful connections between actual interests in a particular communication, and the normative justifications for upholding FOE. A speaker might derive his own (active) FOE right from the recipient's interests, giving him an active derivative right: to speak (actively) rather than listen (passively), which derives from others' interests.[50] Recipient interests can, through derivation, reinvigorate speaker interests in justifying upholding FOE. It does not follow that recipients are the *primary* objects of FOE, and speakers have derivative rights *only* to protect recipient interests;[51] that unjustifiably reduces recipients to mere consumers depending upon offerings of a few producers and distributors, and fails to acknowledge speaker interests in expressing their own views.[52] Rather, a speaker's right is at least partly derivative. Derivation clarifies why a speaker's FOE right should be upheld in accordance with normative justifications, especially if their original right is compromised by detachment or insincerity. Crucially, the speaker's right might derive from a bystander's interests: the speaker must connect their speech with society's interest in ensuring all potential recipients can receive that speech. Derivation is necessarily a utilitarian exercise, not based upon the rightholder's innate value:[53]

> a derivative right is instrumental: its purpose is to safeguard or enhance the enjoyment of certain rights by others…[it] is measured by its effectiveness,…[and] may be limited or discarded in favor of better means to attain the same goals.

A derivation-based justification for upholding FOE is therefore *remoter* than a justification based upon a speaker's original right, and it demonstrates how the nexus between normatively protected interests and the rightholder's actual interests affects how FOE should be assessed in rights-conflict resolution, as in the tort's second stage. How well upholding FOE can be justified depends upon whether the interest in question is original or derivative, and, in the latter case, on the primary interest from which the right is derived:[54] the remoter the normative interests from the actual interests, the remoter the right's value from the rightholder's purpose, and the less likely FOE should be upheld.

It might be difficult to justify upholding a speaker's FOE right deriving from recipient or societal interests, if his speech does nothing to broaden individuals' knowledge, or distracts them from participating in democratic processes, at least on the normative grounds of truth-discovery or democratic participation. Meiklejohn himself doubted whether FOE should be upheld *vis-à-vis* absolutely all speech – especially speech about an entirely private matter.[55] Others have since argued that privacy-invading speech can serve the privacy-subject's interests, as a recipient of that speech: exposure might help him undertake beneficial self-reflection and grow as a mature,

[49] Dan-Cohen (n 25).
[50] ibid.
[51] Schauer, *Free Speech* (n 27) 105–106 and 158–160.
[52] Barendt (n 1) 27.
[53] Dan-Cohen (n 25) 212.
[54] ibid 211.
[55] Meiklejohn, *Political Freedom* (n 16) 79.

social, dignified and happy person.[56] However,[57] empirical evidence and normative arguments assert the exact opposite:[58] privacy intrusions are detrimental to an individual's dignity, make them unhappy, render them unwilling to be outgoing and socialise, and instil in them a stultifying fear of critical reflection and expression. Upholding FOE *vis-à-vis* privacy-invading speech is therefore not easily justified through derivation from a privacy-subject's right as recipient of that speech.

Whether FOE can justifiably be upheld on particular facts depends heavily upon recognising that speech can affect recipients in different ways. Most FOE-justifications rely upon recipient and societal interests. If certain speech affects recipients in ways contrary to their purported interests, that must affect how FOE is assessed in that case. Headline news, in-depth articles, sensationalist tabloids, personal diaries, and photographs might have different effects on or be received in different ways by recipients. They will serve recipient interests of informing themselves about their society and their place in it to differing degrees; they should, therefore, receive only that degree of protection by law that is consistent with how far they further those normative interests.

iv. When publication frustrates the normative underpinnings of FOE

Given there may in particular cases be disjunctions between FOE-justifications and actual speech interests and effects, publication might actually frustrate the normative underpinnings of FOE. If FOE is normatively more than just the absence of censorship, implying also the presence of robust public debate,[59] it might sometimes be necessary to suspend FOE in order to foster the values that it is meant to guarantee.[60]

This means that judicial reasoning must not simplify the normative underpinnings of FOE and must examine in depth how a particular publication is connected with those underpinnings; otherwise, decisions to uphold FOE on particular facts might be unjustified, in accordance with the very right to FOE itself. In a rights-conflict, that means suspending the other right is also unjustified. For instance, corporate (media) and individual expression might be based upon different interests and therefore further the normative underpinnings of FOE in different ways: the former might further truth-discovery, the latter autonomy. Yet the former might also *frustrate* the normative underpinning of autonomy: media publication of a story targeting an individual might inhibit that individual's ability to express his own opinion on the matter.

Media publication, especially tabloid press, may also frustrate society-facing FOE-justifications. Absent a rights-conflict, FOE might easily be upheld to protect tabloid publications, on broad, abstract justifications of truth-discovery, marketplace of ideas and suspicion of government. The press's economic survival is broadly-speaking indispensable to the democratic process.[61] However, a rights-conflict like that in the tort's second stage

[56] E Volokh, 'Freedom of Speech and Information Privacy' (2000) 52 Stanford Law Review 1049; P Wragg, 'The Benefits of Privacy-Invading Expression' (2013) 64 NILQ 187.
[57] As discussed in (c), below.
[58] Such scepticism is advanced in Phillipson, 'Press Freedom, the Public Interest and Privacy' (n 42) 141; H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (OUP 2006) 683–8, 792–4.
[59] Lichtenberg (n 37) 107.
[60] Barendt (n 1) 35.
[61] P Dacre, 'Speech to Society of Editors Conference' (9 November 2008); as cited in Phillipson, 'Press Freedom, the Public Interest and Privacy' (n 42) 142.

necessitates a closer look at the actual interests involved under the broader normative claims to FOE. In a rights-conflict, the stakes are higher for upholding a right, because that entails suspending another right. This is exactly the context in which the court should consider whether it is a "fallacy that all speech in the press performs or contributes to the furtherance of all [the] values" that underpin FOE.[62] Tabloids might trivialise the justifications of democratic participation, tolerance, self-governance, truth-discovery and marketplace of ideas, and use them to conceal and support practices that actually detract from democracy, tolerance, truth-discovery and the marketplace. Their genuine interests might be to profit at any expense, including disseminating sensationalised private information that embarrasses and vilifies individuals, and demonises and drowns out opponents' voices.[63] Their publications might have the effect of promoting warped, over-simplified and titillating narratives about events of no significance to, and that might deflect attention from, government policies and democratic institutions, and which denigrate and abuse members of certain cultures in a society.

The normative underpinnings of FOE might therefore be instrumentalised to give a normative seal of approval and positive support for any form of expression, even where the underlying interests and the effects are contrary to those normative underpinnings. Courts must be sensitive to these dangers of oversimplifying FOE-justifications and thereby 'turning' them against themselves. Even though commercially viable newspapers are essential to a free, vibrant and competitive marketplace of ideas, and to democracy, the attempted disguising and normative legitimation of underlying bare commercial motivations, *at the expense of* FOE's normative underpinnings, should arouse judicial suspicion.[64]

There are, therefore, types and effects of expression that undermine recognised normative underpinnings of FOE. Acknowledging as much does not entail *prohibition* of that expression. Rather, jurists must not assume all expression ought to be protected to the same extent and on the same normative grounds. And when protecting expression (upholding FOE) entails suspending another right, courts should focus upon how the exact effects of the particular expression further or frustrate the normative underpinnings of FOE being invoked to protect that expression. Not doing so risks counterintuitively protecting expression that frustrates the normative grounds of that protection, and this at the expense of the suspended right.

v. Conclusion

FOE is a complex right. Each of its normative underpinnings has demonstrable shortcomings, meaning none can comprehensively justify that right in all possible circumstances. But, although "we do not have in hand a tenable general theory of freedom of expression",[65] the multiple and diverse normative underpinnings reveal the importance of FOE, and provide ample justification for its *general* protection by law, or its justification. These normative complexities, however, mean courts must reason with more depth and nuance to determine whether the legal right to FOE should be upheld *in particular circumstances*, especially when FOE is in genuine conflict with another legal right. If, in a particular case, only some of FOE's normative underpinnings are furthered by

[62] Phillipson, 'Press Freedom, the Public Interest and Privacy' (n 42) 140.
[63] Phillipson, 'Press Freedom, the Public Interest and Privacy' (n 42); Phillipson, 'Leveson, The Public Interest and Press Freedom' (n 42).
[64] Phillipson, 'Leveson, The Public Interest and Press Freedom' (n 42); Phillipson, 'Press Freedom, the Public Interest and Privacy' (n 42) 144–145.
[65] Alexander, *Is There a Right of Freedom of Expression?* (n 2) 146.

upholding the FOE right, or indeed some are frustrated by upholding FOE, *and* upholding FOE frustrates the conflicting right to privacy, then the decision to uphold FOE must involve a comparison between the overall degree of furtherance of FOE and the degree of frustration of privacy. Allowing publication will not always and automatically draw normative force from FOE.

(c) Privacy

i. Philosophical justifications for protecting privacy as a legal right

Several philosophical justifications underpin the legal right to privacy, all of which also have shortcomings that mean none offer a comprehensive justification for upholding that right in any circumstances, rendering privacy as normatively complex as FOE. This cluster of values[66] underpinning privacy can be divided into individual-centric and society-facing justifications.

1. Value of privacy to the individual

a. Dignity and personhood

Privacy has been theorised as safeguarding human dignity, and thereby protecting individual personhood.[67] Bearing no universal definition,[68] 'dignity' can be problematic in justifying privacy. Delimiting and upholding this right on coherent normative grounds becomes impossible as its core value remains undefined.[69] Indeed, similar problems arise *vis-à-vis* FOE, whenever its justifications draw upon dignity. This is why dignity is an imperfect justification for privacy: although the multiplicity of definitions of 'dignity' do not make it an indeterminable concept, there is no single universal definition accepted by all theorists. Before employing 'dignity' as a philosophical justification for a particular right, jurists must first establish what they mean by 'dignity', and justify why they have aligned themselves to that definition. Nevertheless, dignity is invoked to theorise privacy, and, insofar as plausible relationships between dignity and privacy can be found, on whichever definition of the concept, dignity should not be abandoned as a normative underpinning of the privacy right.

A common explication of human dignity derives from Kant's categorical imperative that each individual human being be recognised as having inner self-worth so as to be an end in herself, and that, subsequently, no individual be used solely as a means to an end. Insofar as privacy shields individuals from observation by others, it recognises individuals are not merely entities which can and therefore ought to be observed, about whom information can and therefore ought to be freely obtainable. Private information should not be commodified and

[66] DJ Solove, 'Conceptualising Privacy' (2002) 90 California Law Review 1087; A Busch, 'Privacy, Technology, and Regulation' in B Rössler and D Mokrosinska (eds), *Social Dimensions of Privacy* (CUP 2015); TM Scanlon, 'Thomson on Privacy' (1975) 4 Philosophy & Public Affairs 315; DJ Solove, 'A Taxonomy of Privacy' (2005) 154 University of Pennsylvania Law Review 477.

[67] For instance: C Fried, 'Privacy' (1968) 77 YLJ 475; J Reiman, 'Privacy, Intimacy and Personhood' (1976) 6 Philosophy & Public Affairs 26; E Bloustein, 'Privacy as an Aspect of Human Dignity' (1964) 39 NYU Law Review 962; E Bloustein, 'Privacy Is Dear at Any Price' (1977) 12 Georgia Law Review 429; R Gavison, 'Privacy and the Limits of the Law' (1980) 89 YLJ 421.

[68] S Riley, 'Human Dignity' [2010] IJLC 117.

[69] A Gajda, 'The Trouble with Dignity' in AT Kenyon (ed), *Comparative Defamation and Privacy Law* (CUP 2016).

traded for profit,[70] given invasions of privacy "injure [individuals] in their very humanity".[71] Privacy recognises individuals are fundamentally entitled to manage their own life and identity, according to their own ends, which calls for legal protection.

Dignity underpins critiques of online media and their impact upon users' privacy, with calls for privacy to be construed not as merely protection of access to oneself but "as a social negotiation between actors who seek a comfortable boundary between self and others".[72] Privacy understood as normative barriers erected around aspects of an individual's life draws upon dignity as a categorical imperative:[73] even when an individual discloses certain information, that may not automatically entitle others to seek out and take that information. Dignity-based privacy is "mutually constructed", when the privacy-seeking individual has her privacy claim "respected by others", whether or not others are aware of her disclosure of private information – "just because someone can see something doesn't mean they should look".[74] Privacy requires others to refrain from looking even when they can see. Otherwise,[75]

> A failure to respect a privacy claim – to look – erodes trust because it signals that the other does not acknowledge the claimant as a person requiring dignity and respect for boundaries.

A Dworkinian definition of dignity, under which everyone is responsible for identifying what counts as success or "living well" in their own life,[76] construes privacy as "respect for our personal identity",[77] and a crucial mechanism by which individuals can identify how to maximise their success or 'good living'. Privacy enables individuals to keep from the public aspects of their lives, behaviour and beliefs, allowing them to come to terms with their own identity, that which defines their personhood, and those things that ensure they 'live well', without pressure or bias of public judgment or humiliation. Dignity justifies privacy in shielding core aspects of every individual's life that we "have been socialised into concealing":[78]

> [P]eople view [some matters to do with the body] as deeply primordial, and their exposure creates embarrassment and humiliation. Grief, suffering, trauma, injury, nudity, sex, urination, and defecation all involve primal aspects of our lives – ones that are physical, instinctual, and necessary.

The practical shielding of grief, suffering and trauma from public gaze illustrates how privacy protects dignity, reinforcing the conceptual dignity-privacy relationship. The inability to grieve privately, away from media attention,

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[70] B Rössler, 'Should Personal Data Be a Tradable Good?' in B Rössler and D Mokrosinska (eds), *Social Dimensions of Privacy* (CUP 2015).
[71] Fried (n 67) 475.
[72] V Steeves, 'Privacy, Sociality and the Failure of Regulation' in B Rössler and D Mokrosinska (eds), *Social Dimensions of Privacy* (CUP 2015) 247.
[73] K Hughes, 'A Behavioural Understanding of Privacy and Its Implications for Privacy Law' (2012) 75 MLR 806.
[74] Steeves (n 72) 247.
[75] ibid.
[76] Dworkin (n 21).
[77] Lester (n 29) 145.
[78] Solove, 'A Taxonomy of Privacy' (n 66) 536.

significantly affects relatives of victims of tragedies, impeding their ability to move on,[79] where moving on is intrinsic to identifying one's own purpose in life, and those things enabling one to 'live well', after the loss of a loved one. Likewise, publication of stories involving trauma, and using any means to obtain information about such stories, disregards victims' dignity (in the Kantian sense). The Press Council reacted with "abhorrence and distaste" at cheque-book journalism following the 1981 'Yorkshire Ripper' arrest, when newspapers offered large pay-outs to Sutcliffe's family and friends for their stories,[80] prompting one victim's mother to campaign against such press intrusions.[81] These manifestations of intrusion evidence how denial of privacy allows individuals, and their proximity to misfortune, to be treated thoroughly as a means to some external ends; indeed that is how subjects of grief-journalism have said they feel.[82] These real-life observations of privacy intrusion demonstrate why the concept of dignity remains an appropriate, if imperfect, justification for upholding privacy.

b. Autonomy and freedom

The autonomy justification for privacy[83] is proximate to Dworkinian dignity,[84] when understood as an individual's ability to control her own life, including how much others know about her life. This control enables her to realise, independently and without intrusion, that which defines her inner worth and ability to "live well". The 'barriers' conception of privacy draws upon autonomy,[85] given the strongest barriers to intrusion result from individuals exerting control over their lives and defining who has access. Even *vis-à-vis* normative barriers (socially accepted rather than actively imposed), individuals can control how and when such barriers can be pierced.

Given privacy is crucial to providing "control over certain aspects in [one's] life",[86] it is lost or eroded when individuals lose control over their private information, the manner in which that information is shared, or the extent to which the public can see into their lives:[87]

> If the intimate details of my life are disclosed without my consent…then even the truth of that disclosure cannot undercut the fact that something that is essentially *mine* to control has been taken from me.

Photographs are particularly intrusive in removing individuals' control to shape the narrative about the particular activity depicted,[88] and the autonomy justification for privacy demands that right be upheld especially when

[79] NA Moreham and Y Tinsley, 'Media Intrusion into Grief' in AT Kenyon (ed), *Comparative defamation and privacy law* (CUP 2016).
[80] Press Council, 'Press Conduct in the Sutcliffe Case' (1983) ch 15.
[81] Lester (n 29) 153.
[82] Moreham and Tinsley (n 79).
[83] H Gross, 'Privacy and Autonomy' in JR Pennock and JW Chapman (eds), *Privacy* (Atherton 1971); J Kupfer, 'Privacy, Autonomy, and Self-Concept' (1987) 24 American Philosophical Quarterly 81; R Gavison, 'Information Control' in S Benn and G Gaus (eds), *Public and private in social life* (St Martin's 1983).
[84] Requiring individuals to identify those things that enable them to "live well".
[85] Hughes, 'A Behavioural Understanding of Privacy and Its Implications for Privacy Law' (n 73).
[86] JC Inness, *Privacy, Intimacy and Isolation* (OUP 1992) 41.
[87] FE Schauer, 'Free Speech and the Social Construction of Privacy' (2001) 68 Social Research 221, 223 (emphasis original).
[88] V Goldberg, *The Power of Photography* (Abbeville 1991); K Hughes, 'Photographs in Public Places and Privacy' (2009) 1 JML 159; K Hughes, 'Publishing Photographs Without Consent' [2014] JML 180.

photography is in issue.[89] Digital technology also removes individuals' control over the volume, manner and speed of creation and dissemination of their private information:[90] algorithms' and online platforms' generation and dissemination of individuals' personal information decreases privacy by stripping individuals of a layer of control over their own information. "Digital dossiers"[91] are instances of loss of control, and privacy, over the direction of an individual's life: where a dossier begins in childhood, that individual's future ability to access resources, partake in the marketplace, find employment, and participate in society more broadly, is significantly influenced by their decreased control over who knows what about them.[92]

Control encompasses choice. An individual in control of their life can choose how to live, what to think, and how much information about herself to share with others. Being able to reason, privately, about aspects of her life that are socially controversial or morally unsettled (for example, whether to have an abortion) allows an individual to make that choice freely, and ensures that choice is her own: "[p]rivacy is essential to…free choice".[93] Autonomy-based privacy is not, therefore, necessarily dichotomous with publicity. In exercising his privacy right, an individual might *choose* to vitiate privacy.[94] That ability to choose is more important than the outcome, placing control and choice at the normative heart of privacy.[95] That an individual decided, autonomously, to reveal the most intimate details of her life with the world does not mean she is not or never was entitled to a privacy right. This implication of the autonomy justification may cause difficulties in deciding whether privacy should be upheld *vis-à-vis* such already revealed information, or information that is intertwined with that information.

Nevertheless, if control and choice underpin privacy, then it can be viewed as a precondition for freedom.[96] The power of choice secured by privacy gives individuals liberty, so they are free to act, reason, deliberate, socialise, and develop themselves without constraints of society, pressures to conform, or pressures to maintain a particular status quo. "There is a minimal level of opportunity for choice…below which human activity ceases to be free in any meaningful sense" and so the "horror of uniformity, conformism, and mechanization of life is not groundless".[97] Autonomy and freedom therefore provide strong and wide-reaching justifications for privacy as a legal right, albeit without clearly determining the *extent* of that right.

c. Psychological well-being and security

Alongside connecting privacy with autonomy, the loss of control entailed in loss of privacy has the propensity to erode individuals' sense of security, undermining their psychological resilience and well-being. Here, the assertion that he who has nothing to hide has nothing to fear offers little solace.[98] The fear and psychological unrest following privacy intrusion arises not only from knowing others have gained knowledge about you, but from realising your

[89] Allen et al, 'Privacy, Photography, and the Press' in AD Moore (ed), *Information ethics* (UWP 2005) 363,365.
[90] Gavison (n 83).
[91] Permanent online publicly accessible compilations of information about individuals' lives.
[92] SB Steinberg, 'Sharenting' (2017) 66 Emory Law Journal 839.
[93] Lester (n 29) 146.
[94] Inness (n 86) 41–45.
[95] Scanlon (n 65) 315–322; J Rachels, 'Why Privacy Is Important' (1975) 4 Philosophy & Public Affairs 323, 323–333.
[96] AF Westin, *Privacy and Freedom* (Atheneum 1967).
[97] I Berlin, *Four Essays on Liberty* (OUP 1969) 52.
[98] D Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd edn, OUP 2002) 512.

life is open for others to access. The revelation of unfettered accessibility – the loss of control – causes the grief, perplexity and insecurity concomitant with privacy invasion.

These effects have been documented in several contexts, including grief-journalism, where media coverage of tragedies has induced in victims' next-of-kin fear and insecurity even within their home and family lives, contributing to an emotional imbalance in dealing with their loss, and exacerbating their grieving experience.[99] Privacy intrusions *within* families also have psychological impacts: the (innocuous) exposure of children online (by their parents) has been linked to their feelings of discomfort, vulnerability, powerlessness and insecurity.[100] These very feelings affect individuals' choices about how they behave, where they go, how they interact with those closest to them, and with whom they associate themselves generally, as demonstrated in the Leveson Inquiry victim testimonies.[101] The psychological impacts of privacy intrusions have culminated in such fear and hopelessness as to lead individuals to harm themselves, even fatally.[102]

Privacy can therefore be viewed as an antidote to the fear that society is watching the individual when he does not want to be watched, passing judgment upon him, and, potentially, ostracising him.[103] The controlling device of the Panopticon[104] could be observed in both the McCarthyist United States and the totalitarian German Democratic Republic, and these regimes' effects on human psychology have been recorded in literature of the time and following such periods of intensive surveillance,[105] including fear of leaving one's house, disciplined behaviour seeking to avoid attention, caution taken in forming new relationships and socialising, and desperate vulnerability and powerlessness deterring individuals from asserting their beliefs, exercising their liberties, and seeking to realise their interests.

Invoking empirical evidence of psychological reactions to justify upholding privacy in particular cases can be problematic: that which is accepted at a high level of abstraction will not always hold true on concrete facts. It is unclear whether psychological well-being and security can be a valid normative underpinning of privacy where there is doubt whether the individual actually had such a psychological reaction. It may be that reasonable analogies can be drawn between such cases and cases of actual psychological ramifications; that task would not be foreign to English judges. Such a compromise between the normative and empirical levels is legitimised by historical acknowledgement in England that privacy serves to protect individuals' psychological integrity and security from mainstream media apparently unwilling to refrain from privacy intrusion. From the 1970s to more

[99] Moreham and Tinsley (n 79).
[100] Children's Commissioner, 'Life in Likes: Children's Commissioner Report into Social Media Use among 8-12 Year Olds' (2018).
[101] Lord Justice Leveson, 'An Inquiry into the Culture, Practices and Ethics of the Press, Report' (2012) Witness Statements of: Gerald Patrick McCann, Sally and Bob Dowler; and Hugh Grant.
[102] For examples of cases of suicide following gross breaches of privacy, see: E Pilkington, 'Tyler Clementi, Student Outed as Gay on Internet, Jumps to His Death' *The Guardian* (New York, 30 September 2010) <https://www.theguardian.com/world/2010/sep/30/tyler-clementi-gay-student-suicide> accessed 5 April 2018; J Reynolds, 'Italy's Tiziana' *BBC News* (Naples, 13 February 2017) <http://www.bbc.co.uk/news/world-europe-38848528> accessed 5 April 2018.
[103] F Kafka and H Kuhn, *Der Prozess* (Suhrkamp 2000).
[104] J Bentham, *Panopticon Postscript, Part II* (T Payne 1791); M Foucault, *Discipline and Punish* (A Sheridan tr, 2nd edn, Vintage Books 1995).
[105] A Miller, *The Crucible* (1953); J Becker, 'Der Verdächtige', *Nach der Ersten Zukunft* (Suhrkamp 1980); A Funder, *Stasiland* (Granta Books 2003).

recent years, there has been consistent official acknowledgement of general psychological impacts of, and specific individual suffering due to, such press intrusiveness.[106]

Despite the potential shortcomings of psychological well-being and security as a comprehensive justification for privacy, given the consensus that privacy intrusion can result in negative psychological effects (and that the possibility of that result is not too remote), this is a further justification for upholding the privacy right.

d. Intimacy, family, and cultivating relationships

Privacy has been linked to intimacy,[107] as the common denominator between different types of information about an individual, access to his life, or decisions he makes about his life.[108] The theoretical and juridical origins of privacy lie partly in the desire to protect information about, access to and decisions on arguably the most intimate aspect of an individual's life: sex-life.[109] Such intimate aspects of an individual's life should be "let alone", as there is no residual normative justification for knowing such details: the law should protect intimacy (through a privacy right) as a matter of constitutional importance.[110]

Intimacy has been used to delineate privacy's normative scope of protection: certain aspects of individuals' lives should be shielded from intrusion *because* they are considered intimate: for example, family life, sexuality, body and health, and relationships with others. Intimacy connects with dignity, autonomy and psychological integrity by covering those areas of life that 'individualise' each person and afford them a normative bubble of protection from outside eyes, including home-life and family, health, and sexuality. Because of that connection, privacy should be upheld even *vis-à-vis* innocuous or non-sensitive aspects of intimate areas of life, such as ordinary family goings-on. The negative effects of press intrusions on victims' family lives, evidenced in the Leveson Inquiry, substantiate this intimacy basis for privacy:[111] erosions of privacy, regardless of the content of the information, culminated in victims' inability to enjoy and protect their families, and rendered their families collateral damage in the press's pursuit of information. Such effects upon family life can be seen simultaneously to represent an erosion of security, undermining of autonomy, deprivation of liberty, and a breach of the Kantian categorical imperative relating to dignity and recognition of inner worth.

If privacy is "essential for trust and provides the foundation for intimate family relationships",[112] then intimacy relating to family and relationships exists at the intra-family level as well, and the privacy right, though protective of family life, can penetrate into the family unit. The protection of intimate areas of a family member's life from

[106] Younger Committee on Privacy, 'Report of the Committee on Privacy' (1972) Cmnd 5012; Royal Commission on the Press, 'Final Report' (1977) paras 19.17-19.18; D Calcutt QC, 'Report of the Committee on Privacy and Related Matters' (1990); D Calcutt QC, 'Review of Press Self-Regulation' (1993) paras 4.25-4.27, 4.41; National Heritage Select Committee, 'Privacy and Media Intrusion, Fourth Report' (1993); Lord Chancellor's Green Paper, 'Infringement of Privacy' (1993); 'Fifth Report of Culture, Media and Sport Select Committee – Privacy and Media Intrusion' (2003); Lord Justice Leveson (n 101) Part D, Ch1, [6.1].
[107] Reiman (n 67); Inness (n 86); FD Schoeman, *Privacy and Social Freedom* (CUP 1992).
[108] Inness (n 86) 56–58.
[109] DK Citron, 'The Roots of Sexual Privacy' (2019) 42 Columbia Journal of Law and Arts 383.
[110] Inness (n 86) 116–120.
[111] Lord Justice Leveson (n 101) Witness Statements of: Gerald Patrick McCann; Sally and Bob Dowler; and Hugh Grant.
[112] BC Newell, CA Metoyer and AD Moore, 'Privacy in the Family' in B Rössler and D Mokrosinska (eds), *Social Dimensions of Privacy* (CUP 2015) 105.

access by other members can increase mutual trust between them: it may elevate a child's willingness to confide in their parents when they feel insecure,[113] or a spouse's preparedness to be frank and honest with their partner. Intimacy-based privacy allows family members to feel like individuals in their own right, over and above parents with parental duties, spouses with spousal expectations, and children with children's responsibilities. Protecting spheres of intimacy within the family is, therefore, also linked to the psychological integrity, autonomy, freedom and dignity of individuals within that family.

Intimacy also covers anodyne, trivial or public aspects of an individual's relationship with others, because they are in the 'intimacy' domain and pertain to his ability to form, maintain and grow from his relationships. "Privacy is essential to…our relationships with others",[114] because without it we are less inclined to take chances with others, given the lack of control a loss of privacy entails.[115] Individuals engage in different patterns of behaviour, depending upon the particular person, social interaction or social expectations, and adjust their behaviour to maintain cordiality or peace with others; they use tact and judgment in relations with others.[116] Such socialisation behaviour is frustrated if the individual cannot control who has access to him, and how he presents himself in different situations.

The intimacy of relationship-formation sits alongside the intimacy of certain relationships, including between friends, lovers and family members. These relationships require privacy protection, just as the individuals within those relationships require privacy protection, as discussed *vis-à-vis* intra-family intimacy: "privacy creates the moral capital which we spend in friendship and love".[117] Within the intimacy of a particular relationship, the individuals may choose, *voluntarily*, to give each other private information about themselves.[118] That element of autonomy, again, is a prerequisite for this intimate aspect of life, maintaining and enhancing relationships. Were two friends never alone, their relationship may be stultified,[119] because they might not be at ease in that relationship given the exposure. They might share fewer confidences with each other. Likewise, two lovers might not express themselves so readily to one another. Two spouses might not be as honest with each other.

Even though intimacy has links to the other privacy justifications already discussed, it does not provide comprehensive justification on its own: neither does it cover non-intimate aspects of an individual's life that might deserve protection on grounds of dignity, autonomy and psychological well-being, nor is it clearly defined or delineated. It may unnecessarily complicate the normative foundations of privacy protection to invoke the concept of intimacy as a stand-alone justification when discussing family, or relationship-building. Delineating intimacy relies heavily upon intuitive reasoning: "things are intimate when they draw their meaning from someone's love, liking, or care".[120] That covers family life, health, sexuality, and relationships, but what else? Does it include going for a walk, meditating, and buying groceries? What happens when society does not recognise as intimate an

[113] ibid 110.
[114] Lester (n 29) 146.
[115] Rachels (n 95) 326.
[116] ibid 327–328.
[117] Fried (n 67) 484.
[118] ibid 485.
[119] Rachels (n 95).
[120] Inness (n 86) 74.

aspect of an individual's life that he himself might consider intimate? When should norms intervene to avoid "unfettered relativism" of intimacy?[121]

Intimacy has also been defined in terms of its ends rather than its characteristics, but these ends are inseparable from dignity, autonomy and psychological well-being:[122]

> (1) insulation of personal relationships from accountability for social or global ends and norms, (2) protection of individuals from unconditioned exposure of central emotional vulnerabilities, and (3) encouragement of emotional investment in potentially self-expressive roles and relationships.

Intimacy may be a means of unifying other privacy justifications, but even then it is not comprehensive. How will upholding privacy *vis-à-vis* activities "that imperfectly cover intimacy"[123] be justified?

The fluidity and incompleteness of intimacy not only undermine its justification of privacy, but can expose privacy to exploitation by a society wishing to suppress controversial expression threatening the status quo conception of morality:[124]

> The statement [of an Israeli Supreme Court in a case about a book with details of a love story and private information about a woman] "There are norms for which it is worth even losing a few 'good books'" raises concerns about the enforcement of the right to privacy as an oblique way of imposing censorship on grounds of morality.

Intimacy is best understood as a normative descriptor or category of particular aspects of an individual's life for which it is justified to uphold the privacy right, not upon the question-begging grounds of 'intimacy' itself, but upon other grounds (including dignity, autonomy and psychological well-being). That might include family life, relationships, personal diaries, as well as regular day-to-day activities such as exercising and grocery shopping. Losing privacy over those aspects of life might undermine an individual's autonomy in how he lives his life, his freedom from societal gaze, and his dignity as a being with inner self-worth and capacity to realise the 'good life'.

e. Personal self-reflection, intellectual development and FOE

Privacy is viewed as safeguarding individuals' ability to undertake self-reflection and intellectual development.[125] Not only does it enable introspection, critical thought and self-betterment, it protects the individual from external pressures of conformism, and risk-averse thinking, which disable and discourage such personal development.

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[121] ibid 87.
[122] Schoeman (n 107) 151.
[123] Inness (n 86) 92.
[124] N Cohen, 'Love, Story, Law' (2016) 28 Law & Literature 209, 210.
[125] N Richards, 'Intellectual Privacy' (2008) 87 Texas Law Review 387.

Protecting and fostering personal and intellectual growth is closely connected with the other privacy normative underpinnings of autonomy, freedom, psychological security and dignity. Privacy gives an individual control over the barriers around her beliefs and objectives. Her autonomy in thought is preserved when she can choose how far others (including the state) can have access to the patterns of her behaviour, opinions and intentions. So she feels secure in life, and in her ability to reflect critically upon her thoughts and actions and independently to develop her convictions: "[p]rivacy is essential to free thought".[126] Away from others' "unwanted gaze or interference",[127] when an individual is confident others are not empowered to access how she thinks, she is free to test her convictions in ways that might not conform to a societal status quo. Empirical analysis of the effects of mass systemic surveillance has demonstrated that individuals, who believe their patterns of behaviour might be watched by others, *subconsciously* adjust – correct – their actions and thoughts to align themselves with status quo mores and expectations.[128] Individuals in such a position might not feel the outright and active sense of insecurity and fear that affects their psychological well-being causing them to limit their own freedom of thought. Instead, they almost instinctually limit this freedom, deprioritise critical and non-conformist self-reflection and deliberation, without necessarily consciously feeling intellectually deprived in any way.

If privacy is justified for safeguarding free personal and intellectual development, then privacy can enable FOE.[129] It gives individuals security, confidence and freedom to express themselves with Searlean "sincerity", add meaningfully to the marketplace of ideas, aid truth-discovery, and bolster democratic participation. This normative connection between privacy and FOE is critically important when the two rights *do* conflict, and a court must choose between the two. The court must explicitly acknowledge that privacy is justified in part for its contribution to FOE, and address how this normative underpinning is affected by the particular facts; there may be scope for finding that upholding the privacy right and suspending the FOE right would not have so damaging an effect overall on the normative underpinnings of FOE.[130]

f. Participation in society

The final individual-centric justification for privacy is that it supports individuals to participate in their society. This normative stance is contrary to communitarian criticisms of privacy that it engenders isolationistic, even anti-social, behaviours and attitudes, eroding the cultural fabric of a cohesive and harmonious society.[131] Such scepticism has seen some societies refrain from giving it legal protection:[132] when privacy is equated with asocial aspects of individuals' lives, it might be seen to undermine the flourishing of social networks, upon which (especially pluralistic) society relies for its cohesion and harmony. If privacy is considered an inward-focused and isolating device, it would also be incompatible with the Rawlsian or Razian conceptions of individual liberty as conditional

[126] Lester (n 29) 146.
[127] Richards (n 125) 389.
[128] M Kaminski and S Witnov, 'The Conforming Effect' (2015) 49 University of Richmond Law Review 465.
[129] B Goold, 'How Much Surveillance Is Too Much?' in DW Schartum (ed), *Overvåkning i en rettsstat* (Fagbokforlaget 2010) 42–43; A Lever, 'Privacy, Democracy and Freedom of Expression' in B Rössler and D Mokrosinska (eds), *Social Dimensions of Privacy* (CUP 2015).
[130] Explained in Chapter 6.
[131] A good summary of which can be found in: A Etzioni, *The Limits of Privacy* (Basic Books 1999); D Feldman, 'Privacy-Related Rights' in P Birks (ed), *Privacy and loyalty* (Clarendon 1997) 18–23.
[132] Feldman (n 131) 19.

upon cooperation amongst individuals, and the respect an individual shows to others, his society, and the social institutions guaranteeing the greatest 'net' freedom for everyone.[133]

However, privacy need not undermine the social fabric of a community, by producing silos of egotistical and socially careless individuals. In facilitating individual autonomy, privacy need not automatically lead to societal fragmentation.[134] The cascading effects of adequate protection for individual privacy include more confident, outward-looking and socially active individuals.

According to its other normative underpinnings, privacy increases individuals' sense of self-worth and recognition by their community as someone with personhood and entitlements to their own 'space', and protects individuals' autonomy by giving them control over their lives and the barriers around aspects of their lives. That sense of self-worth and control may contribute to individuals' feelings of sanctity and peace in their lives, safeguarding their psychological well-being, stability and sense of security. This might in turn empower individuals, giving them more confidence to act and reason without threat of social reprisal.[135] It might allow individuals to develop strong relationships with others. Significantly, it might also enable and encourage individuals to be more active in their society, and participate more meaningfully in and be more engaged with their community. It is the *protection* of privacy, and not its erosion, that gives individuals the sense of confidence and security allowing them to focus less upon themselves in isolation and more upon their role in their community. Individuals' desire to protect their private sphere is strongest when their privacy is weakest. Victims' testimonies in the Leveson Inquiry, and observations of oppressive surveillance regimes, as noted above, illustrate how diminished privacy drives individuals further into themselves, for fear of the scrutiny of their society or the apparatuses of power.

The act of "outing", deliberately exposing an individual's private information without their knowledge or consent, has such overpowering effects on individuals and their sense of control over and security in their own lives, that it not only undermines dignity by treating them entirely as a means to the 'outer's' aim, but it weakens their will and ability to participate actively in their society.[136] Outing can shame individuals into silence, eroding their sense of control over the protective barriers around their lives, and their confidence to contribute to their society by protesting, positing novel ideas, disagreeing with others, and campaigning for causes aligning with their own morality. 'Doxing' is a particularly efficient and damaging form of outing: it involves collecting and compiling different data on individuals and publishing it online to expose them.[137] This may reveal the identity of anonymous commentators or campaigners, harass individuals by leaking their private information, and encourage the wider public to vilify and harass individuals based upon the exposed private information. Outing and doxing encapsulate ways of grasping the importance of protecting privacy: it shields individuals from the vindictive, targeted and harmful actions of others, thereby continuing their willingness to participate confidently and freely in society.

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[133] ibid.
[134] ibid 21.
[135] Insofar as they do not harm others.
[136] Lever (n 129) 167–169.
[137] For a summary of doxing in context, see: A Hern, 'Stolen Nude Photos and Hacked Defibrillators' *The Guardian* (Law Vegas, 3 August 2017) <https://www.theguardian.com/technology/2017/aug/03/ransomware-future-wannacry-hackers> accessed 6 April 2018.

The argument that the *absence* of privacy produces an environment of "hermetically isolated individuals"[138] is therefore stronger than the argument that its presence does the same. Privacy protection fosters an intertwined community of engaged and active individuals, and, given that individuals are mutually dependent in achieving the ends they pursue,[139] privacy protection can bring them closer to those collective ends. Increased participation in society, resulting from a sense of inner sanctity gained from strong privacy protection, is in turn valuable to the individual: it enlivens the cooperative and social role of humans, and that is a vital element of human flourishing.[140] This reflexive socialisation value of privacy therefore should be acknowledged alongside the other normative underpinnings of this right.

One major limitation of this justification must also be recognised: it might lead to privacy being used to thwart accountability.[141] Sometimes private information must be made public, for the purposes of political or legal accountability, and that requires suspending or overtopping the justifications for privacy, for the sake of conflicting norms. The justification from participation in society cannot be deployed to overcome the need, in certain circumstances, to hold individuals to account. Individuals' willingness to participate in society would be diminished, but that normative consequence cannot generally, in and of itself, prevent their society legitimately holding them to account. Whether the demands of accountability should take priority over the normative underpinnings of privacy depends upon the particular facts of each case.

That said, individuals' participation in society can justify upholding the privacy right. When reasoning about the privacy right in the tort's second stage, courts should recognise the shortcomings of normative arguments that maintain privacy is limited to making individuals introverted, anti-social and isolated, thereby detracting from their ability to participate in and contribute to their society. Privacy's value to the individual critically extends to enabling them to be social beings and partake meaningfully in their community.

2. Value of privacy to society

a. Introduction

Privacy can also be valuable to society, and it is increasingly argued that this social value should affect how privacy's legal protection develops and is justified.[142] Privacy serves society as a whole in several ways, operating

[138] Feldman (n 131) 49.
[139] ibid 22.
[140] ibid 21.
[141] H Arendt, *The Human Condition* (UCP 1958) 72; C Pateman, 'Feminist Critiques of the Public/Private Dochotomy' in S Benn and G Gaus (eds), *Public and private in social life* (St Martin's 1983); AL Allen, *Uneasy Access* (Rowman & Littlefield 1988) 51–57; AL Allen, *Why Privacy Isn't Everything* (Rowman & Littlefield 2003); B Rössler, 'Gender and Privacy' in B Rössler (ed), *Privacies* (Stanford University Press 2004) 52–57; B Rössler, *The Value of Privacy* (RDV Glasgow tr, Polity 2005) 23–27; JW DeCew, 'The Feminist Critique of Privacy' in B Rössler and D Mokrosinska (eds), *Social Dimensions of Privacy* (CUP 2015).
[142] For example: PM Regan, *Legislating Privacy* (UnivNC Press 1995); Feldman (n 127); A Cockfield, 'Protecting the Social Value of Privacy in the Context of State Investigations Using New Technologies' (2007) 40 UBCLR 41; V Steeves, 'Reclaiming the Social Value of Privacy' in IR Kerr, V Steeves and C Lucock (eds), *Lessons from the Identity Trail* (OUP 2009); H Nissenbaum, *Privacy in Context* (Stanford University Press 2010); K Hughes, 'The Social Value of Privacy' in B Rössler and D Mokrosinska (eds), *Social Dimensions of Privacy* (CUP 2015); PM Regan, 'Privacy and the Common Good' in B Rössler and D Mokrosinska (eds), *Social Dimensions of Privacy* (CUP 2015).

as a common good,[143] and these are indeed part of its normative underpinnings. Privacy deserves legal protection when it enables individuals to perform social functions,[144] or protects them from certain social harms.[145] To the extent that individuals with protected privacy can contribute more or better to their society in various ways, society should protect individual privacy, and, to the extent that privacy is unattainable unless there is a universal minimal standard, the law should protect privacy as a collective good.[146]

b. Democracy

Privacy is valuable to society because it strengthens democracy.[147] If a strong democracy consists of regular elections with sufficiently interested and informed voters, open discussion, and constant testing of established and proposed policies, then individual privacy contributes to democracy. In safeguarding individual autonomy, freedom, sense of self-worth, security, and confidence to participate in society, privacy creates and maintains confident, interested, informed and critical individuals, at liberty to protest and question policies, and cast their votes following meaningful deliberation with others and an honest decision on their own political conviction.

"Democracy suffers and totalitarian dystopias flourish when privacy is diminished".[148] The insecurity inherent in privacy deprivation is the tool by which control and power are taken from individuals and consolidated within a centralised institution. As discussed, outing and doxing deter individuals from partaking in their society, expressing and acting upon their political beliefs, and engaging with others who might disagree with them. Privacy-destructive actions control and silence individuals by stimulating fear of exposure or retribution.[149] The loss of control inherent in the loss of privacy is a *transferral* of power from the individual to another entity. That disempowering and resulting power imbalance is repugnant to democracy, which relies upon empowerment and independence of individuals as the most important units of political action.

Given that FOE and privacy both protect democracy, the conflict in the tort's second stage might be deeper than just as between two rights: it might be a conflict between two opposite ways of securing the same normative objective. It will depend upon the particular facts whether and to what extent the implications of upholding privacy or upholding FOE involve enhancing or undermining democracy; the proximity of those facts to the democracy-promotive underpinnings of privacy, and to the democracy-promotive underpinnings of FOE, will determine how the court engages with these normative underpinnings and which right it chooses to uphold at the expense of the other. Whatever the facts dictate, the courts must acknowledge at a normative level that privacy can serve democracy, and that accepting democracy-related normative arguments in favour of FOE does not automatically demolish the democracy-promotive aspects of privacy.[150]

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[143] Regan, *Legislating Privacy* (n 142) 212–243; Regan, 'Privacy and the Common Good' (n 142).
[144] Feldman (n 131) 15–16.
[145] DJ Solove, *Understanding Privacy* (HUP 2008) 91–92.
[146] Regan, *Legislating Privacy* (n 142); JP Nehf, 'Recognizing the Societal Value in Information Privacy' (2003) 78 Washington Law Review 1; Nissenbaum (n 142) 87–88.
[147] Gavison (n 67) 455; S Simitis, 'Reviewing Privacy in an Information Society' (1987) 135 University of Pennsylvania Law Review 707, 732; A Lever, *On Privacy* (Routledge 2012) 24–28.
[148] Hughes, 'The Social Value of Privacy' (n 142) 228.
[149] Lever (n 129) 168.
[150] For a critical examination of lack of judicial acknowledgement of link between privacy and democracy, see: A Ieven, 'Privacy Rights in Conflict' in E Brems (ed), *Conflicts between fundamental rights* (Intersentia 2008) 59–67.

c. Societal development and progress

In the same way that it strengthens democracy, privacy can contribute to societal development and progress. Insofar as it facilitates and encourages intellectual development of individuals, as well as the contribution of individuals' thoughts and ideas to society, privacy benefits society.[151] Intellectually confident and active individuals benefit their society. The continually evolving ideas of free and autonomous individuals, when made available to society, can stimulate progress in economics, technology, science, politics and art. Social progress, therefore, is in great part contingent upon the protection of individual privacy, and courts adjudicating on the privacy right must recognise this as a potential justification for upholding that right.

d. Cohesion in a pluralistic society

A similar justification for upholding the privacy right is that it can promote cohesion in a pluralistic society, and, resultantly, social harmony. Rather than generating anti-communitarian and anti-socialisation results,[152] safeguarding individual privacy actually stimulates socialisation and benefits the community by alleviating friction between the diverse values and interests held by individuals within that community.[153] In giving individuals the safety and sanctity of their own mental and physical space, in which to develop and express their own personal values and beliefs, and in ensuring that personal space is guaranteed to all individuals in equal measure, a legal right to privacy can enable individuals to feel content in their freedom to live their lives according to their own mores, without having to compete with others to achieve that freedom. In this way, privacy can encourage mutual respect, even empathy, between individuals in their interactions, generating tolerance in a diverse society, and thereby maintaining pluralism in a liberal society. On this reasoning, in spite of cultural and value differences, individuals with a guarantee of a private sphere will *want* to interact with others in their society, and will be willing and able more readily to develop meaningful relationships with others in their society. To that extent, privacy can ensure even the most pluralistic societies maintain cohesion.

Privacy therefore has the same tolerance-fostering function as FOE.[154] Given as much, courts faced with a conflict between these two rights must engage with this normative overlap between privacy and FOE, and pay close attention to how the particular facts affect both rights' capacity to foster social tolerance and cohesion, in order to decide which right to uphold and which to suspend.

e. Minority protection

Privacy is further justified on grounds related to cohesion in a pluralistic society, on the basis that it protects minorities. Insofar as violations of privacy undermine individual dignity, autonomy, freedom and security, denial of privacy will fall most heavily upon minorities, or the most weak and vulnerable members of a society, who already have depleted relative power, autonomy and security in their society. Not only would the weakest and most

[151] Hughes, 'The Social Value of Privacy' (n 142) 229.
[152] Etzioni (n 131).
[153] Hughes, 'The Social Value of Privacy' (n 142) 230.
[154] Bollinger (n 34); Raz (n 32).

vulnerable members of society find it most difficult to protect themselves against intrusive surveillance or aggressive press tactics, such individuals would be least likely to question settled norms in a way that might stimulate social evolution and progress. For example, the prevalent or majority tendency in a society might be to suspect minorities as threatening the established social order, rendering it acceptable and favourable to keep a close eye on their motivations and actions, and to make public various aspects of their private lives. Privacy intrusions, including outing and doxing, can well become instruments by which individuals with minority views or minority ways of life can be threatened, attacked, subordinated, or forced to change and adopt majority mores.

Privacy protection, therefore, has particular normative benefit for members of a social minority, and who therefore might be less able to exercise social power and participate meaningfully in their society. Not only would privacy foster tolerance for and social engagement with individuals belonging to minorities, it would have an empowering effect on those minorities by guaranteeing them the equal minimal protection of dignity, autonomy and security as guaranteed to any member of the society.

The limitation of this justification for privacy is that it will be useful only when recognised at the highest level of abstraction, which might not assist a court in examining a case of a privacy-FOE conflict, or when the privacy-subject in question can be categorised as a member of a social minority. Though minority protection is a normative underpinning of privacy, like the other underpinnings, it does not offer perfect and comprehensive justification for upholding that right.

ii. Conclusion

Jurists must address the normative complexity and various underpinnings of privacy in adjudicating the tort's second stage, and not merely assume the multiplicity of these justifications gives the privacy right some unmeasurable degree of importance when compared to the conflicting right to FOE: that could lead the "practical tail to wag the theoretical dog".[155]

Like the FOE right, privacy is based upon many and varying normative underpinnings, all of which have certain shortcomings that prevent them from being comprehensive and absolute justifications for upholding that right in all circumstances. Moreover, privacy justifications draw upon not only classical theories of dignity, autonomy and liberty, but also psychology, sociology and behavioural science. This makes a single all-encompassing definition of the privacy right elusive. A further normative complication arises from changing social practices in information communication, which can influence conceptions of privacy, and its importance and limitations, so the varied plethora of normative underpinnings of privacy may expand, contract, or change at the margins, according to those changing social needs and conceptions.

This makes the judicial task of engaging with the normative underpinnings of rights in adjudication all the more pressing: judges must articulate the basis of their reasoning about the privacy right in the tort's second stage, and justify in a precise, principled and normatively engaged way their decision on the facts either to uphold or to suspend the privacy right.

[155] Feldman (n 98) 568.

(d) Conclusion

Although both FOE and privacy protect and enhance both the individual and society, there is a problem of indemonstrability *vis-à-vis* constant and comprehensive normative justification for upholding each right as it might arise in any given circumstances. The normative complexity of each right means that the normative strength of each right will always ultimately depend upon the particular circumstances in which the rights arise, and can never be pinpointed in the abstract.

This has implications for resolving the privacy-FOE conflict in the tort's second stage. There is no single, constant normative standard for the courts to invoke and apply when deciding which right to uphold and which to suspend. Not only must the court be sensitive to the normative importance of both FOE and privacy, so that suspending one right in order to uphold the other should not be done lightly or in an unprincipled or opaque way, the court must also remain acutely aware of the circumstantially varying strength of the normative justifications for both of these rights, and the potentiality of claims to privacy and FOE[156] to be deployed against the many and varied normative underpinnings of each right. Furthermore, the court must always advert to the *shared* normative underpinnings of the privacy and FOE rights, lest it oversimplify the philosophical bases of these rights, and too hastily reject one right as having weaker normative foundations than the other. This complexity makes it indubitably essential for any court traversing the tort's second stage to ensure its reasoning is normatively anchored, clear and precise, and takes account of the particular effects of publication and suppression of the information in question in the specific case at hand.

The courts' method for resolving the privacy-FOE conflict in the tort's second stage must at its heart therefore account for the normative complexity of each right, and the implications of that complexity. It must enable and oblige the court to connect the particular consequences of suppression and publication on the facts with the relevant normative underpinnings of each right, to establish how the alternative outcomes of the case can normatively further or frustrate the rights that are central to the case. Chapter 4 examines the strengths and weaknesses of different theoretical approaches to resolving rights-conflicts with precisely this complexity and its implications at the forefront of the inquiry.

[156] Suppression of information and publication of information, respectively.

CHAPTER 4. RESOLVING RIGHTS-CONFLICTS

(a) Introduction

This chapter examines nine different rights-conflict resolution theories through the logical and normative lenses of the preceding chapters, as the next point in the inquiry into how to improve judicial reasoning in the second stage of the tort of misuse of private information.[1]

Some theories cannot logically apply to the tort's second stage, because they negate the existence of genuine conflicts: the **deontological precedence theory** and the **threshold consequentialism theory**. These theories must be disregarded. Out of the logically applicable theories, only those which treat both rights as qualified and presumptively equivalent are suitable for the second stage; rights-ranking theories, including the **strong absolutism theory**, **absolute precedence rules theory**, and **innate value theory**, should therefore be disregarded in favour of context-based theories.

Out of the context-based theories, the strongest are those which demand precision in justificatory reasoning, a focus upon the rights' normative underpinnings, and a connection between those underpinnings and the conflict's particular circumstances. Such theories would be best suited to making judicial reasoning in the tort's second stage more consistent, transparent and principled, according to the two rights themselves and not external factors. These theories are the **optimality theory** and **proportionality theory**, and should be preferred over the weaker theories, namely, the **trade-off theory**, and **public interest theory**.

(b) Conceptions of the general structure of morality

Some of the theories examined in this chapter arise out of different conceptions of the general structure of morality. This is because rights-conflicts, taken to a higher level of abstraction, are moral conflicts, and how they are resolved will be influenced by how the behaviour and consequences of competing moral demands are characterised. General structures of morality are composed of different layers, each dominated by consequentialist or deontological norms dictating how this competition is regulated. Michael Moore's[2] and Matthew Kramer's[3] conceptions of morality's general structure are explored here,[4] because they inform four theories of rights-conflict resolution considered in this chapter, including one of the stronger theories, **optimality**.

In Moore's account of morality,[5] the first level contains consequentialist reasons to effect valuable outcomes. These reasons-for-acting generate varying outcomes and only some generate moral duties. The second level contains deontological duties and permissions, which are always superior to first-level reasons-for-acting.[6] The third level terminates second-level duties and permissions, when discharging them would generate calamitous consequences, of undetermined degree. When these consequences are so dire as to cross the calamity threshold

[1] A summary of these theories can be found in the Appendix.
[2] M Moore, *Placing Blame* (OUP 1997).
[3] M Kramer, *Torture and Moral Integrity* (OUP 2014).
[4] Both were put forth in the context of the moral right not to be subjected to interrogational torture.
[5] Moore (n 2) ch 17; Kramer (n 3) 25–26.
[6] They will always negate any inconsistent first-level reasons-for-acting.

into the third level, a duty-bearer is no longer obliged to discharge that duty.[7] This threshold makes Moore's account of morality essentially consequentialist. It is the consequences of a situation, rather than deontological imperatives, that ultimately dictate the moral course of action. At the third level, all imperatives leading to calamitous consequences are extinguished, eliminating any potential conflicts with deontological duties.

Kramer's account of morality involves multiple low-weight consequentialist reasons-for-action, which generate duties and permissions, but are always defeasible by inconsistent deontological duties or permissions.[8] More weighty consequentialist reasons-for-action generate moral duties and permissions which can become "locked in a conflict with…diametrically opposed [deontological] moral requirement[s]".[9] The conflict's resolution depends upon the deontological duty's strength. Because deontological duties are always binding, innately obligatory regardless of consequences, Kramer describes such duties as "absolute" duties. He then distinguishes between "strongly absolute" and "weakly absolute" duties. If strongly absolute, the duty is *always* more stringent than any competing duty, regardless of consequences, and the conflict is always resolved in favour of the strongly absolute duty. If weakly absolute, the duty's stringency may be "overtopped" by a conflicting duty's stringency in "extreme urgency and desperation".[10]

When this undetermined degree of sufficiently serious harm obtains, a weakly absolute deontological duty may justifiably be breached by the discharging of a conflicting consequentialist duty, because, in those circumstances of calamity, the latter is *more stringent* than the former. A weakly absolute duty, therefore, is not necessarily also the most stringent duty, in all and any circumstances. Whether a weakly absolute duty *actually should be* overtopped[11] by a consequentialist obligation to avoid calamity depends upon whether the situation is dire enough, and that, in turn, depends upon the normative nature of the duty and the extent of any requisite contravention. If the situation is dire enough, the conflict is resolved in favour of the consequentialist duty to avoid such calamities, inducing a breach of the deontological duty.

Therefore, unlike Moore, Kramer does not envisage a threshold of strong moral permissibility, past which all duties[12] leading to calamitous outcomes are extinguished. Instead, it is a threshold of *moral optimality*. This is central to the **optimality theory**, explored below. Deontological duties *persist* past that threshold, at which point a genuine conflict obtains, between a weakly absolute deontological duty and a particularly strong consequentialist duty. This conflict is resolved by closely examining the deontological duty's strength and nature, and the extent and gravity of any contravention. That does not involve determining which path of action is morally right or wrong, because both possible outcomes involve breaching a duty. Instead, it involves determining which wrongful action (breach) *is nevertheless optimal*. Unlike Moore, Kramer reasons that such an action can involve breaching a persisting, deontological duty (committing a moral wrong, or generating real *loss* in terms of rights).

[7] This applies to positive duties to act, and negative duties to refrain from acting: crossing the calamity threshold can make it morally wrong *to do* something, as well as *to refrain from* doing something; in the latter case, the third level can make it morally obligatory to take a certain course of action, to avoid the calamitous consequence.
[8] Kramer (n 3) 26–27.
[9] ibid 26.
[10] ibid 27.
[11] But not extinguished.
[12] Including deontological duties.

The tort's second stage involves a conflict between *pro tanto* rights, privacy and FOE, neither of which have absolute correlative duties: they are qualified. The *pro tanto* right that is suspended generates a loss of rightholding entitlement, but it is not breached.[13] Nevertheless, Kramer's bipartite concept of absolutism can be applied to this conflict. Focusing upon the differences in *process of resolution* of conflicts involving absolute, deontological duties,[14] rather than the absolute, deontological *nature* of duties, permits Kramer's approach to be applied to the privacy-FOE conflict. What matters is the relative strength of the *pro tanto* rights, and how that can be described as strong or weak absolutism. If a *pro tanto* right is *comparable* to a weakly absolute duty *relative* to the other *pro tanto* right, then the process for resolving a conflict involving such a duty should be employed. Just as Kramer's weakly absolute duty is relatable to *pro tanto* duties, Kramer's breach (or overtopping) is *relatable to* suspension of a *pro tanto* right. Further, the moral wrong committed in the breach at the resolution of the conflict past Kramer's calamity threshold is *relatable to* the loss of rightholding entitlement suffered due to the suspension of a *pro tanto* right at the resolution of the tort.

Thus, applying Kramer's account of weakly absolute duties crossing the calamity threshold to a case pursued under the tort, we can consider the following scenario: all journalists bear one duty not to disclose individuals' sexual information (relatable to a weakly absolute duty), and simultaneously another consequentialist duty to inform the electorate about MPs' credibility. A journalist obtains details about the extra-marital affair of an MP, who is pledging in his re-election campaign to criminalise adultery. Let us imagine that it is sufficiently harmful not to inform the public about this MP's hypocrisy, for the consequentialist duty to publish to be more stringent than the weakly absolute duty not to publish. The urgency to avoid that outcome renders it morally permissible for the journalist to abandon the duty not to publish an individual's sexual information, in order to discharge the duty to inform the electorate.

These different conceptions of morality's general structure must be borne in mind when identifying and critiquing different rights-conflict resolution theories.

(c) Logically inapplicable theories

Some theories purporting to resolve rights-conflicts actually *eliminate* conflicts by extinguishing one right. In line with how both Moore and Kramer conceive of low-level, low-weight consequentialist reasons and duties, these theories presume that only apparent rights-conflicts arise when one right challenges another: genuine conflicts never arise. Only one right persists on the facts, while the other is no right at all. Given the tort's second stage involves a genuine conflict between two recognised, justiciable rights, these theories cannot logically apply to it.

Understanding such theories can enhance an understanding of the tort's second stage, and which approaches to it are inappropriate. Thus the **deontological precedence theory** posits that inconsistency between a first-level or low-weight consequentialist duty and a second-level or deontological duty is always resolved in favour of the latter. The other duty is extinguished, or ultimately never obtains as a genuinely binding duty. Similarly, the **threshold consequentialism theory**[15] posits that an inconsistency between a second-level duty and a third-level

[13] Discussed in Chapter 2.
[14] Depending upon whether they are weakly or strongly absolute.
[15] Arising from Moore's account of morality.

consequentialist duty is always resolved in favour of the latter. The former has no place at the third level, and is extinguished as soon as the threshold is crossed. No such conflict obtains.

Such reasoning should not, as a matter of logic, be applied to the tort's second stage.

(d) Logically applicable theories

Theories which *do* recognise genuine conflicts provide ways of resolving them and justifying the decision to uphold one right and suspend the other. Some of these theories are discoverable in Moore's or Kramer's account of morality, while others are discoverable in broader theoretical traditions.[16]

Suitability to the tort's second stage depends upon whether the theory explicitly and constantly acknowledges that whenever one right is upheld and the other suspended, the following is implied:

- The party whose right is suspended bears a double burden:
    - He must surrender his entitlement under that right; and
    - He must discharge the duty correlative to the other party's upheld right.[17]

Explicitly and constantly acknowledging this implication focuses courts' attention on each right's normative underpinnings, because their decision on who should bear this double burden (which right should be suspended) is most strongly justified when it is consistent with the normative conception of the rights themselves. The relationship of entailment between surrendering entitlement to a right and discharging a duty to another person requires courts to analyse how their decision's factual consequences might further and frustrate the interests protected by the rights and the rights' objectives. The essential question is whether it is consistent with either right's normative underpinnings to determine that one rightholder must surrender his entitlement and simultaneously discharge his duty to another, as opposed to that other rightholder bearing that double burden. Here, the court ought to consider how far the burden-bearer is being instrumentalised, for how strong a purpose, and at how high a price to their own protected interests.[18]

Logically applicable theories are characterised as either rights-ranking or context-based. Rights-ranking theories resolve conflicts by ranking rights according to a predetermined scheme, regardless of variable circumstances. Context-based theories resolve conflicts by accounting for circumstances, and are typically said to 'balance' the two rights in context.

[16] Including where proportionality and commensurateness are the ultimate aim in constitutional adjudication, and where unconstrained utilitarianism decides all moral and legal questions.

[17] This is consistent with Hohfeld's correlativity axiom discussed in Chapter 2, and, applied to the second stage, means that, where privacy is upheld, the defendant must refrain publishing (or pay compensation), or, where FOE is upheld, the claimant must allow publication.

[18] Or to society's protected interests.

i. Rights-ranking theories

1. Nature and unsuitability of rights-ranking theories

Rights-ranking theories use predetermined, unvarying orders of precedence to decide which right supersedes the other in a conflict.[19] They are, therefore, unsuitable to the privacy-FOE conflict, given both rights are qualified, presumptively equivalent, and normatively complex. Neither privacy nor FOE rest upon a settled single value, providing constant and comprehensive justification for upholding the right regardless of circumstances.[20] It depends upon the facts which of their normative underpinnings are relevant, and according to which underpinnings it is justified to uphold one right and suspend the other.

Resolution of the privacy-FOE conflict does not necessitate breach of the unsuccessful right; it necessitates suspending one of the *pro tanto* rights.[21] It is not a breach of law for courts to permit or forbid publication, in order to resolve the conflict and the action brought under the tort, on the ground that both outcomes entail a loss of a rightholding entitlement. Courts' inability to discharge their duty correlative to the suspended right is *justified*, if that suspension accords with the qualified right's normative underpinnings. Arriving at that justification requires considering *both* the circumstances in which the rights have *pro tanto* effect, *and* the rights' normative underpinnings. In excluding all consideration of the factual consequences of ordering the rights in a particular way, rights-ranking theories cannot provide the framework required for resolving the privacy-FOE conflict.

The tort's second stage must not involve a rights-ranking theory. It is important to be aware which theories are rights-ranking, and therefore inappropriate for that stage, when critiquing the current approach and considering a new method. The following theories are representative of the rights-ranking characterisation.

2. Representative pool of rights-ranking theories

a. Strong absolutism theory

The **strong absolutism theory** arises from Kramer's account of morality, positing that, where a conflict arises between a deontological duty and a weighty consequentialist duty (to avert the calamity), if the former is strongly absolute, it will always displace the latter. This theory does not extinguish the latter duty. It acknowledges its persistence and entails its breach: a normative wrong is committed, because the calamity has not been averted. The conflict is real, and one of the norms must be breached. That breach is treated as a justified wrong – inescapably a wrong, but justified because it was induced by the upholding of an inherently superior right.

This theory cannot assist the adjudication of qualified rights, including the tort's second stage, because it implies the suspended right is a mere exhortation (to avoid suppression of speech or invasion of privacy), while the upheld right has inherent moral worth, regardless of the consequences it might have for other rightholders. This is

[19] The lower-ranked right is still only suspended, rather than extinguished, meaning these theories are logically applicable: the ranking process determines precedence only, and not the bindingness of a right.
[20] Discussed in Chapter 3.
[21] Confirmed in Chapter 2.

inconsistent with the nature of qualified rights, which need not always be upheld, regardless of circumstances. Each right's normative importance crystallises only on the facts. It is impossible to pinpoint the relative normative importance of these rights in the abstract. Under this theory, however, the resolution of the privacy-FOE conflict would be the same in every case: one of the rights would always be ranked above the other. The suspended right exists solely to protect against dire consequences, while the upheld right inherently dictates outcomes regardless of consequence. The theory requires that, ahead of any conflict, a normative decision be made that one right is strongly absolute. No such normative decision has been made for either privacy or FOE. If it had been, then all tort cases would be resolved either with an injunction (or damages award), or with permission to publish. That would see the law place a permanent burden on either all privacy rightholders or all FOE rightholders, effectively disabling that right whenever it came into conflict with the other.

b. Absolute precedence rules theory

The **absolute precedence rules theory** resolves rights-conflicts by applying a fixed set of rules to that conflict. This theory relies upon rights' absolute, non-variable characteristics, ignoring the circumstances in which rights are binding. Three examples of such rules commonly appear in statutory interpretation, but could also conceivably (though not necessarily) apply to rights-conflicts:[22] *lex superior inferiori derogat* (a higher-level right takes precedence over a lower-level right), *lex specialis generali derogat* (a more specific right takes precedence over a more general right), and *lex posterior priori derogat* (a more recently enacted right supersedes an earlier enacted right).

Lex superior inferiori derogat might apply *vis-à-vis* entrenched constitutions, in which some rights (like FOE) are codified and supreme, and others (like privacy) are not. The former, being *superior*, would always displace latter, being *inferior*. In England neither FOE nor privacy are entrenched in this way. Nor is there a difference in when they were juridified into their current form, or in the overall generality of their application: both are Convention rights incorporated into English law at the same time,[23] and both are applicable to all individuals in potentially any circumstances. This theory is therefore unsuitable to the tort's second stage.

c. Innate value theory

The **innate value theory** posits that a right's nature and innate value can provide sufficient reason not to allow it to be suspended when it conflicts with another right, regardless of the loss that suspension entails on the facts. This reflects the view that some rights to basic liberties should have lexical priority over others,[24] as well as the position that rights can function as exclusionary reasons.[25] If law recognises that human beings have high inviolability, then rights protecting or vindicating that inviolability (such as the right to life) will innately "exclude certain factors as reasons for infringing the rights".[26] Under this theory, an individual's right not to be killed might

[22] R Alexy, 'On Balancing and Subsumption' (2003) 16 Ratio Juris 433; L Zucca, *Constitutional dilemmas* (OUP 2007); D Martínez Zorrilla, 'Constitutional Dilemmas and Balancing' (2011) 24 Ratio Juris 347.
[23] Through the HRA. Before then, both were enacted as rights, under articles 8 and 10 of the ECHR, on 4 November 1950.
[24] J Rawls, *A Theory of Justice* (Belknap 1971).
[25] J Raz, *The Morality of Freedom* (OUP 1986) 186–192.
[26] FM Kamm, 'Conflicts of Rights' (2001) 7 Legal Theory 239, 245. Here, "infringing" should be read as "suspending", for the purposes of the conflict between the *pro tanto* duties in the tort's second stage.

never be suspended, even to save more people from being killed. The right *itself* makes clear that "[w]e could not protect the right by making it permissible to do what the right denies that it is permissible to do": that would be self-defeating.[27] Therefore, rights themselves can exclude certain reasons for displacing them. This theory invokes the very "core"[28] of a right, and can create a "hierarchy of cores"[29] amongst different rights: they are ranked according to the strength of the exclusionary reasons emanating from them.

These reasons might not, for every right, be *absolutely* exclusionary, but they will, for every right, remain unsusceptible to circumstantial variation. Although a conflict's resolution will always ultimately depend upon the *relative* strength of the innate values of the two rights, it will still always primarily depend upon what these innate values are, as independent, constant qualities.[30]

The **innate value theory** requires consensus on rights' normative underpinnings and the strength of the protection that rights are intended to give. If the law is not explicit on these matters, there must be political agreement on these matters, and that must be translatable to legal doctrine. The theory also demands the relevance of rights' normative underpinnings be constant, regardless of circumstances. Not only must there be consensus on the rights' innate value, this consensus must endure in all circumstances. Although this theory could explain First Amendment jurisprudence,[31] it cannot help English law, where neither privacy nor FOE are elevated above other rights, and both are too normatively complex to have determined "cores".[32]

ii. Context-based theories

1. Nature and potential utility of context-based theories

Although context-based theories are suitable to the tort's second stage, given they account for circumstantial considerations, only some offer a strong theoretical basis for an improved approach to that stage.

Their strength depends upon how well they accommodate the normative complexity of privacy and FOE, how thorough the inquiry is which they provide, and how robust the resultant justification is for upholding one right and suspending the other. This depends upon how precise their methodological structure is, how much they focus upon the rights' normative underpinnings and not externalities, and how they combine the rights' normative

[27] Kamm (n 26).
[28] MC Burkens, *Algemene Leerstuckken van Grondrechten Naar Nederlands Constitutioneel Recht* (Tjeenk Willink 1989); G van der Schyff, 'Cutting to the Core of Conflicting Rights' in E Brems (ed), *Conflicts between fundamental rights* (Intersentia 2008) 131.
[29] Burkens (n 28) 145–148.
[30] The **innate value theory** therefore differs from the **strong absolutism theory**. Although both are deontological, rights-ranking theories, the former does not presuppose, as does the latter, that one right will always, in every conflict, displace the other right. Strong absolutism is a particular type of innate value, leaving no room for assessment of the relative strength of the conflicting rights. The **innate value theory** does not impose that foregone conclusion: it simply states that the conflict's resolution entails a ranking of the rights in order determined by the relative strength of their innate values.
[31] In which the Supreme Court resolves all conflicts involving FOE in favour of that right: *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission* 132 S Ct 694 (2012), which involved a conflict between church autonomy and ministers' rights, as discussed in I Leigh, 'Reversibility, Proportionality and Conflicting Rights' in S Smet and E Brems (eds), *When human rights clash at the European Court of Human Rights* (OUP 2017).
[32] It might in general simply not be viable to speak of "cores" of rights, as they are always difficult to determine in theory, let alone in practice: van der Schyff (n 28) 146.

dimension with the conflict's factual dimension. The more constraint and rights-focused principle they demand, the more capable they are of making the approach to the second stage more consistent, transparent and principled.

Context-based theories can, but need not, lead courts to laconic, unconstrained reasoning, and highly subjective, intuitive and opaque decision-making. This is because they have no predetermined, substantive, deontological anchor and are, as a bare minimum, composed of a structure of reasoning, which compares the rights in the conflict's context. Theories which provide nothing more than this are weak because they do not stimulate courts to constrain their reasoning to relevant normative considerations. This undermines the justificatory force of the decisions such theories produce, and would weaken the legitimacy of the inevitable suspension of one right in the tort's second stage.

Stronger context-based theories connect the factual context with the normative dimension. The resolutions and justifications they produce depend upon the facts *as they relate to the rights' objectives*. Their structure of reasoning requires courts to consider how far the potential factual consequences might frustrate or further the rights' normative underpinnings. That requires courts to take a more comprehensive account of all of the relevant facts, which is important in a context-based approach: the most robust justification will come from all parties having the most information at hand about the facts, the underlying principles, the effects of upholding each right, and the interests involved.[33] Stronger theories, therefore, provide a structure for reasoning that demands *more* than a bare comparison of the rights in context.

2. *Representative pool of context-based theories*[34]

Stronger theories are examined before weaker theories, demonstrating how they differ and what determines their strength and weakness. The stronger theories (**optimality** and **proportionality**) may be particularly useful to the judicial approach to the tort's second stage. They provide more constraint and structure, demand more advertence to rights' normative underpinnings, and are more likely to generate a principled approach, than the weaker theories (**trade-off** and **public interest**). These weaker theories also engender a thoroughly utilitarian treatment of the rights, downgrading their normative importance. Courts should therefore not rely upon these theories in the tort's second stage.

[33] M Durante, 'Dealing with Legal Conflicts in the Information Society' (2013) 26 Philosophy and Technology 437, 445.

[34] This is not a comprehensive range of context-based theories; other such theories, all of which merit more comprehensive critical consideration, include: the **conditioned precedence rules theory** (acknowledged in b., below), which will uphold the right which has precedence according to rules taking into account both the normative underpinnings of the rights and the particular circumstances of the conflict (see fnn 94-96, below); the **higher morality theory**, which will uphold the right which the higher morality dictates should not be suspended (see: R Dworkin, *A Matter of Principle* (HUP 1985), R Dworkin, *Freedom's Law* (OUP 1996); R Dworkin, *Taking Rights Seriously* (Bloomsbury Academics 2013), R Dworkin, *Justice in Robes* (Belknap 2006), R Dworkin, *Law's Empire* (2010 Reprint, Hart 1998), J Habermas, *Between Facts and Norms* (W Rehg tr, Polity 1996)); and the **exercisability effects theory**, which will uphold the right which, if upheld, leads to more people being able to exercise that right (see: J Waldron, 'Rights in Conflict' (1989) 99 Ethics 503, 518–519).

a. Optimality theory

The **optimality theory** arises from Kramer's account of morality, and posits that, if a deontological duty is weakly absolute, the resolution of a conflict between it and a consequentialist duty (to avert calamity), or between it and *another* weakly absolute duty, is not pre-determined. The theory demands each duty's exact strength be examined, and this is measured against the effects of a breach of that duty. As this conflict necessarily involves breaching a duty (doing wrong), this theory requires an assessment of which wrong action is nevertheless optimal. This assessment is undertaken by measuring the normative importance of the respective duties against the urgency of the demand to contravene them. The **optimality theory** involves choosing the 'less grave of two wrongs'.

The factual variable is the urgency of doing that which breaches one duty, or the degree of the 'calamity' that makes doing that action more stringent an obligation than not breaching that duty. This means the theory is applicable to rights of circumstantially variable value, and is open to more precise definition for when the conflict should be resolved in favour of one or other right (that is, the nature and degree of the 'urgency' at tipping-point). Given as much, it is suitable to the conflict in the second stage, between the normatively complex rights to privacy and FOE.

Applying this theory to the second stage, the court would measure the justifications for protecting the defendant in accordance with FOE, against the justifications for piercing that protection (upholding privacy), at the same time as measuring the justifications for protecting the claimant in accordance with privacy, against the justifications for piercing that protection (upholding FOE). Effectively, this requires measuring the justification, *in principle*, for protecting either rightholder, against the justification, *on the particular facts*, for upholding the other's right. If, *arguendo*, the conflict were resolved in favour of FOE, it would be on the basis that justification for protecting FOE was greater than the particular reasons, on the facts, for upholding privacy.

The **optimality theory** could legitimately be tailored to the particular privacy-FOE conflict in the second stage, in order to specify what constitutes 'urgency' and when one right's stringency will supersede the other's. This could be done by reference to the rights' normative underpinnings, in light of different factual circumstances. Thus, the urgency of this conflict might increase and intensify (and the harm of suspending one or other right becomes less justifiable) in certain circumstances, taking into account certain normatively-informed factors.[35] For example, where a defendant investigative journalist wishes to publish a photograph of a claimant child taking a bath as part of a story about institutionalised child abuse, a normatively-informed and constrained **optimality theory** might affirm that the negative effect of suspending the child's privacy right is so serious as to make suppression of that information a matter of such urgency, so that the duty to uphold the child's privacy right is more stringent than the duty to uphold the journalist's FOE. The relevant normative underpinnings of FOE would be curtailed in order to avoid the normative calamity involved in denying a child his privacy.

[35] Such as the context of the publication, vulnerability of the claimant, motivations of the defendant, and effects of publication on the claimant and on recipients.

b. Proportionality theory

The **proportionality theory** applicable to rights-conflicts is a particular version of broad conceptions of proportionality reasoning, and also incorporates considerations of commensurateness. Both these broad conceptions and the idea of commensurability must be examined in order to analyse the **proportionality theory** in the rights-conflicts context.

'Proportionality' appears in the theory and practice of constitutional law and rights adjudication in a broad and narrow sense. The broad sense encapsulates three different stages of deciding whether any state action or legal norm is justified:

(1) the action or norm's suitability or *rationality*;
(2) its *necessity* (*de minimis*) on the facts; and
(3) the *proportionality* of the action's or norm's objective to the action itself or means of achieving that objective.[36]

This last step is sometimes referred to as the overall balance of an action or norm.[37] Sometimes, an additional first step is inserted before rationality: the action or norm's *legitimacy*.[38]

The narrow sense encapsulates the last of those stages: proportionality *strictu sensu*, namely, whether the consequences of a legal norm (or action) are a proportionate means of achieving the objectives of that legal norm (or action). Only this narrow sense of proportionality can apply in the tort's context of a *conflict* between two *already recognised and conclusive* (*pro tanto*) rights, which differs from the context of recognising, delineating or imposing, *ab initio*, any single right. In the tort's second stage, it will already have been accepted that *both* rights are legitimate, rational and necessary in the circumstances: that is why the conflict arises.[39] Indeed, proportionality *strictu sensu* is arguably the *only* sense in which a real, full and proper proportionality assessment can be made.[40]

Proportionality differs from commensurateness: the latter is a cardinal property, while the former is an ordinal property.[41] Proportionality is about relativity. It prescribes a structural relationship between a norm's objective and

[36] R Alexy, 'Constitutional Rights, Balancing, and Rationality' (2003) 16 Ratio Juris 131, 133 Alexy calls these three stages 'suitability', 'necessity' and 'the Law of Balancing', meaning 'proportionality' in the narrower sense.
[37] M Luterán, 'The Lost Meaning of Proportionality' in G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law* (CUP 2014) 21.
[38] As summarised in ibid.
[39] Established in Chapter 2.
[40] LW Sumner, *The Hateful and the Obscene* (UTP 2004); A Barak, 'Proportional Effect' (2007) 57 University of Toronto Law Journal 369; D Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 University of Toronto Law Journal 383; A Brudner, 'What Theory of Rights Best Explains the Oakes Test?' in L Tremblay and G Webber (eds), *The limitation of charter rights* (Thémis 2009); P Blache, 'The Criteria of Justification under Oakes' (1991) 20 Manitoba Law Journal 437; C Panaccio, 'In Defence of Two-Step Balancing and Proportionality in Rights Adjudication' (2011) 24 Canadian Journal of Law and Jurisprudence 109.
[41] H Bedau, 'Retribution and the Theory of Punishment' (1978) 75 Journal of Philosophy 601, 613; D Dolinko, 'Mismeasuring "Unfair Advantage"' (1994) 13 Law and Philosophy 493, 506–510; R Shafer-Landau, 'Retributivism and Desert' (2000) 81 Pacific Philosophical Quarterly 189, 201–206; S Nathanson, *An Eye for an Eye* (2nd edn, Rowman & Littlefield 2001) 75–77; C Finkelstein, 'Death and Retribution' (2002) 21 Criminal Justice Ethics 12, 13; M Kramer, *The Ethics of Capital Punishment* (OUP 2011) 74–75.

the means of achieving that objective, rather than prescribing a certain quality for the objective or the means. Proportionality requires the objective be at the same 'level' of intensity as the means. Means of different degrees of intensity should be ordered to 'match' the equivalent objective. Proportionality first orders means of different levels of intensity, and (separately) orders objectives of different levels of importance; second, it aligns those two orders. Thus, if the objective of protecting a child's privacy right is of higher importance than the objective of protecting an adult's privacy right, and, if suppressing a story's content as well as the protagonist's identity is a more intense means of protecting the protagonist's privacy than suppressing the story's content only, it might be proportionate to protect a child's privacy by suppressing both content and (child's) identity, but *dis*proportionate to use such means to protect an adult's privacy.

Commensurateness prescribes substantive equivalence between an objective's importance and the nature of the means. Means are commensurate with an objective when they reflect the objective's importance in their very definition, rather than their position within an order of means of escalating intensity. Instead of setting the level of intensity of the means as relative to other means (as proportionality requires), commensurateness sets the very substance and characterisation of the means, by reference to the objective's qualitative importance. It therefore involves a value judgment, or a statement of value equivalence between a norm's objective and the means of achieving it. Despite this conceptual distinction, the **proportionality theory** encompasses both proportionality and commensurateness. Indeed, incorporating the cardinal property increases the justificatory force of decisions reached through the **proportionality theory**: a decision to favour one pathway over another is more strongly justified if it rests upon both proportionality and commensurateness.

The **proportionality theory** has been conceptualised as decreeing that the "greater the degree of non-satisfaction of, or detriment to, one right…, the greater must be the importance of satisfying" the other.[42] Proportionality defined thus denotes "optimisation":[43] rights should be realised to the greatest extent possible, given the legal and factual possibilities.[44] This is akin to "praktische Konkordanz" ("practical concordance"),[45] which demands, in the spirit of preserving a constitution's unity (and optimising its varied rights), that rights be limited no more than is required to establish concordance between conflicting norms. A more modest conception of the **proportionality theory** sees it as demanding efficient pursuit of pre-determined goals,[46] or, more precisely,[47] enabling "congruence" between "actual administration" (of law or justice) and the "rules as announced".[48]

A resurrection of the "lost meaning" of the **proportionality theory** sees proportionality as an indication of "those criteria that bear on the evaluation of side-effects" [49] of upholding either of the conflicting rights. The theory is not intended to provide a measure to evaluate the ends pursued (objectives of the right), or the merits of the means to achieve those ends (to enforce the right). It is only intended to evaluate the acceptability of side-effects, and

[42] R Alexy, *A Theory of Constitutional Rights* (J Rivers tr, OUP 2002) 102.
[43] Alexy, 'Constitutional Rights, Balancing, and Rationality' (n 36) 135.
[44] Alexy, *A Theory of Constitutional Rights* (n 42) 47.
[45] K Hesse, *Grundzüge Des Verfassungsrechts Der Bundesrepublik Deutschland* (20th edn, C F Müller 1995) 72, 317–318.
[46] J Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 CLJ 174, 178–179.
[47] D Dyzenhaus, 'Proportionality and Deference in a Culture of Justification' in G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law* (CUP 2014).
[48] L Fuller, *The Morality of Law* (YUP 1976) 39, 46–91.
[49] Luterán (n 37) 22, 26–27.

relate the established ends to the chosen means: the more intense the negative side-effects, the less likely the means are justified as proportionate to the ends.

This interpretation of **proportionality theory** is closer to the more modest conception of proportionality as stimulating efficiency, than to the more ambitious conception of it as pursuing optimisation or constitutional unity.[50] A focus upon side-effects determines the justifiability of upholding a right only on the basis of efficiency, without seeking to achieve the more lofty goal of optimising the right's intended effects, or ensuring constitutional concordance. Therefore, where the relevant rights and their boundaries have already been defined, the more modest conception of proportionality is more appropriate: it offers a more exacting test for whether upholding or suspending a right is justified.[51] Conversely, the more ambitious conception can result in equating proportionality with, or defining it by, a looser concept of 'balancing' rights' objectives,[52] offering less concrete and precise instruction on how to resolve a conflict and reach a justified resolution.

This is why this more modest conception, focusing upon side-effects and efficiency, should define the **proportionality theory** applicable to the tort's second stage, where the boundaries of the binding, *pro tanto* rights to privacy and FOE have already been determined. Wider conceptions of proportionality have been deployed to determine the very definition and delineation of rights;[53] that could re-open questions already decided by the court. A court could reason that proportionality demands one right be recognised as reaching over and wiping out, rather than overtopping, the other right. The latter right would not be recognised as a right at all, and the dispute would be resolved by redrawing the rights' boundaries, not by recognising and resolving a genuine rights-conflict.

Thus, we can imagine that a claimant, who has the status of a public figure by virtue of being first in line to the throne, has established he has a REP over his diary-entries, and the defendant national newspaper wishes to publish those entries as they contain demeaning comments about non-Britons. Both parties have established they are, on these facts, entitled to *pro tanto* rights to privacy and FOE, respectively. The privacy right covers the entries, and upholding it means suppression. The FOE right covers the entries, and upholding it means publication. The Court therefore moves on to deciding whether to permit or forbid publication of the entries. This means the two rights are justiciable. They are more than just the appearance of rights or mere *prima facie* rights.

If the Court were to decide the case using the wider conception of proportionality, its decision would amount to a statement that the unsuccessful right was never justiciable on the facts after all. If it forbids publication, it would be holding that FOE in fact never covered the facts in the first place: publication of such entries was never within the boundaries of that right. If it permits publication, it would be holding that privacy in fact never covered the facts in the first place: the entries were never within the boundaries of that right. And yet, the claimant had to show, before the second stage, that the right's boundaries *did* cover the entries. The same would apply *vis-à-vis* FOE

[50] Luterán (n 37). Luterán prefers the narrow conception (efficiency) over the broader (optimisation).
[51] A Young, 'Proportionality Is Dead' in G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law* (CUP 2014) 55.
[52] ibid 58.
[53] TRS Allan, 'Democracy, Legality, and Proportionality' in G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law* (CUP 2014).

and publishing the entries.[54] Hence, the wider conception of proportionality would produce counterintuitive judicial reasoning, and undermine the tort's internal coherence. This wider conception would also deny the importance of the unsuccessful right *tout court*, quite apart from whether the effects of upholding it on the facts are disproportionate. This is one of the main criticisms levelled against proportionality,[55] and is why the **proportionality theory** should *not* be applied to the second stage in a way that relitigates the rights' boundaries.

Given that upholding one right entails suspending the other right, the effects of upholding *both* rights must be assessed, before one of them is suspended. This means applying **proportionality theory** to both rights, in a way that relates the effects of each on the other. Therefore, resolving the privacy-FOE conflict in the second stage should involve:[56]

> (1) establishing the degree and gravity of the detriment that upholding each right has to the other;
> (2) evaluating the importance of upholding each right; and
> (3) considering the extent to which the importance of upholding each right on the facts of the conflict *justifies the detriment* to the other right.

This requirement to justify detriment reveals the place of commensurateness in **proportionality theory**. To capture how this theory secures a justified resolution of rights-conflicts, a final outcome should be added:[57] the right that is upheld will be that right (X), whose detriment to the other right (Y) carries a *stronger justification* than does the detriment to X of upholding Y. Where privacy is upheld on such reasoning, the justification lies in the statement that the operation of the privacy right, and the detriment of that to FOE, carries a stronger justification than the alternative, and the detriment of that to privacy. Justification, therefore, lies in "proportionality [and commensurateness] between…the objective and beneficial effects of [each right], and…[their] deleterious effects".[58] If proportionality focuses upon side-effects, the third step above can be expressed more precisely: the extent to which the importance of upholding right X justifies the detriment to right Y *depends upon the extent and nature of the side-effects of upholding* right X.

This means courts must assess the nature and gravity of each right's hypothetical suspension. They do this by assessing how each right's objectives would be affected by the negative side-effects of upholding the other right. Those negative effects must be justified, and the means of justification lies in the way in which the conflict is resolved and the decision is reached to uphold one right and not the other. To ascertain which right's suspension would be justified, courts must first consider the consequences of suspending *each* right, and, secondly, reason as to whether *each* suspension would be justified. A two-step process captures this separation: the first step identifies how each right's objectives would be affected were it not to be upheld. This involves assessing the degree and gravity of suspending each right. The second step determines whether, for each right, that suspension is justified, measuring the proportionality between the right's objectives and the side-effects of upholding it. That

[54] The case for having a more abstract rationale for drawing the boundaries of justiciability of the FOE right was discussed in Chapter 2, under (d).
[55] G Webber, 'On the Loss of Rights' in G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law* (CUP 2014).
[56] Adopting Alexy's general articulation of proportionality: Alexy, 'Constitutional Rights, Balancing, and Rationality' (n 36) 136.
[57] Which is implicit in Alexy's reasoning.
[58] Panaccio (n 40) 113.

separation between identifying the nature and consequences of the suspension, and ascertaining whether the suspension is justified, best reflects theorists' conception of proportionality reasoning in rights-conflict resolution.[59]

To summarise, the proportionality steps applied to the tort's second stage would be:

> (1) establishing the degree and gravity of the detriment that upholding each right has to the other;
> (2) evaluating the importance of upholding each right (identifying the each right's relevant normative underpinnings and assessing how important they are on the facts); and
> (3) considering the extent to which the importance of upholding each right on the facts *justifies the detriment* to the other right (which depends upon the extent and nature of the side-effects of upholding each right on the other).

Many regard the **proportionality theory** as integral to constitutional adjudication in liberal democracies,[60] or as the universal criterion of constitutionality in judicial review of executive interferences with individual rights.[61] It has been particularly prominent in problems of (over-)reach of state actions.[62] The literature, however, does not refer as much to the specific problem of rights-conflicts.[63]

In the rights-conflicts context, the **proportionality theory** combines and compares the rights' underlying objectives with the conflict's particular circumstances (how upholding or suspending the rights on the facts affects these objectives). Proportionality reasoning will produce thoroughly contextual outcomes. For this reason, the theory has been criticised as necessarily involving *ad hoc*, impressionistic and unprincipled reasoning, and arbitrary and unjustified outcomes.[64] However, contextualisation does not render rights-conflict resolution *inherently* intuitive, subjective and irrational.[65] As long as the theory's requirements are adhered to (a modest, pure focus on side-effects[66]), contextualisation will not give judges infinite discretion, and licence to invoke purely subjective value-judgements, resulting in irrational decisions. The theory constricts the resolution process by demanding courts evaluate each right's objectives, *as already established or presumed in law*.[67] They may not redefine the rights' scope or purpose. Proportionality is not a moral filter, allowing decision-makers to further their subjective preferences.[68] The theory allows the conflict's circumstances, *as related to the rights' established objectives*, to

[59] ibid 108–110.
[60] Alexy, 'Constitutional Rights, Balancing, and Rationality' (n 36); M Kumm, 'The Idea of Socratic Contestation and the Right to Justification' (2010) 4 Law and Ethics of Human Rights 142; A Sweet and J Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Columbia Journal of Transnational Law 72; M Khosla, 'Proportionality' (2010) 8 IJCL 298; Panaccio (n 40); M Klatt and M Meister, 'Proportionality' (2012) 10 IJCL 687; K Möller, 'Proportionality' (2012) 10 IJCL 709; Luterán (n 37); A Sachs, *The Strange Alchemy of Life and Law* (OUP 2009) 206.
[61] D Beatty, *The Ultimate Rule of Law* (OUP 2004) 162.
[62] M Cohen-Eliya and I Porat, 'Proportionality and the Culture of Justification' (2011) 59 AJCL 463, 467.
[63] Though Smet specifically considers proportionality in the rights-conflict context, and criticises it for being an inadequate method for resolving rights-conflicts: S Smet, *Resolving Conflicts between Human Rights* (Routledge 2017) 35, 191–197.
[64] J Habermas (n 34); S Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 IJCL 468; S Tsakyrakis, 'Proportionality: Rejoinder' (2010) 8 IJCL 307; G Webber, 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship' (2010) 23 Canadian Journal of Law and Jurisprudence 179; Smet (n 66).
[65] Alexy, 'Constitutional Rights, Balancing, and Rationality' (n 36); Panaccio (n 40).
[66] Luterán (n 37).
[67] Panaccio (n 40) 122–124.
[68] G Pavlakos, 'Between Reason and Strategy' in G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law* (CUP 2014) 110.

determine the conflict's resolution. This is the essence of the modest conception of proportionality, focusing upon side-effects on the facts.[69] The case is determined by how rights' objectives *relate* to circumstances (through proportionality and commensurateness requirements), not by *bare* idiosyncracies of any case.

If courts purporting to 'do' proportionality produce irrational, incoherent or purely subjective decisions, that should not automatically be attributed to the theory. Courts' failure to apply it correctly might be the problem: "it seems strange to suggest problems with proportionality by studying cases where it was poorly applied".[70] A theory *per se* should not be discounted (for not providing sufficient justification for a rights-conflict decision), if the problem lies in its being misused.[71]

A theory's credibility, however, might be weakened if something inherent in it *allows* or *encourages* courts to misuse or exploit it, or if it is impossible to tell whether courts are applying it correctly, or using it as a stamp of legitimacy for a decision made on intuitive, impressionistic or unsubstantiated reasoning. Does the **proportionality theory** inherently camouflage purely subjective reasoning in the resolution process,[72] giving it the appearance of a formal-technical evaluation of the rights?[73] It has been criticised[74] for its "substantive emptiness and manipulability",[75] fake neutrality, and tendency to result in judges excluding "entire classes of interests from their deliberations".[76] It has been said to "pretend to balance values while avoiding any moral reasoning",[77] or neglect and bypass moral discourse on the values concerned.[78] Such a theory might steer courts into "controversial evaluative disagreements",[79] which is why some judges prefer to avoid proportionality,[80] and why some theorists reject it.[81] On such views, proportionality encourages courts to hold that a right has certain objectives that are unsupported in doctrine, or irrelevant on the facts. Or courts might hold certain means to be commensurate with or proportionate to a right's objectives, where such a conclusion is unsupported by the jurisprudence, or does not recognise how such means affect the conflicting right.[82]

Such problems might arise in the application of the **proportionality theory**, since that theory does not prescribe *how* rights' objectives should be ascertained, or *why* certain values might be proportionate to or commensurate with one another. It relies on *established* substantive values or normative orders of values. Further, its

[69] Luterán (n 37).
[70] Khosla (n 60) 302.
[71] Möller (n 60) 710.
[72] Smet (n 63) 35, 111.
[73] Panaccio (n 40) 114.
[74] P Chapman, 'The Politics of Judging' (1986) 24 Osgoode Hall Law Journal 867; E Mendes, 'In Search of a Theory of Social Justice' (1990) 24 RJT 1; N Siebrasse, 'The Oakes Test' (1991) 23 Ottowa Law Review 99; Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (n 64); Tsakyrakis, 'Proportionality: Rejoinder' (n 64).
[75] The critique is articulated in these terms by Panaccio (n 40) 114, in his rebuttal of it.
[76] B Miller, 'Proportionality's Blind Spot' in G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law* (CUP 2014) 371.
[77] Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (n 64) 474–475.
[78] Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (n 64); Tsakyrakis, 'Proportionality: Rejoinder' (n 64) 308.
[79] Panaccio (n 40) 114.
[80] ibid 113–114.
[81] Webber (n 64); B Miller, 'Justification and Rights Limitation' in G Huscroft (ed), *Expounding the constitution* (CUP 2008); Siebrasse (n 74); Mendes (n 74); F Schauer, 'Freedom of Expression Adjudication in Europe and the United States' in G Nolte (ed), *European and US Constitutionalism* (CUP 2005); Smet (n 63).
[82] The intensity of negative side-effects, or the incongruence of upholding the right with its recognised objectives.

incorporation of commensurateness risks ignoring the reality of indeterminacy in the sphere of human action:[83] it is epistemically impossible to pin-point the *exact* place at which (or reason why) one value is commensurate with another,[84] given that human interests, and human values, are irreducibly plural.[85] Though that does not mean different values cannot be compared, measured or ranked,[86] it means the exact point of commensurateness between them is epistemically elusive and partially indeterminate.

If it is impossible to tell whether one value is commensurate with another, then commensuration of the substantive qualities of two values (such as rights), the importance of their objectives, and the gravity of suspending them, is an impossible feat. They might or might not be commensurate. The choice to uphold a particular right cannot completely be justified.[87] This reality of incommensurability robs the **proportionality theory** of some of its justificatory force,[88] and weakens its credibility. It asks the impossible, and provides unjustified answers.[89]

The **proportionality theory** can fail to highlight the indeterminacy of commensurateness and the impossibility of value commensurability.[90] The failure to prescribe *why*, as a matter of *morality*, certain defined values might be proportionate to or commensurate with one another[91] *conceals* the ultimate impossibility of value commensurability.[92] On this reasoning, there is no "common metric"[93] for the values in the first place; proportionality and commensurateness requirements import merely the appearance of a common scale. In other words, a court can import unanchored, intuitive and subjective moral standards into an equation or test promising to be universally applicable and to provide objective justification for any outcome reached.

These problems have caused some to reject proportionality in favour of rules for "conditioned precedence",[94] on the basis that conflicts are more robustly resolved by conceiving of rights themselves as rules, or otherwise applying unambiguous, rational factors to conflicts.[95] However, it is apparent from the sets of rules proposed by some who favour this approach[96] that this approach may be too rigid and narrow, potentially excluding important issues that could arise on the facts. Further, it provides no guidance for how and why certain factual outcomes might condition the application of the chosen rules: what are the pertinent conditions? There is no overarching framework within which rules can interact with factual circumstances. Finally, this alternative to proportionality

[83] F Urbina, 'Incommensurability and Balancing' (2015) 35 OJLS 575, 577.
[84] Shafer-Landau (n 41) 191–192; Kramer (n 41) 122–124.
[85] I Berlin, *Liberty* (OUP 2002); J Raz and J Griffin, 'Mixing Values' (1991) 65 Proceedings of the Aristotelian Society 83, 102.
[86] S Gardbaum, 'Law, Incommensurability, and Expression' (1998) 146 University of Pennsylvania Law Review 1687, 1688.
[87] R Chang, 'Comparison and the Justification of Choice' (1998) 146 University of Pennsylvania Law Review 1569.
[88] Urbina (n 83) 589.
[89] F Schauer, 'Proportionality and the Question of Weight' in G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law* (CUP 2014); Smet (n 63) 88–96.
[90] Webber (n 64) 194–198.
[91] Beyond the conclusion that they *are* proportionate to or commensurate with one another.
[92] Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (n 64) 471.
[93] ibid 485.
[94] Martínez Zorrilla (n 22) 358.
[95] Zucca, *Constitutional dilemmas* (n 22); L Zucca, 'Conflicts of Fundamental Rights as Constitutional Dilemmas' in E Brems (ed), *Conflicts between fundamental rights* (Intersentia 2008); L Zucca, 'Law, Dilemmas and Happy Endings' in S Smet and E Brems (eds), *When human rights clash at the European Court of Human Rights* (OUP 2017).
[96] P Ducoulombier, 'Conflicts between Fundamental Rights and the European Court of Human Rights' in E Brems (ed), *Conflicts between fundamental rights* (Intersentia 2008) 234–237; 239–243; Smet (n 63) 88–100; 142–173; S Smet, 'Conflicts between Human Rights and the ECtHR' in S Smet and E Brems (eds), *When human rights clash at the European Court of Human Rights* (OUP 2017) 45.

might engender the same fake neutrality as proportionality is criticised to entail: the rules might reflect the decision-maker's personal views on a right's value more than the normative consensus reached on that right, or they might import into a court's deliberation factors that are irrelevant to or inconsistent with the rights' normative underpinnings.

Therefore, the **proportionality theory** need not be rejected outright, even though it rests upon an epistemically indeterminate standard, and provides only a generic framework for reasoning.[97] The theory has worth in that it provides a coherent framework for reasoning in rights-conflicts resolution, to which established substantive legal (or moral-political) values might be added. Although it operates at a high level of abstraction, the theory does not *demand* the deliberation process be morally neutral; it provides a structure for the moral deliberation that must otherwise take place.[98] Proportionality does not prescribe the epistemic determinacy of the property of commensurateness as a *precondition* for deliberation; instead, it provides commensurateness as the *result* of the deliberation – a result with justificatory force.[99]

Given as much, too much may have been expected of proportionality. Accepting it should be no more than a modest framework for assessing side-effects, the expectation of more becomes an illusion.[100] Neither proportionality nor commensurateness are actual values. They are properties, or relations between values, requiring "independent values to be put to work".[101] The theory "only explain[s] the weighing machine and check[s] the weights: the weighing itself has still to be done."[102] This is not the same as demanding courts undertake something impossible or impressionistic. The **proportionality theory**'s "last prong" *requires* courts to engage in "theoretically informed practical reasoning" and not "intuition-based classificatory labelling".[103] In not prescribing any particular values or value-metrics, it demands courts undertake informed evaluative reasoning, for it provides exactly the stage at which, and the extent to which, such reasoning is necessary for resolving the conflict.[104]

The theory essentially requires a 'filling' of appropriate evaluative reasoning. There are reasonable non-quantitative ways of choosing between incommensurable alternatives, other than basic commensuration, which do achieve some form of rational determinacy.[105] This is because, first, the *choice* between two incommensurable values is not impossible; rather, the *commensuration* of two such values is impossible:[106] "[s]aying that two options are incommensurate does not preclude choice".[107] Secondly, incommensurability itself does not impede *justified* choices:[108] what matters is *how* these choices are made, and *how* incommensurable values are related to each

[97] Rather than a specific, substantive and evaluative answer on the quality of a particular value, or what it means morally for any two particular values to be proportionate (or commensurate).
[98] Möller (n 60) 716.
[99] E Millgram, 'Incommensurability and Practical Reasoning' in R Chang (ed), *Incommensurability, incomparability, and practical reason* (HUP 1997) 159.
[100] Luterán (n 37).
[101] Panaccio (n 40) 118.
[102] K Baier, *The Moral Point of View* (Cornell UP 1958) 172.
[103] M Kumm, 'Political Liberalism and the Structures of Rights' in G Pavlakos (ed), *Law, rights and discourse* (Hart 2007) 148.
[104] Klatt and Meister (n 60) 698.
[105] Urbina (n 83).
[106] ibid 597.
[107] J Raz, 'Value Incommensurability' (1985) 86 Proceedings of the Aristotelian Society 117, 132.
[108] L Alexander, 'Banishing the Bogey of Incommensurability' (1998) 146 University of Pennsylvania Law Review 1641.

other.[109] Other non-quantitative ways of determining and justifying which incommensurable alternative to favour might involve "quasirationality":[110] employing set criteria to compare the strength of the *reasons* for favouring one right over the other,[111] as opposed to insisting upon the commensuration of incommensurate values relevant to each right. Such supplementary evaluative reasoning is the "common metric", not *provided*, but *permitted* and *required* by, the **proportionality theory**.[112] Though proportionality may be fulfilling a core element of adjudication, to "authorise judges to reconcile incommensurable considerations", it does not induce judges to "throw the scales out the window, and just choose".[113]

This argument[114] relies upon Waldron's conception of weak incommensurability.[115] Two values are strongly incommensurable when neither is more valuable than the other, and when they are not of equal value.[116] The values are genuinely incomparable in the practical realm. Such a "paralysed" situation might "lead[] to agony": there is no way of testing whether the decision to favour either value is justified. One means of justification could be for an elected legislature to codify the decision in law, rather than a court make it in judicial review.[117]

Weak incommensurability is when two incommensurable values can nevertheless be brought into a morally significant relation with one another. Similarly, "rationally determinable incommensurability" means that, although the alternatives are incommensurable, ways other than commensuration exist to make a rationally determined choice between them.[118] Instead of abdicating decision-making capacity to a legislature, courts should consider moral arguments about the proper relation between the values: that moral argument justifies the decision.[119] This moral-evaluative reasoning exists in the absence of a pre-determined common metric, as it covers all relevant (moral) implications, not merely the formal definition of each value.[120] The **proportionality theory** requires precisely that: relate the rights' evaluated objectives to the evaluated impact that upholding each has on the other, on the facts. The outcome is justified according to the particular morality of the overall legal, constitutional and rights culture.

One type of substantive moral evaluation that could fill the **proportionality theory**'s framework is based upon "deontic pluralism".[121] Within a plurality of interests, some interests might be accorded unqualified recognition because they protect morally significant values (like human dignity). The **proportionality theory** could produce an ultimate decision based upon dignity's requirements, through a moral evaluation of the effects upholding each right has on dignity.[122] This supplementary substantive-moral-evaluative reasoning assists the morally neutral

[109] ibid 1647 describing how free-market trading regularly measures epistemically incommensurable values.
[110] Smet (n 63) 122.
[111] ibid 100.
[112] Klatt and Meister (n 60) 698.
[113] T Endicott, 'Proportionality and Incommensurability' in G Huscroft, B Miller and G Webber (eds), *Proportionality and the rule of law* (CUP 2014) 315.
[114] Möller (n 60) 719–721; Smet (n 63) 88–100.
[115] J Waldron, 'Fake Incommensurability' (1994) 45 Hastings LJ 813, 815–817.
[116] Definition of 'incommensurability' in Raz (n 107) 117.
[117] Möller (n 60) 720.
[118] Urbina (n 83) 580, 593.
[119] Möller (n 60) 720–721.
[120] Waldron, 'Fake Incommensurability' (n 115); Möller (n 60) 721.
[121] M Kumm and A Walen, 'Human Dignity and Proportionality' in G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law* (CUP 2014).
[122] ibid 70.

proportionality theory to provide morally justified conflict resolutions, without lapsing into subjective impressionism. The theory therefore could[123] accommodate some rights being "stronger" than others. If some rights are stronger because, for example, they reflect and protect the morally significant value of dignity, evaluative reasoning can fill the **proportionality theory**'s morally neutral framework to reflect that, ensuring adjudication gives such rights due consideration.

"Deontic pluralism" *within proportionality* does not involve "thoroughly deontological" reasoning and a deontological outcome on account of its incorporation of morally significant values reflected in a right.[124] Proportionality reasoning, however it might be supplemented with moral-evaluative substance, remains consequentialist, because of its focus upon the side-effects of upholding each right. There might be deontological side-constraints to this reasoning process, but the process and outcome remain consequentialist. That does not mean that the proportionality theory inherently commodifies rights, disregards deontological values, or cannot be augmented by supplementary substantive-moral-evaluative reasoning.

That the **proportionality theory** inherently prompts evaluative reasoning does *not* mean it dictates the moral content of that reasoning. It remains a morally neutral structure to guide the resolution process, albeit stimulating moral reasoning, and requiring an evaluative 'filler' based upon settled morality. The theory should not be impugned for morally problematic or seemingly impressionistic decisions. The blame should lie with any court which misapplies the proportionality methodology, or any litigant who does not discharge her responsibility for argumentative sufficiency.[125] The **proportionality theory** *could* camouflage subjective moralising, but only if misapplied or not *supplemented* with other, more exacting, ways of controlling reasoning. Indeed, the theory's "simplicity and limited moral commitments"[126] could strengthens its heuristic value. Those seeking more "complete" theories of morality might have to look elsewhere.[127]

c. Trade-off theory

The **trade-off theory** is a consequentialist approach to resolving rights-conflicts,[128] incorporating cost-benefit analysis.[129] For utilitarians, trade-offs are integral to conflict resolution, demanding conflicts be resolved in favour of the most beneficial or least costly outcome. The cost of suspending one right is traded-off against the benefit of upholding the other. Cost-benefit analysis is claimed to promote social welfare,[130] and to be "the best proxy for

[123] Contrary to: Schauer, 'Proportionality and the Question of Weight' (n 89) 174.
[124] Kumm and Walen (n 121) 88.
[125] By inadequately or wrongly asserting the importance of a right's objective, or the intensity of the detriment to the other right: Panaccio (n 40) 122.
[126] ibid 110.
[127] ibid 119.
[128] LW Sumner, *The Moral Foundation of Rights* (OUP 1988) arguing conflict resolution should be achieved through a calculation of what right in the context serves the greatest overall good for society.
[129] Trade-off reasoning and cost-benefit analysis are also applied to regulatory policy making: C Sunstein, 'Cost-Benefit Analysis, Who's Your Daddy?' (2016) 7 Journal of Benefit-Cost Analysis 107; C Sunstein, 'Humanizing Cost-Benefit Analysis' (2011) 2 European Journal of Risk Regulation 3; M Adler and E Posner, 'Rethinking Cost-Benefit Analysis' (1999) 109 YLJ 165.
[130] A Preda, 'Rights Enforcement, Trade-Offs, and Pluralism' (2011) 17 Res Public 227; Sunstein, 'Cost-Benefit Analysis, Who's Your Daddy?' (n 129) 109.

what matters".[131] Since it requires full accounting of all relevant factors, it boasts to ensure that practical reasoning about risks and the justifiability of certain pathways does not "go badly wrong".[132] It is argued that this theory disciplines subjective, intractable and unreliable intuitions,[133] by forcing decision-makers to assess both benefits and costs, and articulate their decision on the basis of overall utility.

The theory does not define the 'cost' or 'benefit' involved. In the tort's second stage, 'cost' is the gravity of suspending each right, while 'benefit' is how far upholding each right furthers its objectives. Beyond this categorisation of variables, there is no qualitative prescription of gravity of cost, or extent of benefit, because this theory involves only *comparative quantification* of costs and benefits. All it requires for justified resolution is that either the cost of suspending one right is less than the cost of suspending the other, or the benefit of upholding one right is greater than the benefit of upholding the other.

As this "quantitative comparison of the costs and benefits"[134] is a contextual exercise, and given the **trade-off theory** does not prescribe what counts as cost or benefit, it could have wide applicability. The decision-maker's moral orientation is irrelevant, as is the (settled or contested) importance of the relevant values. Cost-benefit analysis is promoted precisely for being a procedure and not a moral compass.[135] The theory could, in principle, be "for everyone".[136]

However, this failure to prescribe a normative overlay,[137] weakens this theory. Upholding or suspending a right might have multiple different costs and benefits. A bare quantification requirement does not instruct courts on whether to account for all or some of these, or specify which costs or benefits, if any, may be discounted. Nothing guides courts on whether certain circumstances or moral principles allow discrimination between different costs and different benefits, or whether all costs and benefits must always be accounted for. This is acutely problematic with rights with normative underpinnings that vary in relevance and importance according to the facts.[138] Upholding or suspending such rights would have multiple different costs and benefits, depending upon the circumstances, and the underpinnings identified as being relevant and most important in those circumstances. Cost-benefit analysis is not well equipped to deal with[139] misinformation, exaggeration, incompleteness and distortion *vis-à-vis* the costs and benefits, and which of them matter.[140]

This theory can fail itself,[141] undermining rights-conflicts adjudication: courts rely upon the parties' information and arguments, which might be incomplete and presented to favour the party making them. In the tort's second stage, courts must assess the harmful and beneficial impacts of publication; that might result in favouring the most

[131] Sunstein, 'Cost-Benefit Analysis, Who's Your Daddy?' (n 129) 118.
[132] C Sunstein, 'Is Cost-Benefit Analysis for Everyone?' (2001) 53 Administrative Law Review 299, 302.
[133] C Sunstein, 'Cost-Benefit Analysis Without Analyzing Costs or Benefits' (2007) 74 University of Chicago Law Review 1895.
[134] Urbina (n 83) 576.
[135] Adler and Posner (n 129) 167–169.
[136] Sunstein, 'Is Cost-Benefit Analysis for Everyone?' (n 132).
[137] Beyond requiring quantification.
[138] As are privacy and FOE: discussed in Chapter 3.
[139] And can even engender.
[140] Sunstein, 'Is Cost-Benefit Analysis for Everyone?' (n 132).
[141] ibid 309–313.

convincing subjective perspective on or reaction to the publication.[142] The **trade-off theory**'s normative bareness renders it inept in making the process of justifying publication (or suppression) more precise, principled and consistent.

Furthermore, the theory requires courts to enumerate rather than evaluate costs and benefits. This quantification obligation does not sit well with rights underpinned by non-tangible values.[143] Although courts artificially quantify actionable dignitary harms for compensation purposes, that occurs after they decide on the substantive action – after they decide where the harm has occurred. The tort's second stage is concerned with that very decision: who should suffer a loss of rigthholding entitlement. The artificiality of quantification might distort that decision.[144]

If moral values and human interests are irreducible due to their plurality,[145] then exhortations to quantify them should be rejected, even in rights-conflict resolution. Not even a "capacious conception of welfare", or cost-benefit measurement based upon people's subjective evaluations and experiences,[146] or data driven "accurate understanding[s] of human behaviour",[147] can remedy irreducibility. Although such values and interests can be evaluated according to recognised norms, they cannot rationally be quantified. Yet **trade-off theory** encourages commodification of such values,[148] despite the reality that cost-benefit analysis cannot easily process dignitary harms, such as social stigmatisation.[149] This commodification of rights[150] is an important reason for being sceptical about this theory.

Moreover, the **trade-off theory** induces commensuration of *incommensurable* degrees of cost.[151] However, commensurability is epistemically impossible. Quantitative comparisons cannot be made between two values[152] by means only of rational criteria.[153] This often results in assuming commensurability between differently valued interests, reducing those values to numerical form, and thereafter accounting only for the numbers, rather than the values.[154] This threatens to treat minority interests as intrinsically less important, there being fewer of them. This could also engender underestimating the strength of certain reasons, because of the relative ease of

[142] Thus, the benefit to the public of publishing information about a celebrity's daily life might be inflated with reference to how influential that celebrity is as a lifestyle trendsetter, leaving aside the fact that interest in that celebrity has been decreasing over the past few years. Likewise, the cost to a Cabinet Minister of publishing information about her holiday activities might be inflated with reference to how little private or leisure time she is able to carve out for herself, leaving aside the fact that that Minister takes markedly more holidays than her Cabinet colleagues.

[143] Such as dignity, democracy, and social cohesion.

[144] Allowing such a distortion would be less tolerable than in respect of any potential distortions in the damages quantification stage.

[145] Berlin (n 85).

[146] Sunstein, 'Cost-Benefit Analysis, Who's Your Daddy?' (n 129) 112–113.

[147] Sunstein, 'Humanizing Cost-Benefit Analysis' (n 129) 7.

[148] Including monetising "parental anguish" to make cost-benefit analysis more accurate: Sunstein, 'Cost-Benefit Analysis, Who's Your Daddy?' (n 129) 109–110.

[149] Sunstein, 'Cost-Benefit Analysis Without Analyzing Costs or Benefits' (n 133) 1909.

[150] Not for compensation purposes (integral to rights adjudication), but for the purposes of deciding which right should be upheld in a rights-conflict – namely, deciding whether or not suspension of a right is justifiable in the first place.

[151] And benefit: Urbina (n 83) 587.

[152] Such as the benefits and costs of upholding or interfering with rights.

[153] Criteria that are distinct from feelings or emotions: Urbina (n 83) 576.

[154] J Waldron, 'Rights in Conflict' (n 34), 509.

equilibriation:[155] that risks assigning mistakenly low values to certain options more often than assigning mistakenly high values. This is effectively a "doctrine of quantitative commensurability of all values".[156]

The incommensurability problem is not reducible to weak incommensurability.[157] The **trade-off theory** does not accommodate rationally determinable incommensurability, because it requires purely quantitative comparison of costs and benefits, rather than evaluative assessment of the relative extents to which upholding each right is proportionate to or commensurate with that right's objectives, as does the **proportionality theory**.[158] The **trade-off theory**'s only formula is that one cost (or benefit) is greater than the other: it does not relate means *to* ends, but, rather, just compares the consequences of the means. Nor does it demand further moral reasoning, beyond a basic framework of ordering different values in relation to each other. It does not require consideration of the justifications for the costs caused by upholding either right, based upon their proportionality to the rights' objectives. Nor does it *permit* choosing between two incommensurable alternatives other than by commensuration. The "super-value" in the **trade-off theory** is often money,[159] and there is no moral-evaluative reasoning beyond deciding how great each cost (or benefit) is. Relying upon commensuration (and nothing more) to choose between two incommensurable options offers the same justificatory force for the choice as does flipping a coin.[160] The **trade-off theory**, aside from purporting to achieve the impossible, is an artificial, unnuanced way of resolving rights-conflicts.

Some suggest the theory escapes the incommensurability problem, because the measuring undertaken is between the degree of satisfaction (benefit) and non-satisfaction (cost) of each right.[161] Since degrees of (non-) satisfaction can be *compared*, the incommensurability problem disappears. Injecting into the equation a comparable criterion can create commensurability.[162] However, this camouflages incommensurable moral values with a cloak of commensurability *qua* comparability.[163] If the two rights themselves are incommensurable, the choice between them, based upon how far they are satisfied, is still a choice between incommensurable values.[164]

The **trade-off theory** does not take rights sufficiently seriously.[165] Its "utilitarianism of rights" does not adequately reflect the Kantian principle that individuals must not be treated solely as means to ends.[166] The theory justifies suspending one right because that right's benefits are lesser, and therefore can be traded-off for, another right's benefits. Further, in demanding rights be viewed as comparable on a common metric, the theory presupposes rights are reducible to a different value,[167] eroding their inherent quality as rights, along with their specific

[155] F Schauer, 'Instrumental Commensurability' (1998) 146 University of Pennsylvania Law Review 1215, 1227.
[156] Waldron, 'Rights in Conflict' (n 34).
[157] As in respect of the proportionality theory.
[158]Sunstein generalises cost-benefit analysis to include the proportionality test, using that as evidence of the virtues of cost-benefit analysis: Sunstein, 'Cost-Benefit Analysis Without Analyzing Costs or Benefits' (n 133) 1906–1907 In the rights-conflict context, cost-benefit analysis is relatable only to the trade-off theory, and not the proportionality theory.
[159] Raz and Griffin (n 85) 102.
[160] M Adler, 'Incommensurability and Cost-Benefit Analysis' (1998) 146 University of Pennsylvania Law Review 1371.
[161] VA da Silva, 'Comparing the Incommensurable' (2011) 31 OJLS 273.
[162] ibid 287.
[163] Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (n 64); Tsakyrakis, 'Proportionality: Rejoinder' (n 64); Webber (n 64). This criticism is also militated against proportionality, as discussed above.
[164] Urbina (n 83) 595.
[165] Preda (n 130).
[166] R Nozick, *Anarchy, State, and Utopia* (Blackwell 1974).
[167] Preda (n 130) 230.

objectives. Steiner argues this predicament is not unacceptable, but, rather, desirable, because all rights are based upon a higher value of justice, and individual rights should be compared through that common metric.[168] However, if the purpose of rights is to resolve disagreements about different values, rights should be treated as lexically prime values not subject to some higher value of justice. Comparing particular rights according to an indemonstrable goal of justice could be reduced to arbitrarily ranking rights, justified by the lofty claim of 'doing justice'.[169]

Both of these perspectives treat rights as tools for resolving conflicts between lesser values. The resolution involves recognising one value as a 'right', giving it priority. The tort's second stage, however, involves two already recognised rights. Courts cannot resolve this conflict by elevating one side to the level of priority enjoyed by rights in a general conception of pluralistic morality. The **trade-off theory** simply does not elaborate any further upon how to choose between two rights, beyond trading one off for the other on the basis of some invocation of justice. The ultimate arbitrariness of priority inherent in the trade-off process means it has low heuristic and justificatory value.

The **trade-off theory** is better suited to policy formation than to rights-conflicts resolution. The former context might involve quantifiable, enumerable, and commensurable values.[170] It might be useful, even essential, to use cost-benefit analysis in such contexts. In rights-conflicts, however, the **trade-off theory** does not offer a comprehensive and nuanced treatment of rights with complex normative underpinnings, so as to provide a sufficiently justified reason for preferring one over another.

d. Public interest theory

The **public interest theory** resolves rights-conflicts by choosing that outcome which most serves the 'public interest'.[171] This stems from a Razian vision that relates rights to 'the public interest' or 'public interests'.[172] On such a view, rights do not, simply by being 'rights', automatically take priority over other interests, including the 'public interest', which might be inconsistent with them.[173] This is a weaker version of rights than the Dworkinian account of rights as "trumps" of lesser norms,[174] giving rights the function of protecting all individuals from majoritarian policies.[175]

[168] H Steiner, *An Essay on Rights* (Blackwell 1994).
[169] Preda (n 130) 230.
[170] Such as wages, taxes, or the number of jobs in a market.
[171] The choice of outcomes is between upholding one right and suspending the other, or vice versa.
[172] For simplicity's sake, 'public interest' covers: 'the' public interest, 'a' public interest, and 'public interests', though, as discussed below, the differences between these terms can be significant.
[173] Raz (n 25) 186–192, 254–255. In line with the interest theory of rights, Raz believes that, for some value to be a right, it must encapsulate an interest that is sufficiently normatively important to be protected by a correlative duty, but the putative rightholder need not be competent or authorised to demand or waive the enforcement of that right. Thus, although for Raz the term 'right' signifies a particularly important interest, it does not (even in the field of fundamental rights) give any additional or greater importance to that interest, than that carried by the interest itself. Therefore, rights may be displaced by important considerations that are not rights; for example, variations on incarnations of the collective good. Indeed, many legal rights are trivial in comparison to some collective goods that are not protected by rights.
[174] Which are typically policies or collective interests.
[175] R Dworkin, 'Rights as Trumps' in J Waldron (ed), *Theories of rights* (OUP 1984).

The Razian approach envisages a constitutional framework for a legal system in which rights may be in direct competition with the 'public interest',[176] or with any other laws.[177] Courts are permitted to hold that the competing 'public interest' take priority over the right. A right's suspension would have to be tolerated where justified on 'public interest' grounds.

Applying this 'public interest' approach to the rights-conflicts context, it must first be recalled that two rights are in conflict with each other, as opposed to a right conflicting with a non-right or state action or policy said to be in the 'public interest'. Therefore, the reason why one right must be suspended as a result of the conflict is *not* that a non-right or state action or policy has been upheld, but, rather, the *other right* has been upheld. However, since the **public interest theory** treats rights as relatable to the 'public interest', the resolution of the rights-conflict involves assessing the extent to which upholding either right is in the 'public interest', and the extent to which suspending either right is not in the 'public interest'. This in turn involves evaluating the extent to which (1) upholding each right furthers the objectives of that right, and (2) the objectives of each right are representative of the 'public interest'.

The fundamental question therefore is: what is 'the public interest'? The **public interest theory** does not provide any generic definition, and that is its essence: to provide a thoroughly contextualised way of resolving rights-conflicts, where even the justificatory factor ('public interest') varies according to context. However, this is problematic for the theory's credibility. It could lead to question-begging. It could be argued that a right's objectives are in the 'public interest' precisely because they have been recognised as the objectives of a right. That is, it was in the 'public interest' in the first place to recognise those objectives and interests as legal rights. The very element of the **public interest theory** which gives it its justificatory force (the notion of 'public interest'), therefore, could be defined through circular reasoning.

Furthermore, the **public interest theory** could permit unelected judges[178] arbitrarily to decide what the 'public interest' is in a particular case.[179] This could undermine the judiciary's neutrality, if the substance of 'public interest' is considered to be a policy decision, resting, in a democracy, with the executive and legislature, accountable in different ways to the electorate. The **public interest theory** could blur the lines between the branches of government in a way that is unpalatable even to those in constitutional systems (such as the Westminster system) which adhere to a weaker form of separation of powers than in some presidential republics. A fundamentally political decision is effectively being made by the branch tasked with only interpreting and applying the law – a step that should occur *after* the political decisions on the law's purpose have already been made. This is exacerbated if there is no clear rationale for understanding what the public interest is. As we shall see below, the **public interest theory** does not necessarily provide such a rationale.

This judicial decision-making on policy could also affect consistency of judgments and transparency of adjudication. A lack of understanding as to the meaning of 'public interest' could lead to laconic reasoning about

[176] Which is of a sufficiently important nature.
[177] Which are not rights.
[178] At least in the English jurisdiction.
[179] As several theorists have argued: JAG Griffith, 'The Political Constitution' (1979) 42 MLR 1; KD Ewing and CA Gearty, *Freedom under Thatcher* (Clarendon 1990); J Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) 13 OJLS 18; J Allan, 'Bills of Rights and Judicial Power' (1996) 16 OJLS 337.

the 'public interest', thus importing intuitive and unprincipled reasoning into rights adjudication.[180] Judicial reasoning becomes opaque, making it impossible to tell when certain actions, in law, amount to a justified suspension of a right. This undermines the credibility of and justificatory force behind the resolution of rights-conflicts, and deprives judgments of any thread of consistency. A theory engendering such a predicament is rightly criticised as being weak, as well as of little value to the courts and to individual rightholders.

The failure of the **public interest theory** to define 'public interest' also leaves unanswered the question of *whose* interests matter. How are courts to know whether it is, in the particular case, in the 'public interest' that the individual's right is upheld?[181] And, if an individual is to be preferred, which of the two individual rightholders in the rights-conflict should the 'public interest' prefer? Once again, the **public interest theory** leaves this to context, even though it directly influences the resolution's justificatory basis.

'Public interest' can be defined in different ways, and three categories of theory can be used to define it:[182] preponderance or aggregative theories, unitary theories, and common interest theories. Each way of defining 'public interest' is distinguished in terms of how the relationship between 'public interest' and individual interests is conceived, and in terms of how 'interest' is conceived.[183] Preponderance or aggregative theories are based upon a subjective definition of individual interests, and on an understanding of '*public* interest' as the aggregation of individual interests. Thus, interests are identified through individuals' preferences, which are seen as the best evidence of what individuals take to be in their own best interests. 'Public interest' is then discovered by aggregating the subjective interests of a preponderance of individuals. 'Public interest' has no independent content, and courts may not define it according to their own understanding of what is good for 'the public', as a unitary entity. 'Public interest' is owned and controlled by the individuals making up that public, and it is the embodiment of the greatest good, in utilitarian terms.

This is problematic because there is no practicable mechanism for determining what is in the interest of a preponderance of individuals.[184] Logically, it is impossible to determine which out of two or more alternatives is preferred by a preponderance of individuals through a mere voting process.[185] Other ways of identifying individual and then aggregate preferences,[186] are also compromised because individuals' pursuit of self-interest does not necessarily result in rational collective outcomes.[187] Furthermore, it is hardly possible to maximise the satisfaction of disparate individual interests.[188] Such interests will inevitably be traded off against each other, so that some interests are sacrificed for the sake of others. If there is no objective means of measuring the value of different interests to different people, it is impossible to measure the greatest possible amount of interest satisfaction.[189] Courts would be forced to prefer majority interests to minority interests, each time these come into conflict.

[180] A McHarg, 'Reconciling Human Rights and the Public Interest' (1999) 62 MLR 671.
[181] As opposed to a collective interest which that right might undermine.
[182] V Held, *The Public Interest and Individual Interests* (Basic Books 1970).
[183] McHarg (n 180) 674.
[184] ibid 675.
[185] K Arrow, *Social Choice and Individual Values* (2nd edn, YUP 1963).
[186] Such as a market process.
[187] AI Ogus, *Regulation* (Clarendon 1994) 29–46.
[188] F Oppenheim, *Political Concepts* (UCP 1981) 144.
[189] L Lewin, *Self-Interest and Public Interest in Western Politics* (OUP 1991) 7; Held (n 182) 67.

Preponderance or aggregative theories, therefore, do not provide an adequate, or morally sound,[190] rubric by which to define the 'public interest'.

Unitary theories envisage 'public interest' as transcending and reconciling disparate individual interests. 'Interest' is defined objectively, and the relationship between individual and collective is not that the former makes up and defines the latter, but that the latter is completely separate from the former. 'Public interest' is defined as what, ideally, an individual or group should prefer. This too is problematic, because it involves one entity deciding for a whole collective what overriding scheme of moral values will either please everyone,[191] or the majority.[192] This exposes a degree of paternalism, which, as with preponderance or aggregative theories, permits powerful individuals to determine a purportedly internally consistent and universally applicable 'public interest' to disregard minority or dissenting interests. Once again, the **public interest theory** could lead to a tyranny of the majority, whereby rights-conflicts are resolved always in favour of the right which furthers the majority's conception of what is good. The right suspended, therefore, becomes a hollow instrument in the general scheme of justice, promising but failing to protect the interests of those who do not conform with the interests or perspectives of the majority, or of those holding the majority of power. Such a problem can be particularly acute in the privacy-FOE conflict, where privacy usually protects the interests of a single individual to shield himself from public gaze, and FOE usually protects the interests of more than one individual to know details about his life. Employing preponderance or aggregative theories, or unitary theories, could see privacy systematically undermined in any conflict with FOE.

Common interest theories seek to reconcile subjective and objective notions of 'interest', and identify as 'public' only those interests which can reasonably be said to be held in common by individual members of the public. 'Interest' can be defined as those things that increase people's opportunities to achieve whatever it is that they want for themselves.[193] While specification of the goals remains subjective, the ways in which they are best achieved is an objective criterion. However, using this to define 'public interest' can make the concept of 'common interest' redundant, because of the limited circumstances in which individuals agree about where their interests lie.[194] A common interest need not merely be something which individuals share, but, rather, a net interest: the collective agreement on the interests of individuals *as members of the public*, as opposed to their interests as individuals *per se*. This "collective" interest could take precedence in defining 'public interest', over any form of "distributive" 'public interest', which is prone to fragmentation.[195] 'Public interest' is thus an expression of what would benefit every individual as a member of the public, and what the public as a collective entity has itself voiced would benefit it.[196] 'Public interest', therefore, could vary over time and across different socio-economic or political landscapes.[197] Though such common interest theories accommodate the disparateness of individual interests better than preponderance or aggregative theories and unitary theories, there is still the opportunity to assert that a majoritarian interest would benefit every individual *qua* member of the public, and it is still possible that a

[190] McHarg (n 180) 675.
[191] An impossible feat in the context of many disparate interests.
[192] Thereby necessitating the arbitrary removal of some interests from the calculation. Held (n 182) ch 5.
[193] B Barry, 'The Public Interest' in A Quinton (ed), *Political Philosophy* (OUP 1967).
[194] Held (n 182) 677.
[195] Oppenheim (n 188).
[196] Through, for example, voting.
[197] Held (n 182) 183.

majoritarian interest is the interest that is voiced most loudly by the collective entity. Thus, even on a subjective-objective model of 'public interest', there are weaknesses in defining that concept.

The fallibility of, and lack of agreement over, these ways of defining 'public interest' indicate it is potentially inherent in *any* notion of 'public interest' that minority interests must give way. Unless the majority of individuals makes it clear it is in the common interest to protect minority interests *because* they are minority interests, or, unless an overarching norm crystallises that minority interests must, by definition, be protected under 'public interest', the danger will always be present that minority interests will be discounted.

The multiplicity and fallibility of the theories of defining 'public interest' also mean courts must decide on an *ad hoc* basis what 'public interest' is, and must choose between at least three different ways of conceiving of 'public interest', each contested on the basis of how to relate collective interests to individual interests, and how to define 'interest' in the first place. Each way of defining 'public interest' poses a further danger of disregarding minority or fringe interests. If one of the rights in the conflict (for example, the privacy right) represents that which the current social climate treats as minority or fringe interests, then the **public interest theory** will condemn that rightholder and their right always to be sacrificed for the sake of vindicating the more socially valued right (for example, the FOE right). The 'fringe right', therefore, is effectively and systematically hollowed out by the **public interest theory**.

This problematic lack of prescription for 'public interest' is apparent in the different ways in which courts, tasked with justifying rights adjudication decisions on the basis of 'public interest', have interpreted and defined 'public interest'.[198] Judicial definitions of 'public interest' can and do vary, and that is evidence of the problems of opaqueness and inconsistency with this theory. Phillipson has argued 'public interest' in article 8 / 10 cases has been broadened and blurred by the courts, without necessarily being anchored in any robust theoretical (or doctrinal) approach.[199] McHarg has explained in a broader context[200] that judicial interpretations of 'public interest',[201] as defined in the limitation clauses of Convention rights,[202] have varied, and it could be argued that judges carry out a 'public interest' test according to their view of the merits of each claim.[203] Though the limitation clauses of Convention rights themselves could define 'public interest' or 'legitimate purposes' by stating that interferences must be prescribed by law and necessary in a democratic society, there is still variation in the interpretation of what these two notions mean, and whether they justify interferences in particular cases. Even if judges are applying the tests of 'prescribed by law' and 'democratic necessity',[204] those two notions themselves are open to broad interpretations, especially when placed in opposition to the preservation and protection of rights.

[198] These judicial approaches will be considered in more depth in Chapter 6, as and when the **public interest theory** arises in the tort's jurisprudence.
[199] G Phillipson, 'Press Freedom, the Public Interest and Privacy' in AT Kenyon (ed), *Comparative Defamation and Privacy Law* (CUP 2016) 151–154.
[200] McHarg (n 180) 685–695.
[201] Or the analogous 'legitimate purposes' term.
[202] For example, article 1 of Protocol 1; article 2(1) and (4) or Protocol 4; and articles 8(2), 9(2), 10(2) and 11(2).
[203] McHarg (n 180) 683.
[204] Which might be more specific than a general notion of 'public interest'.

It could be said, however, that the tests of 'prescribed by law' and 'democratic necessity' show that, through the doctrine they are developing in Convention rights adjudication, courts are putting at least a thin layer of flesh on the bare bones of the **public interest theory**. This doctrinal development over time, alongside the gradual maturation of judicial approaches to rights adjudication, might lead to "patterns emerg[ing]", a clearer rationale developing, and consistent and transparent decision-making, based upon the otherwise conceptually variable **public interest theory**.[205] Yet it seems that relying upon doctrinal development to strengthen the applicability and justificatory force of a theory does not make that theory more credible than it is without the supplemental doctrine. This is especially so if that doctrine is defining 'public interest' in terms of broad concepts such as the 'prescribed by law' or 'democratic necessity', which might offer little more precision than 'public interest' itself. Identifying a "pattern" in the jurisprudence depends upon viewing the judicial reasoning and the decisions through a lens of conceptual analysis,[206] which returns to the variability and indeterminacy inherent in the **public interest theory**.

It is true that some courts are explicitly instructed by legislation to incorporate 'public interest' in rights adjudication.[207] To that extent it cannot be demanded of them to adopt a completely different rights-conflict resolution theory. This does not eliminate the shortcomings of the **public interest theory**. Lord Mance has opined that case law development, and the requirement for delicate and difficult 'public interest' balancing by the courts, have not contributed to any level of certainty, even in common situations, in the context of the tort.[208]

The theory may be improved by supplementation with a determined and specific definition of 'public interest', to be applied whenever courts are faced with a conflict between two particular rights, such as privacy and FOE. That specified meaning of 'public interest' in that particular context could be drawn from the respective rights' normative underpinnings.[209] This could also better insulate judges from accusations of usurping the legislative or executive function, because their reasoning would be anchored in the interpretation of rights, already recognised as such by law, and would not be floating in the realm of political assessments of what is best for the public:[210]

> [A] human rights court needs to be able to point to a firmer theoretical foundation for its claim to legitimacy than simply the reasonableness of individual decisions, since these are judgments with which observers may or may not agree… Ultimately, the inconsistency and unpredictability which result from fudging the conceptual issue represent a greater threat to judicial legitimacy than opting unequivocally for one or other methodological approach.

The normative complexity and variability of privacy and FOE[211] has implications for how feasible it would be to supplement the **public interest theory** with a further layer of detail based upon these philosophical justifications and core purposes. The definition of 'public interest' in the tort's second stage would still vary according to the facts of each case, even though each case involves a conflict between the same two rights. However, this definitional variability would at least be narrowed to the identified normative underpinnings of those two specific

[205] McHarg (n 180) 684.
[206] ibid.
[207] For example, under HRA, s 12.
[208] J Mance, 'Human Rights, Privacy and the Public Interest' (2009) 30 Liverpool Law Review 263.
[209] This broad approach has also been suggested by McHarg: McHarg (n 180) 681.
[210] ibid 696.
[211] Discussed in Chapter 3.

rights. Thus, in each case, the court would first identify these underpinnings, and then specify in respect of each right which of those underpinnings are the relevant and most important ones on the facts. The court would then effectively define 'public interest' according to those normative underpinnings, and measure the effects of upholding or suspending each right against the 'public interest' defined in that way.

For its apparent benefits, harnessing the 'public interest' in this way empties that concept of any meaning, raising the question why that concept is being employed in the conflict resolution process in the first place. Recalling the Razian approach to the relationship between rights and (public) interests, every right is composed of some interest, which the polity has considered important enough to confer the protection of a legal right. When courts identify a right's normative underpinnings, they are effectively identifying that politically recognised interest. So, why do courts then need to label those normative underpinnings or politically recognised interests as 'public interest'? Surely it is self-evident that such justifications, purposes or interest *are* the 'public interest'. Invoking 'public interest' in resolving rights-conflicts, therefore, adds nothing more to the process, or the justificatory force of the outcome. Courts may as well simply refer to each right's normative underpinnings or socially recognised interests, and measure the effects of upholding and suspending with each right on those underpinnings or interests. Invoking 'public interest' is superfluous.

A more important problem remains, however, with the refined process of resolving rights-conflicts through the **public interest theory**. In specifying, in respect of each right, which of the identified normative underpinnings are the relevant and most important ones on the facts, courts might focus less upon the particular facts and how each right arises on those facts, and more upon what it might be in the 'public interest' to recognise as the relevant and most important underpinnings of each right. In the tort's second stage, courts might not focus upon such facts as the nature of the information, the purpose and nature of the publication, the intended recipients of the information and their interests, and the side-effects of the publications,[212] and how such facts relate to the respective rights to privacy and FOE. Instead, they might focus upon which of the normative underpinnings privacy and FOE it might be, in light of the particular case, in the 'public interest' to highlight as most important. Those underpinnings are, after all, intended to define the 'public interest' in the conflict resolution process.

Such an approach deflects courts' attention away from how the facts relate to the rights and their normative underpinnings, and towards undefined and abstract notions of 'public interest' in the context of the particular case. It is the court's definition of 'public interest' that dictates what the most important normative underpinnings are for each right, rather than those underpinnings defining the 'public interest'. This exposes the conflict resolution process to laconic reasoning, inconsistencies and reduced transparency. This is an inherent problem with the **public interest theory**, however harnessed the concept, or refined the process, might purport to be.

The **public interest theory** also frames the conflict resolution process in terms of effectively sacrificing one right for the benefit of the 'public'. That is the crux of the justification given for resolving a rights-conflict in favour of one right and not the other. The 'public interest' demands and justifies upholding that right. The 'public interest' is, in this sense, treated as more important than that right itself. The upshot of this is that the rightholder who must tolerate this loss of rightholding entitlement must do so because it serves the 'public interest'. Effectively, that

[212] Whether in terms of harms to the claimant and others or benefits to the defendant and others.

individual is necessarily and explicitly used as a means to the collective's end. This instrumentalisation is one implication of not treating rights as "trumps" of all other non-right interests,[213] but of instead allowing individuals' rights surrender to other interests.

Arguably, though, this does not necessarily breach Kant's categorical imperative, that an individual, with inherent dignity and value in himself, must never be treated solely as a means to an end but must always be treated as an end in himself: the use of the rightholder is not thorough, that is, the individual is not treated *solely* as a means, on account of the fact that that individual is also part of the public, whose interest is furthered when that individual's right is suspended. To that extent, that individual too benefits from his right's suspension. This is a thoroughly utilitarian argument, and may not appeal to those who view certain rights through a deontological lens, considering them to be more worthy of protection than any notion of the public good.[214] How can the interests of a rightholder, as an individual or as a member of the public, *ever* be served by the suspension of their right? The interests of that rightholder, and that right's normative underpinnings, are relegated below the 'public interest', however that is defined. This is entailed in every resolution of a rights-conflict employing the **public interest theory**. Given as much, it is doubtful that that theory can be supplemented in any way to minimise its deleterious effects in terms of how the law treats individuals who lose their rightholding entitlement. Those deleterious effects are particularly acute for minority or 'fringe' rightholders, who rely most of all on the protective capacity of their rights.

This is a commodification of rights, where rights are instrumentalised for some higher purpose, and their own purpose is rendered irrelevant to whether their suspension is justified. In the **public interest theory**, the right*holder* whose right is suspended is *also* effectively instrumentalised. Where the claimant suffers this loss of rightholding entitlement, the court is effectively deciding she and her privacy are used, through the publication of her private information, in order to satisfy some 'public interest'. Where the defendant suffers this loss, the court is effectively deciding he and his FOE are used, through the suppression of his publication, in order to satisfy some 'public interest'. Neither of these 'public interests' need necessarily be connected with the objectives of the right upheld: 'public interest' is a nebulous term that permits any number of interpretations. Where it is interpreted as the interests of the majority, the factor of instrumentalisation of the unsuccessful rightholder is exacerbated, and their right is rendered a mere façade of protection and a false security against majoritarian rule.

In the tort's second stage, these deleterious effects might be borne out where, for example, the claimant is a celebrity and the defendant newspaper wishes to publish details of her sexual proclivities on the basis it may be beneficial for young persons to see a 'real life' example of how 'promiscuity' leads to instability and unhappiness. On the **public interest theory**, a court might consider that reason as definitive of the 'public interest', such that it is in the 'public interest' that young persons are educated about the negative consequences of an 'over-active' sex life. In such a case, the claimant is explicitly used as a means to the collective's end. But even if the court reasoned with more depth about the 'public interest' and reached the same conclusion, the fact that it framed its conflict resolution process in terms of 'public interest' means that the claimant would still be used as a means to the collective's end. The justification for the interference is not a rights-based justification, but, rather, a justification based upon 'public interest'.

[213] Dworkin (n 175).

[214] Recall Kramer's deontological account of morality, especially in respect of strongly and weakly absolute rights, binding always and everywhere.

In such a scenario, the court might identify the normative underpinnings of the privacy and FOE rights, and then, considering the facts, specify those underpinnings of each right that are relevant and most important on these facts, thus defining the 'public interest' in this case, and then measuring the effects of upholding or suspending each right against that 'public interest'. In reaching the conclusion that upholding FOE and suspending privacy best serves the 'public interest', the court is still stating that the law relegates the claimant's interests as a privacy rightholder, and the underlying purposes of that right, below the 'public interest', and the suspension of the claimant's privacy right becomes a means of satisfying that 'public interest'.

(e) Conclusion

Not all rights-conflict resolution theories can apply to the tort's second stage. Some theories logically cannot apply because they negate the existence of conflicts, while others are unsuited because they rank rights in a predetermined, absolute way.

Although context-based theories are better suited to that stage, they can be problematic due to their potential to give courts wide discretion to employ subjective, intuitive and unprincipled reasoning, whether that be normative or factual reasoning; that is commonly referred to as 'balancing'. The risk of bias in favour of one right can arise in the framing of the resolution process to be applied to the conflict, and the risk of opaque, inconsistent and unanchored outcomes evokes legitimate criticism of 'balancing'. However, some context-based theories offer constraints upon reasoning, in particular, the **optimality theory** and **proportionality theory**. These theories provide a specific structure for reasoning, but also demand that structure be supplemented with moral-evaluative substance derived from the particular conflict and rights in question. Adjusted to the particular logic, context and consequences of the tort's second stage, some of these theories could assist in making judicial reasoning more consistent, transparent and principled.

Other context-based theories cannot assist in that way because they provide little constraint: for example, the **public interest theory**. Some context-based theories should also be rejected for their lack of rights-focus, and their marginalisation of rights and rightholders. The **trade-off theory** and **public interest theory** take a thoroughly consequentialist view of rights, measuring them against factors external to the rights' normative underpinnings. This tends towards a commodification of rights, and does not recognise the serious loss entailed in each rights-conflict. That weakens the justificatory strength and legitimacy of the inevitable outcome of each conflict: upholding one right and suspending the other. Such theories would sooner worsen than improve judicial reasoning in the tort's second stage.

CHAPTER 5. PROBLEMS WITH CURRENT JUDICIAL REASONING

(a) Introduction

This chapter analyses the doctrine of the second stage of the tort of misuse of private information. The courts' approach is evaluated through the lens of the preceding analytical and theoretical findings, to assess the extent to which judicial reasoning recognises the nature and consequences of the conflict between privacy and FOE, engages with the rights' normative underpinnings, and reflects different rights-conflict resolution theories.

Situated within the basic parameters of the "ultimate balancing test", current reasoning incorporates neither a recognition of the rights-conflict and its implications, nor a proper engagement with the rights' normative underpinnings. Even though proportionality is nominally the chosen method for resolving the second stage, the courts' focus upon 'public interest' dominates judicial reasoning in this stage. The disorientating and rights-distancing effect of 'public interest' reasoning makes it the root cause of the current lack of transparency, consistency and principle (as described in Chapter 1 in terms of how engaged courts are with the two rights and their normative underpinnings), and it leads to a utilitarian economy of rights in the tort's second stage.

(b) Current doctrinal framework for the tort's second stage

The courts have characterised the second stage as a "balancing act"[1] between privacy and FOE, to decide which should prevail. Lord Steyn formulated the framework thus:[2]

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

This "ultimate balancing test" is a "very well established" framework,[3] applied in effectively all cases. That is why this inquiry will focus upon the application of this test in practice.

[1] *Campbell v MGN Ltd* [2004] 2 AC 457, [36] (*Campbell*); *PJS v NGN Ltd* [2016] AC 1081, [20] (*PJS*).
[2] *Re S (A Child)* [2005] 1 AC 593, [17] (*Re S*).
[3] *Mosley v NGN Ltd* [2008] EWHC 687 (QB), [28] (*Mosley* 1); cited with approval in *PJS*, [20]; confirmed as principal authority for any case involving a privacy-FOE conflict: *Khuja v Times Newspapers Ltd* [2017] 3 WLR 351, [22]-[24] and *Norman v Norman* [2017] 1 WLR 2523, [59] (*Norman*).

Although the "ultimate balancing test" makes no mention of it, courts habitually consider "public interest"[4] in publication, primarily to ascertain whether it would "enable" FOE to "prevail".[5] 'Public interest', as a consideration at all,[6] entered the tort's second stage via different routes. Section 12(4)(ii) of the HRA mandates consideration of whether publication of journalistic material is in the 'public interest'. The 'public interest' defence in breach of confidence[7] is another origin of this reasoning, as is the 'public interest' element of the balance of convenience test for interim injunctions.[8] These areas of the law, though they can be relevant to the tort's second stage, do not account for the privacy-FOE conflict, as mandated in the "ultimate balancing test". Nevertheless, the current approach involves, in no small part, 'public interest' reasoning.

The English courts also take into account ECtHR jurisprudence, as required by statute.[9] While they should not fall behind Strasbourg, they are not slaves to it,[10] so that "any perceived absence of authoritative guidance from ECtHR" must not influence or inhibit their judgment.[11] Therefore, even though articles 8 and 10 are central to the tort, English courts have meaningful autonomy in deciding these cases, and may exceed Strasbourg in developing the doctrine.

[4] *A v B plc (Flitcroft v MGN Ltd)* [2002] 2 All ER 545, [11], [29] (*Flitcroft*); *AAA v Associated Newspapers Ltd* [2013] EWCA Civ 554, [9], [43], [55] (*AAA* CA); *Ali v Channel 5 Broadcast* [2018] EMLR 17, [195]-[197] and [2019] EWCA Civ 677, [85]-[93] (*Ali* CA); *AMM v HXW* [2010] EWHC 2457 (QB), [38]-[39] (*AMM*); *AMM v NGN Ltd* [2014] EWHC 4063 (QB), [7]; *Author of a Blog v Times Newspapers Ltd* [2009] EMLR 22, [7], [12], [23], [33] (*Author of a Blog*); *AXB v BXA* [2018] EWHC 588 (QB), [8], [53], [55] (*AXB*); *Browne v Associated Newspapers Ltd* [2007] 3 WLR 289, [38], [55] (*Browne* CA); *Bull v Desporte* [2019] EWHC 1650 (QB); *Callaghan v Independent News and Media Ltd* [2009] NIQB 1, [25]; *Campbell*, [56]-[63], [101]-[113], [116], [142]; *CDE v MGN Ltd* [2011] 1 FLR 1524 (*CDE*); *CTB v NGN Ltd* [2011] EWHC 1326 (QB), [26] (*CTB*); *CVB v MGN Ltd* [2012] EMLR 29 (*CVB*); *D v Revenue and Customs Commissioners* [2017] UKFTT 850 (TC), [136]-[138] (*D v RCC*); *Donald v Ntuli* [2011] 1 WLR 294 (*Donald*); *Douglas v Hello! Ltd (No 6)* [2005] 3 WLR 881, [254] (*Douglas* (*No 6)*); *ERY v Associated Newspapers Ltd* [2017] EMLR 9, [47], [69] (*ERY*); *ETK v NGN Ltd* [2011] 1 WLR 1827, [13], [19], [23] (*ETK*); *Ferdinand v MGN* [2011] EWHC 2454 (QB), [62]-[65], [84]-[87], [99] (*Ferdinand*); *Goodwin v NGN Ltd* [2011] EMLR 27 (*Goodwin*); *Gray v UVW* [2010] EWHC 2367 (QB), [44]; *Green Corns Ltd v Claverly Group Ltd* [2005] EMLR 31, [82]-[99], [108]; *HRH Prince of Luxembourg v HRH Princess of Luxembourg* [2018] 2 FLR 480, [99]-[100] (*Luxembourg*); *HRH Prince of Wales v Associated Newspapers Ltd* [2007] 3 WLR 222 (*Prince of Wales*); *Hutcheson v NGN Ltd* [2012] EMLR 2, [34] (*Hutcheson*); *Jagger v Darling* [2005] EWHC 683 (Ch), [14] (*Jagger*); *KJH v HGF* [2010] EWHC 3064 (QB), [4] (*KJH*); *McClaren v NGN Ltd* [2012] EMLR 33 (*McClaren*); *McKennitt v Ash* [2006] EMLR 10, [96]-[101] (*McKennitt* HC); *McKennitt v Ash* [2007] 3 WLR 194 (*McKennitt* CA); *Mosley v NGN Ltd* [2008] EMLR 20, [110]-[171] (*Mosley* 2); *NNN v Ryan* [2013] EWHC 637 (QB), [13] (*NNN*); *Norman*, [76]; *PJS*, [21]-[26], [31]-[36]; *Re C* [2016] EWCOP 21; *Re Guardian News and Media Ltd* [2010] 2 AC 697 (*Guardian*); *Richard v BBC* [2018] 3 WLR 1715 (*Richard*); *Rocknroll v NGN Ltd* [2013] EWHC 24 (Ch), [35] (*Rocknroll*); *Spelman v Express Newspapers* [2012] EWHC 355 (QB), [92], [102]-[108] (*Spelman*); *Terry v Persons Unknown* [2010] EMLR 16 (*Terry*); *Theakston v MGN Ltd* [2002] EMLR 22 (*Theakston*); *TUV v Persons Unknown* [2010] EMLR 19, [4] (*TUV*); *Weller v Associated Newspapers Ltd* [2016] 1 WLR 1541, [40] (*Weller* CA); *X v Persons Unknown* [2007] EMLR 10, [51] (*X*); *YXB v TNO* [2015] EWHC 826 (QB), [17] (*YXB*); *ZXC v Bloomberg LP* [2017] EMLR 21, [48] (*ZXC* 1); *ZXC v Bloomberg LP* [2019] EWHC 970 (QB), [127] (*ZXC* 2).

[5] *Douglas (No 6)*, [70], citing *Flitcroft*; *Douglas v Hello! Ltd (No 3)* [2008] 1 AC 1, [120] (*Douglas (No 3)*).

[6] The actual nature, extent and appropriateness of 'public interest' reasoning is discussed in (f), below.

[7] *Lion Laboratories v Evans* [1984] 1 QB 530 (*Lion*).

[8] *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253, [24]-[25]; see also *Browne* CA, [4].

[9] HRA, s 2(1)(a).

[10] "The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less": *R (Ullah) v Special Adjudicator* [2004] 2 AC 323,[20].

[11] *Commissioner of Police of the Metropolis v DSD* [2019] AC 196,[79].

Indeed, the MOA[12] has widened in the article 8/10 context.[13] A "procedural turn" in Strasbourg's law on rights-conflicts[14] means strong reasons are required to substitute Strasbourg's view for that of domestic courts, especially where those courts have applied broadly framed criteria:[15] Contribution to a debate of general interest; How well known is the person concerned and what is the subject of the report?; Prior conduct of the person concerned; Method of obtaining the information and its veracity; Content, form and consequences of the publication; Severity of the sanction imposed.[16] Previously, contribution to a debate of general interest was "the decisive factor".[17] Albeit now just one out of six, it remains an "essential criterion".[18]

Looser supervision may weaken Convention rights in practice.[19] Widening the MOA may be defensible only if domestic courts make a serious effort in rights-conflicts cases,[20] adequately justifying their decisions. This is why the transparency, principle and consistency of English courts' reasoning is so important to the credibility of the Convention rights to privacy and FOE in this jurisdiction.

(c) Do courts acknowledge the rights-conflict between privacy and FOE?

i. Introduction

Evaluating the strength of the English courts' approach must begin by asking how much they engage with the logic of the tort's second stage. Whether or not the nature and logical entailments of a rights-conflict are acknowledged can affect the strength of courts' reasoning and justification of their decision on which right to suspend.[21]

All types of cases involving a privacy-FOE conflict are relevant, including those under the tort and those *not* under the tort. The latter type includes injunction applications to prevent publication of information in judicial proceedings or judgments, because it would breach article 8.[22] Such cases are relevant authorities because they involve a privacy-FOE conflict identical to that in the tort's second stage. That privacy-FOE conflict in non-tort cases is

[12] Shown by Strasbourg to member states.
[13] Whereas in *Von Hannover v Germany (No 1)* [2004] EMLR 21 (*Von Hannover (No 1)*), the ECtHR took a more interventionist approach to assessing whether national courts had evaluated the democratic necessity of publishing photographs and information about the applicant*,* eight years later, in *Axel Springer v Germany* [2012] EMLR 15 (*Axel Springer*), it indicated that, as long as national courts accounted for certain criteria ([89]-[95]) in 'balancing' the rights, it should not interfere with their reasoning and the final outcome: [87]. For subsequent deferential reasoning, see: *Ruusunen v Finland* (Application no. 73579/10) Fourth Section (14 January 2014) and *Lillo-Stenberg v Norway* (Application no. 13258/09) First Section (16 January 2014).
[14] S Smet, 'Introduction' in S Smet and E Brems (eds), *When human rights clash at the European Court of Human Rights* (OUP 2017) 17.
[15] In the article 8/10 context: *Von Hannover v Germany (No 2)* [2012] EMLR 16, [107] (*Von Hannover (No 2)*).
[16] *Axel Springer*, [89]-[95]; *Von Hannover (No 2)*, [108]-[113].
[17] *Von Hannover (No 1)*; *Ferdinand*, [62]; *ETK*, [23].
[18] *Axel Springer*, [90]; *Von Hannover (No 2)*, [109]; English courts continue to see this as a decisive factor: *Rocknroll*, [30]-[31].
[19] I Leigh, 'Reversibility, Proportionality and Conflicting Rights' in S Smet and E Brems (eds), *When human rights clash at the European Court of Human Rights* (OUP 2017); D Voorhoof, 'Freedom of Expression versus Privacy and the Right to Reputation' in S Smet and E Brems (eds), *When human rights clash at the European Court of Human Rights* (OUP 2017).
[20] E Brems, 'Evans v UK' in S Smet and E Brems (eds), *When human rights clash at the European Court of Human Rights* (OUP 2017).
[21] Discussed in Chapter 2.
[22] For example: *Clayton v Clayton* [2006] 3 WLR 559 (*Clayton*).

identical to that in tort cases because the underlying rights in issue are privacy and FOE. For example, in *Re S*, [23] a privacy-based application was made to suppress information in judicial proceedings. The way in which the FOE right arose on these facts was not by virtue of a defendant or respondent claiming entitlement to that right, but, rather, by virtue of its inextricable connection with the principle of "open justice". The right to a fair trial is also connected with open justice. It could therefore be argued that in such cases the task for the court in resolving the competing interests is different from their task in resolving the privacy-FOE in tort cases. Even in such non-tort cases as *Re S*, however, the "open justice" dimension does not diminish or adjust the relevance of the right to FOE, which the courts in such cases must account for when deciding whether to grant such an injunction, as Lord Steyn explicitly reasoned in *Re S*.[24] In any event, albeit not a tort case, courts apply *Re S* in effectively every tort case: the "ultimate balancing test" is *common* authority for all cases involving a privacy-FOE conflict.[25]

ii. The courts' approach

Courts are not acknowledging the privacy-FOE conflict. Although the "ultimate balancing test" mentions this "conflict",[26] and some judges refer to conflict, the courts' overall approach is not an unambiguous, uniform engagement with the logic and consequences of this rights-conflict.

Judges sometimes refer to a conflictual relationship between privacy and FOE. They have held that courts must "consider article 10(2) along with article 10(1), and by doing so to bring into the frame the conflicting right to respect for privacy,"[27] and that article 10 "operates in the opposite direction" from article 8.[28] They also signify "conflicting interests" underlying the rights,[29] and occasionally mention competition between those rights,[30] which implies they understand their 'balancing' task involves choosing between two rights, rather than avoiding or eliminating the competition. However, references to conflict and competition appear to be mere descriptions, rather than direct, deliberate acknowledgements of the nature and entailments of rights-conflicts. These descriptions are not followed by explicit recognition of a *genuine* conflict, entailing loss of rightholding entitlement. It cannot be inferred from bare references to conflicts or competition that judges are consciously framing their reasoning in terms of resolution of a genuine rights-conflict.

Some judges deny, or purport to minimise, the privacy-FOE conflict. They adopt the language of accommodation, reconciliation, or "potentially" competing rights.[31] Recently a Judge referred to "prima facie rights", and the need

[23] In which Lord Steyn formulated the "ultimate balancing test".
[24] Added as part of addressing specific correction no. 3 on page 6 of Examiners' Joint Report: For a more detailed discussion of the 'balancing' process in cases involving the privacy tort and cases not involving the privacy tort, see: J Gligorijevic, 'Publication Restrictions on Judgments and Judicial Proceedings: Problems with the Presumptive Equivalence of Rights' (2017) 9 JML 215.
[25] The courts apply it in cases under the tort (*PJS*, [20]), as well as in non-tort privacy injunction applications (*Clayton*, [57]-[58]).
[26] *Re S*, [17]:"…where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary."
[27] *Douglas v Hello! Ltd (No 1)* [2001] QB 967, [137] (*Douglas (No 1)*).
[28] *Flitcroft*, [6].
[29] *Flitcroft,* [6]; *ZXC* 1, [36].
[30] For example: *Campbell*, [12], [86], [111]; *Terry*, [61]; *Luxembourg*, [56]-[68], [80]-[118]; *NNN*, [14.2]; *Theakston*, [67]; *Douglas (No 1)*, [133]; *Axel Springer*, [84].
[31] For example: *TUV*, [23].

to undertake 'balancing' "[w]here the two rights potentially conflict",[32] as if the "ultimate balancing test" *avoids* a would-be conflict (a mere "tension" between rights[33]), instead of *resolves* a genuine conflict. The Court of Appeal has interpreted the qualification within each right as providing a proportionality framework "to accommodate the other" right.[34] Another Judge referred to his "considered attempt to reconcile the competing rights", albeit already admitting that, "[w]here the court is required to balance one [right] against the other a solution that comprehensively satisfies all interests is not possible".[35] Lord Hoffman employed similarly paradoxical reasoning in *Campbell*: "neither [right] can be given effect in full measure without restricting the other. How are they to be reconciled in a particular case?".[36] Courts either do not acknowledge the genuineness of the privacy-FOE conflict, or positively confirm there is no such conflict.[37]

In most cases judges do not comment upon the privacy-FOE interaction: they simply state it is a "question of balance".[38] In such instances it is impossible to conclude whether the court sees itself 'balancing' the rights to resolve a genuine conflict, or to avoid confronting that conflict.

Strasbourg also exhibits a sporadic approach to rights-conflicts generally, indicating that that Court does not confront the privacy-FOE conflict either. Though the ECtHR has referred to the relationship between rights as a conflict,[39] including *vis-à-vis* articles 8 and 10,[40] this is more a descriptive tool than evidence of deliberate engagement with rights-conflicts. Although it has reasoned that "constant search for a balance between the fundamental rights of each individual constitutes the foundation of a 'democratic society'",[41] Strasbourg has not committed to an explicit interpretation of some rights-interactions as genuine conflicts, thus eschewing specificationism.[42] Indeed, it has reasoned that the "Convention must [be] interpreted in such a way as to promote internal consistency and harmony between its various provisions",[43] and even that "the inherent logic of article 10…precludes the possibility of conflict with article 8".[44] It has also refused to protect a right to destroy information under article 10, because that would create conflict with others' Convention rights.[45]

iii. Overall implications

[32] *Richard*, [225], [229].
[33] *Richard*, [259].
[34] *Clayton*, [58].
[35] *H v A* [2016] 2 FLR 723, [103].
[36] *Campbell*, [55].
[37] It is possible to imagine the courts use terms like 'reconciliation' to signify they acknowledge the conflict and believe it can be resolved. This, however, is far from clear in the jurisprudence, and can only be a very tenuous assumption.
[38] For example: *Campbell*, [85]; *Re S,* [17]; *Mosley* 1, [28]; *PJS*, [20]; *AMM*, [38]-[39]; *Browne* CA, [38]; *Donald*, [54].
[39] For example: *Eweida v UK* (Application nos. 48420/10, 36516/10, 51671/10 and 59842/10) Fourth Section (27 March 2013), [106] (conflicts between articles 9 and 14, and between different parties' interests under art 14); *Evans v UK* (Application no. 6339/05) Grand Chamber (10 April 2007), [73] (conflict between different parties' interests under article 8); *Fernández Martínez v Spain* (Application no. 56030/07) Grand Chamber (12 June 2014), [123] (conflict between articles 9, and arts 8 and 10); *Palomo Sánchez v Spain* (Application nos. 28955/06, 28957/06, 28959/06 and 28964/06) Grand Chamber (12 September 2011), [57]; and *Odièvre v France* (Application no. 42326/98) Grand Chamber (13 February 2003), [44].
[40] *Axel Springer*, [84]; *Von Hannover (No 2)*, [100].
[41] *Chassagnou v France* (Application nos. 25088/94, 28331/95 and 28443/95) ECHR 1999-III (29 April 1999), [133].
[42] Discussed in Chapter 2.
[43] *Otto-Preminger-Institut v Austria* (Application no. 13470/87) Grand Chamber (20 September 1994), [47]; *Pretty v UK* (Application no. 2346/02) Grand Chamber (29 April 2002), [54].
[44] *Karakó v Hungary* (Application no. 39311/05) Second Section (28 April 2009), [17],[25].
[45] *Gillberg v Sweden* (Application no. 41723/06) Grand Chamber (3 April 2012), [93]-[94].

Neglecting to acknowledge explicitly and consistently the existence and entailments of the privacy-FOE conflict divorces the courts' approach from the logic of the second stage, undermining the credibility of their reasoning. That conflict is the foundation of the "ultimate balancing test", yet courts do not appear to understand the implications: one party's loss of rightholding entitlement. They appear equally open to the specificationist approach.[46] This current approach inspires little confidence that reasoning in tort cases rests upon the objective of justifying why, given the inevitability of suspension, a particular right is suspended.

This approach, in both England and Strasbourg, suggests courts are "deeply unsure about – as well as internally divided on – the very possibility of conflicts".[47] Preference for amelioration, reconciliation and accommodation evidences judicial inclination towards equilibrium, potentially enabling courts to foster an appealing[48] conflict-free, 'peaceful' process, and *avoid* their responsibility to provide robust, rights-focused justifications for suspending one right and not the other. This could entail over-extending the 'balancing' metaphor to present a false façade of lossless justice, rather than transparent reasoning to justify *why* the decision (necessitating real loss to one party) is just.[49]

Inadequately recognising rights-conflicts and their entailments could also result in rights-distant reasoning. Reasoning not explicitly and consistently connected with *rights* self-evidently undermines rights-adjudication, including the rights-based tort of misuse of private information. In this tort, it is the *rights in conflict*, the inevitability of suspending one right and one party suffering a real *loss*, that obliges courts to consider how either potential outcome[50] affects the rights' normative underpinnings. Not confronting the rights-conflict as such means judicial reasoning is *removed* from the rights. This permits courts to apply the "ultimate balancing test" (including proportionality) by reference *not* to a contextual assessment of the rights, but to an assessment of external factors.[51]

Similarly, current ambivalence about conflicts could see courts *justify* their decisions on rights by reference *not* to rights and conflict resolution, but to some broader factor, unconstrained by rights-based normative considerations and doctrinally settled conflict-resolution methodology. This could be the 'public interest'. Whatever the outcome, a 'public interest' justification could support upholding either right or suspending either right. Arriving at and justifying a decision on rights could involve reasoning unconnected with the rights themselves, if the courts do not explicitly and consistently constrain themselves to the nature and entailments of the rights-conflict that logically arises before them.

By denying or neglecting the privacy-FOE conflict in the second stage, the courts expose their decisions to the criticisms against theorists who deny, ignore or minimise conflicts generally.[52] Yet courts need not themselves

[46] Whose inapplicability to the tort was discussed in Chapter 2.
[47] S Smet, 'On the Existence and Nature of Conflicts between Human Rights at the European Court of Human Rights' (2017) 17 HRLR 499, 499–521.
[48] R Moosavian, 'A Just Balance or Just Imbalance?' (2015) 7 JML 196.
[49] ibid.
[50] Publication or suppression of the private information.
[51] Like 'public interest': discussed in (f), below.
[52] Explored in Chapter 2.

undertake the logical analysis undertaken in Chapter 2, to find the rights-conflict. They need only recognise the tort's second stage centres upon a genuine privacy-FOE conflict, *both* of which are already recognised as legally binding rights on the facts. They must concentrate upon the logical implication that, given *both* parties are (on the facts) entitled to protection under their respective rights, and given the decision must favour *either* publication *or* suppression, one right must be *suspended* and that party must suffer a *loss of rightholding entitlement*. That inevitable loss of entitlement to an already established (*pro tanto*) right must be the driving force behind judicial reasoning towards a clear justification for the decision, because that is what distinguishes genuine conflicts from apparent conflicts.[53]

(d) How do courts engage with the rights' normative underpinnings?

i. Introduction

Even if courts are ambivalent about the privacy-FOE conflict, how do they engage with these rights' normative underpinnings, especially in view of the multifaceted justifications for both rights?[54] This entails asking how well courts identify which of the various normative interpretations of either right is most implicated in the facts, and whether courts consider how and why the rights are intended to protect the respective parties, given the facts, and how publication or suppression might further or frustrate the rights' purposes. As discussed in Chapter 1, this question concerns *how well the court itself has demonstrated* that its reasoning is anchored in the rights' normative underpinnings, which to some extent is about how *explicit* the court is in linking its treatment of the facts to the relevant normative underpinnings. This concern about connecting reasoning to normative underpinnings cannot be answered by subsequently explaining certain judicial propositions or treatments of facts, however often they feature in the case law, in terms of the rights' normative underpinnings. The court itself is obliged to explain which normative underpinnings are relevant on the facts, why they are relevant, and how they lead the court to treat the facts in the way in which the court has done. As discussed in Chapter 1, this distinction must be borne in mind, namely, the distinction between the authoritative force of judicial reasoning as it appears in a judgment, and the *ex post facto* finding of patterns in reasoning between different judgments, in order to identify potential implicit links with the rights' normative underpinnings.

Examining how courts engage with the rights' normative underpinnings does not entail examining how well judges philosophise about rights. The question is how clearly and consistently they connect relevant normative underpinnings of the rights to the factual implications. Where courts face genuine rights-conflicts and must choose to suspend one right to uphold the other, their justification for and legitimacy of that choice is strengthened if their reasoning unambiguously and explicitly incorporates the normative dimension of each right, including the normative loss incurred on the facts if either right is suspended.[55] Indeed, the strongest rights-conflict resolution theories integrate normative underpinnings in this way.[56] The optimality theory is strong because the qualitative measurement of 'stringency' it requires encompasses normative underpinnings. Engaging with normative

[53] The courts' current failure to acknowledge that critical distinction will be addressed in the new method put forth in Chapter 6.
[54] Discussed in Chapter 3.
[55] As discussed in Chapters 2, 3 and 4.
[56] As established in Chapter 4.

underpinnings is also a prerequisite of proportionality: addressing rights' normative underpinnings is the only way courts can assess whether the 'means' (consequences for each right in the particular circumstances) qualitatively match the 'ends' (*normative underpinnings* of each right). It is therefore critical that courts anchor their reasoning in the relevant normative underpinnings of privacy and FOE.

ii. The courts' approach

1. General approach

In effectively every case the courts acknowledge privacy and FOE both lie "at the heart of liberty in a modern state",[57] neither having presumptive superiority over the other.[58] This much is encapsulated in the "ultimate balancing test". Beyond these baseline consistencies, there is overall inconsistent engagement – even *dis*engagement – with the rights' normative underpinnings, their normative complexity, and how they are affected by disclosure or non-disclosure on the facts. What is lacking is a consistently explicit reference to the rights' normative underpinnings as such, how that normative dimension is engaged on the facts of the case, and what implications the alternative outcomes of the case have for the normative value of the rights.

2. Privacy

Courts sometimes acknowledge some of privacy's normative underpinnings. Thus, privacy:[59]

> focuses upon the protection of human autonomy and dignity—the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people.

Furthermore, "[privacy] law is concerned to prevent the violation of a citizen's autonomy, dignity and self-esteem",[60] and has been deployed to ensure the claimant and his family are not "engulfed in a cruel and destructive media frenzy".[61] An invasion is "a sweeping attack on the values of autonomy and dignity which are at the heart of the right to privacy".[62] This potential to "cause harm" is "an important factor" in determining whether FOE should be suspended.[63] Privacy is normatively important because "it is intrusive and distressing for [a claimant]'s household minutiae to be exposed to curious eyes",[64] even though misuse of private information does not necessarily involve physical intrusion: it protects not only secrecy, but also psychological sanctity and family life.[65] Privacy "embraces

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[57] *Murray v Big Pictures Ltd* [2008] 3 WLR 1360, [24] (*Murray* CA).
[58] *Douglas (No 1)*, 1002-1006; *Campbell*, [12], [16]-[21], [55], [105]; *PJS*, [11], [51]; *Murray* CA, [23]-[24]; *Mosley* 2, [7]-[12]; *Theakston*, [17], [25], [26]; *Ferdinand*, [38], [41], [42]; *Goodwin*, [62]; *Richard*, [227]-[228]; *Spelman*, [28]-[30]; *Weller v Associated Newspapers Ltd* [2014] EMLR 24, [22], [25] (*Weller* HC)*; McKennitt* HC, [46]-[49].
[59] *Campbell*, [51]. *Douglas (No 3)*, [275].
[60] *Mosley* 2, [7].
[61] *CTB*, [26].
[62] *GYH v Persons Unknown* [2017] EWHC 3360 (QB), [35].
[63] *Campbell*, [118].
[64] *McKennitt* HC, [138]; upheld in *McKennitt* CA, [22].
[65] *PJS*, [60].

more than one concept", confidentiality *and* intrusion.[66] In evaluating compensation for privacy invasion, courts have further confirmed the right protects autonomy, safeguards against injury to feelings, and prevents damage to dignity.[67]

Such acknowledgement of privacy's normative importance does not appear in all cases. Sometimes,[68] courts make no reference to the normative reasons why it might be protected generally, and (less still) in the particular case.[69] This has sometimes led to reasoning treating privacy *inconsistently* with its normative underpinnings, and courts *dis*engaging with these underpinnings in the "ultimate balancing test". Judges have reasoned the privacy right is weak, implying it is *undeserved*,[70] where the information involves merely fleeting or extra-marital sexual relations:[71] "[o]bviously, the more stable the relationship the greater will be the significance which is attached to it."[72] Although the claimant established a REP, his extra-marital relationship sat "at the outer limits of relationships which require the protection of the law", resulting in a suspension of privacy in favour of FOE.[73] In failing to acknowledge the normative importance of protecting the claimant's prerogative to reach a judgment on who should know about his sex-life, the Judge handed the issue over to the press[74] to reach that judgment.

The judgments which evidence this type of reasoning may be considered atypical for the lack of engagement with the normative value of the right to privacy, for example, *Theakston* and *Flitcroft*. Although these judgments, including the Court of Appeal decision in *Flitcroft*, have not been overruled for their treatment of the privacy right, and, as such, can be adduced as examples of inadequately principled judicial reasoning that can arise in the absence of a clear, rights-focused method of reasoning directed at resolving the conflict between privacy and FOE, the courts might no longer necessarily be inclined to employ such reasoning. This is an important qualification which must be acknowledged in any discussion of such judgments. However, there are more recent instances of judicial reasoning that show diminished engagement with and acknowledgement of privacy's normative importance. In 2017 a Judge reasoned there was no need to consider negative effects of privacy intrusion on the claimant's health and children, because the information concerned business activities,[75] where "stress and strain may be said to come with the job", rather than "sexual or relationship issues", where "impact of disclosure can be particularly acute".[76] Such reasoning relies upon general assumptions about which issues might cause individuals more or less stress, thereby undervaluing the normative importance of privacy as protecting individuals' control over their private information, and protecting them from the harm that loss of such control could have on their wellbeing and family life. In 2015, in a blackmail case involving the threatened revelation of the fact of a sexual relationship between claimant and defendant, the Judge reasoned the claimant's privacy claim over such a fact was weak because it concerned a fleeting and short sexual relationship with the defendant and

[66] *Goodwin*, [85]; echoed by Eady J in *CTB*, [23].
[67] *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch), [108] (*Gulati*).
[68] Whether or not they ultimately uphold privacy.
[69] For example: *A v B, C and D* [2005] EMLR 36 (*A v B*); *Flitcroft*; *AAA v Associated Newspapers Ltd* [2013] EMLR 2 (*AAA* HC) and *AAA* CA; *Author of a Blog* (where the Judge addressed the tort's second stage even though no REP was found); *McClaren*.
[70] Relative to FOE.
[71] *Theakston*; *YXB*.
[72] *Flitcroft*, [11](ix).
[73] *Flitcroft*, [47].
[74] And the other party to the affair.
[75] Allegations of financial crimes.
[76] *ERY*, [71].

because the claimant also had commercial motives in restraining such a revelation.[77] The Judge cited both *Theakston* and *Flitcroft* in support of this reasoning about the relevance of the trivial nature of the sexual relationship to the weight attached to the privacy claim.[78] In 2013, a Judge did not engage with the normative importance of a child's privacy in the context of a newspaper revealing that child's paternity, where the father was a prominent politician who himself had not acknowledged paternity.[79] The reasoning here was influenced by the fact that the child's mother had volunteered that information to a member of the press at a private party, and the Court of Appeal upheld that reasoning.[80]

Such lines of reasoning fail to show explicitly whether the courts appreciate in all privacy tort cases how publication of private information could affect individuals, *vis-à-vis* degree of intrusion, and effects on dignity, autonomy, relationships with others,[81] and other aspects of life normatively protected by privacy.[82] In such judgments, while assessing privacy, judges may be relying more upon personal judgments of how distressing particular issues might be, or subjective moral judgments of the quality of the activities or relationships themselves. In such instances judges would not be aligning their reasoning on the facts with privacy's normative importance, and how publication might frustrate it and suppression further it. Indeed, it is "simply not up to the Court to accord less weight to a person's right to private life, merely because that person has engaged in conduct…judges may find morally reprehensible,"[83] or not sufficiently 'morally worthy' of privacy protection. Absent clear judicial engagement with the normative underpinnings of the privacy right, and how that normative value is borne out on the facts of the case, a judgment on the privacy right opens itself up to such criticism (whether or not the privacy right is ultimately upheld).

Not all judgments expose such disengagement with privacy's normative underpinnings. Some sustain a meaningful connection between the right's normative importance and the negative effects of publication on the facts, including *vis-à-vis* sexual information. Privacy has been upheld to protect an individual's sex life: sexual activities between consenting adults were their own business, except in cases of wrongdoing.[84] Dissemination of footage of two well-known individuals engaging in sexual relations outside a nightclub was prohibited, given it would "serve only to humiliate the claimant".[85] An injunction covering aspects of the claimant's sex life was granted despite a significant loss of privacy already.[86] The reasoning in these judgments importantly demonstrates that the courts are capable of explicitly connecting their decisions to uphold or suspend the privacy right with that right's normative underpinnings, including the normative element of control protected by the privacy right (reflected in acknowledging sexual activities are an adult's own business), and the normative element of degradation entailed in the publication of sexual information (reflected in acknowledging publication of such information humiliates the person in question).

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[77] *YXB*, [61](iii).
[78] *YXB*, [61](iii)(a).
[79] *AAA* HC. Though the Court did uphold the claimant's privacy right in respect of photographs of the claimant to be published in the newspaper.
[80] *AAA* CA, [21].
[81] TDC Bennett, 'The Relevance and Importance of Third Party Interests in Privacy Cases' (2011) 127 LQR 531.
[82] Discussed in Chapter 3.
[83] S Smet, 'Conflicts between Human Rights and the ECtHR' in S Smet and E Brems (eds), *When human rights clash at the European Court of Human Rights* (OUP 2017) 43–44.
[84] *Mosley*, [11].
[85] *Jagger*, [14].
[86] *TSE v NGN Ltd* [2011] EWHC 1308 (QB) (*TSE*).

The Supreme Court has recently engaged with privacy's normative underpinnings by detailing the negative effects of intrusion. In *PJS* it cited case law dating back to 2000 evidencing the English courts' cognisance of the intrusive harm of misuse of private information,[87] and the way in which privacy would be frustrated by *re*publication. This has been followed in *Richard*, where the Judge emphasised the nature and detrimental effect of intrusive harm of the journalists' activities.[88] *PJS* also highlights the normative importance of protecting control over one's private life, including family life. It was normatively important the claimant retain the ability to choose when and how to relay certain private information to their children; lifting the injunction would deprive them of this.[89]

Whether these judgments are exceptional, or they present a prospect for greater engagement with privacy's normative underpinnings, jurisprudential inconsistency remains in the explicit engagement with this right's normative underpinnings. Sometimes courts' assessment of privacy on the facts is inconsistent with the right's normative underpinnings. One example concerns *imputed* claimant 'consent' to publication, or 'waiver' of privacy. Although this is more relevant to the tort's first stage,[90] courts have given less weight to an *established* privacy right where claimants' actions imply consent to publication. In *AAA*, although the claimant had a REP over information revealing her paternity, that was weakened by her mother's disclosure of that information at a private party, and her mother's hinting at the issue in an interview.[91] Normative waiver or consent here was however surely limited to volunteering the information to a specific individual at the party; hinting in an interview should not translate into consent to have the information published in national broadsheets[92] - that sits uncomfortably with the normative value of autonomy underpinning of privacy. Courts have also held claimants actively seeking to protect their privacy are entitled to a weightier privacy right.[93] That implies individuals should act in particular privacy-protective ways, to secure legal protection.

That is inconsistent with privacy seen as protecting *inherent* values, including dignity and liberty, to which everyone is automatically entitled, and which are not earned. Yet treating claimants' behaviour as material to their privacy entitlement is arguably demanded in the *Axel Springer* criteria, where claimants' past behaviour is relevant. A doctrine of implied consent might be necessary to exclude liability for *re*publication in some circumstances,[94] but that is significantly narrower than deciding whether to suspend privacy according to the rightholder's general conduct. An individual's behaviour does not automatically qualify privacy's normative underpinnings. Alongside dignity and liberty, control and autonomy imply it is the individual's prerogative to choose which information is disclosed, and the mode and extent of that disclosure.

[87] *PJS*, [59]-[63]. P Wragg, 'Privacy and the Emergent Intrusion Doctrine' (2017) 9 JML 14.
[88] Including door-stepping and using helicopters to film the claimant's house.
[89] *PJS*, [74].
[90] Deciding on REP.
[91] *AAA*, [119]; upheld on appeal.
[92] That the individual 'waiving' privacy was not the claimant, but, rather, her mother, will be discussed further below.
[93] *Murray* CA, [37]; *Weller* CA; *Douglas (No 1)*.
[94] H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (OUP 2006) 773.

Treating claimants' behaviour as relevant in the privacy tort's second stage is most apparent with public figures.[95] Privacy, being a ECHR right, is universally applicable,[96] and any wholesale exclusion of certain individuals from the application of such rights must be justified on strong, unambiguous grounds. However, despite the rejection of the 'zonal argument',[97] and, despite several important statements that public figure status will not automatically suspend privacy,[98] courts have treated that status as material (if not decisive) in evaluating the privacy entitlement.[99] Thus,[100]

> [c]onduct which in the case of a private individual would not be the appropriate subject of comment can be the proper subject of comment in the case of a public figure.

Similarly, "a condition of participating in high level sport that the participant gives up control over many aspects of private life".[101] This departs from earlier confirmations[102] that any imputations of consent or waiver must be applied narrowly and only *vis-à-vis* the disputed information, rather than to the claimant's leading a public life. These confirmations themselves were, however, never unequivocal: in *Campbell* Lord Hoffmann conceded the claimant, having used "publicity to promote her career", could not then "insist upon too great a nicety of judgment" in how media presented stories about her.[103] Furthermore, Strasbourg's *Axel Springer* criteria include inquiring into how well-known the individual was and their prior conduct. Yet if privacy normatively protects every individual's dignity, autonomy,[104] and liberty, regardless of how they lead their lives or whether they are well-known,[105] such factors are irrelevant.

In particular, courts have classified certain public figures[106] as 'role models', "emulated by others", about whose lives their followers therefore should know.[107] Recently the Council of Europe confirmed:[108]

> …an arrest of a well-known television actor (who might be considered as a role model for young people) for possession and use of illegal drugs is likely to be considered…worth reporting.

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[95] K Hughes, 'The Public Figure Doctrine and the Right to Privacy' (2019) 78 CLJ 70; D Mokrosinska, 'Privacy, Freedom of Speech, and the Sexual Lives of Office Holders' in AD Moore (ed), *Privacy, Security and Accountability* (Rowman & Littlefield 2015); FE Schauer, 'Can Public Figures Have Private Lives?' in EF Paul, F Miller and J Paul, *The Right to Privacy* (CUP 2000) 293.

[96] ECHR, article 1.

[97] That publicity over an aspect of an individual's private life exposes that whole zone of their life to publicity: *A v B*,[28]; rejected in *Rocknroll*; *McKennitt* CA, [54]; *X*.

[98] *Campbell*, [57]; *McKennitt* CA, [65]; *Von Hannover (No 1)*.

[99] *Flitcroft*, [43]; *Ferdinand*; *Theakston*, [89]; *Terry; McClaren.*

[100] *Flitcroft*, [11](xii). It should be noted, as discussed above, that this Court of Appeal authority, though not overruled and still cited by lower Courts (for example, in *YXB*, [61]), may be considered to be atypical in its treatment of the normative value of the privacy right; it should, therefore, be considered as one example of normatively disengaged reasoning, and not a definitive rule on how Courts approach the two rights in question.

[101] *Spelman*, [69].

[102] *Douglas (No 1)*, 995; *Campbell v MGN Ltd* [2003] QB 633 (CA), 649, 657; upheld on appeal.

[103] *Campbell*, [66].

[104] As control over information. See: Fenwick and Phillipson (n 94) 777–778; G Phillipson and H Fenwick, 'Breach of Confidence as a Privacy Remedy in the Human Rights Act Era' (2000) 63 MLR 660, 680.

[105] Or they are connected to well-known people - reportage on public figures' families is common: Fenwick and Phillipson (n 94) 790.

[106] For example: sportspeople and television personalities.

[107] *Flitcroft*, [43]; *Theakston*, [69]*, Terry; Ferdinand,* [87]-[90]; *McClaren*, [18], [34].

[108] Council of Europe, 'Guidelines on Safeguarding Privacy in the Media' (2018) 13.

Who is a 'role model' remains unclear. The higher the profile, the more likely the individual might be considered to be a 'role model';[109] or it might be someone who "may set the fashion".[110] The reasoning that underpins such a judgment that, because the claimant is a 'role model', his privacy entitlement is weaker, is that there is greater *and legitimate* interest in knowing how he leads his life, so that he may not deploy his privacy right against that legitimate interest. The influence of 'public interest' reasoning will be discussed below. Here it should be noted that such reasoning, whether or not it draws upon legitimate interests held by the public, disregards privacy's normative underpinnings, particularly those relating to dignity, liberty and autonomy, and it sees courts arbitrarily imposing 'role model' responsibilities upon claimants, denying them control over their private information,[111] liberty and autonomy in leading their private lives according to their own moral standards, and dignity in being treated as ends in themselves. Although courts have not recently invoked explicit 'role model' reasoning, and have doubted the appropriateness of *involuntary* role models,[112] this doctrine has never been overruled for inconsistency with privacy's normative underpinnings. Following this doctrine's inception in *Flitcroft*,[113] courts have themselves acknowledged the press's publication of such stories about other footballers, under such titles as "Good role model?".[114] Until this doctrine is overruled, media may (with some legitimacy) continue to report upon misbehaviours of (in)voluntary celebrities.

Not all public figure cases evidence such normatively disengaged reasoning. A recent judgment recognised the special value of privacy for public figures: being so well-known made the claimant *more* vulnerable to distressing intrusions, entitling him to *stronger* privacy protection than ordinary persons.[115] Indeed this was acknowledged some 15 years ago, where it was reasoned that "To hold that those who have sought publicity lose all protection would be to repeal Article 8's application to very many of those *who are likely most to need it*.".[116] Thus courts are capable of acknowledging some individuals may require *greater* privacy protection *because* of particular vulnerabilities.

The basis upon which reasoning about the privacy right in cases like *Douglas (No 5)* and *Richard* is more normatively engaged than such reasoning in cases like *Flitcroft* is not that the court ultimately upheld the privacy right and suspended the FOE right. Whether judicial reasoning is normatively engaged does not depend upon the outcomes of cases, or how far the judge may ultimately be prepared to protect one right over another. Rather, it depends upon how developed and transparent the reasoning is: it will be more normatively engaged when it is explicit from the reasons given in the judgment that the judge has considered how the normative underpinnings of the right in question are affected by the prospect of that right being upheld or suspended on the particular facts of the case, and has grounded his or her decision on such a consideration. When a judge does not explicitly link reasoning about the issue at hand with the normative underpinnings of the rights in question, such reasoning will

[109] *Flitcroft*, [11](xii).
[110] *Flitcroft*, [11](xii).
[111] See: G Phillipson, 'Judicial Reasoning in Breach of Confidence Cases under the Human Rights Act' [2003] EHRLR 53, 60–72.
[112] *McKennitt* CA, [65]; *Prince of Wales*, [106], [115].
[113] Where an adulterous footballer was deemed to be a 'role model'.
[114] *Ferdinand,* [33].
[115] *Richard*, [245], [256].
[116] *Douglas v Hello! Ltd (No 5)* [2003] EMLR 31, [226] (emphasis added).

be open to the criticism that it is normatively disengaged because it is unclear *how* the judge did, if at all, consider the rights' normative underpinnings. The final decision, not having been explicitly linked to the relevant normative underpinnings of the right in question, can be criticised as disengaged from, or oblivious to, the right's normative underpinnings, where a decision that is explicitly linked to the normative underpinnings cannot be so criticised. Though the latter type of decision may be criticised for being *wrong* in its consideration of the normative underpinnings, at least jurists and rightholders can know which normative underpinnings have been considered by the judge and how they have been considered. That is why reasoning ought to be, *and appear to be*, normatively engaged, and why transparency in judicial reasoning is crucial. As discussed in Chapter 1, reasonable people, including judges, may disagree about the way in which rights are conceptualised and treated on the facts; what matters is that judicial decisions are normatively engaged in the first place, meaning that they are, at a bare minimum, explicit in their treatment of normative underpinnings of the rights in question. In *Richard*, by acknowledging the claimant's vulnerability in explicit terms of the propensity of the press to intrude upon his private life, and his capacity to protect his privacy, the Judge reasoned about privacy in a way that was more normatively engaged, and more explicitly engaged, than was the case in *Flitcroft*, where the implications of being a public figure were not accounted for in terms of vulnerability or harm with specific and explicit reference to the normative protection offered by the privacy right: protection of dignity, autonomy, liberty and psychological sanctity.

Children are particularly vulnerable. The courts have consistently recognised the special need to protect children's privacy[117] (confirming their interests are nevertheless not determinative in the 'balance'),[118] and that is a principled reflection of privacy's normative importance in protecting individuals' well-being and ability to grow as dignified, autonomous social beings. However, courts are prioritising parental autonomy, meaning a child's privacy claim depends upon their parents' wishes or behaviour.[119] Parents actively protecting their child's privacy is decisive when courts uphold privacy (*not* the special normative need to protect minors' privacy).[120] When parents are inattentive or have 'misbehaved', that is prioritised over the normative importance of protecting children's privacy.[121]

Courts also insufficiently or inconsistently recognise the normative protection afforded to claimants' families, often 'collateral damage' in privacy intrusions, which itself affects the claimant's life. Before *PJS*, with a couple of exceptions,[122] courts did not place much, if any, weight on detrimental effects on families, including children.[123] In *PJS*, the detriment of publication to the claimant's children necessitated the containment of further publication.[124] This acknowledges privacy extends to protecting family relationships, and the psychological wellbeing of vulnerable, helpless individuals. As a Supreme Court authority, *PJS*, and its appreciation of wider effects of publication on families and children, should supplant the majority of judgments preceding it, which insufficiently recognised these broader implications.

[117] For example: *Luxembourg*, [89].
[118] *Weller* CA, [39]-[41].
[119] J Gligorijevic, 'Children's Privacy: The Role of Parental Control and Consent' (2019) 19 HRLR 201.
[120] *Murray v Express Newspapers plc* [2007] EWHC 1908 (Ch), [23] (*Murray* HC), cited by the Court of Appeal, [37]; *Weller* CA, [35]. Similar reasoning in cases where children were not the claimants: *PJS*; *ETK*; *CVB*; *CTB*; *Luxembourg*, [89]; *K v L* [2012] 1 WLR 306 (*K v L*).
[121] *AAA* CA, [21], [116]. Similar reasoning in cases where children were not the claimants: *Flitcroft,* [13]; *Ferdinand*, [72].
[122] *CTB*, [26]; *ETK*, [18]; *Donald*; *CVB*, [59], [65], [67]; *K v L*; *Luxembourg*, [89].
[123] For example: *Ferdinand*; *Flitcroft*, [13]; *ERY,* [71]*; A v B,* [16], [37]; *D v RCC*, [153]; *Hutcheson*; *McClaren*.
[124] *PJS*, [72]-[78].

Privacy's social value has also received insufficient explicit judicial attention. There is little and sporadic engagement with privacy's objective of ensuring individuals can develop and sustain relationships, and generally socialise to become confident members of their community. Some recognition can be gleaned from judicial discussions of the nature of an intrusion's harmful consequences,[125] and article 8 has been confirmed as "intend[ing] to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings".[126] However, courts have ignored privacy's social dimension where it would have been pertinent on the facts: in a case where the unsuccessful claimant was an MP's teenage son who played for the national rugby team,[127] the normative orientation of privacy towards protecting an individual's ability to interact with others in their community would have been critical to him as a young person transitioning into adulthood while navigating a public sports-career.

3. Freedom of expression

Courts do sometimes engage explicitly with the normative underpinnings of FOE. This is characterised by broad statements of its importance, occasional references to classical philosophical justifications, and confirmations that it is qualified.[128] The normative explanation for FOE most often cited is democratic self-governance:[129]

> The free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy. Without this, it can scarcely be called a democracy at all.

This reflects established wisdom that FOE is *necessary* for liberal democracy: "free speech is the first casualty of a totalitarian regime".[130]

Where defendants wish to publish private information to rectify a public record, or reveal unknown facts, courts also invoke the 'truth' justification;[131] but some courts have failed to acknowledge this normative element where it was relevant.[132] With revelations of misbehaviour (like adultery), courts sometimes explain the relevant underpinning as "freedom to criticise".[133] When individuals wish to publish private information about themselves

[125] *Gulati*, [32], [159], [229]; *Luxembourg*, [89].
[126] *Von Hannover (No 1)*, [50], quoted in *McKennitt* HC, [50] and *McKennitt* CA, [38].
[127] *Spelman*.
[128] For example: *Campbell,* [20], [107], [110], [117]; *Re S*, [28]; *Flitcroft*, [11](ii); *Browne* CA, [38], [40]; *Ferdinand*, [64]-[71]; *Richard,* [267]-[269].
[129] *Campbell*, [158]-[159]; for a cross-section of case law prioritising the democracy justification, see: *Terry*, [101]-[104]; *Hutcheson*, [29]; *Ferdinand*, [64]; *McClaren*, [19]; *Luxembourg*, [102].
[130] *AG v Guardian (No 1)* [1987] 1 WLR 1248, 1287.
[131] "The press must be free to expose the truth and put the record straight": *Campbell*, [151]. See also: *Ferdinand*, [66], [68]; implicit recognition in: *AAA* CA, [38]-[45], *Flitcroft*, [11](xii), *Hutcheson*, [45], [46], *Terry*, [83]; *Luxembourg*.
[132] *Browne* CA; *McClaren*; *ERY*; *Donald*; *CTB*; *A v B*.
[133] *Terry*, [97]-[105]; *Hutcheson*, [29]; *McClaren*, [19]. P Wragg, 'A Freedom to Criticise' (2010) 2 JML 295.

and the claimant, courts make at least implicit reference to individual autonomy as underlying FOE,[134] even where the defendant has failed,[135] but, again, meaningful and explicit judicial engagement is limited.[136]

This limited engagement with FOE's normative underpinnings, and judicial prioritisation of the democracy justification,[137] mean the right may be assessed according to irrelevant or overbroad norms, or courts omit relevant underpinnings.[138] Nor do courts typically recognise explicitly FOE's normative complexity, its many diverse (sometimes conflicting) purposes, and, importantly, that its normative significance in any particular case can be affected by "role distance" or subliminal speaker-interests.[139]

Judges appear to engage with FOE's normative importance, and how it is *connected with the facts*, more comprehensively in cases *not* involving privacy.[140] In privacy cases they tend only to refer to its encapsulation in section 12 of the HRA, and its importance to democracy.[141] They have also explained FOE not through its specific normative underpinnings, but *vis-à-vis* a generic 'public interest': "There is a public interest in freedom of expression itself…as well as…specific public interest in the article complained of".[142] The issue has been expressed as "whether proposed publication is lawful in the light of the public interest in freedom of expression",[143] and the principle has been expressed as there being "always a public interest in anyone—particularly…the media—having the right to say what they want...'freedom of expression is an important right for its own sake'".[144] Whether FOE should be suspended is decided with reference not to normative underpinnings but to 'public interest'.[145]

In such reasoning, references to 'public interest' could encompass an acknowledgement of the normative underpinnings of FOE that relate to recipient interests, where the recipient is 'the public'. That would be a legitimate inference to draw from judicial reasoning about 'public interest', and would allay concerns about normative engagement with the FOE right to some extent. For example, the reasoning of Tugendhat J in *Goodwin* about exactly why it was in the 'public interest' that newspapers should publish information about a chief executive having

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[134] *Flitcroft*, [43](iii); also acknowledged where the individual wishing to share their story was not sued alongside the media: *Ferdinand*, [71].

[135] *Donald*, [22]-[24]; *McKennitt* CA, [50]-[52] *CC v AB* [2007] EMLR 11, [6], [7], [19], [28], [35], [44] (*CC*); *CDE*.

[136] No engagement in: *CTB*; *A v B*. The way in which courts treat FOE from this perspective is discussed further below.

[137] This does not refer to the outcome of cases, or the ultimate decision whether to uphold the FOE right or not. Judicial prioritisation of the democracy justification is a reference to the courts' general readiness to invoke the democracy justification when they set out why, at a high level of abstraction, the FOE right is important. It signifies a risk that the courts may be inadequately accounting for other justifications for this right. The relatively heavy judicial reliance upon the democracy justification bears upon how courts engage with FOE's normative underpinnings, and not upon whether FOE is ultimately upheld. This is because other factors may determine the final outcome, including the relative strength on the facts of the conflicting privacy right.

[138] One exception is *Ferdinand*, where the Judge acknowledged three different FOE underpinnings: democracy, truth, and individual autonomy and liberty: [64], [66], [68], [71].

[139] Discussed in Chapter 3. For example, no such meaningful or sustained engagement by the Supreme Court or Court of Appeal in: *PJS*; *AAA* CA; *Murray* CA; *Weller* CA; *McKennitt* CA*; Browne* CA. The Courts mostly opted instead to reason *vis-à-vis* 'public interest', which is discussed in (f), below.

[140] *R (Simms) v SoS Home Department* [2000] 2 AC 115, 126; *R (Carlile) v SoS Home Department* [2015] AC 945, [91]-[92] (*Carlile*).

[141] Without exactly explaining 'democracy'. For example, *Flitcroft,* [11](ii); *Richard*; *AAA* CA; *Murray* CA; *Weller* CA*; McKennitt* CA.

[142] *AAA* HC, [52], upheld by Court of Appeal. 'Public interest' is discussed more comprehensively below.

[143] *Spelman,* [42].

[144] *PJS*, [52], quoting Jackson LJ, Court of Appeal judgment: [2016] EMLR 17, [55].

[145] *PJS,* [52].

a sexual relationship with an employee in his organisation invoked the principles of holding power to account, and of the importance of open and public discussion about what should be a standard in public life;[146] such principles are reflected in the normative underpinnings of FOE that relate to democratic participation, truth-discovery and suspicion of public power, and implicitly recognise the normative interests of recipients of such information (to be able to discuss such matters and make informed judgments on them). As such, the reasoning in *Goodwin* is an example of how the courts are indeed capable of accounting for the substantive, relevant normative underpinnings of FOE in deciding whether to uphold or suspend that right (and the privacy right). However, there remains scope for a greater degree of explicit and transparent judicial engagement with why such interests are protected by FOE, and how that right is therefore engaged on the facts and affected by the alternative outcomes. At the very least, an improvement to the courts' current approach to engaging with FOE's normative underpinnings may involve adopting the sort of reasoning employed by Tugendhat J in *Goodwin*. The courts' treatment of 'public interest' will be discussed in greater detail below.

Courts have also equated FOE with press freedom,[147] sometimes narrowing it to the importance of 'public interest' reportage.[148] Media freedom is used to justify FOE often by invoking the press's moral responsibility to report and the public's democratic entitlement to be informed: FOE is a right "which the press assert on behalf of the public",[149] and "[n]ot only does the press have the task of imparting such information and ideas: the public also has a right to receive them".[150] This elision of press freedom and FOE could derive from courts' failure to engage comprehensively with FOE's various normative underpinnings, identify which are relevant on the facts, and reason beyond the democracy justification. Instead, they create an "ambiguity" allowing press defendants to argue[151] FOE is sacred, its suspension requiring *greater* justification than suspension of other qualified rights, including privacy.

In 'balancing' FOE against privacy, courts have considered press commercial interests as integral to FOE.[152] This evidences little judicial sensitivity to media "role distance" or lack of "sincerity".[153] In the common situation of press defendants, courts do not typically engage fully with the potential variety of speaker-interests, and the normative complexities and potential normative contradictions of FOE.[154]

Press freedom is not the same as FOE. Indeed, judicial deference to press commercial interests might *frustrate* that most prominent FOE justification, democracy:[155]

> [T]he bare freedom-from-interference of the press often does not correlate with the democratic value of press freedom…paradoxically, one may actively promote the second kind of freedom

[146] *Goodwin*, [132]-[133].
[147] For example: *Flitcroft*, [11](iv). G Phillipson, 'Leveson, The Public Interest and Press Freedom' (2013) 5 JML 220.
[148] *ETK*, [13].
[149] *Campbell*, [115].
[150] *Campbell,* [107], [116]-[117], citing *Jersild v Denmark* (1994) 19 EHRR 1, [31] (*Jersild*).
[151] Phillipson, 'Leveson, The Public Interest and Press Freedom' (n 147) 222.
[152] For example: *Flitcroft; Campbell,* [77], [162]; *Hutcheson*, [34]; *AAA* HC, [102].
[153] Where publishers' actual and alleged motivations do not align: E Goffman, *Encounters* (Bobbs-Merrill 1961); JR Searle, *Speech Acts* (CUP 1969); JR Searle, *Expression and Meaning* (CUP 1979).
[154] Discussed in Chapter 3. An exception is: *CTB*, [27]. Treatment of press commercial interests is discussed more fully in (f), below.
[155] Phillipson, 'Leveson, The Public Interest and Press Freedom' (n 147) 239.

> by limiting the first. A press that…had higher standards of accuracy, and that was subject to some real method of accountability…would make a much greater contribution to that democratic…good that the trope 'press freedom' is meant to stand for.

Furthermore, *not* allowing publication of trivial stories might discourage media from publishing such stories and in turn increase public concentration upon serious issues pertaining to democratic self-governance.[156]

Judicial deference to media has somewhat subsided. A newspaper's FOE-based arguments against continuing an injunction, where the information had been published online and overseas, were rejected, it being "unlikely that the heavens will fall at our decision".[157] That an unconstrained press is commercially incentivised to publish interesting stories was insufficient to justify suspending an individual's privacy right.[158] One Judge was particularly forthright in criticising journalists' activities, rejecting the argument that press freedom, even when faced by privacy, occupies an exalted constitutional position in English law.[159] Earlier, another Judge had also rejected arguments against an injunction, that the newspaper's FOE encompassed more than its commercial interests.[160] However, such reasoning has not explicitly overruled precedents which have seen courts conflate FOE with media's democratic role. This might inflate FOE's significance on the facts, or ignore other relevant normative underpinnings. It is not yet unforeseeable for a court to reason that, normatively, FOE serves to protect media, or unrestricted media serve to advance FOE. Recent judgments like *PJS* and *Richard* do not necessarily provide definitive authority in their scepticism of media arguments, given that the high degree of press intrusion in each case did not make it difficult for the Court, in the second stage, to criticise the defendant, or question its lofty arguments.

Courts sometimes acknowledge FOE's other normative underpinnings where the press is not the, or not the only, defendant. These cases typically involve information about the defendant's interactions with the claimant.[161] FOE is explained better through individual autonomy, liberty and self-fulfilment, than through democracy. Courts have generally recognised the "rights…of those who wish to tell…their stories" in cases involving suppression applications not necessarily based upon privacy.[162] In privacy cases, however, judges do not signify the implications of suppression for such individual-centric norms to the same extent as *vis-à-vis* democracy-orientated underpinnings, especially press freedom. Media have been involved whenever FOE has been upheld in cases involving 'telling one's own story';[163] and, when the press was not a defendant or did not intervene, FOE was suspended.[164] There was less emphasis on the defendant's autonomy-based FOE in one such judgment, than

[156] Fenwick and Phillipson (n 94) 800.
[157] *PJS*, [3].
[158] *PJS*, [21].
[159] *Richard*, [321]-[322]. The general proposition of Mann J in this judgment, that editorial discretion cannot by itself justify intrusions upon privacy without further justification (by reference to 'public interest') has been endorsed by the Court of Appeal: *Ali* CA, [85].
[160] *CTB*, [27].
[161] For example: *Flitcroft*, [11](xi); *A v B*; *McKennitt* CA; *Donald; CTB; Luxembourg*, [37]; *CC*; *CDE*. Sometimes the individual concerned is not sued alongside the press: *Ferdinand*.
[162] *Roddy (A Child)* [2004] EMLR 8, [28] (*Roddy*); *Kelly v BBC* [2001] Fam. 59, 79; *O (A Child) v Rhodes* [2016] AC 219.
[163] *Flitcroft*; *A v B*; *Roddy*; *Rhodes*; *Ferdinand*.
[164] *McKennitt* CA; *CC*.

there was on the defendant's democracy-based FOE in judgments upholding FOE.[165] Elsewhere, where FOE was suspended (and there were arguments from media), the courts either did not acknowledge, or hardly engaged with, the individual's autonomy-based FOE claim.[166]

Yet courts are capable of meaningful engagement with this particular underpinning. In *Roddy*, although media argued press freedom to vary the existing injunction, the Judge examined FOE from the perspective of the individual's autonomy and liberty to tell her own story.[167] In explaining why a 16-year-old individual's autonomy should thus be vindicated, the Judge departed from his earlier reasoning that a 16-year-old was not entitled to express himself in similar circumstances. The applicant had "sufficient understanding and maturity, to decide for herself whether…[her story] should be shared with the whole world",[168] and courts should be less paternalistic:[169]

> [W]e do not recognise [her] dignity and integrity as a human being—we do not respect her rights under Arts 8 and 10 —unless we acknowledge…it is for her to make her own choice, and not for her parents or a judge or any other public authority to…make the choice on her behalf.

This normatively-engaged judgment shows courts need not lapse into philosophical ruminations, to go beyond passing references to FOE's democratic importance. This ensures they bring to bear the rights' normative dimensions on the factual consequences of their decision.

Such reasoning also featured in *Luxembourg*, where the Judge went beyond democracy-based press freedom, acknowledging how suppression would affect an individual's FOE.[170] The defendant wished to publish information about her family life, to clear her name in the press, which had impugned her character. The Judge acknowledged the particular importance of this to the defendant, but reasoned that allowing publication would frustrate conflicting privacy interests with greater detriment than suppression would frustrate her FOE interests.[171] Although FOE was *suspended*, the reasoning and justifications were normatively anchored and rights-focused, connected to why the defendant's autonomy-based FOE was weaker on the facts than the claimant's privacy, more so than in cases where FOE is *upheld* for reasons effectively unrelated to individual autonomy and self-fulfilment in publishing information.[172] Such examples of judicial reasoning as in *Roddy* and *Luxembourg*, which explicitly invokes and relies upon the normative underpinnings of FOE that are relevant on the particular facts, instead of implicitly acknowledging such normative underpinnings, or normative speaker or recipient interests, through the vehicle of

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[165] *McKennitt* CA, [28]-[29], [50]-[52]. Compare with courts' emphasis on democracy-based and press-orientated FOE in: *Flitcroft*, *A v B,* and *Ferdinand*. Note in *McKennitt* the Court's scepticism about how far the defendant's story really was her own (rather than a story purely about the claimant), which may have weakened her FOE claim.

[166] *CTB*; *Donald*, [22]-[24]; *CDE*.

[167] *Roddy*, [45]-[48], [56]-[58].

[168] *Roddy*, [56].

[169] *Roddy*, [57].

[170] *Luxembourg,* [37], [67], [68], [103].

[171] *Luxembourg,* [109].

[172] This approach can also be observed in *CC v AB*, where privacy was upheld over an individual's FOE in broadcasting information about his married life. The Judge acknowledged the defendant's autonomy and liberty in telling his story, but suspended his FOE because of the acute harm it would generate for his wife (the claimant); the Judge also found the defendant was motivated by revenge and profit from selling his story. That ill-motive, relative to the harm to the privacy rightholder, provided a normatively anchored, rights-focused justification for suspending the autonomy-based FOE right: *CC*, [6], [7], [19], [28], [35], [44].

'public interest', should be the standard to which courts aspire in undertaking the "ultimate balancing test" in the privacy tort's second stage. Therefore, although it is possible, as has been discussed with reference to Tugendhat J's reasoning in *Goodwin*, and as will be discussed further below in the context of 'public interest', to draw inferences about FOE's normative underpinnings in what is implicit in 'public interest' reasoning about whether private information should be published, the courts have demonstrated that they are capable of engaging with these normative underpinnings without necessary reliance upon 'public interest', and instead by explicitly discussing how publication or suppression of information would affect the reasons why the right to FOE is normatively valued.

Another way in which courts approach FOE's normative underpinnings is ranking information according to a speech-hierarchy. Courts consider it important to differentiate between speech-content low in the hierarchy, and speech-content high in the hierarchy.[173] Once again, this is rooted in the prioritisation of the democracy justification.[174] Courts therefore find it acceptable, in the tort's second stage, to evaluate whether the expression is like "political speech", deserving protection under FOE, or like "vapid tittle-tattle", not deserving protection.[175] They have described the hierarchy as political expression at the top, with artistic and commercial expression ranked much lower;[176] accordingly, privacy-invasive publication of mere gossip "for its own sake could never be justified".[177] The idea that "different considerations apply" to speech that is "sensational" and "intended to…entertain",[178] so that such speech undermines FOE arguments,[179] has influenced some judges' justifications for suspending FOE.[180] Additionally, speech-ranking is mandated by statute: the only categories of information attracting FOE-protection under section 12(4) of the HRA are "journalistic, literary or artistic".

Speech-ranking, however, is inconsistently applied: in most speech-ranking cases, privacy was upheld because the speech-content was insufficiently important to justify FOE superseding privacy.[181] In cases not featuring speech-ranking, FOE was upheld, even though the information would have been ranked low.[182] In one case, the Judge explicitly refused to assess the information's social value.[183] Furthermore, sometimes courts categorise celebrity gossip essentially as commercial speech intended to sell newspapers and generate profit, which can *strengthen*, rather than weaken, FOE.[184] This exposes the courts' "diametrically opposed views on the free speech value of celebrity gossip",[185] and deeper disagreement about the value of commercial speech.

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[173] *CC*, [36]-[38].
[174] *Campbell*, [148].
[175] *Campbell*, [29], [148]-[149], [158]. The relationship between speech-value hierarchy and what is in the 'public interest' to publish is explored in (f), below.
[176] *Campbell*, [117].
[177] *Mosley* 2, [132].
[178] *Mosley v UK* [2012] EMLR 1, [114] (*Mosley* 4).
[179] *Mosley* 4, [131].
[180] *Rocknroll*, [30]; *Richard*, [300].
[181] For example: *Mosley* 2, [15],[31]; *CC*, [6]; *Donald*, [22]; *ETK*, [23]; *Rocknroll*, [32]. The exception is *Campbell*, where partial publication was permitted.
[182] For example: *Flitcroft*; *McClaren*; *Theakston*; *Terry*; *Ferdinand; Spelman*.
[183] *Terry*.
[184] *Flitcroft*; *Campbell,* [77], [162]; *Hutcheson*, [34]; *AAA* HC, [102].
[185] Wragg, 'A Freedom to Criticise' (n 133) 296.

There remains, therefore, no coherent and transparent method of ranking speech. Current judicial assessments seem instinctual, supported by insufficient rationalisation or justification: the Prince of Wales's candid diary comments about different cultures he observed overseas were not ranked highly,[186] and nor was a story suggesting a celebrity's abuse of someone else's vulnerability in the context of an intimate relationship.[187] Such judgments are not necessarily wrong, but the courts in those cases did not explain *why* the information was of insufficiently high value to attract FOE-protection. This lack of greater and more explicit engagement with the relevant normative underpinnings of the FOE right can be contrasted with the reasoning of Tugendhat J in *Goodwin*, as discussed above, where it could at least be inferred from that Judge's reasoning (about holding public power to account and public discussion of standards of public behaviour) that the Judge sought to protect specific normative underpinnings of FOE, instead of rank the value of information about a chief executive's sexual relationship with an employee, and on that basis decide whether the public should be entitled to receive it.

The danger of ranking speech in lieu of engaging explicitly and directly with FOE's normative underpinnings is that low-ranked information might be excluded altogether from FOE's normative protection, *before* any 'balancing' against privacy. Strict enforcement of speech-categorisation could marginalise 'low-value' speech, and there is no comprehensive, principled way of determining such classification.[188] This may threaten the normative "freedom to criticise",[189] if critical speech is routinely classed as low-value, without further justification. If courts are inconsistently grading information with such consequences, *without* explicitly connecting their judgments to FOE's normative underpinnings, then they are misapplying that right,[190] and risk denying the defendant a proper justification for their loss of rightholding entitlement.

Speech-ranking might normatively relate well to the democracy justification, but courts should account for other relevant FOE underpinnings. Even if on the facts the most pertinent FOE justification is democratic self-governance, why should *only* socio-political speech be protected, especially given that category's unsettled boundaries? Judicial tendencies not to protect low-level online expression, and lack of judicial engagement with its potential importance, have rightly been criticised.[191] Indeed the outright exclusion of some types of information would be *contrary* to FOE's normative underpinnings.

It is more principled to engage with FOE's normative underpinnings and recognise it is underpinned by various justifications, one or more of which might be relevant on the facts. The "ultimate balancing test" demands *both* rights' normative importance be acknowledged. A defendant should be *pro tanto* entitled to protection under FOE even for low-value information; it could then be the claimant's *relatively weightier* entitlement to privacy that would necessitate (and *justify*) suspension of FOE. This is especially so if such information could greatly harm the claimant (and his family) if published, and this has been acknowledged by the courts in cases where evidence

[186] *Prince of Wales*.
[187] *CDE.*
[188] Wragg, 'A Freedom to Criticise' (n 133).
[189] ibid.
[190] P Wragg, 'Free Speech Is Not Valued If Only Value Speech Is Free' (2009) 15 EPL 11.
[191] J Rowbottom, 'To Rant, Vent and Converse' (2012) 71 CLJ 335. Although Rowbottom does not propose abandoning speech-ranking altogether.

was accepted that publication would impact the claimant's family life in such a way.[192] A crude ranking of information would not involve an "intense focus" on *both* privacy *and* FOE.

This "intense focus" is sometimes absent where the information is not 'obviously' sensitive (like sexual information or criminal allegations[193]). In such cases, but not in all cases, courts appear to feel less obliged to elucidate why, *on the particular facts*, FOE should be upheld by allowing publication. Instead, they assume there should be publication because of the self-understood (or briefly acknowledged) normative importance of FOE, particularly in relation to democracy.[194] That focus on democracy has also seen courts more readily accept FOE arguments against public figures: "The free exchange of information…is crucial to any democracy…This includes revealing information about public figures".[195] Given the insufficient, or inconsistent, explicit engagement with privacy's normative underpinnings *vis-à-vis* public figures, inflating FOE's importance via the democracy justification threatens to skew the presumptive equality of articles 8 and 10 in favour of the latter. Implicit prioritisation of FOE might be most pronounced with publication of public figures' non-sensitive private information.[196]

iii. Overall implications

Explicit judicial engagement with the normative underpinnings of privacy and FOE is not sustained and consistent across the body of cases in the privacy tort. Overall, the rights' normative importance is simplified. Where courts allude to normative importance, FOE is largely defined by democratic ideals, and privacy by broad statements about dignity and self-esteem. It remains unclear how judicial assessment of the facts draws upon these normative underpinnings, even if engagement with the normative importance of each right might be inferred from the reasoning in *some* cases.[197] Part of this problem is the inconsistency and lack of depth in courts' identification of and engagement with *those specific* normative underpinnings *that are relevant* on the facts.

Furthermore, courts engage insufficiently with how normative claims *vis-à-vis* each right might conflict on the facts. A claimant and defendant might both claim autonomy underpins their respective rights.[198] In that context, how should judges reconcile the reasoning and outcomes of the materially similar cases of *Flitcroft,* where the claimant failed, and *McKennitt,* where the claimant succeeded?[199] *McKennitt* (but not *Flitcroft*) featured a confidentiality agreement and the information did not concern an extra-marital affair. Should that make a difference to how privacy and FOE protect autonomy? Privacy-autonomy does not depend upon individuals securing their affairs with confidentiality contracts.[200] Likewise, privacy-autonomy does not depend upon information being anodyne or amoral, and FOE-autonomy does not depend upon it being sensational or revealing immorality.[201] The justificatory

[192] *AMP v Persons Unknown* [2011] EWHC 3454 (TCC); *CDE*; *CTB*; *CC; Luxembourg; PJS.*
[193] For example: *PJS* and *Richard*, respectively.
[194] For example: *Spelman*; *AAA* CA.
[195] *Campbell*, [158]-[159].
[196] *Spelman*; *AAA* CA. But see: *Murray* CA, albeit that case concerned photographs (particularly intrusive), and an infant child (particularly vulnerable), whose privacy his parents had consistently sought to protect.
[197] For example, as discussed in respect of Tugendhat J's reasoning in *Goodwin*.
[198] G Gomery, 'Whose Autonomy Matters' (2007) 27 LS 404.
[199] The cases are materially similar because both involved an individual wishing to disclose information arising from her relationship with the defendant, and which was also information over which the claimant had a REP. Both cases therefore involve the autonomy underpinning of FOE (alongside any additional media interest in publishing the information).
[200] Recall the discussion in Chapter 3.
[201] S Benn, 'Public and Private Morality' in S Benn and G Gaus (eds), *Public and private in social life* (St Martin's 1983) 155.

force and rights-based rationale of decisions in such cases, as well as normative consistency between such decisions, would have been increased with more direct judicial engagement with how each right's normative underpinnings[202] were affected by the particular facts.

Courts have also insufficiently engaged with how the two rights normatively 'support' each other. FOE might be inaccessible without protections which privacy guarantees,[203] and (intellectual) privacy might be pointless without FOE protecting the development of ideas.[204] Although courts have acknowledged a normative overlap,[205] they do not evaluate the importance of upholding one right in terms of the *overall* positive value for the other right. This may be useful where claimants seek to prevent press coverage of their private life (especially sex-life), where such publication might have a censorious effect upon the claimant.[206] Engaging more with this normative dimension[207] would provide robust, principled justifications for decisions to allow or prohibit publication, more so than current invocations of FOE's democratic importance or privacy's limitations determined by the claimant's morality.

(e) How do courts apply proportionality?

i. Introduction

The "ultimate balancing test" mandates proportionality analysis. So how are courts using proportionality to resolve the privacy-FOE conflict? Their inconsistent and insufficient engagement with the rights' normative underpinnings *already* exposes a deficiency, because proportionality requires contextualised assessment of the rights' objectives. This stage of the inquiry examines how courts implement proportionality, including assessing the degree and gravity of detriment that upholding either right has for the other, by evaluating the side-effects of publication and suppression.[208]

ii. The courts' approach

There is no clearly structured, principled, and rights-specific proportionality methodology, which English courts apply faithfully and consistently in all cases. They reiterate the "ultimate balancing test", noting proportionality must be undertaken,[209] and have adopted Strasbourg's rule of using proportionality to decide when not to uphold qualified rights.[210] They do not, however, explain the specific, rights-based, substantive requirements of proportionality to be applied in each case. They *assume* the content of the proportionality method, and *assume* it is known by everyone. They commence 'balancing' with broad references to proportionality, and proceed to their decision without elaborating how proportionality is applied in context.

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[202] Instead of external factors, such as 'public interest'.
[203] Recall Chapter 3, particularly: C Fried, 'Privacy' (1968) 77 YLJ 475, 483–484.
[204] N Richards, 'Intellectual Privacy' (2008) 87 Texas Law Review 387.
[205] *Campbell*, [55]; *Terry*, [98]; *Roddy*, [35]-[37].
[206] For example: *Flitcroft; Ferdinand*; *McClaren*; *A v B*.
[207] Where relevant on the facts.
[208] Discussed in Chapter 4.
[209] For example: *PJS*, [20]*; McKennitt* CA, [11], citing *Campbell*, [21]*; Murray* CA, [26]; *Mosley* 2, [14]; *Richard*, [270]; *Ferdinand*, [41]; *McClaren*, [8]. Reference was also made to proportionality, independent of the "ultimate balancing test", in *X*, [83].
[210] Strasbourg jurisprudence: *Peck v UK* [2003] EMLR 15, [39], [76], [78]; *Couderc v France* [2016] EMLR 19 (*Couderc*). English adoption: *Douglas (No 6)*, [53]; *Re S*, [15]; *Rocknroll*, [31].

For instance, it is unclear exactly why publishing details of a footballer's extra-marital affair was a proportionate means of achieving the relevant normative ends of FOE on the facts.[211] What were these ends? To reveal the claimant had misled the public about his private life? If so, why was frustrating these ends with an injunction deemed less detrimental to FOE than was frustrating the relevant ends of the claimant's privacy? Reasonable persons may disagree about the decision, but the element lacking is proportionality analysis. The same deficiencies can be observed in other cases where FOE was upheld:[212] Why exactly was suppression a disproportionate frustration of the ends of FOE, given the alleged harms of the privacy-invasion? The most those judgments do is describe the inquiry as 'weighing' rights, and cite 'public interest' in publication.[213] One of these cases, *Flitcroft*, is a Court of Appeal judgment, and remains an undisturbed authority, with Divisional Court Judges continuing to follow it in adjudicating the tort's second stage.[214] Again, it is unclear exactly how, on the particular facts, publishing an adolescent sportsman's private information was a proportionate means of achieving FOE's objectives, and why, simultaneously, suppressing that information was a disproportionate means of achieving privacy's objectives.[215] The court's failure to analyse the factual implications through a clearly articulated proportionality test leaves these questions unanswered, regardless of whether the ultimate decision is considered correct.

The same questions arise *vis-à-vis* judgments upholding privacy. Why was suspending the children's privacy through publication of anodyne photographs of a public place deemed a disproportionate way of achieving FOE's ends?[216] What were these ends, and why, on the facts, did achieving them matter less than achieving privacy's ends? These decisions show privacy can protect particularly vulnerable individuals, like children, but they do not justify, in proportionality terms, why such an agenda mattered more on the facts than free reportage. Why was it *proportionate* in those cases to demand that editors' autonomy be demoted under celebrities' wishes that photographs of their children remain private? The courts did not explicitly and comprehensively explain the effect of the privacy-invasion for the children, so much as they relied upon the parents' endeavours to shield them from publicity.[217] Why is it not disproportionate to FOE to inhibit media publication, in order to respect those parental wishes? Such questions may be particularly germane given the failure of courts to 'stand up for' children's privacy elsewhere.[218]

Although the Supreme Court in *PJS* explained more fully the invasive harm of publication for children than was the trend in those previous judgments, the majority judgments mentioned proportionality only once, and it did not articulate or methodically apply a principled proportionality test on the facts.[219] Lord Toulson's dissent calls for proper proportionality analysis to justify the majority's decision.[220] Why did preventing an exacerbation of intrusive harm (by proliferating the story in mainstream newspapers) make it proportionate to prohibit media from

[211] *Ferdinand*.
[212] *Flitcroft*; *McClaren*; *Terry.*
[213] 'Public interest', including its implications for proportionality, is discussed in (f) and (e), below.
[214] Recently, *ZXC* 1,[36].
[215] *Spelman*.
[216] For example: *Weller* CA; *Murray* CA.
[217] *Murray* HC, [23], upheld by the Court of Appeal, [37]; *Weller* CA.
[218] For example: *Spelman*; *AAA* CA.
[219] *PJS*, [20]-[24]
[220] *PJS*, [97]-[93].

republishing online information, instead of awarding damages at trial? It is plausible to assume "[t]he story is not going to go away, injunction or no injunction."[221] If it could not really predict the efficacy of continuing suppression, why did the majority prioritise the claimant's privacy over FOE? Why should the story's content (details of sexual activities) mean its suppression does not disproportionately frustrate FOE,[222] including freedom from judicial interference with the content of publications? Lord Mance cited the Leveson Inquiry's findings that online photographs differ materially from those "blazoned on the front page of a newspaper".[223] His Lordship may generally have been influenced by tabloids' wrongdoing in that Inquiry's context, when reasoning in *PJS* that suppression would not disproportionately undermine FOE.[224] How is that relevant to proportionality assessed on the facts? It would be inconsistent with FOE's normative underpinnings effectively to punish media for their (or their competitors') past sins, by now more readily constraining their FOE. Have media as such lost a degree of entitlement to FOE?

Even when courts specify what proportionality entails in the tort's context, they do not necessarily show how they arrive at their conclusion, on the facts. According to which considerations is an outcome proportionate? Are those considerations consistently applied? In *T v BBC*, Eady J concluded "[t]he value of the broadcaster's expression in terms of Article 10 simply cannot be proportionate to the exposure of T's raw feelings and of her treatment of, or relationship with, her small daughter,"[225] and ordered voiceover and pixilation be used to hide T's identity. The Judge can be commended for alluding to FOE's value, and the privacy-invasive harm of exposure, but it remains unclear exactly *why* broadcast without pixilation[226] would *disproportionately* limit T's privacy.

This lack of precision might be because proportionality is seen as a foreign import. That contention has been persuasively disputed in the judicial review context, and also in FOE adjudication:[227] proportionality is *not* alien to English law, and *can* be integrated into rights adjudication at common law. Nor is English jurisprudence bereft of articulations of proportionality. In a case involving breach of confidence, featuring a conflict between articles 8 and 10, Sedley LJ explained proportionality's rationale:[228]

> [I]t is the tool—the metwand—which the [Strasbourg] Court has adopted (from 19th-century German jurisprudence) for deciding a variety of Convention issues including, for the purposes of the qualifications to Arts 8 to 11, what is and is not necessary in a democratic society. It replaces an elastic concept with which political scientists are more at home than lawyers with a structured inquiry: Does the measure meet a recognised and pressing social need? Does it negate the primary right or restrict it more than is necessary? Are the reasons given for it logical? These tests of what is acceptable by way of restriction of basic rights in a democratic society

[221] *PJS*, [90].
[222] *PJS*, [21]-[24].
[223] *PJS*, [31].
[224] *PJS*, [44]-[45].
[225] *T v BBC* [2008] 1 FLR 281, [18] (*T v BBC*).
[226] The exercise of uninhibited editorial autonomy.
[227] TRS Allan, 'Democracy, Legality, and Proportionality' in G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law* (CUP 2014) 211–212; J Jowell and A Lester, 'Proportionality' in J Jowell and D Oliver (eds), *New Directions in Judicial Review* (Stevens 1988) 51. *R v SoS Home Department, ex p Leech (No 2)* [1993] 2 WLR 1125
[228] *London Regional Transport v Mayor of London* [2003] EMLR 4, [57] (*London Regional Transport*).

> reappear, with variations of phrasing and emphasis, in the jurisprudence of [courts across many jurisdictions].

This passage has been neither applied in cases under the tort, nor referred to in judgments that have become authorities on the "ultimate balancing test". It was mentioned in two Court of Appeal cases, concerned more with traditional breach of confidence than the current tort,[229] but, even then, it did not feature in the reasoning about proportionality: the question was framed in terms *not* of proportionality, but of 'balancing' and 'public interest'.[230]

English courts appear generally unwilling to constrain their reasoning about qualified Convention rights to a robust methodology true to proportionality's requirements, including degree and gravity of detriment to the right, and side-effects of potential decisions. In a judgment about limitations upon article 8, Lord Thomas emphasised the importance of structure and consistency in 'balancing' qualified rights:[231]

> it is important that judges…adopt an approach which clearly sets out an analysis of the facts as found and contains in succinct and clear terms adequate reasoning for the conclusions arrived at by 'balancing' the necessary considerations.

Yet, immediately after explaining this, his Lordship held the trial Judge should have done this "analysis" by listing "pros" and "cons" in a "balance sheet",[232] before confirming proportionality was the applicable approach.[233] This preference for trade-off analysis sheds no light onto judicial reasoning: the courts' task is already understood in crude terms as always ruling in favour of the outcome with more "pros" than "cons". Proportionality, by definition, demands more than counting advantages and disadvantages. Yet English courts are reluctant to elucidate, *and continuously apply*, any methodology beyond that.[234]

Even Baroness Hale's explanation in *Campbell* is ultimately no more than a directive to apply proportionality: "the proportionality of interfering with one has to be balanced against the proportionality of restricting the other…applying the proportionality test to each [right]".[235] While this confirms proportionality is used to resolve a rights-conflict, it offers no rights-specific content for the methodological structure. 'Balancing' different 'proportionalities' against each other makes little sense and adds little clarity, especially given proportionality is intended to inject precision and structure into the "ultimate balancing test", and to be an integral *part* of the 'balancing' umbrella, rather than itself be defined by 'balancing'.

Nevertheless, proportionality is often reduced to 'balancing' in privacy-FOE cases. When courts declare they apply proportionality, as did Baroness Hale in *Campbell*, they explain their reasoning as 'balancing', rather than as a

[229] *Prince of Wales*, [56]-[60]; *ABC v TMG Ltd* [2019] EMLR 5, [20]-[22] (*ABC*).
[230] *London Regional Transport*, [67]-[68].
[231] *Poland v Celinski* [2016] 1 WLR 551, [15] (*Poland*).
[232] *Poland*, [16].
[233] *Poland*, [20]-[22].
[234] Lord Thomas's "balance sheet" dicta in *Poland* were applied in *ZXC* 1, [37]-[52].
[235] *Campbell*, [140], [141].

more nuanced method constrained by proportionality principles. For example, in *Douglas*, Sedley LJ confirmed FOE did not have presumptive priority over privacy, because:[236]

> the principles of legality and proportionality…always[] constitute the mechanism by which the court reaches its conclusion on countervailing or qualified rights…[and] in the jurisprudence of the Convention proportionality is tested by, among other things, the standard of what is necessary in a democratic society.

Yet the reasoning on the facts employed no discernible, structured, rights-focused proportionality analysis. Instead, "[e]verything…ultimately depend[s] on the *proper balance* between privacy and publicity in the situation facing the court."[237] Sedley LJ's conclusion, on whether the privacy-based arguments were "sufficient to tilt the balance of justice"[238] against FOE, were not based upon proportionality. Courts have continued to invoke "balancing", and abstract weighing of factors, to describe and (purport to) apply proportionality.[239] 'Balancing' takes centre-stage, while proportionality is a mere consideration: "It always remains a matter of balancing competing rights while paying due regard to proportionality".[240]

Sometimes courts do not engage with or even mention proportionality in the second stage. They have also described that stage simply as the 'public interest': "In the light of the conclusion that I have reached on reasonable expectation of privacy, the question of public interest at the second stage of the enquiry does not arise".[241] In *PJS*, the majority focused upon 'public interest' and not proportionality; Lord Mance mentioned proportionality, while Lord Neuberger explained "it was necessary to balance" the rights, treating 'public interest' as decisive.[242] Other judgments do not even mention proportionality: one Judge quoted Lord Steyn's "ultimate balancing test", without referring to proportionality again, opting instead for "balancing" focused upon 'public interest'.[243] The Court of Appeal, invoking the "balance exercise" between rights, reasoned a child's privacy would be outweighed by "exceptional reasons in the public interest", without once mentioning proportionality.[244] Even Sedley LJ, having articulated proportionality's rationale in *London Regional Transport*, equated proportionality with 'balancing': "It is a test of *proportionality*. But a significant element *to be weighed in the balance* is…".[245]

Reducing proportionality to 'balancing' or 'public interest' eliminates from the judicial inquiry the possibility of media defendants engaging in "disproportionate public interest reporting",[246] or disproportionate suppression of stories *not* in the 'public interest'. That would seriously undermine judicial justifications for upholding one right instead of the other.

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[236] *Douglas (No 1)*, 1005.
[237] *Douglas (No 1)*, 1004.
[238] *Douglas (No 1)*, 1007.
[239] *Prince of Wales*, [67]; *Hutcheson*, [44], [48]; *Theakston*, [67], [71], [73], [75]; *ETK*, [9], [18]-[20]; *Rocknroll*, [38]-[40].
[240] *CDE*, [46].
[241] *Goodwin*, [131].
[242] *PJS*, [20]-[24], [44]-[45], [51]-[50].
[243] *AAA* HC, [114]-[120], upheld on appeal.
[244] *Weller* CA, [39]-[42]. Also no mention of proportionality (outside quoting authorities) in second stage reasoning, in: *AXB*; *Browne v Associated Newspapers Ltd* [2007] EMLR 19 (*Browne* HC); *Browne* CA; *CVB*; *Donald*; *ERY*; *MJN v NGN Ltd* [2011] EWHC 1192 (QB).
[245] *London Regional Transport*, [67], emphasis added.
[246] P Wragg, 'Leveson and Disproportionate Public Interest Reporting' (2013) 5 JML 241.

The courts also apply the *Axel Springer* criteria[247] to elaborate upon proportionality.[248] These criteria can form the dominant and decisive part of second stage reasoning,[249] but they do not prevent courts from seeking to "strike the balance" and treating their task as "an overall evaluative exercise which is not a precise scientific measuring one, but [where] the most significant factors are"[250] those arising from the criteria. Strasbourg proposed these criteria to streamline domestic jurisprudence towards proportionality-orientated adjudication, reducing the need for Strasbourg interference. But in privacy-FOE cases English courts use the criteria as a convenient, straightforward *substitute* for proportionality analysis.[251] The *Axel Springer* criteria – a list of six questions – do not, however, resemble proportionality analysis aimed at rights-conflict resolution.[252]

Despite this lack of explicit, structured proportionality analysis, there has been a degree of judicial editorialising not inconsistent with proportionality reasoning. Courts sometimes permit publication of some but not all information, or publication in a certain format, because otherwise publication would encroach *excessively* upon privacy, or have *insufficient* FOE justification. In *Campbell*, damages were awarded only for those parts of the publication superfluous to setting the record straight.[253] In *AAA*, while publication of details of a claimant's paternity were permitted, photographs of her were not, as they exceeded the purpose of exposing her father's adultery.[254] In *Theakston*, the photographs were deemed too intrusive to be justified in line with publication of the actual story.[255] In *T v BBC*, although the Judge did not prohibit the broadcast, voiceover and pixilation were ordered to protect T's privacy.[256] In *Richard*, damages were awarded against the defendant on grounds not only of its broadcast of the claimant's identity, but also of the format of its reportage: part of the harm suffered was that the BBC had reported with "breathless sensationalism";[257] Mann J certainly did not "[i]gnor[e]…the literary quality of what…was…publish[ed]", contrary to previous judicial endeavours to defer to journalistic autonomy *vis-à-vis* private information.[258] Detailed, explicit proportionality analysis is still missing in these cases, but this judicial preparedness to 'editorialise' demonstrates the courts' *ability* to evaluate facts in the nature of proportionality reasoning: they are asking "whether the extra intrusion…could be justified by reference to the 'speech value' which those details [or that format] added".[259] Although defendants (particularly media) might object to the interfering judicial blue pen,[260] this approach gives more precision to decisions permitting or forbidding publication, and sees courts justify *why* some but not other aspects of a publication should be permitted – as is their *responsibility* under

[247] *Axel Springer*, [89].
[248] *Rocknroll*, [31]; *ABC*, [34]; *Hannon v NGN Ltd* [2015] EMLR 1,[85].
[249] *Richard*, [275]-[314].
[250] *Richard*, [315].
[251] Essentially the approach in *Richard*. This might well be the English courts' response to Strasbourg's own silence on exactly what proportionality means in privacy cases. But note Nicklin J's reasoning in *ZXC* 2, [134], that the *Axel Springer* factors do not offer much assistance, having already been accommodated in English law.
[252] Discussed further in (e)iii., below.
[253] Photographs of the claimant leaving the rehabilitation clinic and details of her medical notes.
[254] *AAA* HC, [122], upheld on appeal.
[255] *Theakston*, [77]-[80].
[256] *T v BBC*.
[257] *Richard*, [300].
[258] *Flitcroft*, [43](vi).
[259] Fenwick and Phillipson (n 94) 784.
[260] *Flitcroft*, [48].

proportionality.[261] Thus, courts specifying exactly which information may be published does not eliminate editorial latitude: [262]

> The practical exigencies of journalism demand that some latitude must be given. Editorial decisions have to be made quickly and with less information than is available to a court which afterwards reviews the matter at leisure.

It is a "crucial principle that, where there is a rational view by which…[to] justify publication, a court must give full weight to editorial knowledge and discretion and be slow to interfere".[263] English courts have reiterated Strasbourg confirmations that FOE protects the substance *and form* of expression, giving media in particular autonomy.[264] Judicial 'editorialising' is strictly limited to ensuring a privacy-invading publication serves its FOE-based purpose without exceeding its limits. Such reasoning is closer to proportionality than is wholesale suppression of the full contents of a travel diary,[265] or *carte blanche* permission to publish details of extra-marital sexual proclivities, alongside the fact of those affairs.[266]

iii. Overall implications

Courts acknowledge they must undertake proportionality analysis, but fail to do so in any discernible, meaningful way. In not providing clear, rights-specific content to a structured, consistently applied proportionality methodology, courts are not discharging their duty under the rights. Recalling theorists' criticisms of proportionality,[267] any acknowledgement of 'proportionality' *not* supplemented by moral content derived from the rights becomes redundant. This means rightholders know less about how courts resolve conflicts involving their rights. They have less insight into the *legal implications* of publishing private information, or the *legal prospects* of seeking suppression. That uncertainty can chill expression, especially for individuals[268] lacking resources to test the law *each time the conflict arises*. It can also undermine privacy, especially when individuals are unable to pursue lawsuits or injunction applications.

Far from constraining courts' rights-conflict resolution process to a robust methodology, and stimulating judges to provide concrete rights-based justifications for their decisions, references to proportionality are achieving the opposite. Equating proportionality with 'balancing' removes structure and gives courts unlimited discretion. This vindicates critics of proportionality,[269] who argue it does not guarantee fair and precise rights-adjudication. Deficiencies in proportionality reasoning also indicate courts might be using the 'balancing' metaphor for rhetoric effect and moral authority in their decisions in tort cases, irrespective of how detailed, normatively engaged or

[261] Fenwick and Phillipson (n 94) 785.
[262] *Campbell*, [62].
[263] *Ali* CA, [92].
[264] *Campbell*, [108],citing *Jersild*.
[265] *Prince of Wales*.
[266] *Flitcroft*; *D v L* [2004] EMLR 1; *Ferdinand*; *McClaren*; *Terry*; *Trimingham v Associated Newspapers Ltd* [2012] 4 All ER 717 (*Trimingham*).
[267] Discussed in Chapter 4.
[268] Or weaker participants in the media-market.
[269] Discussed in Chapter 4.

rights-focused their reasoning actually is.[270] Proclaiming a decision is 'balanced',[271] implies the decision is good and just, and removes the need to specify exactly how it was reached. Citing 'proportionality' without producing a methodological structure supplemented with relevant, rights-specific content, also gives courts a useful justificatory label for outcomes of rights-conflicts. Unconstrained value judgments are more likely to occur "when proportionality is stated merely as a conclusion".[272] The courts are currently declaring *that* an outcome is proportionate, without showing *why* it is proportionate.

Traversing the *Axel Springer* criteria does not exonerate courts from failing to 'do' proportionality. These criteria have no perceptible connection with proportionality, beyond the assumption that applying them to the facts begets a proportionate outcome.[273] One English Judge has admitted the courts "do not derive much assistance from the factors identified in *Axel Springer*", as they add nothing to the established English approach.[274] Strasbourg itself has applied the criteria without once mentioning proportionality.[275] Nor has it explained the rationale for each criterion. Only in assessing a sanction's severity might courts come close to proportionality.[276]

Stating that "conclusions [on the criteria] relate to the balance as between privacy rights and the article 10 rights"[277] reduces these criteria to factors a reasonable court may consider in deciding whether to permit publication. The "ultimate balancing test", however, demands more: an "intense focus" upon rights, and a proportionality test. The criteria neither induce that intense focus and nor complete a proportionality analysis. Strasbourg has offered no clear articulation of the proportionality test to be applied to the privacy-FOE conflict. It has simply held proportionality is required, implying that traversing the criteria will (somehow) produce proportionate decisions.[278]

That, however, does not settle the matter for English courts. Their obligation to account for relevant Strasbourg jurisprudence does not mean abdicating the responsibility to provide robust, principled doctrine for rights-adjudication. English courts must *go further than Strasbourg* where the latter's jurisprudence is lacking.[279] That must include elaborating upon proportionality. The criteria are a set of non-exhaustive factors against which Strasbourg typically measures domestic courts' reasoning.[280] English courts are therefore free to apply a proper proportionality analysis,[281] without incurring Strasbourg's disapproval. The ECtHR could hardly hold a domestic court's principled, methodical and rights-focused proportionality analysis to be outside the MOA, simply because the court refused to traverse criteria essentially unconnected with proportionality.[282]

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[270] Moosavian (n 48).
[271] Or has involved 'balancing'.
[272] S Kiefel, 'Proportionality' (2012) 23 PLR 85, 87.
[273] *Axel Springer*, [101].
[274] *ZXC* 2, [134], per Nicklin J.
[275] *Von Hannover (No 2)*, [107]-[113].
[276] The only allusion to proportionality within the criteria is *vis-à-vis* sanction severity: *Axel Springer*, [95]; *Couderc*, [151]; *Richard*, [276].
[277] *Richard*, [320].
[278] *Axel Springer*, [85]-[110]: there was no discussion of what proportionality means or how the criteria relate to it, beyond a statement after applying the criteria that the restrictions upon FOE were disproportionate.
[279] As explained in (b), above.
[280] *Axel Springer*, [85]-[110].
[281] Which may reflect Strasbourg's criteria.
[282] Or the rights' normative underpinnings.

English courts can and do import rights-focused, normatively anchored content into a proportionality framework. In non-tort article 8 cases where the rightholder is a child, courts have confirmed the children's best interests are an integral and primary consideration in the proportionality assessment; although a child's best interests could be outweighed by other considerations, no other consideration may be treated as inherently more significant.[283] This is because children are in particular need of protection under the Convention right normatively orientated towards protecting family life, dignity, and psychological well-being and development. It is plausible, therefore, to develop within English common law a proportionality methodology informed by the relevant rights' normative underpinnings.[284]

English courts should, in the tort's second stage, articulate and consistently apply a true, principled proportionality test, substantively informed by the rights-conflict and the rights' normative underpinnings. Their current failure to do so exposes their decisions to serious question. These decisions currently rely upon assumed knowledge of what proportionality requires, and instinctual reactions to implications of publication or suppression. That falls short of both the "ultimate balancing test", and the proportionality theory.[285]

(f) How do courts consider 'public interest'?

i. Introduction

The "ultimate balancing test" does not mention 'public interest', but courts habitually invoke it in the second stage. That is why this inquiry must examine the role of 'public interest' in that stage. Chapter 4 outlined significant problems with the 'public interest' theory of rights-conflict resolution, including lack of adequate definition, the risk of weakening rights, instrumentalisation of the holder of the suspended right, and marginalisation of minority interests. Such problems are borne out in the doctrine of the tort's second stage, especially regarding the malleability of 'public interest', and the treatment of 'trivial' speech, public figures, and press defendants.

ii. The courts' approach

1. Focus on 'public interest'

Although the "balancing operation"[286] is framed in terms of proportionality and an "intense focus"[287] upon rights, judges prefer the non-prescriptive 'public interest' test. English courts adjudicating the tort's second stage have attributed this approach to Strasbourg's earlier authority demanding publication be justified as contributing to a debate on matters of legitimate public concern.[288] 'Public interest' is now "integral" to the second stage, despite

[283] For example: *Zoumbas v SoS Home Department* [2013] 1 WLR 3690, [10]-[11].
[284] This is also apparent in some judgments on privacy-based injunction applications, when judges import into the framework of their reasoning (the balance of convenience test, rather than proportionality in particular) principles of due process and rule of law: *CTB*; *ABC*. Also relevant in: *CDE*, [86]; *PJS*. Such principles form the normative backbone of all rights: the rightholders' ability to pursue his legal claim-right. Thus, anonymised injunctions were justified in *CTB* and *ABC* on grounds revelation of the individuals' identity would destroy their claims in misuse of private information and breach of confidence. Both injunctions were subsequently breached by MPs revealing the individuals' identities, under parliamentary privilege.
[285] Discussed in Chapter 4.
[286] *Campbell*, [85].
[287] *Re S*, [17].
[288] *Von Hannover (No 1)*: Fenwick and Phillipson (n 94) 786.

playing no part in how the "ultimate balancing test" was first applied.[289] When taking account of the dicta in *Re S*, the Court of Appeal has reasoned that it is essential that courts "ask where the public interest lies", confirming it was "a question of balance."[290]

Courts favour the rationale that publication (suspending privacy) is justified if 'public interest' in the information is high enough, or if publication itself is in the 'public interest': "the question is whether there is a sufficient public interest in that particular publication to justify curtailment of the conflicting right".[291] That continues to permeate judgments: the decisive factor in a recent judgment suspending FOE was that disclosing a criminal investigation suspect's identity was not in the 'public interest'.[292] Beneath references to rights-in-competition, the rights' general importance, and proportionality, "'public interest' is *the* fundamental animating concept and major underlying determinant of" the second stage.[293]

The concept of 'public interest' originated in breach of confidence.[294] Given breach of confidence evolved into the current tort, it might seem natural that 'public interest' now dominates the tort's jurisprudence. This is especially so given that connections can be inferred between the courts' reasoning in breach of confidence cases, that wrongdoing can satisfy the 'public interest' defence,[295] and courts' reasoning in privacy tort cases that there is 'public interest' in knowing about wrongdoing, which can tip the 'balance' in favour of FOE.[296] 'Public interest' also features in section 12 of the HRA, and is mentioned in industry codes.[297] It is also reflected in the first *Axel Springer* criterion, preserving Strasbourg's earlier requirement that privacy-invasive publication contribute to a debate on matters of legitimate public concern.[298]

Yet the Supreme Court has not re-formulated the "ultimate balancing test",[299] and, given the continued absence of 'public interest' from that formulation, its prominence within the second stage remains unjustified. Nor is 'public interest' *implicit*: the breach of confidence principle, that courts must balance 'public interest' in maintaining confidence versus that in publication, *differs* from the situation under the HRA: "[w]e now talk about the *right* to respect for private life and the countervailing *right* to freedom of expression".[300] Furthermore, "breach of confidence…now covers two distinct causes of action, protecting two different interests: privacy, and secret ('confidential') information. It is important to keep these two distinct".[301]

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[289] *Mosley* 2, [11], citing *Re S*, [23], where 'public interest' was not even referred to. *McKennitt* HC, [54].
[290] *Browne* CA, [38].
[291] *Campbell*, [56]. Also: *Browne* CA, [38],[55]; *Luxembourg*, [59]; *Jagger*, [14]; *ETK*, [23]; *KJH*, [4], [11]; *Norman*, [76](3); *ERY*, [49]; *Hutcheson*, [46].
[292] *Prima facie* and ultimately on the facts there was no 'public interest': *Richard*, [282], [317].
[293] R Moosavian, 'Deconstructing "Public Interest" in the Article 8 vs Article 10 Balancing Exercise' (2014) 6 JML 234, 243. (emphasis original)
[294] *Initial Services v Putterill* [1968] 1 QB 396, 405; *Lion*; *W v Edgell* [1990] 2 WLR 47 (*Edgell*); *AG v Guardian (No 2)* [1990] 1 AC 109, 282 (*Spycatcher*); *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd* [1975] QB 613.
[295] *Lion*; *Edgell*; *Spycatcher*, 282.
[296] For example: *Goodwin*; *Browne* CA.
[297] Which courts can take into account. See: *Douglas (No 1)*, 994-995; *Campbell*, [159]; *Richard*, [268], [277], [307]-[314].
[298] *Axel Springer*, [89]; *Von Hannover (No 2)*, [108].
[299] *PJS*, [20], [51].
[300] *Campbell*, [85]-[86] (emphasis added); although Lord Hope then undertook 'balancing' in terms of "public interest in disclosure" versus claimant's "private interest": [101]-[113], [116].
[301] *Douglas (No 3)*, [255].

This is why it is not appropriate for courts adjudicating in the rights-conflict context of the privacy tort's second stage to rely upon the underlying ideas of the 'public interest' defence in traditional breach of confidence jurisprudence. It is also why a lack of explicit and meaningful judicial engagement with the normative underpinnings of privacy and FOE in adjudicating the tort's second stage cannot be cured by the recognition of implicit similarities in reasoning employed in the breach of confidence context, about when 'public interest' might justify publication of private (or confidential) information. That is so even where, for example, the breach of confidence doctrine of 'no confidence in iniquity'[302] can be traced through the 'public interest' defence in breach of confidence (that wrongdoing ought to be revealed publicly and not kept in secret),[303] and linked to some judicial reasoning in privacy tort cases that publication of private information is nevertheless in the 'public interest' because it reveals nefarious behaviour.[304] What is missing is explicit judicial engagement, in adjudication of the privacy tort's second stage, with the rights' normative underpinnings, and, in particular, why such FOE justifications as 'truth' or 'check on power', or general recipient interests in being informed, might direct the court *in any particular case* to reason that, because the private information pertains to wrongdoing, the FOE right should be upheld *at the expense of the privacy right*.

In spite of the judicial recognition that the breach of confidence and privacy tort actions must now be kept separate in the judicial psyche, and even when judges highlight the "ultimate balancing test" as the "new methodology" applicable to the (relatively) new tort, their reasoning returns to the "public interest defence".[305] Recently, the inquiry was described as "the assessment…of the strength of the justification for publishing the [i]nformation", and that "interference [with FOE] is necessary to secure the legitimate aim and…is proportionate to that aim", but the substance of this Judge's reasoning depended exclusively upon whether "there was a sufficient public interest in revealing [the] information".[306] Another Judge ignored the *Axel Springer* criteria by selectively interpreting that judgment as creating a 'public interest' test for whether publishing information about a sportsperson is justified.[307]

Courts also consider 'public interest' in *non*-disclosure,[308] reflecting that aspect of breach of confidence doctrine which asks whether it is in the 'public interest' to keep confidentiality.[309] Yet asking which outcome is more in the 'public interest' is critically different from asking which right should be suspended following an intense focus upon rights and proportionality analysis.

Privacy and FOE themselves are evaluated through 'public interest' in upholding or suspending either right,[310] or whether the right is outweighed by 'public interest'.[311] Courts do not reason in terms of the rights themselves, or tightly defined, rights-focused consequences of suppression or publication. Judges even express the rights'

[302] *Gartside v Outram* (1856) 26 LJ Ch (NS) 113, 114 per Wood V-C; *Hubbard v Vosper* [1972] 2 QB 84, 101; *Church of Scientology v Kaufman* [1973] RPC 627.
[303] *Lion*; *Edgell*; *Spycatcher*, 282. See: T Aplin and others, *Gurry on Breach of Confidence* (2nd edn, OUP 2012) 688.
[304] For example: *Goodwin*; *Browne* CA.
[305] For example: *Mosley* 2, [7], [10], [14], [26], [112]; *Terry*, [125].
[306] *ZXC* 2, [127], [133].
[307] *Spelman*, [49]-[50]: the Judge referred only to the first criterion, a "test of contribution to a debate of general interest", without acknowledging the other criteria.
[308] For example: *YXB*, [17].
[309] *Spycatcher*, 186, 188, 196, 198.
[310] Or simply confirm the case "involved a strong claim to freedom of expression in the public interest": *Hutcheson*, [48].
[311] For example: *Campbell*, [56], [85], [113]; *Richard*, [317]; *PJS*, [48]; *AAA* HC, [119]; *AAA* CA, [55]; *Weller* CA, [40], [54]; *Mosley* 2, [24]; *McKennitt* HC, [57]; *McKennitt* CA, [56]; *Browne* HC, [46], [66]; *Browne* CA, [55]; *CVB*, [67]; *CDE*, [51].

normative underpinnings in terms of 'public interest': the truth justification for FOE has been described as "one aspect of the public interest [being] the need to protect the public from being misled by a statement made by or on behalf of the…claimant".[312] This dilutes the "intense focus" on rights, since considering the broader 'public interest' does not shed light on how publication or suppression affects the rights themselves. Proportionality has even been applied to 'public interest', with on Judge asking "whether the intrusion…into the claimant's privacy was *proportionate to the public interest* supposedly being served by it".[313]

This 'public interest' focus distorts the tort's conflict. Judges have interpreted it as REP versus 'public interest' in publication: "whether there has been a breach of privacy…depends upon whether there is a REP, *or* a public interest in disclosure".[314] Even when they do not (erroneously) return to REP in the second stage, courts express their decision through 'public interest': "The only permitted exception is where there is a countervailing public interest which in the particular circumstances is strong enough to outweigh [privacy]".[315] One Judge has even defined the second stage as "the question of public interest".[316]

2. Meaning of 'public interest'

If 'public interest' is "decisive"[317] in that stage, what does it mean? It has been recognised that 'public interest' will "develop to meet changing needs",[318] and an "objective assessment of whether there is 'public interest' in the publication must acknowledge that in a plural society there will be a range of views as to what matters".[319] Despite identifying this variability, frequent references to 'public interest' indicate courts understand it to mean something in particular. Nevertheless, *vis-à-vis* the tort's second stage, it remains undefined.

A subsequent inconsistency, if not contradiction, exists between how courts describe 'public interest', and how they implement it. They have used a "high" test for justifying publication, requiring "exceptional public interest",[320] assessed objectively by impartial judges.[321] Where 'public interest' concerns claimant misconduct, the defendant should show gross misbehaviour.[322] However, the reasoning and outcomes in the cases convey a low 'public interest' threshold, and an unavoidable subjective assessment of whether publication passes it.[323] Despite acknowledging the dangers of judges deploying their personal moral views to determine 'public interest',[324] judges' reliance upon 'public interest' might inherently inspire such moralising, and not principled, rights-focused, legal reasoning.

[312] *Mosley* 1, [31]; *Terry*, [128]; *Ferdinand*, [65].
[313] *Mosley* 2, [14] (emphasis added).
[314] *Spelman*, [92] (emphasis added).
[315] *Mosley* 2, [131].
[316] *Goodwin*, [131], per Tugendhat J.
[317] *ETK*, [23].
[318] *Goodwin*, [133].
[319] *Ferdinand*, [64].
[320] *AAA* HC, [118].
[321] *Ferdinand*, [64]; *ETK*, [19]; *Abbey v Gilligan* [2013] EMLR 12, [45], [107]; *Goodwin*, [2].
[322] *McKennitt* HC, [96]-[101].
[323] See generally: Moosavian (n 293) 259.
[324] *CC*; *Mosley* 2.

Nevertheless, courts have persisted with 'public interest', attempting to 'legalise' it. Thus it is 'public interest' "in a legal sense",[325] and "legal" 'public interest' in publication is distinguishable from publication that is merely interesting to the public.[326] The former can contribute to a debate of general interest, excluding tawdry allegations, sensationalism, voyeurism, and the public's thirst for information about others' private lives.[327] That dichotomy, between 'public interest' publication and publications of interest to the public, was present in breach of confidence jurisprudence and has become a defining factor in the tort's jurisprudence.[328] The courts have therefore tended to concentrate upon whether the content of information is 'worthy' of protection, categorising it as important or trivial.

There is some indication of a judicial willingness to define the meaning of 'public interest' with more precision. In *Weller*, the Court of Appeal confirmed that the fact that information contributes to a debate of general interest is not necessarily determinative of whether there is 'public interest' sufficient to suspend a privacy right,[329] which is consistent with Strasbourg's confirmation that contribution to a debate of general interest may be *one* relevant factor weighing in favour of upholding article 10.[330] Further, the Court of Appeal in *Ali* reasoned that 'public interest' was a legal principle and a matter of logical and rational judgment, and should be interpreted as capable of covering the broad thematic of a broadcast, as opposed to being atomised as covering only a specific activity (which may happen to be the crux of the privacy intrusion).[331] However, it must be cautioned, as discussed in Chapter 1, that the Court of Appeal upheld the judgment at first instance, which ultimately took a narrower view of 'public interest' and decided the case in favour of the claimant, on grounds it could be inferred from that judgment that the Judge had taken all of the broader factors into account.[332] This might diminish the utility of this Court of Appeal judgment in clarifying what 'public interest' means as a legal principle, because it is unclear how the need to take a broader view of 'public interest' (described by the Court of Appeal in this particular case as covering the whole programme) can be reconciled with Arnold J's judgment at first instance that 'public interest' here attached only to the particular aspect of that programme that was the privacy intrusion (the home eviction of the claimants). Nevertheless, the courts may have begun to indicate that they are capable to tethering the meaning of 'public interest' to more concrete requirements, in a way that might allay fears that what is really occurring behind the words of the judgment is a form of untethered judicial moralising.

3. Ranking speech by value

[325] *PJS*, [2], [21], [22], [32], [34], [44], [78].
[326] *PJS*, [2], [21].
[327] *PJS*, [22]-[24]; *Armoniene v Lithuania* [2009] EMLR 7, [39]; *Mosley* 4, [114]; *Von Hannover (No 1)*, [65]; *Couderc*, [100]-[101]. 'Public interest' is therefore both descriptive (of how 'interesting' information is) and normative (signifying whether it should be published): E Barendt, *Freedom of Speech* (2nd edn, OUP 2005) 244.
[328] *British Steel v Granada Television Ltd* [1981] AC 1096, 1168G; *Lion*, 537B; *McKennitt* CA, [66]; *Prince of Wales*, [51]; *Mosley* 2, [114]; *ETK*, [23]; *Mosley* 4, [114]; *Ferdinand*, [63]. Lord Justice Leveson, 'An Inquiry into the Culture, Practices and Ethics of the Press, Report' (2012) pt B, Ch 4, [4.9].
[329] *Weller* CA, [72].
[330] *Von Hannover (No 2),* [109].
[331] *Ali* CA, [85], [87], [90], [92].
[332] *Ali* CA, [93].

Assessing 'worthiness' of speech-content attracts the same problems as ranking according to a speech-hierarchy.[333] Yet courts still use the distinction between higher- and lower-value speech to explain why 'public interest' publication is justified:[334]

> …this type of expression is at the bottom end of the spectrum of importance (compared, for example, with freedom of political speech or a case of conduct bearing on the performance of a public office). …any public interest in publishing such criticism…, in the absence of any other, legally recognised, public interest,…is incapable by itself of outweighing such article 8 privacy rights as the claimant enjoys.

Courts invoke examples of important information to illustrate the ranking process, including information "revealing (say) criminal misconduct or antisocial behaviour".[335] This provides neither a reliable framework to be applied consistently, nor a justification for why low-value speech automatically stands no chance against privacy. Even though "freedom to criticise (within the limits of the law) the conduct of other members of society as being socially harmful, or wrong" is "one of the most valuable freedoms",[336] these "limits of the law" remain undefined, as does how courts assess the "social utility of the threatened speech".[337] There is no rights-focused, normatively-engaged rationale for why information about a powerful public figure's sadomasochistic activities ranks below the 'public interest' threshold,[338] while information about a television presenter's visiting a brothel ranks above it;[339] why private information about a teenage sportsperson ranks above the threshold,[340] while information about an influential pop-star suspected of criminal wrongdoing is fodder for "gossipmongers".[341]

This absence of rationale permits instinctual ranking of speech-content, which may result in presumptive ranking of the *rights* themselves – expressly prohibited by the "ultimate balancing test". If only 'legal' 'public interest' can challenge privacy-based arguments, and if only 'important' speech can be of 'legal' 'public interest', then FOE *vis-à-vis* all speech below this standard will be subjugated to privacy *before any 'balancing' is undertaken*. This is one risk that remains as long as the courts continue to employ speech-ranking methods that see them value speech at either end of a "spectrum of importance".[342]

4. Treatment of public figures

This unharnessed notion of 'public interest' also risks presumptive ranking of individuals, particularly public figures, who face the proposition that there is 'public interest' in knowing about their private lives *because* they are public

[333] Discussed in (d), above.
[334] *PJS*, [24].
[335] *X*, [25].
[336] *Terry*, [104].
[337] *Terry*, [104].
[338] *Mosley* 2.
[339] *Theakston*.
[340] *Spelman*.
[341] *Richard*, [282].
[342] *PJS*, [24].

figures.[343] This does not mean every public figure case results in publication. Courts recognise that, even if a public figure courts publicity, this *per se* is insufficient to establish 'public interest'.[344] There is no *automatic* 'public interest' in information about public figures, weakening their privacy claim;[345] indeed, public figures may procure stronger privacy protection from publicity than ordinary individuals.[346]

However, the ambiguity of 'public interest' still allows courts to consider that an individual's public role *per se* makes stories about them of 'public interest':[347]

> it is not self-evident that how a well-known premiership football player, who has a position of responsibility within his club, chooses to spend his time off the football field does not have a modicum of public interest.

Thus, if a claimant is considered to be a 'role model',[348] it is in the 'public interest' to publish information about them. Indeed, *no* 'public interest' was found in a recent case because the claimant was *not* a role model or person of authority.[349] In *AAA* there *was* 'public interest' in publishing the claimant's paternity information because her father was an elected politician; the information would reveal elements of his character.[350]

Notwithstanding these earlier and more recent judgments and such reasoning about public figures, the courts have, as stated immediately above, recognised that a public figure status in and of itself should not be sufficient to establish 'public interest', and, in addition to that general proposition, there are some noteworthy judgments in which the courts have provided *further* reasons why, in the particular case, it was in the 'public interest' to know private information about the claimant, who happened to have a public profile. In *Goodwin* and *Browne* the 'public interest' was found not on the sole basis that the claimant had a public role, but that the public ought to be able to hold to account those who wield public power (including considerable commercial power), and to discuss standards of proper public conduct.[351] As discussed above, however, such judgments would still be improved by explicit reference to how such reasons in favour of publication are connected with the normative underpinnings of FOE, and why, on the particular facts, that right ought to be upheld and the right to privacy, along with its relevant normative underpinnings, ought to be suspended. More broadly, though, the doctrine in the privacy tort's second stage would be improved if all judgments were based upon reasoning closer to that provided in *Goodwin* and *Browne*, than to that provided in *Flitcroft, AAA, NNN, Theakston* and *Spelman*.

5. Treatment of press defendants

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[343] The treatment of public figures has been discussed in (d), above, *vis-à-vis* how the courts approach the normative underpinnings of the rights.

[344] "A person may attract or seek publicity about some aspects of his or her life without creating any 'public interest' in the publication of personal information about other matters.": *Campbell*, [57].

[345] *McKennitt* CA, [56]-[66].

[346] *Richard*.

[347] *Flitcroft*, [43](vi).

[348] The 'role model' doctrine is discussed in (d), above.

[349] *NNN*, [13].

[350] *AAA* HC, [118]; *AAA* CA, [55]. Other judgments also expose the reasoning that publication was in the 'public interest' in effect exclusively because the claimant was a public figure; for example: *Theakston*; *Spelman.*

[351] *Browne* CA, [129]; *Goodwin*, [132]-[133].

The 'public interest' focus opens a special door to press defendants. Media are perceived as a public good, serving the public by holding power to account and representing "the marginalised and downtrodden".[352] They "perform an invaluable function", being "an essential foundation of any democracy…exposing crime, anti-social behaviour and hypocrisy…campaigning for reform and propagating the view of minorities".[353] The press's 'public watchdog' function features in both English courts' 'public interest' reasoning, and Strasbourg's reasoning.[354] It suggests that, because media are a "powerful pillar of democracy",[355] press freedom inherently benefits the public,[356] and suppression of press publications is *per se* against the 'public interest'.

The truth and democracy justifications for FOE are implicit here, but it is 'public interest', *not* rights-based reasoning, that supports publication of press stories. 'Public interest' reasoning allows courts to accept 'free press' arguments, without explaining *how* publication *in the particular case* furthers such normative concerns, and *why* these arguments outweigh privacy's normative concerns. If media always serve democracy, *inherently no* suppression is in the 'public interest'. If 'truth' is always in the 'public interest', that justifies *always* forcing individuals to 'come clean' about their private lives. Under 'public interest' courts need not consider the implications for autonomy.[357] The "ultimate balancing test", however, demands courts articulate why, on the facts, such FOE justifications make suspending privacy proportionate. The "discernible rhetoric effect" of the press watchdog function,[358] resulting from 'public interest' focus, allows courts to avoid deeper examination of contextualised rights-based arguments, and to appear to justify *any* privacy-invasive publication.

'Public interest' reasoning also makes press commercial interests relevant, as a purported public good under FOE: a flourishing press fosters pluralism, which FOE seeks to protect.[359] Courts have recognised and even treated as decisive the contention that hurting press revenue by inhibiting publication affects the press's survival.[360] Even when press defendants are unsuccessful, courts accept that impediments to selling stories affect press viability overall.[361] However, justifying privacy intrusion through the economic value of press publication lacks empirical credibility and rights-focused principle:[362] valuing press viability over privacy means the "burden of ensuring the general social good of having newspapers falls on that very small minority of individuals whose privacy they invade".[363]

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[352] Moosavian (n 293) 249.
[353] *Francome v MGN Ltd* [1984] 2 All ER 408, 413 (*Francome*); quoted in *Terry*, [102] and *Spelman*, [102].
[354] *Campbell*, [107]; *ETK*, [13]; *Spelman*, [48]; *Von Hannover (No 1)*, [63]; *Mosley* 1, [28]; *Goodwin*, [133]; *Mosley* 4, [114]; *Axel Springer*, [91]; *Von Hannover (No 2)*, [10]. The ECtHR has interpreted article 10 as implying a duty on media to communicate information, deriving from the public's right to receive information: *Axel Springer*, [79]; *Von Hannover (No 2)*, [102]. this has been applied in England: *Campbell*, [116]; *Spelman*, [52]. Note, however, the rejection of a general, constitutional role for the press as part of FOE-based justifications against liability in the tort, in *Richard*, [321]-[322].
[355] *ETK*, [13].
[356] J Oster, 'Theory and Doctrine of "Media Freedom" as a Legal Concept' (2013) 5 JML 57, 73.
[357] The privacy-protected entitlement to "selective disclosure": Fenwick and Phillipson (n 94) 804.
[358] Moosavian (n 293).
[359] *Terry*, [104]; *Trimingham*, [79]-[80], [265]-[266].
[360] *Flitcroft*, [11] (though the Judge's comment was later discredited in *McKennitt* CA, [64]); *ETK*, [13]; *Spelman*, [24],[49]; *Weller* HC, [75], [145]-[147], [149], [175], [180], [182] (upheld on appeal); *Guardian*; *Donald*, [55]; *Goodwin*, [110],[111]; *TSE*, [26]; *Mosley* 4, [131]; *Axel Springer*, [51]; *Von Hannover (No 2)*, [71]; *Hutcheson*, [34]; *AAA* HC, [102]. See dicta in *Campbell*, [143]: "we need newspapers to sell in order to ensure that we still have newspapers at all".
[361] *PJS*, [21].
[362] Phillipson, 'Leveson, The Public Interest and Press Freedom' (n 147) 234.
[363] ibid.

This "economic survival" argument[364] also problematises the division between 'public interest' speech-content and trivial speech: realistically, the latter is the elixir of life for a fledging press, but, doctrinally, it *defines* information not in the 'public interest'.[365] And distinguishing between legitimate news-reportage and purely sensational reportage is inherently difficult.[366] Courts are aware that zealous editors might confuse 'public interest' with a good scoop,[367] but also acknowledge that "the commercial imperative to sell newspapers is a relevant factor to be taken into account when conducting the Article 8/10 balancing exercise".[368] This shows how 'public interest' rests upon a false dichotomy and contradiction of interests, inhibiting coherency and principle in the tort's second stage.

More recently,[369] courts have rejected arguments about the press's inherent importance or its imperilled survival. Egregious misbehaviour of some elements of the British press[370] also cautions against special treatment. 'Public interest' reasoning, however, remains part of the doctrine, and even recent press-sceptical judgments, and the Leveson report,[371] treated 'public interest' as a central consideration. Where it remains central, so does the proposition that media deserve special treatment. When the Court of Appeal recently defined 'public interest' in more constrained terms, as a legal principle involving logical and rational judgment and potentially covering a general theme to be depicted in an overall broadcast, rather than just a specific privacy-intrusive activity, it completed its definition of 'public interest' with the corollary that, where 'public interest' so defined is made out, the "court must give full weight to [the broadcaster's] editorial knowledge and discretion and be slow to interfere".[372] Given how judges treat FOE's normative underpinnings,[373] persuading courts to limit press publication or media broadcasts will not necessarily become easier. New-technology pressures facing traditional news media might make it of 'public interest' to ensure such businesses retain competitive capacity.[374] Insofar as 'public interest' is central to the second stage, broader arguments about safeguarding news media could *on their own lead* to a suspension of privacy, *without* a deeper evaluation of the rights-implications. This remains a rational possibility wherever the broad concept of 'public interest' is definitive of whether publication is permitted or not, and it should be highlighted as a future potential direction for judicial reasoning under 'public interest' in light of technological developments and political acknowledgement that such developments could threaten traditional press viability.

iii. Overall implications

In focusing upon 'public interest', courts are not adhering to the "ultimate balancing test", especially the presumptive equivalence of, and "intense focus" on, the rights in question. They have *substituted* 'public interest'

[364] ibid 232.
[365] Moosavian (n 293). See discussion immediately above.
[366] E Volokh, 'Freedom of Speech and Information Privacy' (2000) 52 Stanford Law Review 1049; See also generally: G Millar and A Scott, *Newsgathering* (OUP 2016).
[367] *Francome*, 898; *Mosley* 2, [139]; *Richard*.
[368] *AAA* HC, [102].
[369] *PJS*; *Richard*; discussed in (d), above.
[370] Detailed in the Leveson Inquiry: Lord Justice Leveson (n 328) 66-67,[5.10].
[371] ibid.
[372] *Ali* CA, [92].
[373] Discussed in (d), above.
[374] One public inquiry has already resulted in a recommendation that special protection be given to "Public Interest News" as a way of combating these threats, but without defining exactly what that means and who in particular decides in each case whether a publication meets the threshold: F Cairncross, 'Cairncross Review: A Sustainable Future for Journalism' (2019).

considerations for reasoning about rights and their normative underpinnings: they ask which right it is more in the 'public interest' to uphold, rather than which right should be upheld *on its own terms*. That means justifications for their decisions are *not* explicitly based upon privacy and FOE *per se*, even though such outcomes *entail* suspending one right in favour of the other, which is a serious loss to one rightholder.[375] It also means the tort's second stage is susceptible to the problems inherent in 'public interest' reasoning.

The likely catalyst of all such problems is that 'public interest' remains open-ended.[376] Deciding upon 'public interest' in the second stage can open the door to unprincipled ranking and assessment of the social worth of speech-content, and marginalisation of 'lower-order' speech. Unprincipled ranking, or ranking that is not focused upon the two rights in question, lies not in the courts' lack of giving explicit reasons for why some speech-content is of lower social worth than other speech-content; the courts do give reasons, for example, that the content is mere gossip, so as to be lower-order, as in *PJS*. The apparent arbitrariness lies, rather, in courts' not explicitly linking their readiness to assess the social worth of speech-content with the normative underpinnings of the rights in question, and not explicitly linking the way in which they assess the worth of content on the facts of the case with how upholding or suspending the rights in question, on those facts, affects their normative underpinnings. The 'public interest' does not compel the courts to make these connections, so that when 'public interest' is used to assess the implicit social worth of speech-content, it may not be explicit in the reasoning why or how such an assessment should be made, based upon the normative underpinnings of the rights in question.

For example, in relying upon 'public interest', the courts are not compelled explicitly to show why it matters, in terms of the normative value of the FOE right, that private information indicating misuse of corporate power is of such high order *vis-à-vis* its social worth, that it should be published in a national newspaper instead of communicated to all shareholders. If the relevant FOE interest is the recipient-interest of shareholders (as the Court of Appeal reasoned in one such case, *Browne*, involving information about a sexual relationship between a chief executive and an employee),[377] why should the claimant's privacy right be suspended to an extent beyond disclosure of the information to those interested recipients? The Court did not justify its reasoning explicitly, in terms of the rights concerned, when it opined that the international corporation was large enough and had a sufficiently large number of shareholders to justify publication of the relevant information in newspapers, rather than in communication to the shareholders, in spite of such information being private information: the Court stated only that that was "a relevant consideration in favour of publication of the information in the public interest".[378]

If the size of a company means recipient interests in FOE expands to the public at large, instead of being limited to the shareholders, then the courts must be explicit about why this is the case, and why the normative underpinnings of FOE demand this, so much so that a relevant privacy right should be suspended. It may be, though this was not explicitly provided in *Browne*, that the consumers of such large corporations have a recipient-interest under the right FOE, because such knowledge may importantly affect their decisions and actions as

[375] Discussed in Chapter 2.
[376] The undefined nature of 'public interest' was highlighted in Chapter 4 as an inherent issue within the 'public interest' theory for rights-conflict resolution.
[377] *Browne* CA.
[378] *Browne* CA, [55] (the reasoning was *obiter* given it was held there was no REP in the information in question; but in giving its opinion about how the "ultimate balancing test" should operate on the facts, the Court of Appeal proceeded on the assumption that the relevant information was found to have attracted a REP).

consumers. Such a proposition must be explicitly recognised in judicial reasoning as a normative demand underpinning the FOE right, and must not be left to be inferred. This is because such a proposition is *per se* a moral judgment about the function of FOE in a market economy, and about the proper extent of the law in protecting consumers in such an economy, and such a moral judgment may be open to challenge. Such a moral judgment must be transparently set out in judicial reasoning, especially if it is to become the legal reason for suspending an individual's recognised entitlement to a right to privacy.

On the other hand, the relevant recipient-interest might only arise if there is an evidentiary basis for believing a sexual relationship actually affected a powerful corporate officer's decision-making: this is how Tugendhat J reasoned in the similar case of *Goodwin*, where it was held there was *no* 'public interest' in disclosing information that such an officer was having an affair, *if* the sole grounds were that it could have affected his decision-making at a time when his company made a disastrous acquisition, which led to the company being bailed out using public funds.[379]

Whichever position is best, on exactly who the normative 'recipient' is under the right to FOE in such cases, the rubric of 'public interest' does not demand of the courts to engage in explicit, principled, rights-focused engagement, and to justify their decisions on what is in the 'public interest' in explicit terms of the right to FOE. The 'public interest' allows the courts to assess the value of certain information, sometimes through ranking according to a "spectrum of importance",[380] without demanding they justify *why and how* they are evaluating speech-content in accordance with the explicitly identified relevant normative underpinnings of the rights in question.

'Public interest' reasoning may also lead to a beatifying of media as the bulwark of FOE, and recognising the importance of low-order publications to press survival, as discussed under sub-part 5, immediately above, and in the doctrinal analysis of Moosavian[381] and Phillipson.[382] The potentiality of such reasoning may be inherent in a preparedness to resolve privacy tort cases with reference to 'public interest', instead of with explicit reference to specific normative underpinnings of the two rights in conflict, regardless of how any particular case is ultimately decided. The quality of judicial reasoning in rights adjudication – whether it is principled and transparent – is not determined by the ultimate outcome of a case on its facts, and the rightness or wrongness of that ultimate outcome. Ultimate outcomes on specific facts do not make judicial reasoning more principled or transparent, and do not eliminate risks inherent in the way in which courts choose to reason. If they choose to reason in ways that are not explicitly and meaningfully rights-focused, their ultimate final decisions on the facts will not cure that problem. Instead, judicial reasoning that is not explicitly grounded in the normative underpinnings of the rights in question will mean the outcome of such a judgment rests upon less secure foundations. The preparedness to treat media interests as definitive of the FOE right, and *vice versa*, as discussed under sub-part 5 above, is a problem in judicial reasoning in the process of resolving a case, rather than in the ultimate resolution of a case in favour or not in favour of a media defendant.

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[379] *Goodwin*, [135]-[136]. Tugendhat J here reasoned that there was 'public interest' in disclosing *other* private information, namely, the job description of the person involved in the affair with the Chief Executive Officer: [132].
[380] *PJS*, [24].
[381] Moosavian (n 293).
[382] Phillipson, 'Leveson, The Public Interest and Press Freedom' (n 147); G Phillipson, 'Press Freedom, the Public Interest and Privacy' in AT Kenyon (ed), *Comparative Defamation and Privacy Law* (CUP 2016).

Regardless of whether a media defendant ultimately succeeds in any particular case, an inclination to equate the FOE right with press freedom, and thereby to recognise the need to be mindful of the press's economic survival, is something that remains possible under the rubric of 'public interest' reasoning, when it is not possible under a more disciplined, rights-focused method of reasoning. That, in and of itself, is problematic, and it stems not from the particular outcomes of particular cases, but from the resort to 'public interest' reasoning that is not explicitly rights-focused. The way in which particular outcomes are relevant in this problem is that they will be based upon weak justifications, and may not so easily be explained when related to other outcomes on materially similar facts. If it is the case that 'public interest' reasoning poses no risk of elevating press interests, including their economic interests in publishing mere gossip, why did information about footballers' extra-marital affairs,[383] or about a teenage sportsperson's private life,[384] deserve to be published despite privacy intrusions? If it is the case, instead, that 'public interest' reasoning elevates press interests only to the extent media report on matters of widespread concern, why should information about the identity of a suspect in a serious criminal investigation have been suppressed[385] despite widespread concern about it? Judicial reasoning that routinely employs 'public interest', instead of focusing explicitly and meaningfully upon the rights' normative underpinnings, may generate confusion about what is in the 'public interest', and how press interests feature in the strength of the FOE right on the facts of the case. The courts' openness to equating press freedom with the FOE right, as discussed in sub-part 5 above, is a symptom of 'public interest' reasoning, and that openness is not eliminated by specific outcomes that see media defendants succeed or fail; instead, that openness exposes a deeper ambiguity about how engaged courts really are with the rights in question, and whether their ultimate decisions on particular facts can be explained adequately in terms of the rights which are directly affected by them.

Assessing 'public interest' in the publication of certain *content* may also invite problematic reasoning into the second stage. 'Public interest' may encourage courts to assess the information-content's nature and quality, rather than how publication or suppression of it would affect the two rights. Though the information-content's nature and quality might be relevant to how publication or suppression of it would affect the two rights, these two matters are not the same. Publication of certain information might inordinately frustrate privacy regardless of how important public knowledge of its content is considered to be. Suppression of certain information might significantly frustrate FOE, despite its trivial content. An assessment of how publication or suppression of information would affect the two rights might involve consideration of the nature and quality of the information-content, but that must not be the sole focus for the courts. The privacy tort does not empower courts to pronounce upon what sort of information-content should be flowing in society; it obliges courts to decide whether certain information should be published or suppressed on the basis of the normative demands of the privacy right and the FOE right. Yet 'public interest' permits assessment of information-content (whether or not its nature and quality mean it should be published) to the exclusion of other factors that might be equally or more relevant to how the rights, and their normative underpinnings, might be affected by publication or suppression.

Speech-content categorisation oversimplifies matters, distancing courts from the rights' normative underpinnings and how they are affected by publication or suppression. Treating speech categories as a code, which decides

[383] *Flitcroft*; *Ferdinand*; *Terry*; *McClaren*.
[384] *Spelman*.
[385] *Richard*.

the 'balancing' exercise, is anathema to the inherently contextualised and rights-oriented "ultimate balancing test". In ranking speech by value, courts apply a test based less upon the *rights* engaged, and more upon a judge's assessment of the social worth of certain speech-content. Courts must do more to justify, in accordance with FOE's normative underpinnings, why low-value speech matters less, and why its subjugation is the defining element of 'public interest'. Excluding certain speech for its assessed value, without normatively-engaged justification, undermines FOE,[386] because it can marginalise certain speech that might well have social worth.[387]

Deciphering the social worth of speech-content may distract courts from delivering a coherent definition of 'the public'. Without describing the 'reasonable reader', or recognising the 'public's' diversity, courts simply invoke the 'public' or "a section"[388] of it, when evaluating speech-content. If information merely titillates or entertains, any group interested in it is excluded from the 'public'.[389] The interests of those wishing to publish or receive such speech-content are automatically traded-off for the benefit of some more important 'public': upholding one right costs the 'public' less than upholding the other.[390] Problems with the trade-off theory of rights-conflict resolution[391] therefore feature in the current focus upon 'public interest'. In neglecting to explain who the 'public' is, the courts, without a rationale anchored in the two rights, sacrifice some individuals' rightholding entitlement in favour of others. It remains unclear *who* must vitiate their rightholding entitlement to benefit the undetermined 'public'. This reasoning is also question-begging: if a publication is not in the 'public interest' because it is low-value, more is needed to explain why it is low-value if it interests only "a certain public".[392] Nor does referring to interested readers as "gossipmongers"[393] illuminate matters. Why are gossipmongers excluded from the 'public'? The courts' answer appears to be: 'because they are gossipmongers'.

'Public interest' reasoning can also instrumentalise certain claimants. If public figures are deemed individuals about whose lives it is in the 'public interest' to know, their privacy-based arguments are implicitly marginalised in the 'balancing' process, and it is their public status and way of life that effectively uphold FOE. Eliding press survival arguments with 'public interest' further burdens such claimants.[394] The privacy-FOE conflict entails suspending one right *in order to* uphold the other, which means suspending one right is the *only way* of upholding the other. Whenever press FOE is upheld against a public figure's privacy because of an ambiguous and unprincipled 'public interest',[395] the public figure's personality and private life are instrumentalised to vindicate press-orientated FOE.[396]

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[386] As discussed in (d), above.
[387] See: Wragg, 'Free Speech Is Not Valued If Only Value Speech Is Free' (n 190); Wragg, 'A Freedom to Criticise' (n 133); P Wragg, 'The Benefits of Privacy-Invading Expression' (2013) 64 NILQ 187.
[388] *Rocknroll*, [32].
[389] *Von Hannover (No 1)*, [65]; *Axel Springer*, [91]; *OPQ v BJM* [2011] EMLR 23, [25] (*OPQ*); *Rocknroll*, [32].
[390] Or benefits the 'public' more than upholding the other.
[391] Discussed in Chapter 4.
[392] *OPQ*, [25].
[393] *Richard*, [282].
[394] Recall: Phillipson, 'Leveson, The Public Interest and Press Freedom' (n 147) 234.
[395] Rather than on a normative-engaged and rights-focused rationale.
[396] Although Mann J recently recognised in *Richard* that public figures might need *greater* privacy protection from press intrusion than 'ordinary' claimants, this does not overrule the direct links that already exist between claimants' public status, 'public interest' in press publication, and upholding FOE. It should also be noted that, in *Richard*, it was the low 'public interest' in identification of suspects in criminal investigations, *combined with* the high intrusive harm of the defendant's actions, that decided this case in favour of the claimant.

Judicial preoccupation with 'public interest' exposes serious problems with current doctrine. A more coherent, transparent justificatory approach would focus less upon 'public interest' and more upon how the consequences of suppression or publication further or frustrate the rights' relevant normative underpinnings. Judges should be adjudicating on the parties' respective claims – their *rights* – rather than undertaking inherently arbitrary, unsettled reasoning about whether publishing certain information is of 'public interest'.

(g) Root cause of current problems: focus on 'public interest'

i. Introduction

The root cause of current inconsistency, lack of transparency and lack of principle in the tort's second stage[397] is the courts' focus upon 'public interest'. This focus has beleaguered doctrine with problems inherent in the 'public interest' theory for resolving rights-conflicts, one of the weakest of such theories.[398] It has also pushed courts towards another weak theory – trade-off theory – introducing into the doctrine the act-utilitarian and rights-neglecting problems inherent in that theory. Simultaneously, 'public interest' reasoning distracts courts from rights-conflicts, the privacy and FOE rights themselves, and proportionality, causing them routinely to misapply the "ultimate balancing test".

Cumulatively this means current doctrine is not rights-orientated. Although the outcomes of these cases always involve suspending one right, the reasoning and justification underlying that inevitable, judicially-enforced loss of rightholding entitlement is not based upon the rights themselves. Focusing upon 'public interest' enables courts to continue with an appearance of rights-adjudication, while disregarding the rights' normative and practical dimensions.

ii. 'Public interest' prevents consistent, transparent and principled reasoning

The struggle to define 'public' and 'interest' has produced incoherent, unstable and arbitrary reasoning. This failure substantiates general critiques of 'public interest',[399] and the assertion that "[u]ncovering rational criteria by which to make this controversial judgment [what is 'public interest'] presents a perennial challenge".[400] This indeterminacy has seen courts "shift" the meaning of 'public' to exclude groups interested in low-value speech.[401] Arbitrariness is increased because the courts themselves decide whether speech is low-value. Alternatively,[402] courts might define 'public' as consumers purchasing newspapers only if their stories are sufficiently interesting, thereby elevating 'low-value' speech. 'Public interest' reasoning affords courts abundant options, unrestricted by principle.

This exposes the false premise of 'public interest': what is in the 'public interest' does *not* always exclude what is merely interesting to the public. The dichotomy is doctrinally flawed and self-defeating, given contradictory judicial

[397] Outlined in Chapter 1.
[398] Discussed in Chapter 4.
[399] Discussed in Chapter 4: A McHarg, 'Reconciling Human Rights and the Public Interest' (1999) 62 MLR 671.
[400] R Wacks, *Privacy and Media Freedom* (OUP 2013) 162.
[401] Moosavian (n 293) 254, 264–265.
[402] And likewise according to no discernible rationale.

approaches of sometimes devaluing 'merely interesting' expression, and sometimes inflating its value to protect press profits:[403] actually, 'merely' interesting publications are *included* in the 'public interest' concept. The dichotomy is also normatively flawed: categorising speech-content is unconnected with FOE's normative underpinnings. FOE does not protect *only* 'public interest' speech. Its underlying philosophy is that law *not* distinguish between 'worthy' and 'unworthy' speech-content. The courts have provided neither a FOE-connected justification for preferring socially worthy speech, nor a normatively anchored way of *identifying* socially worthy speech. 'Public interest' reasoning allows courts to make "tenuous speculations"[404] about how audiences will receive particular speech, and, subsequently, decide whether such speech is good for society: that is far removed from FOE's normative underpinnings,[405] *and* judicial statements about its breadth.[406] Limits on FOE, sought by a privacy claimant, should be justified according to that right itself (and the conflicting privacy right), *not* the social worth of the speech-content.

Common law courts are not inherently incapable of recognising the defects of 'public interest' reasoning, and excluding it from their jurisprudence. In breach of confidence, Australian courts have retained the iniquity rule and rejected 'public interest'.[407]

The inconsistency and lack of principle of 'public interest' is perceptible in the contrasting approaches to applying 'public interest' in English breach of confidence: whereas there was 'public interest' in knowing the antics of a celebrity's private life, there was insufficient 'public interest' in knowing (more) about widespread harm of a pregnancy drug.[408] 'Public interest' offers no credible or rational justification for these decisions. This is identical to the lack of consistency, principle and transparency in the law of misuse of private information.

iii. 'Public interest' diverts courts away from rights-conflict and rights' normative underpinnings

Emphasising 'public interest' allows courts to ignore the privacy-FOE conflict and its necessary outcome: the loss of rightholding entitlement, which requires a rights-orientated justification in every case. 'Public interest' offers a pre-packaged justification: an outcome is justified *because* it is of 'public interest'. Whatever it is, 'public interest' gives judicial decisions a legitimating gloss. 'Public interest' reasoning also allows courts to consider factors irrelevant to the rights' normative underpinnings. This removes rights-reasoning from the tort's second stage.

As discussed, courts assess speech-content by whether it meets the "somewhat crude" test of 'public interest'.[409] Effectively every disputed expression will have one or more of the political, social or moral dimensions which

[403] P Wragg, 'The Benefits of Privacy-Invading Expression' (2013) 64 NILQ 187, 199; Oster (n 216) 68; Moosavian (n 192) 260, 263; R Wacks, *Privacy and Media Freedom* (OUP 2013) 113, 168.
[404] Moosavian (n 293) 259.
[405] Discussed in Chapter 3.
[406] *Handyside v UK* (A 24 1979-80) 1 EHRR 737; *Carlile*, [91].
[407] *Castrol Australia Pty Ltd v Emtech Associates Pty Ltd* (1980) 22 ALR 31, rejecting Lord Denning's approach in *Woodward v Hutchins* [1977]1 WLR 760 (*Woodward*). The notion of 'public interest' was described as "picturesque if somewhat imprecise", and "not so much a rule of law as an invitation to judicial idiosyncracy by deciding each case on an ad hoc basis as to whether, on the facts overall, it is better to respect or to override the obligation of confidence": *Smith Like and French Laboratories (Australia) Ltd v DCSH* [1990] FSR 617, 663.
[408] *Woodward*; *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1.
[409] Moosavian (n 293) 247.

defendants will adduce in arguing for publication. Yet 'public interest' does not provide a framework for justifying *why* publication or suppression frustrates or furthers either right. Instead, courts are forced to assess a story's social worth,[410] applying the question-begging concept of 'public interest' without any constraints derived from the rights' normative underpinnings.

Courts have indicated, through examples of lower-order speech,[411] that such speech has low value because it shocks and delves into intimate matters. This invites courts to pass moral judgment on types of expression without making rational[412] connections with the normative underpinnings of either FOE or privacy. Instead of considering how either right's suspension is justified on terms consistent with their normative underpinnings, the courts focus upon criticising speech-content or presentation.[413] This preoccupation with "unseemly" speech that "both belittles and perverts" and leads to a "lowering of social standards and of morality" was visible amongst pioneering privacy jurists.[414] The infiltration of English privacy law by such emotive moralising, through 'public interest', has, however, inappropriately distanced courts from justifying why such speech is harmful *by reference to its interference with privacy*. The tort is concerned the privacy-intrusive nature of speech-content, not its quality. That judicial assessments of speech-content can conceal moral-political orthodoxies[415] is not an inaccurate statement in the context of the tort's second stage.

It is unsurprising therefore that courts fail to reason explicitly in terms of privacy protection. For example, rather than asking whether the law should ever protect "titillation for its own sake",[416] or reasoning that there is "no legitimate public interest" or "genuine public interest" in "a matter of prurient gossip",[417] courts should ask explicitly whether publication of gossip-like speech can justify suspending privacy on the particular facts of the case. It could be inferred from such reasoning about gossip-like speech that judges might *implicitly* be analysing the propensity of such speech to reflect the underpinnings of FOE, so as to justify suspending the privacy right and its normative underpinnings; yet there remains a need for *explicit* rights-focused analysis lest such reasoning be interpreted as being based solely upon the social worth or quality of speech-content, instead of whether an individual's entitlement to informational privacy should be suspended. These matters depend upon how the privacy right is engaged on the facts, not upon how worthy or otherwise gossip-like speech is in general, especially since even gossip-like speech may have social value.[418] It might well be right to conclude that there is little or no 'public interest' in "titillation for its own sake" or in "prurient gossip", but, given that the FOE right and its multifarious normative underpinnings does not automatically empower the courts to suspend that right because of the perceived social worth of speech-content, the courts should explicitly connect their reasoning about suspending FOE (and not permitting publication) with how that outcome is demanded by the privacy right on the facts of the particular case. Courts should allow that even gossip-like speech can make a social contribution, and focus upon

[410] *CTB v NGN Ltd* [2011] EWHC 1334 (QB), [25]: the story must serve a "legitimate social purpose".
[411] "[M]atters of lurid sexual or other shocking nature": Moosavian (n 293) 252.
[412] Let alone meaningful.
[413] Recalling Mann J's strong criticism of the BBC's "breathless sensationalism" in presenting its story: *Richard*, [300].
[414] S Warren and L Brandeis, 'The Right to Privacy' (1890) 4 Harvard Law Review 193, 196.
[415] MJ Perry, 'Freedom of Expression' (1983) 78 NwULR 1137, 1174.
[416] *Mosley* 2, [132].
[417] *AXB*, [55].
[418] Wragg, 'The Benefits of Privacy-Invading Expression' (n 388) 194, 197; DL Zimmerman, 'Requiem for a Heavyweight' (1983) 68 Cornell Law Review 291, 326–341.

its privacy-invasive implications. Given "formations of opinions and entertainment are not opposites",[419] it is unprincipled and inappropriate for courts to judge the "value of information that people [might] seek".[420] The tort does not envisage such judicial power over the flow of information in society: when publication is forbidden on grounds of its social worth, the courts have exceeded their mandate under the tort. 'Public interest' reasoning thus risks taking courts away from legal principles concerning privacy protection, potentially allowing the tort unjustifiably to suppress low-value speech.

Furthermore, judicial consideration of press commercial interests is inconsistent with privacy's normative underpinnings. If dignity, autonomy and individual liberty underpin privacy, it is unprincipled and inappropriate for claimants, who have established a REP, to carry the burden of a purportedly endangered press industry. The press's health is *not* relevant in the "ultimate balancing test", and considering its survival does not progress the courts' justificatory task in resolving the privacy-FOE conflict. The 'public' might well have an interest in a vibrant press culture, and FOE does encompass press freedom. Under the tort, however, courts must find *more precise* and *rights-based* justifications for permitting publication.[421] Anything less than that[422] effectively sees courts turn claimants away because of market realities and generic, societal concerns about the state of media. The privacy right is thus made conditional upon a healthy and thriving media.[423] That commodifies privacy claimants and the privacy right. Given that "private information is a lucrative commodity per se",[424] that should be a reason for courts to uphold claimants' privacy, rather than a reason to suspend it.

It could be inferred from some judgments that 'public interest' reasoning is inspired by broad theoretical justifications for FOE, particularly truth,[425] and democracy.[426] However, even if such an inference of underlying principle (as opposed to explicit, precise rights-based reasoning) were satisfactory, such implied connections with broad theoretical justifications provide little clarification or justification for courts' decisions, given the variable application of the 'public interest' test, and their reluctance to define 'public' and 'interest' and specify exactly which FOE normative underpinning is engaged on the facts.[427]

The dominance of 'public interest' truncates judicial engagement with the FOE right, so that "theoretical justifications for free expression…are not explicitly discussed in court judgments".[428] Even the Supreme Court recently held it was "the public interest in freedom of expression and in the story being published" that mattered, rather than the FOE right itself.[429] This is problematic because 'public interest' does not require courts to examine speaker interests and motives; instead, they "must assess the free speech side of the equation *only* by reference

[419] The reasoning of the German Constitutional Court in the *Von Hannover (No 1)* case, cited in *Von Hannover (No 1)*, [25].
[420] Zimmerman (n 419) 354.
[421] Such as how a particular publication of private information furthers specific normative underpinnings of FOE, *in light of* the genuine speaker and recipient interests that arise on the particular facts of the case.
[422] And anything not focused upon the privacy right as well as relevant aspects of the FOE right.
[423] Some have highlighted the lack of empirical evidence that the press is endangered or that its survival is at risk: Wacks (n 401) 35; Phillipson, 'Leveson, The Public Interest and Press Freedom' (n 147) 233.
[424] Council of Europe Parliamentary Assembly Resolution 1165 (1998), [6]; Moosavian (n 293) 257.
[425] That is, a free press prevents the public from being misled.
[426] That is, a free press exposes abuse of power: Phillipson and Fenwick (n 104) 683.
[427] G Phillipson and H Fenwick, 'Breach of Confidence as a Privacy Remedy in the Human Rights Act Era' (2000) 63 MLR 660, 683.
[428] ibid 244.
[429] *PJS*, [48].

to…audience-based justifications".[430] While audience-based justifications may be connected with the 'truth' justification for the FOE right, or the democratic legitimacy justification, or with more specific interests of recipients to receive information, as discussed in Chapter 3, these are not the only justifications underpinning the normatively complex right to FOE. Indeed, 'public interest' can, in conceptual terms, be understood as encompassing *some* normative underpinnings of the FOE right. However, 'public interest' is not an adequate vehicle by which to make clear and meaningful connections between the facts of the case, the *relevant* normative underpinnings of the right in question, and how upholding or suspending that right would affect those underpinnings. It does not explain *why* the 'truth' or 'democracy' justifications, or recipient-interests, are particularly important on the facts of a particular case, and why they might be considered *to the exclusion of* other FOE justifications. 'Public interest' not only has low heuristic value in that regard, it also stimulates a potential side-lining of normative underpinnings that might be particularly relevant on the facts of a case (such as speaker-interests, and individual autonomy), and allows courts to equate, without further justification that links the rights to the facts, the importance of the FOE right with recipient-interests and more consequentialist philosophical underpinnings of that right (such as 'truth' and 'democracy'). Retaining 'public interest' within the "equation" of the tort's second stage, therefore, ignores other factors material to the privacy-FOE conflict, including individuals' interests in sharing their story, and media interests in demonstrating independence from powerful individuals seeking to control them with threats of writs and injunctions. Further, given the fundamental problems with the 'public interest' theory,[431] and the doctrinal problems that the 'public interest' focus has caused, we should doubt whether 'public interest' could *ever* be used with sufficient "clarity and care"[432] in a privacy-FOE conflict.

Current doctrine gives primacy of consideration to 'public interest', and not the conflicting rights. Using 'public interest' to evaluate the legal rights is wrong, because it dilutes the importance and full effect of those rights. Asking where the 'public interest' falls subjugates the rights *themselves* to the 'public interest'.

iv. 'Public interest' leaves no room for proportionality

The 'public interest' focus prevents courts from developing a credible proportionality analysis for resolving the privacy-FOE conflict. 'Public interest' reasoning diverts courts from establishing rational connections between each rights' normative underpinnings and the factual consequences of publication or suppression. Establishing that link, then comparing the degree to which publication furthers FOE and frustrates privacy, with the degree to which suppression furthers privacy and frustrates FOE, is a minimum requirement of two-way proportionality, which the "ultimate balancing test" demands. Yet, reference to 'public interest' sees courts concentrate either upon narrow, subjectively assessed factors, including whether certain information merely titillates, or upon lofty, repetitive articulations of the importance of upholding either right. Whether this is a conscious judicial short-cut to a moral justification in difficult cases, or simply an unconscious reverting to the familiar concept of 'public interest',[433] it is the root cause of the justification deficit in the outcomes of these cases.

v. 'Public interest' entails a utilitarian economy of rights

[430] Phillipson, 'Leveson, The Public Interest and Press Freedom' (n 147) 231, emphasis added.
[431] Discussed in Chapter 4.
[432] Lord Justice Leveson (n 328) pt B, Ch 1, [1.4].
[433] Being a relic of breach of confidence jurisprudence, as discussed in (f), above.

This justification deficit implicates the tort's viability in protecting the two Convention rights. Although the "ultimate balancing test" is intended to provide justification for upholding one right and not the other,[434] the 'public interest' doctrine releases courts from the duty to apply that test faithfully, and risks systematising preferential treatment of one right. Legal doctrine itself can be a legitimising tool for a particular moral order, such as where 'public interest' dictates legal outcomes. In such a case, doctrine is not doing all that it boasts to do: provide a principled justification for suspending one right and not the other.

The operation and functionalisation of doctrine can deflect deeper critical analysis about whether justice is being done.[435] In the rights context, 'public interest' could be a doctrinal mask for a ruling moral, permitting, *without proper consideration and justification*, the unavoidable loss of rightholding entitlement, whenever that right conflicts with another – like a mask that legitimises the moral parameters of this status quo. The indoctrination of 'public interest' could be legitimising a particular economy of rights: it might be a doctrinal apologia for a legal order where individual rights are routinely, without justification, sacrificed for the 'public good'.

Standardised 'public interest' reasoning may therefore be a doctrinal proxy for a thoroughly utilitarian treatment of rights, that is, their non-treatment: rights are not taken as seriously as they are purported to be taken. 'Public interest' is a doctrinal scaffolding, disciplining the moral confines of the law of privacy and expression, and consequently the operation of Convention rights. The prioritisation, promotion and cementation of 'public interest' reasoning in current doctrine dulls the scope for judicial and public reflection on whether the incumbent 'public interest' test itself remains consistent with an evolving register of global solidarity on privacy and FOE, and 'shocking' outrages of invasions of privacy and suppressions of expression.

"Public interest defence" is indeed a misleading label in misuse of private information.[436] The courts must revert the original words of the "ultimate balancing test", in which 'public interest' does not feature. Instead, it demands an "intense focus" upon rights, and proportionality analysis tailored to the rights-conflict. They must cease applying a doctrine of 'public interest' to justify suspending either privacy or FOE, because it allows them to avoid robust, principled reasoning in the tort's second stage. The solution must involve rationalising the conflict resolution process, not adding criteria that mimic 'public interest' considerations.

(h) Conclusion

The courts' current approach to the tort's second stage suffers from significant problems, the root cause of which is the dominance of 'public interest' reasoning. These problems, and the 'public interest' focus, explain why current doctrine is inconsistent, not transparent, unprincipled,[437] and not rights-orientated. Given the tort is founded upon two rights, such rights-neglecting judicial reasoning debilitates the law in providing credible and legitimate justifications for the legal consequences rightholders face in these cases.

[434] Something that is integral to the operation of qualified Convention rights.
[435] Even though that is what the doctrine is purporting to do.
[436] N Moreham and M Warby (eds), *Tugendhat and Christie: The Law of Privacy and the Media* (3rd edn, OUP 2016) 507.
[437] As discussed in Chapter 1.

Inconsistent and insufficient acknowledgement of the nature and entailments of the privacy-FOE conflict indicates that rights-conflict adjudication is not the prism through which courts approach the tort's second stage, even though that is part of the "ultimate balancing test". This is also apparent in their insufficient engagement with the two rights' normative underpinnings, beyond repetitive and abstract recognition of why each right has been juridified. Courts do not clearly and consistently identify *how* relevant normative underpinnings are furthered or frustrated by the factual consequences of publication or suppression. Both of these shortcomings deprive current doctrine of a principled, consistent and transparent leitmotif by which these cases can reliably be resolved.

This disengagement with rights-conflicts and normative underpinnings prevents courts from credibly invoking proportionality as this leitmotif. Although they routinely say they must undertake proportionality, their focus is not on establishing rational connections between the rights' normative objectives and the means of achieving them, and then comparing the strength of these connections as between privacy and FOE. Rather, courts are preoccupied with 'public interest' considerations, which are fundamentally at odds with the structured, nuanced and normatively-engaged reasoning demanded of proportionality analysis.

Given the inherent malleability of 'public interest', courts' focus upon it has infected current doctrine with problems of instinctual, unprincipled and arbitrary reasoning; a systematic marginalisation of or preference for particular parties that is anathema to a rights ethos; and the presumptive priority of one right over the other in some cases. Fixing 'public interest' as the leitmotif in the tort's second stage has given the doctrine a crudely act-utilitarian nature: it is tarnished by trade-off reasoning and consumed by an indeterminate conception of the public good, disregarding the importance of the two rights and the impact upon the two rightholders.

Not only does 'public interest' divert courts away from honest, rigorous and principled rights-adjudication, it creates further, significant problems for the tort's doctrine. As the root cause of these deficiencies, the 'public interest' focus disables English common law in the misuse of private information from generating credible, rights-orientated justifications for the loss of rightholding entitlement entailed in every case.

CHAPTER 6. A NEW METHOD OF REASONING: TAILORED PROPORTIONALITY-OPTIMALITY

This chapter posits a new method to improve judicial reasoning in the second stage of the tort of misuse of private information: tailored proportionality-optimality (Subsection A). It then applies that method to a set of hypothetical facts to demonstrate its workability and efficacy (Subsection B).

A. Tailored proportionality-optimality

(a) Introduction

Tailored proportionality-optimality can improve judicial reasoning by prioritising a consideration of the privacy and FOE rights over the 'public interest', and applying a proportionality analysis tailored to those particular rights and orientated toward resolving the rights-conflict. It can produce decisions that exhibit an unambiguous judicial consciousness of the inevitable loss of rightholding entitlement suffered by one party,[1] and the subsequent need to provide a coherent, principled and rights-focused justification for each decision.

This new method is customised to the privacy-FOE conflict, and encompasses explicit judicial recognition of the nature and entailments of that rights-conflict, explicit engagement with the two rights' normative underpinnings, and explicit application of proportionality that focuses upon side-effects. It draws upon the logical analysis of the tort's second stage[2] and the strongest theories of rights-conflict resolution,[3] in order to deprioritise 'public interest'.

(b) The tailored proportionality-optimality method

This method has three parts, covering the following detailed steps to improve judicial reasoning.

Part A: Engaging with the rights-conflict.

1. **Genuine and unavoidable rights-conflict**. The court recognises that, as a matter of legal principle reflecting the logical implications of the interaction between the qualified Convention rights to privacy and FOE in this tort, it now faces a genuine and unavoidable rights-conflict, whose resolution is the central purpose of the tort's second stage.
2. **The rights-conflict on the facts**. The court describes this conflict on the particular facts, including which facts both of the rights cover so as to come into conflict with one another. At the highest level of abstraction, the privacy right will cover the information in respect of which there is a REP, entitling the claimant to a *pro tanto* right to non-publication of that information. The FOE right will cover the act of disclosing that same information, entitling the defendant to a *pro tanto* right to publish that information. Courts should recognise

[1] See Chapter 2.
[2] See Chapter 2.
[3] See Chapter 4.

FOE as a justiciable *pro tanto* right on the simple basis that a party wishes to publish information.[4] More detailed reasoning about the *extent* of that right's protection[5] is the purpose of the second stage.

3. **Loss of entitlement to right**. The court recognises that, as a matter of legal principle, the necessary outcome of resolving this conflict is the suspension of one of the *pro tanto* rights. This suspension of an already recognised, justiciable right is the loss of rightholding entitlement that one party must suffer. Because it is impossible to uphold both rights on the facts, and because resolving the case requires one right be upheld, one right must inevitably be suspended.
4. **Justification and legitimacy**. The court acknowledges that, because the tort entails suffering this loss of rightholding entitlement, it must, as a matter of law, provide an explicit justification for its resolution of the conflict in favour of one right, and that justification must be centred upon the two rights, their normative underpinnings, and their operation on the particular facts; it is not solely a matter of resolving the conflict, but, crucially, articulating the justification for the particular resolution. The court acknowledges that justification legitimises its decision, ensuring it is in the 'public interest', and guaranteeing the court discharges its statutory responsibilities, where applicable.[6]

Part B: Establishing a rational connection between the normative and the factual.

5. **Normative underpinnings**. The court acknowledges the different, generic normative underpinnings of privacy and FOE, regardless of the particular facts. The court accounts for at least the following normative underpinnings:[7]
    - For FOE: truth discovery and marketplace of ideas; democratic participation; autonomy and self-realisation; suspicion of governmental power; validation and tolerance of diversity in pluralistic society based upon equal treatment; and legitimated democratic self-governance.
    - For privacy: dignity and personhood; autonomy and freedom; psychological well-being and security; intimacy, family and cultivating relationships; personal self-reflection, intellectual development and FOE; participation in society; democracy; societal development and progress; cohesion in pluralistic society; and minority protection.
6. **Factual consequences**. The court articulates the consequences, on the facts, of forbidding and permitting publication. The court categorises into 'consequences of non-publication' and 'consequences of publication' only those facts that it has accepted have been proven on a balance of probabilities by each party.[8] The court's acceptance of proven factual consequences must be on the sole basis of the parties having discharged their evidential burden of proof, and established proof to the requisite standard.[9] This factual assessment is not on the basis of whether the facts are necessarily material to the rights' normative underpinnings. The identification of proven facts must take place prior to and separately from the court's

[4] Discussed in Chapter 2.
[5] That is, whether it should be upheld on the facts.
[6] HRA, s 12.
[7] See Chapter 3.
[8] This may include complex idiosyncrasies of the case, such as calculations of material loss or assessments of psychological harm, as well as straightforward factual propositions, such as online publication making the information accessible to a large number of recipients.
[9] That it is more likely than not that something occurred due to publication or suppression, or would occur were publication forbidden or permitted.

connecting the facts to the rights' normative underpinnings, primarily because those proven facts (and factual consequences) will dictate which of the generic normative underpinnings are relevant in the particular case. When the court is considering whether a fact has been proven on the evidence, the question of relevancy of that *fact* is separate from the subsequent question of relevancy of the rights' normative underpinnings: all factual consequences flowing from the acts of publication or non-publication, and proven to the requisite standard, will be relevant.

7. **Establishing connections between factual consequences and normative underpinnings**. The court draws connections between the factual consequences identified *vis-à-vis* each of the two possible outcomes in step 6, and any of the normative underpinnings identified *vis-à-vis* each of the two rights in step 5, which can rationally be said to find expression in those factual consequences. The court recognises that it must account for *all* of the factual consequences identified, but that *not all* of the normative underpinnings will necessarily apply in the particular case. The need to assess factual consequences of publication and non-publication through the lens of the normative rights to privacy and FOE is the rationale behind the non-exhaustive *Axel Springer* criteria; step 7 more than satisfies this Strasbourg requirement to undertake a detailed, step-by-step assessment of the facts in light of the two Convention rights.

Part C: Undertaking tailored proportionality and optimality.

8. **Proportionality *strictu sensu* applied to both rights**. The court acknowledges that the proportionality analysis applied here is the narrow or modest version of proportionality. This version asks:[10] (1) what is the importance of upholding each right?; (2) what is the degree and gravity of the detriment that upholding each right has to the other?; and (3) what is the extent to which the importance of upholding each right justifies the detriment to the other right?[11] The court undertakes the following five steps to complete this analysis.
9. **Normative value of upholding each right**. The court focuses upon the normative-factual connections made in step 7, and re-articulates these connections in terms of how far upholding each right achieves the normative ends of the rights. The court does this by paying close attention to how the circumstances specifically affect the various interests involved, including speaker interests, recipient interests, privacy-subject interests, and wider societal interests,[12] and then by setting out the positive normative implications of the different factual consequences, from the perspective of each right. The court does not presume either publication or suppression will necessarily affect some interests in predetermined ways, but, rather, focuses upon the particular circumstances to decide how these interests are affected.
10. **Side-effects of upholding each right**. The court focuses upon the normative-factual connections made in step 7, and re-articulates these connections in terms of the negative side-effects that upholding each right generates for the rights. As in step 9, the court pays close attention to how the particular circumstances specifically affect the various interests involved, and then sets out the negative normative implications of the different factual consequences, from the perspective of each right. The court does not presume some interests will necessarily be affected in predetermined ways; it focuses upon the circumstances before it to decide how these interests are affected.

[10] (given the particular facts)
[11] See Chapter 4.
[12] See Chapter 3.

11. **The greatest possible furtherance of rights**. The court evaluates the extent to which upholding each right overall furthers the normative underpinnings of the rights, and then compares this overall furtherance of normative underpinnings as between the two outcomes: publication and suppression. The court must be open to finding that, on the facts, publication might actually further privacy's normative underpinnings, or suppression might actually further FOE's normative underpinnings. For example, permitting the defendant to publish private information that concerns *both* claimant *and* defendant could further individual autonomy and freedom, and personal self-reflection, which are privacy's normative underpinnings. Or forbidding publication of certain private information could further truth-discovery (a FOE normative underpinning), if that information adds nothing new to the marketplace and also has the tendency to distract from and distort the critical reasoning process necessary for discovering 'truth'. This potential overlap results from the normative complexity of both privacy and FOE.[13] The court identifies which outcome (upholding privacy or upholding FOE) would most further the rights' normative underpinnings.
12. **The least possible frustration of rights**. The court evaluates the extent to which the side-effects of upholding each right overall frustrate the normative underpinnings of the rights, and then compares this overall frustration of normative underpinnings as between the two outcomes: publication and suppression. The court must be open to finding that, on the facts, publication might actually frustrate FOE's normative underpinnings, or suppression might actually frustrate privacy's normative underpinnings. The court identifies which outcome (suspending privacy or suspending FOE) would least frustrate the rights' normative underpinnings.
13. **Optimality**.

- The court compares the degree and intensity of the positive impact of the outcome generating the greatest possible furtherance of rights (identified in step 11), with the degree and intensity of the negative impact of the outcome generating the least possible frustration of rights (identified in step 12).
- Where the *same* right is *both* more furthered than the other would be by being upheld *and* more frustrated than the other would be by being suspended, the court upholds that right and suspends the other.
- However, where *one* right is furthered more than the other would be by being upheld *but the other right* is frustrated more by being suspended, it is unclear that upholding the former right and suspending the latter is the most optimal and less grave outcome. Therefore, the court undertakes a *further* comparison: it compares the degree of furtherance of each right with the degree of frustration of the other right *as between each of the two alternative outcomes* (publication and non-publication), and, whichever outcome generates the largest *difference* or *gap* between the degree of furthering and the degree of frustrating of each right, that is the outcome the court chooses to resolve the rights-conflict. The following propositions are three different ways of describing the same decision of the court to permit publication,[14] in accordance with this step's requirements:
    - The degree and intensity of furthering FOE (by permitting publication) is more than the degree and intensity of frustrating privacy *to a greater extent than* the degree and intensity of furthering privacy (by forbidding publication) is more than the degree and intensity of frustrating FOE.
    - The measure of difference between the degree and intensity of furthering FOE and the degree and intensity of frustrating privacy (by permitting publication) *is greater than* the measure of difference

[13] Discussed in Chapter 3.
[14] Upholding FOE and suspending privacy.

between the degree and intensity of furthering privacy and the degree and intensity of frustrating FOE (by forbidding publication).

- The furtherance of FOE frustrates privacy through permitting publication *to a lesser extent* than the furtherance of privacy frustrates FOE through forbidding publication.

These three propositions express the same justification for prioritising FOE over privacy.

- The court acknowledges the comparisons involved in this step are between incommensurable values, and therefore this values-comparison must be anchored in a moral constant.[15] That moral constant is the obligation on the court to resolve the conflict and decide the case in favour of the most optimal[16] of two wrongs. Optimality is measured by the degree and intensity of furthering rights according to their normative underpinnings, and gravity is measured by the degree and intensity of frustrating rights according to their normative underpinnings. The 'two wrongs' represent the only two options open to the court: suspend one right, or suspend the other right.[17]
- Ensuring the court's choice between the two rights is based upon such a justification will ensure that choice is in the 'public interest', because 'public interest' in this rights-adjudication context is defined and measured in terms only of the furtherance of rights: only those outcomes that most further and least frustrate rights are in the 'public interest'.

(c) Discussion

i. Nature and entailments of the rights-conflict

Tailored proportionality-optimality incorporates in Part A the inescapable logic that privacy and FOE are locked in genuine conflict, by requiring the court to recognise how and why privacy and FOE come into conflict on the facts, reflecting the Hohfeldian logic of correlativity. Part A also requires the court to recognise the inevitability of one right's suspension, and how that translates into a loss of rightholding entitlement for one party.

Step 4 legitimises the binding nature of the court's decision. The court acknowledges its task is to *justify* that decision (which must involve suspending a right), and do so *in terms of the rights themselves*, in order to preserve the credibility and reliability of the common law in the adjudication of Convention rights.

Tailored proportionality-optimality does not compartmentalise judicial engagement with the rights-conflict, rendering it a repetitive and hollow exercise for courts in each new case. Rather, it sustains this judicial focus upon the nature and entailments of the rights-conflicts throughout the whole method, to the very final step of optimality:[18] here the court is required to recall that the only two options available *both* involve 'wrongs', in the form of suspension of a right and loss of rightholding entitlement. The court thus actively directs itself to finding the most optimal and least grave of those two options. This sustained focus upon the rights-conflict and its implications ensures courts do not deviate into the territory of denying, ignoring or minimising the conflict, thereby avoiding their task of providing sound and strong justification for preferring, on the facts, one right over the other.

[15] See Chapter 4.
[16] Or the less grave.
[17] As confirmed in step 3.
[18] See Step 13.

ii. Rational connection between the normative and the factual

Part B provides the grounding for the proportionality analysis, and the optimality theory. It provides the moral content that must be inserted into the structure of proportionality reasoning, to make it workable and useful.[19] The rational connections between the normative and the factual, accounting for *all* proven factual consequences and for *only those* normative underpinnings germane to those consequences, supplement the basic proportionality framework with evaluative reasoning anchored in the two rights' normative underpinnings. That 'fills' or completes, as well as legitimises, the proportionality analysis.

These rational connections also activate the optimality theory, which also depends upon assessing how the rights' normative cores are impacted by the alternative factual outcomes. It is insufficient, for both proportionality and optimality, for the court to declare each rights' normative underpinnings and pronounce upon their abstract importance. The court must assess how the rights' normative dimensions are affected by the peculiar circumstances of the conflict, and that requires more detailed examination of which interests are involved on the facts, how these interests reflect the rights' normative underpinnings, and how they are affected by the different factual consequences. That reasoning enables the court to *justify* upholding one right *and not the other* in resolving the conflict *on those facts*.

Establishing rational connections between the factual and the normative also enables genuine two-way proportionality, because the court is considering *in equal measure* how the factual consequences impact the normative underpinnings of *each* right. Only after a thorough examination of where rational connections can be drawn between factual consequences and normative underpinnings, can the court analyse comprehensively the implications for *both* rights.

The absence in current judicial reasoning of rational connections between factual consequences and the normative underpinnings is conspicuous. The courts' present application of proportionality is meaningless given the lack of precision or consistency in articulating both the structure which proportionality takes in the tort and the rights-focused evaluative reasoning which supplements that structure.[20] The need to do more than declare the general value of rights – the need to *evaluate* how factual consequences affect those rights – is not lost on common law judges: one Judge has confirmed "[i]t is necessary to evaluate the exercise of [the FOE] right, not as a matter of generality, but in the particular circumstances of the case".[21] Injecting into judicial reasoning this drawing of rational connections between the factual and the normative ensures courts are applying meaningful and effective proportionality (and optimality) analyses.

iii. Strongest rights-conflict resolution theories: proportionality and optimality

Any new method for the tort's second stage must incorporate proportionality, given the limitations of common law precedent. Proportionality also has particular value to judicial reasoning, independently of the English courts

[19] See Chapter 4.
[20] Discussed in Chapter 5.
[21] *T v BBC* [2008] 1 FLR 281, [17] (*T v BBC*).

having already adopted it. Applied correctly and appropriately, proportionality increases transparency, consistency and principle in judicial reasoning. These advantages[22] have recently been recognised by the highest court in a jurisdiction where proportionality has not been adopted with the same security and finality as in England: four High Court of Australia Judges have recognised that "a structured proportionality analysis…serves to encourage transparency in reasoning to an answer",[23] that, "[a]s a tool, it provides a framework that promotes transparency of reasoning, although it does not purport to supply a mechanical or mathematical approach to the answer",[24] and that it "forces judges to confront the issues in a structured way and to explain and justify the approach that is taken."[25] Given these senior jurists have preferred proportionality as a method of judicial reasoning for the very qualities that would improve current English judicial reasoning in the tort's second stage, proportionality *ought* to be incorporated in that new, improved method, *regardless* of whether English judges have already, nominally, adopted it.

The optimality theory amplifies and assists proportionality by focusing the court on achieving the task set by proportionality in a way that places the two rights centre-stage in judicial reasoning. This theory concentrates judicial attention upon a right's normative centre, and how it is affected by external, factual considerations in a rights-conflict. It is not preoccupied with those factual considerations: it is a deontological, not consequentialist, theory. Because it is deontological, the inherent normative value of privacy and FOE is elevated as the primary consideration in the conflict's resolution; these qualified, *pro tanto* rights can be viewed in the same way as weakly absolute duties in the optimality theory: both *pro tanto* rights and weakly absolute duties persist and are binding throughout the conflict's resolution, and neither *pro tanto* rights nor weakly absolute duties involve presumptive superiority dictating how to resolve the conflict. The factual consequences of either outcome (publication or non-publication) are evaluated in terms of the rights' relevant normative underpinnings, and not vice versa. That is how the optimality theory steers courts away from commodifying rights in accordance with some external 'public interest'.

The optimality theory is by itself insufficient to provide transparency, principle and precision in the tort's second stage.[26] It requires supplementation by specific considerations, informed by the particular right's normative underpinnings alongside the facts of the particular case. This is achieved in Part B, as discussed above, because the court is obliged to identify the rights' normative underpinnings, and to implement in its reasoning those normative underpinnings which are rationally connected to the particular facts. That provides the substance for the optimality theory, tailoring it to this cause of action.

iv. Strongest version of proportionality

Tailored proportionality-optimality incorporates the modest version of proportionality, a two-way application to both rights, and a version tailored to the particular rights and conflict in the tort's second stage. The modest version of proportionality focuses upon the efficient pursuit of pre-determined ends, and the side-effects of upholding or

[22] Discussed in Chapter 4.
[23] *Clubb v Edwards; Preston v Avery* [2019] HCA 11 (10 April 2019), [74] (*Clubb*), per Kiefel CJ and Bell and Keane JJ, citing *McCloy v NSW* (2015) 257 CLR 178, [75] and *Brown v Tasmania* (2017) 261 CLR 328, [125].
[24] *Clubb*, [468], per Edelman J.
[25] *Clubb*, [470], per Edelman J.
[26] Discussed in Chapter 4.

suspending rights. That version is best suited to the resolution of rights-conflicts.[27] The more intense the negative side-effects, the less likely the means will be justified as proportionate to those ends. In the tailored proportionality-optimality method, that is understood as 'the more intense the negative side-effects of suspending a right, the less likely that suspension will be justified as proportionate to the value derived from upholding the other right'. That is reflected throughout Part C, and the measurement of intensity of side-effects for the purpose of determining proportionality is informed by the optimality theory.

The other version of proportionality, the ambitious, rights-optimising version, does not feature in tailored proportionality-optimality. That version of proportionality is *not* the same as the optimality theory, which *does* feature in this new method. This is because the rights-optimising version of proportionality is concerned with optimising rights, whatever the problem, while the optimality theory is concerned with finding the most optimal rights-focused solution to the particular problem. The difference is important. A court would use the optimising version of proportionality to inflate any and all rights involved, and that permits redrawing their boundaries in an attempt to eliminate rights-conflicts.[28] In this scenario, the court's primary motivation is *not* to provide a strongly justified resolution of an unavoidable rights-conflict, but to inflate the rights involved, as if there is no conflict. The reason for applying proportionality is not to resolve a conflict, but to optimise any rights identified. This scenario involves optimisation *despite* conflict. On the other hand, a scenario involving the court using the optimality theory involves a search for optimality *given the unavoidability of* conflict. In that situation, the court's primary motivation is to resolve the conflict in the most optimal (or least grave) way possible, from a rights-perspective. The court focuses upon how the alternative factual outcomes would affect each right's normative underpinnings, taking a deontological approach to each right, but not aiming to inflate these rights as if they were not locked in conflict. Therefore, rejecting the more ambitious, optimising version of proportionality does *not* invalidate the incorporation of the optimality theory in tailored proportionality-optimality: the two are materially different.

Tailored proportionality-optimality incorporates two-way proportionality, applied to both privacy and FOE. Not only is this mandated in the "ultimate balancing test", it is also how proportionality analysis *must* be applied if it is deployed to resolve rights-conflicts. Rights-conflicts necessarily involve two rights and not just one.[29] The suspension of *each* right must therefore be assessed for proportionality. The 'interference' with the rights comes from upholding *another right*. This two-way proportionality analysis is set out in step 8, which assesses both rights in the same way. It is also incorporated into step 13, which accounts for the possibility that the same right is *both* more furthered by being upheld *and* more frustrated by being suspended, and which therefore asks the court to choose that outcome which generates the largest *difference* or *gap* between the degree of furthering and the degree of frustrating of each right.

Finally, the proportionality theory is tailored to the privacy and FOE rights, and the conflict between them. Proportionality is a structure for reasoning that must be supplemented with moral-evaluative content in order to avoid potential pitfalls of the theory's application.[30] In the tailored proportionality-optimality method, this requisite

[27] Discussed in Chapter 4.
[28] The logical and normative pitfalls of such an approach have been discussed in Chapters 2 and 4.
[29] As in the situation of governmental action that may limit the application of a right. In such a situation, proportionality can straightforwardly be applied to the single right in issue, measuring whether the governmental action is a proportionate means of achieving the policy end, given the interference with the right. See Chapter 4
[30] See Chapters 4 and 5.

moral content is composed of the rational connections between the factual consequences and the rights' normative underpinnings, as well as the optimality theory, which injects a moral constant into the comparison of incommensurate values: the imperative to find the most optimal or least grave outcome given the inevitability of loss of rightholding entitlement. Optimality tailors proportionality to the rights-conflict and the rights by directing the court to that moral purpose in its adjudication of the tort, and thereby ensuring the court's use of proportionality is inseparable from the privacy-FOE conflict which it faces. *Tailored* proportionality prevents courts from merely invoking 'proportionality' as part of a convenient metaphor for justice, alongside 'balancing'. Tailoring the analysis to the particular problem ensures it cannot be hollowed out and used as a doctrinal apologia for unprincipled, opaque reasoning.

(d) Conclusion

The significance and deep-rootedness of problems with the current doctrine in the tort's second stage necessitate improvement to judicial reasoning. Any new method must eliminate current deficiencies and enhance transparency, consistency and principle in the courts' adjudication of the tort.

Tailored proportionality-optimality offers a more rigorous, normatively anchored, step-by-step mode of reasoning for courts to adopt in the second stage. Its value lies in its adherence to the tort's limiting parameters, so that it does not ask the courts to deviate from legislative mandate and common law precedent.[31] Within those parameters, this method incorporates the logical and normative dimensions of the second stage, by bringing to the forefront the rights-conflict and its implications, and the normative underpinnings and complexities of privacy and FOE. It makes full use of the strongest theories of rights-conflict resolution, proportionality and optimality, and ensures these tools are adequately tailored to the problem by demanding courts identify and explain rational connections between all proven factual consequences of the alternative outcomes and the rights' normative underpinnings. Tailored proportionality-optimality focuses judicial reasoning upon rights, without losing the courts in abstract philosophical ruminations about rights. Importantly, it eliminates the root cause of problems in current doctrine, the preoccupation with 'public interest', by defining 'public interest' entirely in terms of the relative furtherance and frustration of the rights themselves.

Tailored proportionality-optimality is intended to eliminate the utilitarian economy of rights, which a judicial focus on 'public interest' has created in the law of misuse of private information. It is intended to equip the common law with the means by which it can legitimately, credibly and reliably give meaning to the rights it purports to protect. It achieves this by embedding in common law reasoning the recognition of rights-conflicts and their implications, and the detailed, methodological analysis of how rights' normative underpinnings are frustrated or furthered in any given fact situation. This ensures the common law treats rights as intrinsically valuable embodiments of the law's protection of fundamental principles, rather than as commodities to be traded away in the name of 'public interest'; it ensures the common law treats rights as ends in themselves, whose suspension from time to time resembles a real loss and therefore requires rights-based, and *exclusively rights-based*, justification.

[31] HRA, s 12 (to account for 'public interest'), and *Re S (A Child)* [2005] 1 AC 593, [17] (to undertake the "ultimate balancing test", which includes and "intense focus" upon each presumptively equivalent right and a proportionality analysis applied to both rights).

B. Applying tailored proportionality-optimality

(a) Introduction

The tailored proportionality-optimality method must be applied to a hypothetical case to illustrate how that method would operate in the tort's adjudication, and to demonstrate its workability and efficacy in making judicial reasoning in the second stage more transparent and principled. The hypothetical case adduced here incorporates several factors relevant to the judicial resolution of the privacy-FOE conflict, drawing upon cases that have already been decided.[32]

(b) Hypothetical: Letizia's case

Letizia is a former catwalk model and current MP. She is well-known for her modelling and political careers. Through extensive and increasing coverage of her life, particularly her fashion style, lifestyle and political activities, she has become a social media 'influencer', garnering millions of 'followers' of those social media accounts which constantly publish photographs of her 'out and about'. She has never engaged in social media, does not have her own account, and uses only her party's account to publish political statements. She has never taken action to dim the social media spotlight shining on her.

Ever since Letizia first stood for Parliament, she has propounded the politics of animal welfare. She maintains she leads a thoroughly vegan lifestyle, eschewing not only animal foodstuffs, but also clothing of animal material. In her modelling days, she was well-known for refusing to walk for designers who used leather and fur in their creations. She has vocally opposed pet-ownership. She is identified primarily as an animal welfare activist.

Letizia is married to Victor. Together, they have two children, aged nine and four. Victor has always supported Letizia's political career, and has stood alongside her as a co-campaigner for animal welfare. The marriage is currently undergoing some difficulties, and Letizia and Victor have decided to live separately, carefully constructing a detailed child-caring arrangement so each of them continues to have equal contact with the children. Letizia and Victor have always kept their children entirely out of the public's gaze, and the children do not receive any publicity.

The editor of the People's Truth, a national daily newspaper published in print and online, contacts Victor to tell him he has information from a confidential source close to the family that Letizia does not lead a vegan lifestyle at home; he would like Victor to corroborate the truth of that information. The source has told the People's Truth several things about Letizia, including that she regularly eats non-vegan, and has provided photographs of Letizia baking with her children in their kitchen, using cow's milk, butter and eggs. Victor knows the source's information is true, and recognises the photographs as genuine. He chooses not to comment, but the editor says he will publish the scoop and photographs anyway.

The pressure and animosity of the separation takes its toll on Victor. He has decided he cannot live the vegan lie any longer, and wants to publish a personal statement, alongside a photograph montage, on his social media

[32] See Chapter 5.

account, for the general public to see Letizia was lying, and that he is remorseful and, despite all, a morally upright person and good father. The photographs all belong to him, and have not previously been published online, or publicly at all. The information he wishes to publish includes:

- explicit sexual photographs of Letizia posing in a designer bikini made of genuine leather and rabbit-fur, taken by him in their bedroom; and
- photographs of him, Letizia and their children in their garden playing with a friend's dog, Piccolo, whom they had been pet-sitting.

Letizia has discovered the People's Truth is about to publish the story and photographs, and Victor is about to publish his statement and photographs. Letizia will not deny the allegations, but does not want this material published. The newspaper will not stand down, while Victor has offered not to publish the bikini photographs if Letizia promises to give him more time with the children than she would have with them.

Letizia and her children (through their litigation friend) apply for a permanent injunction against both the People's Truth and Victor, in respect of all of the information, in the tort of misuse of private information. The Court finds she and the children have a REP for all of the information relevant to each of them, so the tort's first stage has been passed. In accordance with the discussion in Chapters 1 and 2, this is an assumption that must be made in order to begin exploring the adjudication of the tort's second stage, which is the stage with which this dissertation, and the tailored proportionality-optimality rationale, is concerned. The assumption is that the Court has, on the basis of clear engagement with the normative underpinnings of the privacy right, determined that the tort's first stage has been passed, such that each claimant has a REP over each piece of information in issue.

(c) Applying tailored proportionality-optimality to Letizia's case

The Court would apply **tailored proportionality-optimality** to each of the four sets of private information:

i. Information about Letizia's non-vegan diet.
ii. Photographs of Letizia baking with the children.
iii. Photographs of Letizia wearing the bikini.
iv. Photographs of the family with Piccolo.[33]

i. <u>Information about Letizia's non-vegan diet</u>

Part A: Engaging with the rights-conflict

Step 1: Genuine and unavoidable rights-conflict

[33] *Vis-à-vis* the first three sets of information, Letizia is the applicant. Each of her children are joint applicants *vis-à-vis* the second set of information, and they are the sole applicants *vis-à-vis* the fourth set of information. The People's Truth is the defendant *vis-à-vis* the first and second sets of information, while Victor is the defendant *vis-à-vis* the third and fourth sets of information.

As a matter of legal principle reflecting the logical implications of the interaction between the qualified Convention rights to privacy and FOE in this tort, this Court now faces a genuine and unavoidable rights-conflict, whose resolution is the central purpose of the tort's second stage.

Step 2: The rights-conflict on the facts

Letizia's privacy right covers this information, entitling her (*pro tanto*) to non-disclosure. Simultaneously, the People's Truth's FOE right covers the same information, entitling it (*pro tanto*) to disclose it without repercussion. Both rights cover the matter of disclosure of that particular information, and are therefore in conflict with each other: it is not logically possible simultaneously to uphold both rights in this case.

Step 3: Loss of entitlement to right

As a matter of legal principle, the necessary outcome of resolving this conflict involves suspending one of these rights, which entails either Letizia or the People's Truth suffering a loss of rightholding entitlement. Because it is impossible to uphold both rights on these facts, and because resolving the case requires one right be upheld,[34] one right must also be suspended.

Step 4: Justification and legitimacy

Because the tort of misuse of private information entails suffering this loss of rightholding entitlement, this Court must, as a matter of law, provide an explicit justification for its resolution of the conflict in favour of one right, and that justification must be centred upon the two rights, their normative underpinnings, and their operation on the particular facts. It is not solely a matter of resolving the conflict; the Court must articulate the justification for the particular resolution. This justification legitimises this Court's decision to grant an injunction or dismiss the injunction application, ensuring its decision is in the 'public interest', and guaranteeing this Court discharges its duties under the HRA.

Part B: Establishing a rational connection between the normative and the factual

Step 5: Normative underpinnings

There are various generic normative underpinnings of the privacy and FOE rights,[35] including, *vis-à-vis* FOE:

- truth-discovery and marketplace of ideas
- democratic participation
- autonomy and self-realisation

[34] Granting an injunction or dismissing the application for an injunction.

[35] A court would elaborate upon the normative underpinnings which it identifies in this step; those identified here are drawn from the discussion in Chapter 3.

- suspicion of governmental power
- validation and tolerance of diversity in pluralistic society based upon equal treatment
- legitimated democratic self-governance

and, *vis-à-vis* privacy:

- dignity and personhood
- autonomy and freedom
- psychological well-being and security
- intimacy, family and cultivating relationships
- personal self-reflection, intellectual development and FOE
- participation in society
- democracy
- societal development and progress
- cohesion in pluralistic society
- minority protection

Step 6: Factual consequences

The consequences of granting the injunction and forbidding disclosure of the information about are:

- A significant portion of the public[36] is denied as-yet unpublicised information about Letizia's personal, at-home diet, with which information it is possible to evaluate her animal welfare claims and integrity as an elected representative.
- The People's Truth's editor does not have full independent editorial discretion to decide which stories it may publish, and which information it is desirable or necessary to include to communicate fully and effectively the stories it chooses to run.
- Letizia retains control over who knows about her personal or at-home diet, and can keep that information out of the public realm.

The consequences of dismissing the injunction application and permitting disclosure of the information are:

- A significant portion of the public has the opportunity to learn about Letizia's non-vegan diet, with which as-yet unpublicised information it is possible to evaluate her animal welfare claims and integrity as an elected representative.
- The People's Truth, which relies upon profit to compete in the media market, has the opportunity to draw profit from its disclosure of information imputing that an MP has misled the electorate about her ideology and way of life, upon which she has built her political platform.
- Letizia forever loses control over who knows about her at-home diet.
- Letizia potentially has to face negative (retributive) publicity about her (non-)veganism.

Step 7: Establishing connections between factual consequences and normative underpinnings

[36] Including readers of the People's Truth in print and online but also spanning beyond that readership.

Assessing each of the factual consequences identified in step 6, the following rational connections can be drawn between the factual consequences and the rights' normative underpinnings identified in step 5:

- The public being denied this information is connected with the FOE underpinning of truth-discovery and marketplace of ideas because the information is excluded from this marketplace, undermining the quest for truth-discovery, especially considering it suggests the truth does not lie in the information already in the public domain.[37]
- The People's Truth's editor not having full discretion over the stories that newspaper runs is connected with the FOE underpinning of suspicion of governmental power because governmental (judicial) power is deployed to instruct a newspaper exactly what material it can publish.
- Letizia retaining, or forever losing, control over who knows about her at-home diet is connected with the privacy underpinning of autonomy and freedom because it affects the power she has to choose when, how and how much others know about her private life.
- The electorate having the opportunity to learn about Letizia's non-vegan diet is connected with the FOE underpinnings of democratic participation and legitimated democratic self-governance because as-yet unpublicised information inextricably linked to an MP's politics is revealed to the electorate, including those who already do or may wish to support her, where that information might alter their electoral intentions, or enhance their ability to evaluate their electoral options.
- The People's Truth having the opportunity to profit from its disclosure of this information is connected with the FOE underpinnings of truth-discovery and marketplace of ideas, and legitimated democratic self-governance, because a vibrant, competitive and free media market contributes to the marketplace of ideas, aids truth-discovery, and helps a democratically self-governing community to hold power to account.
- The People's Truth having the opportunity to profit from its disclosure of this information is also connected with the privacy underpinning of dignity and personhood because aspects of Letizia's private life are used as a means to a company's commercial ends.
- Letizia potentially having to face negative publicity is connected with the privacy underpinning of psychological well-being and security because public knowledge of the information might culminate in a public outcry against her for having misled the electorate, and may prompt *ad hominem* attacks against her.

Part C: Undertaking tailored proportionality and optimality

Step 8: Proportionality *strictu sensu* applied to both rights

The proportionality analysis which applies here is a narrow, or 'modest', version of proportionality. This version asks, given the particular facts, (1) what is the degree and gravity of the detriment that upholding each right has to the other; (2) what is the importance of upholding each right; and (3) what is the extent to which the importance of upholding each right justifies the detriment to the other right? The following steps must be undertaken in order to complete this analysis.

Step 9: Normative value of upholding each right

[37] That Letizia is a dedicated vegan.

The normative-factual connections in step 7 must now be re-articulated in terms of how far upholding each right achieves the normative ends of these rights. Special attention must be paid to how the circumstances affect the various interests involved, including interests of speakers, recipients, privacy-subjects, and the wider society. This Court must not presume either publication or suppression will necessarily affect some interests in predetermined ways, but, rather, must focus upon the particular factual circumstances to decide how these interests are affected in this case. Thus, upholding privacy[38] generates the following normative value for privacy:

- vindicates individual autonomy and freedom by preserving Letizia's power to choose when, how and how much others know about her private life.
- vindicates individual dignity and personhood by preventing aspects of Letizia's private life to be used as a means to a company's commercial ends.
- vindicates individual psychological well-being and security by stopping publicity that might culminate in a public outcry against Letizia and in *ad hominem* attacks against her.

And, upholding FOE[39] generates the following normative value for FOE:

- vindicates the ideal of marketplace of ideas and the quest for truth-discovery by allowing public disclosure of information suggesting the truth does not lie in the existing public record (that Letizia is a dedicated vegan), thereby serving recipients' interests in knowing more (and more accurately) about Letizia's public claims; this contributes to 'setting the public record straight' about matters already open for public discussion, in the same way as was held in *Campbell*.[40]
- vindicates the principles of democratic participation and legitimated democratic self-governance by giving electors the opportunity to learn about as-yet unpublicised information inextricably linked to an MP's politics; that information might alter their electoral intentions, or at least enhance their ability to evaluate their electoral options.
- further vindicates the ideal of free marketplace of ideas, the quest for truth-discovery and the principle of legitimated democratic self-governance, by allowing the People's Truth the opportunity to profit from its disclosure of this information and thereby maintain a competitive place in the media market; maintaining press competitiveness contributes to the marketplace of ideas, aids truth-discovery, and helps a democratically self-governing community to hold power to account.

Step 10: Side-effects of upholding each right

The normative-factual connections made in step 7 must also be re-articulated in terms of the negative side-effects that upholding each right generates for the rights. As for step 9, special attention must be paid to how the circumstances affect the various interests involved, including interests of speakers, recipients, privacy-subjects, and the wider society. This Court must not presume either publication or suppression of private information will necessarily affect some interests in predetermined ways, but, rather, must focus upon the particular factual circumstances to decide how these interests are affected in this case. Thus, upholding privacy[41] generates the following side-effects for FOE:

[38] And forbidding disclosure of this information.
[39] And permitting disclosure of this information.
[40] *Campbell v MGN Ltd* [2004] 2 AC 457.
[41] And forbidding disclosure of this information.

- undermines the ideal of free marketplace of ideas and the quest for truth-discovery by withholding from the public information suggesting the truth does not lie in the existing public record,[42] thereby disadvantaging recipients' interests in knowing more (and more accurately) about Letizia's public claims; this prevents the public record being 'set straight' about matters already open for public discussion.
- downplays the concern that governmental power and intervention in expression should be viewed always with suspicion by permitting judicial editorialising in the place of otherwise uninhibited newspaper editorial discretion as to what stories and substantive information can or should be published by national newspapers.
- undermines the principles of democratic participation and legitimated democratic self-governance by denying electors the opportunity to learn about as-yet unpublicised information inextricably linked to an MP's politics; that information might alter their electoral intentions, or at least enhance their ability to evaluate their electoral options.
- further undermines the ideal of free marketplace of ideas, the quest for truth-discovery and the principle of legitimated democratic self-governance, by denying the People's Truth the opportunity to profit from disclosure of this information and thereby maintain a competitive place in the media market; maintaining press competitiveness contributes to the marketplace of ideas, aids truth-discovery, and helps a democratically self-governing community to hold power to account.

And, upholding FOE[43] generates the following side-effects for privacy:

- undermines individual autonomy and freedom by removing Letizia's power to choose when, how and how much others know about her private life; the disclosure of these facts by the People's Truth will result in nationwide dissemination of Letizia's private information in print and online, and in media outlets other than the People's Truth, including by individuals on social media.
- undermines individual dignity and personhood by permitting aspects of Letizia's at-home life to be used as a means to a company's commercial ends.
- undermines individual psychological well-being and security by allowing publicity that might culminate in a public outcry against Letizia and in *ad hominem* attacks against her.

Step 11: The greatest possible furtherance of rights

Evaluating the extent to which the normative value of upholding each right overall furthers the rights' normative underpinnings, and then comparing this overall furtherance of normative underpinnings as between the two rights, this Court finds that upholding FOE and permitting disclosure of this information furthers the normative underpinnings of FOE more than upholding privacy and forbidding disclosure of that information would further the normative underpinnings of privacy. This conclusion can be explained with the following reasons:

- Disclosing this information furthers FOE in a crucially important and significant way: it vindicates three well-established normative underpinnings of FOE (marketplace of ideas and truth-discovery, democratic participation, and legitimated democratic self-governance), in a direct and unambiguous way. Disclosing this information not only contributes to an already publicly open discussion about Letizia's veganism, and *corrects* the public record about her veganism, it also gives electors more information about her politics,

[42] That Letizia is a dedicated vegan.
[43] And permitting disclosure of this information.

integrity and reliability as their representative, which information they require to make informed democratic choices. Disclosing this information is not peripheral to these normative underpinnings, but *directly* and *clearly* furthers them. There is no other way of achieving these normative ends than to disclose these substantive facts about Letizia's at-home diet. Given these normative underpinnings are the central reasons why FOE is protected by law as a right, and given they would all clearly and straightforwardly be furthered by disclosure of this particular information, there is a strong impetus for the Court to uphold FOE.

- This impetus is stronger than that for upholding privacy. While upholding privacy furthers that right by vindicating and protecting individual dignity, autonomy and well-being and security, there is nothing exceptional about this information, in its substance or disclosure, that links it inextricably to these normative underpinnings, more than that it is information that has been recognised as private information. The information does not, for example, contain sensitive health data, or photographs of Letizia. It is information about her diet, which also happens to be directly relevant to her political platforming. The furtherance of FOE[44] is more direct, clear and intense than would be the furtherance of privacy.[45]
- While disclosure of this information would further FOE by generating profit for the People's Truth and thereby contributing to a vibrant, competitive and free media market as is desirable in a democracy, this aspect of furthering FOE is less direct and clear than the furtherance of FOE through supporting the marketplace of ideas and truth-discovery, democratic participation, and legitimated democratic self-governance, as discussed above. Protecting the press's profit margins will always be a way in which permitting disclosure of information furthers the right to FOE, where the press is involved. But it is a remote way of furthering that right, and should therefore *on its own* not be considered an impetus for upholding FOE that is stronger than any impetus for upholding privacy. This is a part of furthering FOE, but it is not the reason why in these circumstances upholding FOE furthers rights more than would upholding privacy.

Step 12: The least possible frustration of rights

Evaluating the extent to which the side-effects of upholding each right overall frustrate the normative underpinnings of the rights, and then comparing this overall frustration of normative underpinnings as between the two rights, this Court finds that suspending privacy and permitting disclosure of this information frustrates the normative underpinnings of privacy less than suspending FOE and forbidding disclosure of that information would frustrate the normative underpinnings of FOE. This conclusion can be explained with the following reasons:

- Disclosure of this information generates fewer and less intense negative side-effects on the rights' normative underpinnings overall than does suppression of this information. In these circumstances (of private information containing facts that uncover the truth about an MP's way of life that is inextricably linked to her political platform, and that indicates she has been misleading electors), the frustration of privacy by permitting disclosure is less intense than would be the frustration of FOE by forbidding disclosure.
- The privacy right would be frustrated by permitting disclosure – that cannot be disputed – because Letizia's dignity and autonomy would be undermined, and her well-being and security put at risk, but this sort of

[44] By permitting disclosure.
[45] By forbidding disclosure.

frustration of privacy would occur with *any* disclosure of *any* private information (that reveals something negative about the privacy rightholder).

- Meanwhile, the FOE right would be frustrated more intensively: the negative side-effects of suppressing this *particular* information about Letizia's diet, in these *particular* circumstances of her being elected on an animal welfare platform, cut at the heart of three well-established normative underpinnings of FOE. The 'stakes' are higher for FOE than they are for privacy on these particular facts.

Step 13: Optimality

Comparing the frustrating impact of suspending privacy with the furthering impact of upholding FOE, and comparing the difference or gap between the degree of furthering and the degree of frustrating of each right as between each of the two alternative outcomes,[46] involves comparisons between incommensurable values. Therefore, this values-comparison must be anchored in a moral constant. That moral constant is the obligation on this Court to resolve the privacy-FOE conflict and decide the case in favour of the most optimal (less grave) of two wrongs. Optimality is measured by the extent to which rights are furthered according to their normative underpinnings, and gravity is measured by the extent to which rights are frustrated according to their normative underpinnings. The 'two wrongs' represent the only two options open to this Court: suspend one right, or suspend the other right, as confirmed in step 3.

This Court may choose to uphold a right and suspend the other only if the degree of furthering that right is greater than the degree of frustrating the other, or if the difference between those degrees of furtherance and frustration is also greater than it would be on the alternative outcome. That is the case here with upholding FOE and suspending privacy, for the following reasons:

- In these circumstances, the furtherance of FOE is greater than the frustration of privacy when disclosure is permitted, and the frustration of FOE would be greater than the furtherance of privacy were disclosure to be forbidden; in addition, the furtherance of FOE frustrates privacy through permitting disclosure *to a lesser extent* than the furtherance of privacy would frustrate FOE through forbidding disclosure.
- The impact of disclosure of this information is, by virtue of the truth-promoting content of that information as well as the political context in which it is disclosed, an overall rights-furthering impact, rather than a rights-frustrating impact. Although privacy is frustrated, in these circumstances, its frustration is not as intense and as exigent as the furtherance of FOE: that is why upholding FOE *not only entails but also justifies* the suspension of privacy.
- Drawing upon the third element of the proportionality analysis stated in step 8, the relative extent to which the importance of upholding each right justifies the detriment to the other right is such that the importance of upholding FOE justifies the detriment to privacy *to a greater extent* than upholding privacy would justify the detriment to FOE; that is why permitting disclosure of this information is proportionate, while forbidding such disclosure would be disproportionate.

Ensuring this choice between the two rights is based upon such a justification ensures it is in the 'public interest', because 'public interest' in this rights-adjudication context is defined and measured in terms only of the furtherance

[46] Publication and non-publication.

of rights: only that outcome which overall most furthers rights and overall least frustrates rights is in the 'public interest'. Here, permitting disclosure of the information[47] is in the 'public interest'.

Conclusion

For these reasons, this information should be disclosed. The People's Truth's FOE right should be upheld and Letizia's privacy right suspended, on the justification that, in these circumstances, FOE is furthered to a greater extent by being upheld, than privacy is frustrated by being suspended. There is a stronger rights-based justification for upholding FOE and suspending privacy, than there is for upholding privacy and suspending FOE, because the former outcome is the more optimal, less grave, and more proportionate. It is, therefore, in the public interest to disclose this information. The application for a permanent injunction against the disclosure of this information is dismissed.

ii. Photographs of Letizia baking with the children

Part A: Engaging with the rights-conflict

Step 1: Genuine and unavoidable rights-conflict

The same legal principle applies as *vis-à-vis* the information about Letizia's non-vegan diet.

Step 2: The rights-conflict on the facts

Letizia's privacy right, and each child's privacy right, covers these photographs, entitling them each (*pro tanto*) to non-publication of those photographs. Simultaneously, the People's Truth's FOE right covers the same photographs, entitling it (*pro tanto*) to publish those photographs without repercussion. Both rights cover the matter of publication of those photographs, and are therefore in conflict with each other: it is not logically possible simultaneously to uphold both rights.

Step 3: Loss of entitlement to right

As a matter of legal principle, the necessary outcome of resolving this conflict between Letizia's and each child's privacy right, and the People's Truth's FOE right involves suspending either one of these rights, which entails either Letizia and/or her children, or the People's Truth, suffering a loss of rightholding entitlement. Because it is impossible to uphold both privacy and FOE on these facts, and because resolving the case requires that one right be upheld,[48] one right must also be suspended.

Step 4: Justification and legitimacy

[47] Upholding FOE and suspending privacy.
[48] Granting an injunction or dismissing the application for an injunction.

The same legal principles, including in relation to section 12 of the HRA, apply as *vis-à-vis* the information about Letizia's non-vegan diet.

Part B: Establishing a rational connection between the normative and the factual

Step 5: Normative underpinnings

The normative underpinnings of the privacy and FOE rights include those set out above *vis-à-vis* the information about Letizia's non-vegan diet.

Step 6: Factual consequences

The consequences of granting the injunction and forbidding publication of these photographs are:

- A significant portion of the public[49] is denied that which is effectively photographic evidence of Letizia's non-vegan diet, contrary to her political claims about animal welfare, and implicating her integrity as an elected representative.
- The People's Truth's editor does not have full independent editorial discretion to decide the manner in which it publishes its stories, namely whether and how it includes photographs.
- Letizia retains control over who sees photographs of her and her children in their home, and can keep such images out of the public realm.
- Images of the children at home do not enter the public realm.

The consequences of dismissing the injunction application and permitting publication of these photographs are:

- A significant portion of the public gains access to photographic evidence of Letizia leading a non-vegan lifestyle, contrary to her political claims, and implicating her integrity as an elected representative.
- Through the use of photographs, the People's Truth can more effectively market and communicate the story about Letizia's true non-vegan diet, and therefore potentially attract more readers which would generate a greater profit from this story.
- Letizia forever loses control over who sees photographs of her and her children at in their home.
- Given the availability of online communications, images of the children at home are forever accessible by an infinite audience.

Step 7: Establishing connections between factual consequences and normative underpinnings

Assessing each of the factual consequences identified in step 6, the following rational connections can be drawn between the factual consequences and the rights' normative underpinnings identified in step 5:

- The public being denied photographic evidence of Letizia's non-vegan lifestyle is connected with the FOE underpinning of truth-discovery and marketplace of ideas for the same reasons as *vis-à-vis* the information

[49] Including readers of the People's Truth in print and online but also spanning beyond that readership.

about Letizia's non-vegan diet, and particularly because these photographs corroborate the new information indicating the truth does not lie in the information already in the public domain.[50]

- The People's Truth's editor not having full discretion to decide about publishing photographs in its stories is connected with the FOE underpinning of suspicion of governmental power for the same reasons as *vis-à-vis* the information about Letizia's non-vegan diet, and particularly because the Court would be stepping into the editor's shoes in deciding whether and how photographs will be included in its stories.
- Letizia retaining, or forever losing, control over who sees photographs of her and her children at in their home is connected with the privacy underpinning of autonomy and freedom for the same reasons as *vis-à-vis* the information about Letizia's non-vegan diet.
- Images of the children at home entering or not entering the public realm is connected with the privacy underpinnings of dignity and personhood, autonomy and freedom, psychological well-being and security, family and cultivating relationships, and participation in society, because it has implications, respectively, for: the children's images and at-home activities being used as a means to a political end (corroborating information indicating Letizia misled the electorate) without the children themselves having the capacity to object to that; the children's future ability (when they gain an understanding of what privacy means and develop their personal attitude to their own privacy) to control who sees photographs of them; public identification of the children which could lead to increased public attention on and intrusion into their lives; the children's ability to engage freely with their mother in family activities in their home, and their ability to develop relationships with others (in childhood and adulthood) without automatically being associated with, or judged according to, their mother's wrongdoing; and the children's present and future ability to partake in their society as individuals in their own right and uninhibited by social judgment of them having been raised in a non-vegan household by parents postulating as vegans.
- The electorate having the ability to see photographic evidence of Letizia's non-vegan diet is connected with the FOE underpinnings of democratic participation and legitimated democratic self-governance for the same reasons as *vis-à-vis* the information about Letizia's non-vegan diet, and particularly because these corroborating photographs enhance electors' ability to judge whether or not Letizia has been misleading them.
- The People's Truth having the ability more effectively to market, communicate and profit from its story about Letizia's true non-vegan diet is connected with the FOE underpinnings of truth-discovery and marketplace of ideas, and legitimated democratic self-governance for the same reasons as *vis-à-vis* the information about Letizia's non-vegan diet, particularly given the special utility of photographs in adding colour to a story.
- The People's Truth having the ability more effectively to market, communicate and profit from its story about Letizia's true non-vegan diet is connected with the privacy underpinning of dignity and personhood for the same reasons as *vis-à-vis* the information about Letizia's non-vegan diet, particularly because photographs of a person are especially intrusive when compared to the disclosure of information about a person.

Part C: Undertaking tailored proportionality and optimality

[50] That Letizia is a dedicated vegan.

Step 8: Proportionality *strictu sensu* applied to both rights

The proportionality analysis which applies here is as set out *vis-à-vis* the information about Letizia's non-vegan diet.

Step 9: Normative value of upholding each right

Bearing in mind the same principles as articulated *vis-à-vis* the information about Letizia's non-vegan diet, upholding privacy[51] generates the following normative value for privacy:

- vindicates individual autonomy and freedom by preserving Letizia's control over who can see images of her and her children in her home.
- further vindicates individual autonomy and freedom by protecting the children's future ability[52] to control who sees photographs of them.
- vindicates individual dignity and personhood by preventing the children's images and at-home activities from being used as a means to a political end[53] without the children themselves having the capacity to object to that.
- vindicates individual psychological well-being and security by preventing public identification of the children which could lead to increased public attention on and intrusion into their lives.
- vindicates the need to protect family life and individuals' cultivation of relationships by preserving the children's ability to engage freely with their mother in family activities in their home, and their ability to develop relationships with others (in childhood and adulthood) without automatically being associated with, or judged according to, their mother's wrongdoing.
- vindicates the social value of individuals' participation in society by preserving the children's present and future ability to partake in their society as individuals in their own right and uninhibited by social judgment of them having been raised in a non-vegan household by parents postulating as vegans.

And, upholding FOE[54] generates the following normative value for FOE:

- vindicates the ideal of marketplace of ideas and the quest for truth-discovery by enabling the People's Truth to add photographic evidence of the revelation about Letizia's non-vegan diet, thereby serving readers' interest in knowing the truth about a matter of public record.
- vindicates the principles of democratic participation and legitimated democratic self-governance by enabling electors to see corroborating photographs and enhancing their ability to judge whether Letizia has been misleading them, thereby serving electors' interest in being able to make informed electoral choices.
- further vindicates the ideal of marketplace of ideas, the quest for truth-discovery, and the principle of legitimated democratic self-governance by allowing the People's Truth to exploit the special effect photographs have in adding colour to a story, thereby enhancing its ability to profit from its publication,

[51] And forbidding publication of these photographs.
[52] When they gain an understanding of what privacy means and develop their personal attitude to their own privacy.
[53] Corroborating information indicating Letizia misled the electorate.
[54] And permitting publication of these photographs.

and ultimately contribute to and maintain a vibrant, competitive and free media market, which is desirable in an open and self-governing democracy.

Step 10: Side-effects of upholding each right

Bearing in mind the same principles as articulated *vis-à-vis* the information about Letizia's non-vegan diet, upholding privacy[55] generates the following side-effects for FOE:

- undermines the ideal of marketplace of ideas and the quest for truth-discovery by forbidding the People's Truth from adding photographic evidence of the revelation about Letizia's non-vegan diet, thereby disadvantaging readers' interest in knowing the truth about a matter of public record.
- downplays the concern that governmental power and intervention in expression should be viewed always with suspicion by permitting judicial editorialising in the place of otherwise uninhibited newspaper editorial discretion as to how to present stories and whether to include photographs.
- undermines the principles of democratic participation and legitimated democratic self-governance by preventing electors from seeing corroborating photographs and diminishing their ability to judge whether Letizia has been misleading them, thereby disadvantaging electors' interest in being able to make informed electoral choices.
- further undermines the ideal of marketplace of ideas, the quest for truth-discovery and the principle of legitimated democratic self-governance by denying the People's Truth the ability to exploit the special effect photographs have in adding colour to a story, thereby preventing it from profiting fully from its publication, and weakening its contribution to a vibrant, competitive and free media market.

And, upholding FOE[56] generates the following side-effects for privacy:

- undermines individual autonomy and freedom by removing Letizia's control over who can see images of her and her children in her home.
- further undermines individual autonomy and freedom by reducing the children's future ability to control who sees photographs of them, and allowing public identification of them which could lead to increased public attention on and intrusion into their lives. This undermining of autonomy and freedom is intensified by the use of photographs, because photographs are particularly intrusive.[57] This negative side-effect is compounded by the reality that these images could be on-published online, thereby creating a permanent "digital dossier" of the children which will follow them throughout their lives and into adulthood.[58]
- undermines individual dignity and personhood by allowing the children's images and at-home activities to be used as a means to a political end[59] without the children themselves having the capacity to object to that. Given that publicly revealing the children's images does not contribute to the corroboration of the

[55] And forbidding publication of these photographs.
[56] And permitting publication of these photographs.
[57] *Douglas v Hello! Ltd (No 6)* [2005] 3 WLR 881, [84], per Lord Phillips.
[58] SB Steinberg, 'Sharenting' (2017) 66 Emory Law Journal 839.
[59] Corroborating information indicating Letizia misled the electorate.

information about Letizia's non-vegan diet, the children and their private lives would be *thoroughly* commodified and instrumentalised for a political end, however important and worthy that end is. This undermining of dignity and personhood is intensified by the use of photographs, which are particularly intrusive.

- further undermines individual dignity and personhood by allowing Letizia's and her children's private lives to be used as means to company's commercial ends, and to (the more remote) social ends of maintaining a free, vibrant and competitive media market. Again, this undermining of dignity and personhood is intensified by the use of photographs, which are particularly intrusive.
- undermines individual psychological well-being and security by allowing public identification of the children which could lead to increased public attention on and intrusion into their lives (especially given the particularly intrusive nature of photographs).
- undermines the protection of family life and individuals' cultivation of relationships by damaging the children's present and future ability to partake in their society as individuals in their own right and uninhibited by social judgment of them having been raised in a non-vegan household by parents postulating as vegans. The children may always be associated with their mother and her wrongdoing – that cannot be prevented – but photographs of them (especially as part of a permanent digital dossier) have an intensifying effect, making that association explicit and unavoidable for those who read about Letizia's non-vegan diet.
- undermines the social value of individuals' participation in society endangering the children's present and future ability to partake in their society as individuals in their own right and uninhibited by social judgment of them having been raised in a non-vegan household by parents postulating as vegans. Again, although the children may always be associated with their mother and her wrongdoing, permanently public photographs of them have an intensifying effect, making that association explicit and unavoidable for those who read about Letizia's non-vegan diet.

Step 11: The greatest possible furtherance of rights

Evaluating the extent to which the normative value of upholding each right overall furthers the normative underpinnings of the rights, and then comparing this overall furtherance of normative underpinnings as between the two rights, this Court finds that upholding privacy and forbidding publication of these photographs *unless the children's images are pixilated* furthers the normative underpinnings of privacy more than upholding FOE and permitting publication of those photographs *without pixilation* would further the normative underpinnings of FOE. This conclusion can be explained with the following reasons:

- Forbidding publication unless it excludes the children's images furthers the rights to privacy and FOE to the greatest possible extent, because it vindicates those normative underpinnings of both privacy and FOE that are most directly and most significantly affected by the (non-)publication of these photographs.
- Privacy is furthered by the pixilation condition more than FOE would be furthered by permitting publication without such condition, because, first, pixilation vindicates several of privacy's normative underpinnings, and in a way that highlights exactly why the legal right to privacy is underpinned by these normative values, and why it is protected by law: the rightholders in question are children, who are particularly vulnerable to the corrosive effects of privacy intrusion, because they have not yet developed their own appreciation of

why privacy matters and their own stance on how they will lead their private and public lives, *and* because they will bear the corrosive effects of privacy intrusion through their childhood, adolescence and adulthood. Protecting *children's* privacy substantiates the generic normative impetus to protect privacy in a particularly clear way. Children might be considered as privacy rightholders *par excellence*, whose interests go to the normative centre of that right. Secondly, the publication of children's images contributes nothing to the normative underpinnings of FOE that are rationally connected with, and that are most intensely and directly furthered by, the consequences of publication in these circumstances: the children's images have no bearing upon the truth about Letizia's non-vegan lifestyle given the photographs already depict her and non-vegan foodstuffs, and they add nothing to the corroboration of that information.

- FOE is furthered by the permission to publish with pixilation more than privacy is furthered by the complete suppression of these photographs, because such publication enhances readers', and the electorate's, ability to judge the veracity of Letizia's claims and her political integrity, while complete suppression would see Letizia exercise control over one instance of her being photographed, in circumstances in which she has long permitted (by not objecting to) the use of photographs of her to be disseminated widely on social media. This does *not* mean Letizia has thereby surrendered her privacy entitlement, or that Letizia deserves to have her right suspended either because she has not prevented others from publishing photographs of her, or because she is an 'influencer' or 'role model'. These propositions have no bearing upon how the Court measures the extent to which her privacy right would furthered (by suppression of the photographs) in comparison with the extent to which the FOE right is furthered. The only material consideration is the magnitude of importance of vindicating FOE in relation to the public record and electors' interests, and the *only* way of achieving that is to publish these photographs of Letizia, which would as it happens be a small and relatively anodyne addition to the pool of the photographs of her already in the public domain.

Step 12: The least possible frustration of rights

Evaluating the extent to which the side-effects of upholding each right overall frustrate the normative underpinnings of the rights, and then comparing this overall frustration of normative underpinnings as between the two rights, this Court finds that suspending FOE and forbidding publication of these photographs *unless the children's images are pixilated* frustrates the normative underpinnings of FOE less than suspending privacy and permitting publication of those photographs *without pixilation* would frustrate the normative underpinnings of privacy. This conclusion can be explained with the following reasons:

- Even though the children's privacy rights are upheld, Letizia's privacy right is suspended, so that pixilated publication of the photographs is permitted: FOE is overall suspended because of the pixilation condition, which resembles judicial editorialising in the place of the defendant's full editorial discretion. That is the primary way in which FOE is frustrated here. Frustrating FOE in that way is less intense than frustrating privacy by suspending the children's privacy, for the reasons set out in step 11 relating to the particular vulnerability of children as privacy rightholders.[60] In addition, this form of frustration of FOE (judicial editorialising) is mollified to the extent that it is precisely judicial editorialising that *allows at least some*

[60] Compared with the reality that publishing their image contributes nothing to the FOE normative underpinnings of marketplace of ideas, truth-discovery, democratic participation and legitimated democratic self-governance.

publication of the photographs, *at least some* use of them as corroborating evidence of Letizia's vegan lie, and *at least some* commercial exploitation by the People's Truth of these photographs.

- Most importantly, Letizia can be expected to vitiate her privacy right (her control over who can see her image) in circumstances in which that image provides direct evidence of her having misled the electorate about her way of life and, as a necessary consequence, her political ideology and the very reason why she has been elected into office. The same reasons apply here as *vis-à-vis* the information about Letizia's non-vegan diet, set out in steps 11 and 12 under the analysis for that information. This is notwithstanding that photographs are more intrusive than information. When compared with the significant and direct ways in which the normative underpinnings of FOE would be frustrated were the photographs to be suppressed entirely, the fact that these photographs depict Letizia doing nothing more than using non-vegan foodstuffs in her own kitchen mean the particularly intrusive nature of photographs does not elevate her privacy 'needs' over the FOE 'needs' of her electorate. Indeed, these photographs provide a particularly valuable means of corroborating the truth about her lifestyle. Hiding these photographs from the public would more readily resemble the negative state of affairs of Letizia actively frustrating the FOE right in significant ways, than it would resemble the positive state of affairs of Letizia exercising her autonomy over which photographs of her can be published.
- The same does not hold true for her children. They and their privacy would be plainly commodified if the same treatment were to apply to their images in the photographs: they have no proximity to the veracity of Letizia's political claims, and carry no moral responsibility to the electorate. They merely happen to be the children of an elected representative, and are as such 'involuntary public figures', if they are 'public figures' at all. Permitting publication of their images in these photographs would frustrate their privacy right by thoroughly commodifying them as mere means to a political end, and in depriving them of any chance of controlling the publication of their image when they later in life acquire the capacity to make informed decisions about when, how and the extent to which they will publish photographs of themselves at home. Highlighting the particular normative need to protect children's, or vulnerable individuals', privacy can be gleaned from the reasoning in *ETK*,[61] where Ward LJ held it was not the children's fault that their father had attracted public attention and they were because of his public status always at the risk of the "ordeal of playground ridicule", and in *T*,[62] where Eady J effectively stepped in to protect the privacy of a vulnerable person (with diminished mental capacity) even where that person had consented to the publication of her private information.
- Given how serious and significant this frustration of privacy would be, the frustration of FOE (by suppressing all publication of the photographs) would be less intense. Indeed, the law calls upon the courts to 'editorialise' in cases where, though publication overall should be permitted, it ought to be tempered to preserve sufficiently important conflicting interests. This does remove discretion from the editor, but it is the less grave alternative to suppressing the whole publication overall, which would have the same objective to protect the conflicting interests in privacy. That is why the pixilation condition, though frustrating the FOE right, is a *proportionate* means of upholding the (children's) privacy right.

Step 13: Optimality

[61] *ETK v NGN Ltd* [2011] 1 WLR 1827, [17]; followed in *Bull v Desporte* [2019] EWHC 1650 (QB), [113].
[62] *T v BBC*, [17]-[18].

The same legal principles apply as *vis-à-vis* the information about Letizia's non-vegan diet. Here, the Court chooses to uphold privacy and suspend FOE, for the following reasons:

- In these circumstances, the furtherance of privacy is greater than the frustration of FOE when publication is forbidden unless pixilated, and the frustration of privacy would be greater than the furtherance of FOE were publication to be permitted without pixilation; in addition, the furtherance of privacy frustrates FOE through forbidding publication unless pixilated *to a lesser extent* than the furtherance of FOE would frustrate privacy through permitting unpixilated publication.
- Forbidding publication unless the children's images are pixilated ensures the rights-conflict can be resolved in a way that both rights can be furthered in the most direct and important ways (protecting the quest for truth-discovery, the interests of the electorate, and the interests of children), and in a way that both rights are frustrated in only marginal or remote ways, as described in steps 11 and 12.
- Drawing upon the third element of the proportionality analysis stated in step 8, the relative extent to which the importance of upholding each right justifies the detriment to the other right is such that the importance of upholding privacy (overall) justifies the detriment to FOE *to a greater extent* than upholding FOE justifies the detriment to privacy; that is why forbidding publication of these photographs *unless there is partial pixilation* is proportionate, while permitting this publication *without any pixilation* would be disproportionate.

The same legal principles concerning 'public interest' apply as *vis-à-vis* the information about Letizia's non-vegan diet. Here, permitting publication of these photographs *without pixilating the children's images*[63] is not in the 'public interest'.

Conclusion

For these reasons, these photographs should not be published without pixilation of each child's image. The People's Truth's FOE right should be suspended,[64] and each child's privacy right should be upheld. Letizia's privacy right should be suspended.[65]

In opposition to each child's privacy right in these circumstances, the People's Truth's FOE right is frustrated to a lesser extent by being suspended, than the children's privacy rights would be were they to be suspended. In these circumstances, the right to privacy is furthered to a greater extent by being upheld, than the right to FOE is frustrated by being suspended. However, in opposition to Letizia's privacy right in these circumstances, the People's Truth's FOE right would be frustrated to a greater extent were it to be suspended, than is Letizia's privacy right by being suspended. In *these* circumstances, the right to FOE is furthered to a greater extent by being upheld, than the right to privacy is frustrated by being suspended

In respect of Letizia's privacy in these circumstances, there is a stronger rights-based justification for upholding the FOE right and suspending the privacy right, than there is for upholding the privacy right and suspending the FOE right, because the former outcome is the more optimal, less grave, and more proportionate. However, in

[63] Overall suspending privacy and overall upholding FOE.
[64] Given that publication is conditional upon some pixilation.
[65] Given publication of her image is permitted.

respect of each child's privacy right in these circumstances, there is a stronger rights-based justification for upholding the privacy right and suspending the FOE right, than there is for upholding the FOE right and suspending the privacy right, because, in *that* situation, the former outcome is the more optimal, less grave, and more proportionate.

It is, therefore, in the public interest to publish these photographs only to the extent that each child's image is pixilated. The application for a permanent injunction against the publication of these photographs is granted to the extent it demands pixilation of each child's image.

iii. Photographs of Letizia wearing the bikini

Part A: Engaging with the rights-conflict

Step 1: Genuine and unavoidable rights-conflict

The same legal principle applies as *vis-à-vis* the information about Letizia's non-vegan diet.

Step 2: The rights-conflict on the facts

Letizia's privacy right covers these photographs, entitling her (*pro tanto*) to non-publication of those photographs. At the same time, Victor's FOE right covers the same photographs, entitling him (*pro tanto*) to publish those photographs without repercussion. Both rights cover the matter of publication of those particular photographs, and are therefore in conflict with each other: it is not logically possible simultaneously to uphold both rights in this case.

Step 3: Loss of entitlement to right

As a matter of legal principle, the necessary outcome of resolving this conflict between Letizia's privacy right and Victor's FOE right involves suspending one of these rights, which entails either Letizia or Victor suffering a loss of rightholding entitlement. Because it is impossible to uphold both rights on these facts, and because resolving the case requires one right be upheld,[66] one right must also be suspended.

Step 4: Justification and legitimacy

The same legal principles, including in relation to section 12 of the HRA, apply as *vis-à-vis* the information about Letizia's non-vegan diet.

Part B: Establishing a rational connection between the normative and the factual

Step 5: Normative underpinnings

[66] Granting an injunction or dismissing the application for an injunction.

The normative underpinnings of the privacy and FOE rights include those set out above *vis-à-vis* the information about Letizia's non-vegan diet.

Step 6: Factual consequences

The consequences of granting the injunction and forbidding publication of these photographs are:

- Victor is prevented from making public aspects of his life, in particular photographs taken in his home by him and in his possession.
- Victor's public audience, covering the electorate, is denied that which is effectively photographic evidence of Letizia's non-vegan lifestyle, contrary to her political claims about animal welfare, and implicating her integrity as an elected representative.
- Letizia is able to retain control over who sees explicit sexual images of her taken in the seclusion of her bedroom.
- These images of Letizia do not enter the public realm.

The consequences of dismissing the injunction application and permitting publication of these photographs are:

- Victor is able to choose and publish aspects of his life, in particular photographs taken in his home by him and in his possession.
- Victor's audience, covering the electorate, is able to see photographic evidence of Letizia's non-vegan lifestyle, contrary to her political claims about animal welfare, and implicating her integrity as an elected representative.
- Letizia forever loses control over who sees explicit sexual images of her taken in her own bedroom.
- These images of Letizia enter the public realm, exposing Letizia to the risks of public outrage (for her lies), as well as public shaming and ridicule (for having featured in explicit sexual photographs).

Step 7: Establishing connections between factual consequences and normative underpinnings

Assessing each of the factual consequences identified in step 6, the following rational connections can be drawn between the factual consequences and the rights' normative underpinnings identified in step 5:

- Victor's being prevented or allowed to make public aspects of his life, including these photographs, is connected with the FOE underpinnings of autonomy and self-realisation and suspicion of governmental power, because, respectively: his choice and wish to publish such photographs is an exercise of his autonomy and part of his self-realisation, in the form of publicly admitting he was part of a lie, taking responsibility for it, and showing remorse over it; and judicial prevention of his ability to do that is an exercise of coercive censorial governmental power against his liberty.
- Victor's audience being denied photographic evidence of Letizia's non-vegan lifestyle is connected with the FOE underpinnings of truth-discovery and marketplace of ideas, democratic participation and legitimated democratic self-governance, for the same reasons as *vis-à-vis* the photographs of Letizia baking with her children.

- Letizia's (in)ability to retain control over who sees these explicit sexual images of her is connected with the privacy underpinnings of autonomy and freedom, psychological well-being and security, intimacy, family and cultivating relationships, participation in society, and minority protection, because, respectively: control over who has access to her most intimate images goes to the centre of her autonomy and freedom; such control also gives her sanctity and security over how many people know about her most intimate behaviour; such control allows her to be intimate with her partner in a home setting without fear of exposure, and to develop relationships with other individuals at varying degrees of intimacy, without being exposed to others in such an intimate way when that is not what she wants; such control allows her to participate in society with confidence she will not be exposed and humiliated, and without such intimidation, especially in her role as a politician; and, arguably, preserving the control women have over explicit sexual photographs of them taken consensually in extremely intimate and secluded circumstances protects women as an historically disempowered and objectified group in society.
- These images of Letizia entering or not entering the public realm is connected with the privacy underpinnings of dignity and personhood, and psychological well-being and security, because, respectively: any number of individuals has access to her image in explicit, sexual and semi-nude form, enabling anyone (voyeuristically) to treat her as an object or to on-publish that image in an abusive way; and any number of individuals can see her in an unguarded and vulnerable state, exposing her to the risk of public shaming and ridicule but also harassment (sexual or otherwise), and further intrusion (as well as the risk of public outrage and *ad hominem* attacks for having misled the public about her vegan lifestyle).
- Victor's uninhibited ability to choose to publish these photographs is connected with the privacy underpinning of dignity and personhood because it resembles his use of Letizia's private life and intimate images as a means to achieve his personal ends of self-expression and public admission of and remorse for lying about the veganism.

Part C: Undertaking tailored proportionality and optimality

Step 8: Proportionality *strictu sensu* applied to both rights

The proportionality analysis which applies here is as set out *vis-à-vis* the information about Letizia's non-vegan diet.

Step 9: Normative value of upholding each right

Bearing in mind the same principles as articulated *vis-à-vis* the information about Letizia's non-vegan diet, upholding privacy[67] generates the following normative value for privacy:

- vindicates individual dignity and personhood by denying others access to Letizia's explicit sexual photographs, and preventing others (voyeuristically) treating her as an object or on-publishing those photographs in an abusive way.
- vindicates individual autonomy and freedom by preserving the control she has over who has access to her most intimate images.

[67] And forbidding publication of these photographs.

- vindicates individual psychological well-being and security by giving her sanctity and security in the knowledge that others do not know about her most intimate behaviour, and by preventing her public exposure in an unguarded and vulnerable state, thereby minimising the risk of public shaming and ridicule, harassment (sexual or otherwise), and further intrusion (as well as the risk of public outrage and *ad hominem* attacks for having misled the public about her vegan lifestyle).
- vindicates the need to protect individual intimacy, family life and individuals' cultivation of relationships by allowing her to be intimate with her partner in a home setting without fear of exposure, and to develop relationships with others at varying degrees of intimacy without being exposed to others in such an intimate way when that is not what she wants.
- vindicates the social value of individuals' participation in society by enabling her to participate in society with confidence she will not be exposed and humiliated, and without such intimidation, especially in her role as a politician.
- arguably vindicates the social objective of minority protection by preserving the control she as a woman has over explicit sexual photographs of her taken consensually in extremely intimate and secluded circumstances, thereby protecting women as an historically disempowered and objectified group in society

And, upholding FOE[68] generates the following normative value for FOE:

- vindicates individual autonomy and self-realisation by respecting Victor's choice and wish to publish such photographs, and allowing him publicly to admit he was part of a lie, take responsibility for it, and show remorse over it.
- vindicates the concern that governmental power and intervention in expression should be viewed always with suspicion by ensuring his ability to publish these photographs is not impeded by coercive censorial governmental power.
- vindicates the ideal of marketplace of ideas and quest for truth-discovery in the same way as *vis-à-vis* the photographs of Letizia baking with her children.
- vindicates the principle of democratic participation in the same way as *vis-à-vis* the photographs of Letizia baking with her children.
- vindicates the principle of legitimated democratic self-governance in the same way as *vis-à-vis* the photographs of Letizia baking with her children.

Step 10: Side-effects of upholding each right

Bearing in mind the same principles as articulated *vis-à-vis* the information about Letizia's non-vegan diet, upholding privacy[69] generates the following side-effects for FOE:

- undermines individual autonomy and self-realisation by denying Victor the choice whether to publish such photographs, and preventing him from publicly admitting he was part of a lie, taking responsibility for it, and showing remorse over it.
- downplays the concern that governmental power and intervention in expression should be viewed always with suspicion by using coercive censorial governmental power to prevent him from publishing the photographs.

[68] And permitting publication of these photographs.
[69] And forbidding publication of these photographs.

- undermines the ideal of marketplace of ideas and quest for truth-discovery in the same way as *vis-à-vis* the photographs of Letizia baking with her children.
- undermines the principle of democratic participation in the same way as *vis-à-vis* the photographs of Letizia baking with her children.
- undermines the principle of legitimated democratic self-governance in the same way as *vis-à-vis* the photographs of Letizia baking with her children.

And, upholding FOE[70] generates the following side-effects for privacy:

- undermines individual dignity and personhood first by allowing others access to Letizia's explicit sexual photographs, enabling anyone (voyeuristically) to treat her as an object or to on-publish that image in an abusive way, and secondly by permitting Victor to publish these photographs and thereby use Letizia's private life and intimate images as a means to achieve his personal ends of self-expression and public admission of and remorse for lying about the veganism, and also as a means to achieve his end of having greater access to their children than she would after their separation.
- undermines individual autonomy and freedom by denying her control over who has access to her most intimate images.
- undermines individual psychological well-being and security by exposing her to the anxiety in the knowledge that many people know about her most intimate behaviour, and by allowing her public exposure in an unguarded and vulnerable state and thereby exposing her to the risk of public shaming and ridicule, harassment (sexual or otherwise), and further intrusion (as well as the risk of public outrage and *ad hominem* attacks for having misled the public about her vegan lifestyle).
- undermines the protection of individual intimacy, family life and individuals' cultivation of relationships by denying her the liberty of being intimate with her partner in a home setting without fear of exposure, and of developing relationships with others at varying degrees of intimacy without being exposed to others in such an intimate way when that is not what she wants.
- undermines the social value of individuals' participation in society by preventing her from participating in society with the confidence she will not be exposed and humiliated, and without such intimidation, especially in her role as a politician.
- arguably undermines the social value of minority protection by removing the control she as woman should have over explicit sexual photographs of her taken consensually in extremely intimate and secluded circumstances, thereby failing to protect women as an historically disempowered and objectified group in society.

Step 11: The greatest possible furtherance of rights

Evaluating the extent to which the normative value of upholding each right overall furthers the normative underpinnings of the rights, and then comparing this overall furtherance of normative underpinnings as between the two rights, this Court finds that upholding privacy and forbidding publication of these photographs furthers the normative underpinnings of privacy more than upholding FOE and permitting publication of those photographs would further the normative underpinnings of FOE. This conclusion can be explained with the following reasons:

[70] And permitting publication of these photographs.

- There is both individual-centric and societal value in upholding privacy *and* in upholding FOE, but suppressing these photographs furthers the normative underpinnings of privacy in a more direct, pressing and important way than publication would further the normative underpinnings of FOE.
- Publication upholds Victor's individual interests in FOE, as well as societal interests in truth-discovery and electors' interests being able to make informed choices at the ballot box. These are important and well-established normative underpinnings of FOE, but publishing these photographs is not the only way to achieve these ends. *It is a remote and disproportionate means of furthering this right*. Victor has the ability to admit collusion in the lie and express remorse without generating the harm inherent in publishing these sorts of photographs, just as there are ways, other than exposing Letizia in this arguably punitive way, of setting straight the public record and informing electors about Letizia's non-vegan lifestyle. Victor could, instead of publishing these photographs, disclose information that Letizia owns and wears garments made of genuine leather and fur.
- Suppression, on the other hand, furthers privacy in a direct, pressing and important way, which makes it a proportionate means of achieving the normative ends of the privacy right: there is no way of achieving those ends other than suppressing these explicit, intimate photographs. And the normative ends of privacy that are implicated here are many and go to the centre of why privacy is legally protected as a right. Not only are the principles of autonomy and dignity implicated, but the more practical elements of protecting individuals' lives are also implicated: psychological well-being, security, intimacy and relationships. Furthermore, suppression is the only way of furthering the societal ends of privacy, by protecting individuals' confidence to participate in society and protecting historically subjugated minorities.

Step 12: The least possible frustration of rights

Evaluating the extent to which the side-effects of upholding each right overall frustrate the normative underpinnings of the rights, and then comparing this overall frustration of normative underpinnings as between the two rights, this Court finds that suspending FOE and forbidding publication of these photographs frustrates the normative underpinnings of FOE less than suspending privacy and permitting publication of those photographs would frustrate the normative underpinnings of privacy. This conclusion can be explained with the following reasons:

- Suppression frustrates FOE in several ways, including by limiting both speaker interests and recipient interests. However, the degree of frustration of FOE by suppression is far less than the degree of frustration of privacy by publication. As discussed in step 11, suppressing these photographs does *not* prevent either the speaker or the recipients from *using other ways* to communicate or receive information in the photographs that links those photographs with the normative underpinnings of FOE. It is the imputation of Letizia's non-vegan lifestyle from these photographs that links them to the underpinnings of self-realisation, marketplace of ideas, truth-discovery, democratic participation and legitimated democratic self-governance. Again, it is possible just to disclose a statement that Letizia owns and wears garments made of genuine leather and fur. Speaker and recipient interests would thereby be satisfied.
- FOE is also frustrated through the coercive censorial power of an injunction, and the Court's suggestion that Victor use other means to communicate his message, but the degree of frustration in this regard is manifestly less than that of privacy were this Court not to uphold privacy. Deploying judicial censorship must be permitted where the needs of a conflicting right (such as privacy) are more pressing than those of FOE. That is the case here. After all, Victor's FOE entitlement to autonomy and self-realisation does not

inherently permit or necessarily require the infliction of such egregious harm to Letizia; therefore, forbidding publication of these photographs would be a minor incursion on this normative underpinning, especially when compared with the fantastically damaging incursion upon privacy through the publication of these photographs.

- As indicated in step 10, publication of this nature of photographs would undermine Letizia's dignity in more than one way, allowing both Victor and his audience (whether or not they are electors), to instrumentalise her in her most exposed and vulnerable state. It would affect her life (and, vicariously, the lives of her children)[71] in significant, debilitating and irreversible ways. It would also send a powerful signal to other individuals, and to women, that they would not have the law's protection against such demeaning exposure, potentially preventing them from being 'at ease' even in the most secluded and intimate settings of their home.
- This case has an element of blackmail, and possibly revenge porn. These nefarious and privacy-frustrating motivations for publication justify frustrating the FOE right in favour of protecting an otherwise powerless individual in the position of Letizia. The courts have been clear about their intolerance of blackmail,[72] which is consistent with Dan Cohen's warning about the prevalence of role distance between a speaker's purported intentions and genuine intentions, and the insincerity of a speaker in that regard.[73]
- The same can be concluded about the kiss-and-tell dimension of this case, in which Victor is exploiting for his own gain intimate sexual information he shares or 'co-owns' with Letizia: it is not straightforwardly just his to publish, and the courts have been cautious about these situations especially where explicit images and nefarious motivations are concerned.[74]
- Insofar as publication of these photographs would frustrate Letizia's ability to participate in her society with confidence and without anxiety, both generally and as a politician, publication would undermine the FOE underpinnings of democratic participation and legitimated democratic self-governance: publication could deter any others who have ever produced such photographs of themselves from doing the same. So it is better for democracy overall that Victor is free to state on the public record that Letizia owns and wears garments made with animal material, and that he is prohibited from humiliating her by publishing these photographs.

Step 13: Optimality

The same legal principles apply as *vis-à-vis* the information about Letizia's non-vegan diet. Here, the Court chooses to uphold privacy and suspend FOE, for the following reasons:

- In these circumstances, the furtherance of privacy is greater than the frustration of FOE when publication is forbidden, and the frustration of privacy would be greater than the furtherance of FOE were publication to be permitted; in addition, the furtherance of privacy frustrates FOE through forbidding publication *to a lesser extent* than the furtherance of FOE would frustrate privacy through permitting publication.

[71] As the Supreme Court reasoned in *PJS v NGN Ltd* [2016] AC 1081.
[72] *AMM v HXW* [2010] EWHC 2457 (QB), [38]-[39]; *POI v Lina* [2011] EWHC 25 (QB); *NPV v QEL* [2018] EMLR 20.
[73] Discussed in Chapter 3: M Dan-Cohen, *Harmful Thoughts* (PUP 2002) 247,252; E Goffman, *Encounters* (Bobbs-Merrill 1961) 85–152; JR Searle, *Speech Acts* (CUP 1969); JR Searle, *Expression and Meaning* (CUP 1979).
[74] *CC v AB* [2007] EMLR 11.

- Suppressing publication of these photographs is the only way of securing the central protective capacity of the right to privacy. Not to do so would be to disengage altogether with the privacy right by allowing its most important normative underpinnings to be frustrated with a disregard for principles that are constitutive of such a right (including dignity, autonomy and freedom), with disastrous practical effect for the applicant, and with a potent chilling effect on other individuals.
- Given as much, and given that the relevant normative underpinnings of FOE can in this case be fully achieved by other means, suspending the FOE right is manifestly justified by the pressing need to uphold privacy. It would be unambiguously disproportionate to suspend privacy in favour of FOE; that outcome would by far be the graver of the two alternatives.
- Drawing upon the third element of the proportionality analysis stated in step 8, the relative extent to which the importance of upholding each right justifies the detriment to the other right is such that the importance of upholding privacy justifies the detriment to FOE *to a greater extent* than upholding FOE would justify the detriment privacy; that is why forbidding publication of these photographs is proportionate, while permitting this publication would be disproportionate.

The same legal principles concerning 'public interest' apply as *vis-à-vis* the information about Letizia's non-vegan diet. Here, permitting publication of these photographs (suspending privacy and upholding FOE) is not in the 'public interest'.

Conclusion

For these reasons, these photographs should not be published. Letizia's privacy right should be upheld and Victor's FOE right suspended, on the justification that, in these circumstances, the right to privacy is furthered to a greater extent by being upheld, than the right to FOE is frustrated by being suspended. There is a stronger rights-based justification for upholding the privacy right and suspending the FOE right, than there is for upholding the FOE right and suspending the privacy right, because the former outcome is the more optimal, less grave, and more proportionate. It is, therefore, not in the public interest to disclose these photographs. A permanent injunction against the publication of these photographs is granted.

iv. Photographs of the family with Piccolo

Part A: Engaging with the rights-conflict

Step 1: Genuine and unavoidable rights-conflict

The same legal principle applies as *vis-à-vis* the information about Letizia's non-vegan diet.

Step 2: The rights-conflict on the facts

Each child's privacy right covers the photographs of the family with Piccolo, entitling each child (*pro tanto*) to non-publication of those photographs. At the same time, Victor's FOE right covers the same photographs, entitling him (*pro tanto*) to publish these photographs without repercussion. Both rights cover the matter of publication of those

particular photographs, and are therefore in conflict with each other: it is not logically possible simultaneously to uphold both rights in this case.

Step 3: Loss of entitlement to right

As a matter of legal principle, the necessary outcome of resolving this conflict between the children's privacy rights and Victor's FOE right involves suspending one of these rights, which entails either the children or Victor suffering a loss of rightholding entitlement. Because it is impossible to uphold both rights on these facts, and because resolving the case requires one right be upheld,[75] one right must also be suspended.

Step 4: Justification and legitimacy

The same legal principles, including in relation to section 12 of the HRA, apply as *vis-à-vis* the information about Letizia's non-vegan diet.

Part B: Establishing a rational connection between the normative and the factual

Step 5: Normative underpinnings

The normative underpinnings of the privacy and FOE rights include those set out above *vis-à-vis* the information about Letizia's non-vegan diet.

Step 6: Factual consequences

The consequences of granting the injunction and forbidding publication of these photographs are:

- Victor is prevented from making public aspects of his life, in particular photographs taken in his home by him and in his possession.
- Victor's public audience, covering the electorate, is denied that which is effectively photographic evidence of Letizia's non-vegan lifestyle, contrary to her political claims about animal welfare, and implicating her integrity as an elected representative.
- Images of the children in their garden do not enter the public realm.

The consequences of dismissing the injunction application and permitting publication of these photographs are:

- Victor is able to choose and publish aspects of his life, in particular photographs taken in his home by him and in his possession.
- Victor's audience, covering the electorate, is able to see photographic evidence of Letizia's non-vegan lifestyle, contrary to her political claims about animal welfare, and implicating her integrity as an elected representative.
- Given the availability of online communications, images of the children in their garden are forever accessible by an infinite audience.

[75] Granting an injunction or dismissing the application for an injunction.

Step 7: Establishing connections between factual consequences and normative underpinnings

Assessing each of the factual consequences identified in step 6, the following rational connections can be drawn between the factual consequences and the rights' normative underpinnings identified in step 5:

- Victor's being prevented or allowed to make public aspects of his life, including these photographs, is connected with the FOE underpinnings of autonomy and self-realisation and suspicion of governmental power, for the same reasons as *vis-à-vis* the photographs of Letizia wearing the bikini.
- Victor's audience being allowed or denied photographic evidence of Letizia's non-vegan lifestyle is connected with the FOE underpinnings of truth-discovery and marketplace of ideas, democratic participation and legitimated democratic self-governance, for the same reasons as *vis-à-vis* the photographs of Letizia baking with her children.
- Victor's uninhibited ability to choose to publish these photographs is connected with the privacy underpinning of dignity and personhood because it resembles his use of the children's private, at-home, family lives as a means to achieve his personal ends of self-expression, public admission of and remorse for lying about the veganism, and public postulation that he is an attentive father.
- Images of the children in their home garden entering or not entering the public realm is connected with the privacy underpinnings of dignity and personhood, autonomy and freedom, psychological well-being and security, family and cultivating relationships, and participation in society, for the same reasons as *vis-à-vis* the photographs of Letizia baking with the children.

Part C: Undertaking tailored proportionality and optimality

Step 8: Proportionality *strictu sensu* applied to both rights

The proportionality analysis which applies here is as set out *vis-à-vis* the information about Letizia's non-vegan diet.

Step 9: Normative value of upholding each right

Bearing in mind the same principles as articulated *vis-à-vis* the information about Letizia's non-vegan diet, upholding privacy[76] generates the following normative value for privacy:

- vindicates individual autonomy and freedom for the same reasons as *vis-à-vis* the photographs of Letizia baking with the children.
- vindicates individual dignity and personhood by preventing the children's images and at-home activities being used as a means to a political end (corroborating information indicating Letizia misled the electorate), *and* to Victor's personal end (expressing remorse for the vegan lie and postulating that he is a good father), without the children themselves having the capacity to object to that.

[76] And forbidding publication of these photographs.

- vindicates individual psychological well-being and security for the same reasons as *vis-à-vis* the photographs of Letizia baking with the children.
- vindicates the need to protect family life and individuals' cultivation of relationships for the same reasons as *vis-à-vis* the photographs of Letizia baking with the children.
- vindicates the social value of individuals' participation in society for the same reasons as *vis-à-vis* the photographs of Letizia baking with the children.

And, upholding FOE[77] generates the following normative value for FOE:

- vindicates individual autonomy and self-realisation for the same reasons as *vis-à-vis* the photographs of Letizia wearing the bikini.
- vindicates the concern that governmental power and intervention in expression should be viewed always with suspicion for the same reasons as *vis-à-vis* the photographs of Letizia wearing the bikini.
- vindicates the ideal of marketplace of ideas and quest for truth-discovery in the same way as *vis-à-vis* the photographs of Letizia baking with her children.
- vindicates the principle of democratic participation in the same way as *vis-à-vis* the photographs of Letizia baking with her children.
- vindicates the principle of legitimated democratic self-governance in the same way as *vis-à-vis* the photographs of Letizia baking with her children.

Step 10: Side-effects of upholding each right

Bearing in mind the same principles as articulated *vis-à-vis* the information about Letizia's non-vegan diet, upholding privacy[78] generates the following side-effects for FOE:

- undermines individual autonomy and self-realisation for the same reasons as *vis-à-vis* the photographs of Letizia wearing the bikini.
- downplays the concern that governmental power and intervention in expression should be viewed always with suspicion for the same reasons as *vis-à-vis* the photographs of Letizia wearing the bikini.
- undermines the ideal of marketplace of ideas and quest for truth-discovery in the same way as *vis-à-vis* the photographs of Letizia baking with her children.
- undermines the principle of democratic participation in the same way as *vis-à-vis* the photographs of Letizia baking with her children.
- undermines the principle of legitimated democratic self-governance in the same way as *vis-à-vis* the photographs of Letizia baking with her children.

And, upholding FOE[79] generates the following side-effects for privacy:

- undermines individual autonomy and freedom for the same reasons as *vis-à-vis* the photographs of Letizia baking with the children.
- undermines individual dignity and personhood by allowing the children's images and at-home activities to be used as a means to a political end *and* to Victor's personal ends. without the children themselves having the capacity to object to that. Given that publicly revealing the children's image does not contribute to the

[77] And permitting publication of these photographs.
[78] And forbidding publication of these photographs.
[79] And permitting publication of these photographs.

corroboration of the information about Letizia's non-vegan lifestyle, the children and their private lives would thus be *thoroughly* commodified and instrumentalised for a political end, however important and worthy that end is. And given that Victor may paint a picture of his character (including as a parent) without using his children's photographs, the children are likewise thoroughly commodified for his personal ends. This undermining of dignity and personhood is intensified by the use of photographs, which are particularly intrusive.

- undermines individual psychological well-being and security for the same reasons as *vis-à-vis* the photographs of Letizia baking with the children.
- undermines the need to protect family life and individuals' cultivation of relationships for the same reasons as *vis-à-vis* the photographs of Letizia baking with the children.
- undermines the social value of individuals' participation in society for the same reasons as *vis-à-vis* the photographs of Letizia baking with the children.

Step 11: The greatest possible furtherance of rights

Evaluating the extent to which the normative value of upholding each right overall furthers the normative underpinnings of the rights, and then comparing this overall furtherance of normative underpinnings as between the two rights, this Court finds that upholding privacy and forbidding publication of these photographs furthers the normative underpinnings of privacy more than upholding FOE and permitting publication of those photographs would further the normative underpinnings of FOE. This conclusion can be explained with the following reasons:

- As discussed *vis-à-vis* the photographs of Letizia baking with the children, suppressing these photographs would further privacy's normative underpinnings more directly and in a more fundamental way than publishing these photographs would further FOE's normative underpinnings. This is because children can be seen as paradigmatic privacy rightholders, which makes protection of their privacy interests particularly pressing. That does not mean they will always rank above FOE interests. Here, however, as *vis-à-vis* the photographs of Letizia wearing the bikini, the specific FOE interests of speaker and recipients can be furthered in ways other than through publication of photographs intruding upon children's privacy. Victor can include in his story a statement describing how the family looked after Piccolo and effectively had a pet for that time, contrary to Letizia's ideological platform. He can also describe the ways in which he has been an engaging and attentive father, through anecdotes rather than photographs. There is less rights-value in publishing these photographs for the sake of furthering FOE than there is in suppressing them for the sake of furthering privacy.
- The courts have acknowledged the special need to protect children's privacy (though cautioning children are not a 'trump-card'), especially where photographs are involved (given how intrusive photographs are), even where the image is of children in public or engaging in anodyne or entirely normal activities;[80] the impetus is not to prevent the revelation of some activity but to prevent public intrusion into the normative family 'bubble' in which children and the family unit are intended to be most secure and at ease. There is, therefore, particular value in upholding privacy here, more so than there is in upholding FOE.

[80] *Murray v Big Pictures Ltd* [2008] 3 WLR 1360; *Weller v Associated Newspapers Ltd* [2016] 1 WLR 1541.

Step 12: The least possible frustration of rights

Evaluating the extent to which the side-effects of upholding each right overall frustrate the normative underpinnings of the rights, and then comparing this overall frustration of normative underpinnings as between the two rights, this Court finds that suspending FOE and forbidding publication of these photographs frustrates the normative underpinnings of FOE less than suspending privacy and permitting publication of those photographs would frustrate the normative underpinnings of privacy. This conclusion can be explained with the following reasons:

- As discussed *vis-à-vis* the photographs of Letizia baking with the children, there are significant ways in which the publication of even the most anodyne photographs frustrate privacy. As recalled and explained in step 11 here, children are privacy rightholders *par excellence* because of their vulnerability, and that, combined with the particularly intrusive nature of photographs, raises the stakes for privacy overall. Permitting publication of photographs of the children frustrates the privacy right in important ways: it affects the lives of the children, and raises doubts as to the ability and willingness of the courts to vindicate the core reasons why privacy is protected by law in the first place.
- In respect of FOE, however, (as discussed *vis-à-vis* the photographs of Letizia wearing the bikini) the degree to which the suppression of photographs imputing that Letizia misled the electorate frustrates FOE is not necessarily that great: suppression does not prevent that message from being communicated in other ways.
- There is not the same indication of nefariousness (through blackmail, revenge porn and kiss-and-tell) here as *vis-à-vis* the photographs of Letizia wearing the bikini. Yet Victor's FOE entitlement to autonomy and self-expression must be tempered by the pressing need to protect children, who, having no capacity to protect their own privacy, are at particular risk of being instrumentalised for another's ends, or simply being exposed in ways that can have lasting effects on their lives, their relationships, and their participation in society. Publication of these photographs, like those of Letizia baking with the children, automatically creates a permanent digital dossier for the children. Furthermore, though it is not a *newspaper* that seeks to commodify the children for its own profit, or for the truth-uncovering and democratic interests of its readership and the electorate, the children are still being commodified for *another's ends*: the electorate is interested in corroborating photographs of Letizia's non-vegan lifestyle, and the public record ought to be corrected; also, Victor wishes to express remorse for his part in the wrongdoing and to show he is an attentive father. These ends are not linked to the children's best interests or the children themselves, so the question is whether sacrificing the children's at-home lives, their images and their privacy for the sake of these ends is justified. The Court finds it is not justified, because of the particular vulnerability of children, and the reality that other ways of communication can be used to achieve those ends as effectively.
- It is implicit in this proposition that Victor should not be permitted to exercise his autonomy as an individual *and* as a parent in a way that impinges upon his children's privacy. Indeed, the courts have reasoned in ways that protect children's privacy *against* the wishes and control of their parents: the courts upheld privacy against the wishes of a parent in part in order to shield his or her own children from the negative side-effects of upholding FOE.[81] Frustration of a parent's FOE right by suppression of private information

[81] *Donald v Ntuli* [2011] 1 WLR 294; *HRH Prince of Luxembourg v HRH Princess of Luxembourg* [2018] 2 FLR 480.

can indeed be less intense than would be frustration of their child's privacy right by publication of that information, even where that information is the *parent*'s private information (and not exclusively the child's, or not exclusively about the child), and even where the parent has a legitimate (not malicious) reason to publish the information.

- Therefore, although there is no malice here, and although the anodyne photographs here are not as directly and intensively harmful to the children as the explicit photographs of Letizia wearing the bikini are to her, this Court is justified in using its coercive censorial power to stop publication of these photographs and frustrate FOE in that way, because the degree to which FOE is thereby frustrated is still less than the degree to which privacy would be frustrated were the photographs to be published.

Step 13: Optimality

The same legal principles apply as *vis-à-vis* the information about Letizia's non-vegan diet. Here, the Court chooses to uphold privacy and suspend FOE, for the following reasons:

- In these circumstances, the furtherance of privacy is greater than the frustration of FOE when publication is forbidden, and the frustration of privacy would be greater than the furtherance of FOE were publication to be permitted; in addition, the furtherance of privacy frustrates FOE through forbidding publication *to a lesser extent* than the furtherance of FOE would frustrate privacy through permitting publication.
- The rationale for the Court's choice is an understanding of both privacy and FOE wherein a parent ought not to be permitted to instrumentalise his own children's private and family lives to realise his personal interests in autonomy and self-realisation, even if his underlying motivation is to vindicate publicly his reputation (as a good parent and remorseful contributor to a lie). That does not mean the interests in autonomy and self-realisation are unimportant, but that, on these particular facts, they would be frustrated to a lesser extent given the particular importance of protecting children's privacy (as inherently vulnerable rightholders), combined with the other options open to the parent to vindicate his reputation (and set the public record straight about a politician).
- Drawing upon the third element of the proportionality analysis stated in step 8, the relative extent to which the importance of upholding each right justifies the detriment to the other right is such that the importance of upholding privacy justifies the detriment to FOE *to a greater extent* than upholding FOE would justify the detriment to privacy; that is why forbidding publication of these photographs is proportionate, while permitting this publication would be disproportionate.

The same legal principles concerning 'public interest' apply as *vis-à-vis* the information about Letizia's non-vegan diet. Here, permitting publication of these photographs[82] is not in the 'public interest'.

Conclusion

For these reasons, these photographs should not be published. Each child's privacy right should be upheld and Victor's FOE right suspended on the justification that, in these circumstances, the right to privacy is furthered to a greater extent by being upheld, than the right to FOE is frustrated by being suspended. There is stronger rights-

[82] Suspending privacy and upholding FOE.

based justification for upholding the privacy right and suspending the FOE right, than there is for upholding the FOE right and suspending the privacy right, because the former outcome is the more optimal, less grave, and more proportionate. It is, therefore, not in the public interest to disclose the photographs of the family with Piccolo. A permanent injunction against the publication of these photographs is granted.

(d) Discussion

It is clear from this application of tailored proportionality-optimality to Letizia's case that the courts are asked to undertake a more finely-grained and rigorous way of reasoning about each set of information for which they find a REP. That reflects the objective of this method: to improve judicial reasoning by making it more transparent, consistent and principled. The objective is not to *change* the law of misuse of private information, the meaning of the rights to privacy and FOE, or the parameters of the tort. Tailored proportionality-optimality allows the courts to discharge all of their legislative, common law and Strasbourg-based responsibilities in adjudicating the tort's second stage: the 'public interest' is given a rights-based meaning in this method, and section 12 of the HRA is adhered to when the courts conclude, through rights-based reasoning, whether or not it would be in the 'public interest' to publish the information in question; the "ultimate balancing test" requirements of intense focus upon rights and two-way proportionality are reflected in effectively all of the steps of tailored proportionality-optimality; and Strasbourg's *Axel Springer* requirement for appropriate 'balancing' criteria to be implemented is adhered to when the court establishes and then evaluates the rational connections between the different factual consequences and the rights' normative underpinnings.

Asking English courts to apply tailored proportionality-optimality therefore does not ask them to deviate from legislative mandate or common law precedent. That would invalidate any attempt to improve their reasoning in this tort. Instead, as apparent from its application to Letizia's case, tailored proportionality-optimality asks English judges to reason with more detail overall, more close attention to the alterative factual consequences and how they affect the rights in terms of their relevant (rationally connected) normative underpinnings, and more rigour in comparing these effects, and thereby identifying the best (most strongly justifiable) outcome. The application of this method to Letizia's case also reveals that this method of reasoning can, where appropriate, incorporate underlying reasoning and principles in established case law under this tort. Nothing in the tailored proportionality-optimality method asks the courts to overrule concrete propositions of law about how either of the rights might be frustrated or furthered, which might be gleaned from their past judgments in this tort. Such propositions might, or might not, be applicable at any of the steps in this method.

Furthermore, given that reasonable judges presiding over case like Letizia's may disagree about the substantive outcome, the above substantive conclusions on granting an injunction or dismissing an injunction application are *not* the only and necessary outcomes of applying tailored proportionality-optimality to Letizia's case. It may be that equally precise, normatively-engaged, rights-focused reasoning, in accordance with the required steps, can lead to the opposite conclusion for, say, the photographs of the family with Piccolo: it may be possible to reason in a rational way that, in such circumstances, the FOE right is furthered to a greater degree by being upheld than the privacy right is frustrated by being suspended. A reasonable interpretation of the factual consequences, rationally combined with a reasonable construction of the rights' normative underpinnings, might yield that conclusion. This possibility of substantive disagreement does not undermine tailored proportionality-optimality. That method is

intended to improve judicial reasoning by making it more consistent, more transparent and more principled than it currently is. It is not intended to ask the courts to arrive at particular, predetermined substantive conclusions.

Tailored proportionality-optimality *does* ask the courts to eschew their current preoccupation with 'public interest', because that is the *wrong method* of reasoning in rights-adjudication. The application of this method to Letizia's case demonstrates that it is possible – and *preferable* – to decide cases in this tort without employing 'public interest' as the starting point, guiding rationale, or clinching mechanism. Tailored proportionality-optimality forces the courts instead to focus upon the rights, their normative underpinnings, and how the facts before them affect those rights. This method of reasoning places 'public interest' at the very end of the justificatory process, on the understanding that *any and all* decisions that are justified on rights-focused grounds are in the 'public interest', *precisely because* they are justified in terms of the rights involved. Tailored proportionality-optimality therefore rests upon the fundamental notion that, in rights-adjudication, the common law should prioritise *rights* and subordinate all other external concepts, including 'public interest', to the rights in question. Because this is the leitmotif of tailored proportionality-optimality, applying that method to the tort's second stage ensures that neither privacy nor FOE are mere commodities in a utilitarian economy of rights, and that, when either of these rights is suspended, it is only ever suspended for unambiguously rights-focused reasons. In respect of all four sets of information in Letizia's case, the decision to suspend the right (and allow or forbid publication) was justified clearly by reference to the greatest furtherance and least frustration of rights, and to the proportionality of that suspension; only *then* could that decision (to allow or forbid publication) be expressed in terms of what is or is not in the 'public interest'.

(e) Conclusion

The simulated adjudication of Letizia's case in this chapter illustrates how tailored proportionality-optimality achieves the fundamental aim of improving judicial reasoning in the English law of misuse of private information. It also illustrates how, by improving the courts' approach to the tort's second stage, this method can ensure the common law is a credible and reliable mechanism through which to protect and to give full expression to Convention rights *as rights*, even in cases of conflict, when these rights must be suspended from time to time.

CHAPTER 7. CONCLUSION

(a) Disclosure of private information: two rights and a tort, but very little principle

The disclosure of private information will continue to be litigated in the English courts. The evolving common law tort of misuse of private information is not, however, crystallising into a clear, principled, rights-focused cause of action. Jurisprudence on the issue of whether the court should stand behind a claimant in suppressing his private information, or behind a defendant in publishing her story, is often characterised by impressionistic and opaque, rather than consistently focused and normatively anchored, reasoning. This is despite the recognition, by both Parliament and the courts, that the matter of disclosing private information engages the two Convention rights to privacy and FOE. Even though the courts employ this tort as a way of taking account of these rights when parties litigate the disclosure of private information, their reasoning in the tort's second stage about whether disclosure should be permitted is often not rights-focused and principled.

That deficiency is the motivation behind this dissertation. Given that both privacy and FOE have the force of rights in English law, its purpose is to elucidate how and why courts may be falling short in this instance of rights-adjudication, and to provide a new method of reasoning so as better to equip the law to deal with informational privacy. This has practical implications for individuals relying upon the law's recognition of privacy and FOE, and adjusting their behaviour accordingly. It also has moral implications for the law's capacity to 'work' in the realm of rights, to give effect to rights or otherwise clearly justify their suspension, and to be and appear to be applying rights fairly in all cases where they are invoked.

This inquiry began with an Hohfeldian analysis of the tort's second stage, finding a genuine rights-conflict entailing the suspension of one Convention right. It then examined the normative dimension of the privacy and FOE rights, before critiquing different approaches to resolving rights-conflicts, through the lens of that normative dimension and the logical implications of the conflict. A critical doctrinal inquiry, informed by this logical and theoretical exploration, then analysed the courts' current approach for how well or poorly it reflected the logic of the tort's second stage, as well as the rights' normative complexity and the strongest approaches to resolving the conflict between them. The root cause of current doctrinal deficiencies was identified as being the focus upon 'public interest'. This leads to the problematic type of inconsistency, lack of transparency and lack of principle that can be observed in current judicial reasoning, and also creates a utilitarian economy of rights in the tort's second stage, where rights are routinely instrumentalised, their protective capacity effectively neutralised, wholly for the sake of an undetermined 'public interest'. In order to improve the law of misuse of private information, and to enable the courts to engage better with rights adjudication in this context, this dissertation advocates a new method for reasoning in the tort's second stage: tailored proportionality-optimality. Applying this method to a hypothetical situation in the law of misuse of private information demonstrates its efficacy and value in building principled and transparent jurisprudence upon a firm foundation of juridified rights.

(b) 'Public interest': avoiding the rights-conflict and delegitimising the resolution

The 'public interest' is the leitmotif of the courts' adjudication of the tort's second stage. That is the root cause of the lack of principle in current doctrine. 'Public interest' reasoning allows courts to consider an infinite number of

benefits or disadvantages of either disclosure or non-disclosure of private information, centring both the inquiry and the justification upon the undefined idea of 'public interest'. This distracts the courts from confronting and resolving the genuine rights-conflict between privacy and FOE, in a way that justifies the inevitable legal demand for one party to lose their rightholding entitlement, in terms of the rights themselves, their normative importance, and the effect that such a suspension of one right has upon the normative force of the rights concerned.

Confronting rights-conflicts and their necessary consequences is a difficult and serious task. What if the court suspends the 'wrong' right, or is unable adequately to justify suspending that right? Either way, the court is interpreting and applying the law so as to permit one party to act inconsistently with the right of the other party. Getting that decision wrong, or providing inadequate justification for it, would subject one party to a court-ordered breach of their right. Conflicts between *qualified* Convention rights, including privacy and FOE, do not result in a breach of a right, *as long as* the resolution of that conflict is *justified in terms of the rights' themselves including their qualifications*. Even though loss is inevitable in such conflicts (one party must suffer the suspension of their Convention right), the normative nature of and qualifications on these rights means that loss is not an outright breach of right (necessitating a remedy), but, rather, the suspension of an already established rightholding entitlement. That suspension is a legitimate result of the tort's adjudication, and must be accepted as such, *only to the extent that* the court's justification is in terms of the rights themselves. Courts must engage with the rights, and *demonstrate* that they are doing so, in order to legitimise their decisions to impose the loss of rightholding entitlement upon one of the parties. Where that loss is not contained within the rights' normative spheres, it becomes a breach of a right, and undermines that right's moral force and practical utility.

The logic of rights-conflicts and these serious implications are undeniable in the tort's second stage. Hohfeld's correlativity axiom demonstrates there is a genuine conflict between privacy and FOE, necessitating one be set aside in favour of the other: it is logically impossible that the court discharge its obligations to uphold both rights simultaneously on the facts before it. The qualified nature of these rights, however, means that resolution of this conflict can be justified in accordance with the definition of the rights themselves, so that the conflict inherent in the tort does not force the court to breach one of the rights. The claimant and defendant 'enter' the tort's second stage having each established their entitlement to a Convention right, which binds the court to uphold that right. The court is faced with a conflict between *pro tanto* rights, or rights that must be upheld *to the extent that* their suspension cannot be justified in accordance with their qualification. The court will not breach a Convention right by suspending it in this context, as long as it can find a justification for that suspension within the right's own normative codex.

The rights-conflict in the tort's second stage therefore simultaneously obliges courts to *justify* with clarity and principle their decisions to favour one right and not the other, and to do so *in terms of the rights themselves* – lest their decisions lack the justification necessary to legitimise the loss that one party must inevitably suffer, and to ensure they act consistently with the Convention rights, as they are obliged to do under the HRA.

The courts' focus upon 'public interest' allows them to avoid facing the conflict and the need to provide a rights-focused justification for its resolution. Current doctrine under the tort's second stage exposes a lack of meaningful recognition of and engagement with the privacy-FOE conflict. Though some judges might use the terminology of conflict, there is no clear, consistent judicial acknowledgement of the reality and implications of this conflict. Judicial

reasoning about the rights in the second stage is dominated by 'public interest', side-lining the rights themselves and the conflict between them. The enduring reference to 'balancing' rights, as well as a preference for the language of overall 'public interest', accommodation and harmony, over the language of rights-conflict resolution and the need for proper justification, demonstrates that current doctrine allows and *welcomes* avoidance of the rights-conflict.

The mentality of avoidance, minimisation and denial of conflicts is present amongst several moral philosophers, some of whom view the collision of irreconcilable interests in a pluralistic society through a consequentialist lens that does not allow for two rights to come into conflict with each other; instead, they consider only one of those irreconcilable imperatives to be a right, and the other to be no right at all. Given that the tort of misuse of private information engages two already juridified and *pro tanto* binding Convention rights, that philosophical perspective cannot apply to the tort. Any court purporting to adjudicate the tort in such terms of extinguishing one right would be acting inconsistently with the Convention rights, and breaching the HRA. Current doctrine does not suggest courts are actively pursuing that line of reasoning. However, the openness of current jurisprudence to the avoidance and minimisation of the rights-conflict is just as dangerous: such avoidance at the very least risks delegitimising the courts' decisions on whether to permit disclosure of the private information.

Difficult as resolving rights-conflicts is, the courts are obliged to do so, and must find ways of reaching well-reasoned and openly justified resolutions. A two-way proportionality methodology, focusing upon the side-effects of alternative factual outcomes on each of the rights themselves, is one of the strongest approaches to resolving a conflict between two normatively complex, qualified and equally valued rights, as are privacy and FOE. It does not allow courts to presume one right is normatively superior, and forces them to evaluate how each right and rightholder is affected by each alternative outcome, according to the right's normative purpose. Proportionality requires disciplined, structured and detailed reasoning in each case, supplemented by a moral-evaluative ingredient that derives from the rights' normative underpinnings. The courts continue to demand that they undertake 'proportionality' in the tort's second stage, but their preoccupation with 'public interest' alleviates the burden of discipline, structure and moral engagement with the rights. That perpetuates normatively unanchored and impressionistic reasoning of rights-'balancing', where the rhetorical effect of this metaphor for justice supersedes a clear, principled justification for the necessary decision that one party must lose their entitlement to a right. By encouraging courts to avoid the rights-conflict and the rigour of proportionality, 'public interest' reasoning undermines the legitimacy of the resolution of misuse of private information cases.

(c) 'Public interest': a utilitarian economy of rights

The problematic implications of 'public interest' reasoning reach further than perpetuating unprincipled reasoning and potentially delegitimising decisions in the tort. 'Public interest' reasoning is also why the law of misuse of private information is, in reality, *not* rights-focused. Courts make rights-related statements, alluding to the rights' importance, their qualified nature, and the need to 'do' proportionality, but their resort to 'public interest' takes their adjudication of the tort wholly out of the sphere of rights. 'Public interest' reasoning is thoroughly consequentialist, because it relegates the rights' normative importance to a fluid conception of the 'best' outcome for the 'public'. While the inherently indeterminate nature of this concept can lead to inconsistent, opaque and unprincipled reasoning, and allows courts to avoid the discipline of rights-conflicts and proportionality, the consequentialist

demand it entails also leads to an indoctrinated commodification of the rights in question. This predicament, identified in theoretical criticisms of the 'public interest' approach, is perceptible in current doctrine under the tort's second stage: focusing upon 'public interest', courts do not explicitly evaluate the rights themselves, and the moral reasons why those rights should be upheld on the particular facts. Even when they draw upon propositions of law set out in previous judgments, and reason by analogy with some (but not other) materially similar cases, so that patterns of reasoning may subsequently be gleaned from pockets of the case law, they do not abandon their explicit reliance upon 'public interest' reasoning, and they do not anchor their reasoning squarely and explicitly within the normative spheres of the two rights at the centre of this cause of action. 'Public interest' reasoning has created a utilitarian economy of rights, in which either privacy or FOE are traded away in favour of the court's vision of the 'public interest'.

In this way, judicial decisions to suspend one right and deny one party his rightholding entitlement sit within a vague sphere of 'public interest', and outside the normative concern of the rights themselves. Neither privacy nor FOE appear to be as important as 'public interest'. That being the decisive factor, the rights become the currency used to acquire the outcome thought best to depict this 'public interest'. This focus upon 'public interest' is a doctrinal apologia for a ruling consequentialist moral order in which the law pays lip-service to 'rights' before sacrificing these rights for some external public good. It is a legitimising tool for an approach to the law that purports to recognise and uphold entitlements called 'rights', but that in reality solves inevitable problems involving irreconcilability of different interests by *eliminating* rights. Neither is this consistent with the ethos of juridified Convention rights and the normative force of privacy and FOE, nor is it faithful to the doctrinal demands of the "ultimate balancing test" (the need for justification based upon two-way proportionality), set by the House of Lords,[1] and reconfirmed in effectively every case in the tort.

(d) A new method of reasoning: tailored proportionality-optimality

A new method to improve judicial reasoning in the tort's second stage is **tailored proportionality-optimality**. Composed of several detailed steps courts must take *vis-à-vis* each instance of disclosure of private information, this new method combines the strongest rights-conflict resolution theories with the specific normative complexities and underpinnings of privacy and FOE, in a way that accounts for the logical demands and established doctrinal constraints of the second stage. It leaves no room for 'public interest' to dictate courts' reasoning or final decision. This new method thus focuses courts' attention upon the rights themselves, and, in a transparent and principled manner, reinstates at the centre of informational privacy jurisprudence the legally recognised value of the two rights, as ends in themselves, rather than as two tradeable means of reaching some external 'public interest'.

Given the logical demands of rights-conflicts and the demonstrable privacy-FOE conflict in the second stage, tailored proportionality-optimality obliges courts to start from an appreciation of the nature and entailment of that conflict, explicitly recognising that one already legally cognisable right must be suspended. The court explicitly acknowledges its task is to provide a rights-focused, normatively anchored justification for this suspension of rightholding entitlement, because it resembles a serious loss to one of the rightholders, and it is the only way to legitimise this loss and to ensure it is not an outright breach of a Convention right.

[1] *Re S (A Child)* [2005] 1 AC 593, [17].

Furthermore, given the constraints of legislation and judicial precedent, this new method incorporates two-way proportionality, namely, a consideration of whether the limiting effect of either outcome[2] is proportionate or disproportionate for *each* right. The modest version of proportionality, focusing upon minimising negative side-effects of factual outcomes upon the rights' normative value, rather than upon maximising the rights despite inevitable limitations, is the best version of proportionality for the tort's second stage. This is intimately connected with the logic of that stage: the intractable conflict between privacy and FOE, and the choice courts must make between these rights. Rights-conflicts allow for no maximisation; rather, they entail an unavoidable loss: the vindication of one right *is* the suspension of the other. Given that loss of rightholding entitlement is inevitable either way, courts cannot hope to maximise rights, but, rather, must focus upon choosing the least damaging set of side-effects that are generated by the possible outcomes. Does permitting disclosure of the information or forbidding disclosure of the information generate the least damaging set of side-effects? The nature and intensity of these side-effects is measured in accordance with the principle of proportionality, namely, by asking, in respect of each of the alternative outcomes, whether the side-effects of upholding one right are proportionate to the normative aims of upholding that right.

The second element of tailored proportionality-optimality is optimality. This is another strong rights-conflict resolution theory, and another theory that directly confronts rights-conflicts and their logical entailments. Modest two-way proportionality is combined with optimality in order to concentrate courts' attention upon the two rights themselves, and their normative underpinnings. Unlike other rights-conflict resolution theories, optimality takes a deontological approach to rights, and resolves conflicts by asking courts to choose between rights based upon a consideration of their normative underpinnings. There is no room to consider any concepts external to the rights themselves, such as 'public interest'. Under optimality, although the conflict demands that one right be suspended,[3] the justification for that suspension remains within the normative realm of the rights themselves. Optimality's rationale is that necessary losses must be decided and justified in terms only of the quality that is lost: the least grave outcome is the most optimal outcome, and that is decided on the basis of the respective moral stringency of each right's correlative duty. The duty which is least stringent in the circumstances is the duty that must be suspended, and that lesser degree of stringency translates into the lesser out of two moral wrongs.

This question of degree of stringency of obligation inherent in each right, just like the question of what is proportionate,[4] cannot be of any use to courts resolving rights-conflicts if it is left in the abstract. That is why the new method is *tailored* proportionality-optimality, where the methodological structures of these two approaches are 'filled' with the substantive, normative import of the rights in question: privacy and FOE. Courts must determine the stringency of obligation inherent in both privacy and FOE, and the nature and degree of intensity of the side-effects that upholding each right has on the other. That demands two things: a serious and comprehensive appreciation of the rights' normative underpinnings, and the identification of rational connections between these normative underpinnings and the factual consequences of the particular case. Tailoring in this way operationalises these structures of reasoning, activating them for the tort's purposes. One of the problems in the courts' current failure to apply proportionality in any meaningful way is that it remains an abstract structure of reasoning, restated

[2] Disclosure or non-disclosure of the private information.
[3] It must result in loss, or a moral wrong.
[4] The question of which side-effects are the least damaging to the rights.

in every case, but left bereft of any specific, relevant moral substance. This is why reasoning in the tort's second stage, though continuously labelled as 'balancing' and 'proportionality', remains unprincipled and remote from the rights' normative underpinnings. Such judicial practice also gives credence to those theorists who criticise proportionality on the grounds that it stimulates impressionistic and unprincipled reasoning.

That is why 'tailoring' is crucial in the new method of reasoning. This sort of tailoring, which demands rational links be drawn between normative underpinnings and factual consequences, also answers the need to resolve the privacy-FOE conflict by reference to how the *facts* impact the rights. Privacy and FOE are qualified, rather than absolute, rights. In the language of Kramerian optimality, they are weakly absolute. In the language of proportionality, they may be suspended as long as that does not disproportionately limit those rights' normative underpinnings. In essence, the legitimation of suspending one right lies in the fusion of the factual and the normative. Just as Kramer's weakly absolute rights can be overtopped past a point of calamity, so too can qualified Convention rights be suspended in circumstances permitted by their qualifications. That does not make optimality any less deontological, nor does it permit utilitarian purposes, external to the rights' normative force, to enter the reasoning in the tort's second stage. The factual element of the justificatory inquiry necessitates that the normative dimension be *related* to the particular problem at hand. Optimality and proportionality both demand that the methodological structure be supplemented with a normative substance, just as they both demand that the normative substance be *related to* the facts. Drawing rational connections between normative underpinnings and factual outcomes is necessary for courts to evaluate the degree to which each right is furthered or frustrated on the alternative options open to them: permitting or forbidding publication *on the facts of that case*.

Tailoring proportionality and optimality to the two rights in question is also crucial because of the normative complexity and idiosyncracies of privacy and FOE. Both of these rights rest upon several, diverse normative underpinnings. For each right, cumulatively, these underpinnings justify the juridification of the right, the moral elevation of the right to the realm of the law, and the protection afforded to the right in the form of coercive demands (a judicial decision to permit or forbid disclosure of the information). However, none of these normative underpinnings can on their own perfectly and comprehensively justify in any particular, or in all, circumstances why either of the rights should be upheld. Each of the underpinnings is problematic and can be criticised from different perspectives, even though each is one ingredient of a powerful moral realisation that the respective rights to privacy and FOE should be protected by law, and that individuals wishing to assert privacy or FOE should be protected by law in doing so. There is sufficient moral justification for bringing these rights into legal cognisance, but further evaluation is required to decide whether these rights should be upheld by law on particular facts. This is the normative explanation for why these two rights are best conceived of as *qualified* legal rights. This also explains why the two qualified Convention rights to privacy and FOE come into *genuine* conflict in the tort's second stage, and why one is *suspended*, as opposed to extinguished. The normative complexity of each right, the imperfection of each rights' various normative underpinnings, means that each right, though sufficiently important to be juridified, is nevertheless qualified according to the extent to which it should be upheld in any given factual scenario in which it arises. The privacy right arises *pro tanto* whenever an individual has a REP; the FOE right arises *pro tanto* whenever an individual is about to disclose (or has disclosed) information. Yet both of the these rights may be suspended if their normative underpinnings are insufficiently engaged on the facts. When the rights conflict *with each other*, their normative complexities must be central to the way in which courts decide which right to uphold at the expense of the other.

By focusing judicial attention on the relative extent to which each alternative outcome furthers and frustrates the rights to privacy and FOE, tailored proportionality-optimality incorporates the two rights' normative complexities, the logic and consequences of the conflict between them, and the absolute necessity to provide an exclusively rights-focused, methodical and principled justification in every case in misuse of private information.

(e) Improving the evolving common law onto the right path

It is hoped that the English courts will, in continuing to develop the common law of misuse of private information, and to adjudicate difficult cases where privacy conflicts with FOE, at least take note of these findings, and ideally adopt a new method of reasoning in the nature of tailored proportionality-optimality. In this way, they would improve informational privacy law in England, re-inspiring confidence in the law's capacity to decide when private information may be disclosed, with transparency, principle and an unambiguous rights-focus. That, in turn, would re-inspire confidence in the law's recognition and treatment of two rights that, though they do come into conflict with each other, remain, in equal measure, elemental to individual liberty and democratic society.

APPENDIX

Table of rights-conflict resolution theories

Rights-conflict resolution theory	Logical applicability of theory to tort's second stage	Characterisation of theory	Originating theoretical approach	Theory justifies resolving the conflict in favour of:	Appraisal of theory
Deontological precedence	Logically inapplicable	Conflict-denying	Using a general structure of morality to explain and deal with conflicts and potential conflicts	The right, which rests upon the strongest deontological justifications	Should be disregarded as it negates genuine conflicts
Threshold consequentialism	Logically inapplicable	Conflict-denying	Using a general structure of morality to explain and deal with conflicts and potential conflicts	The right, which, if upheld, would avoid the calamity	Should be disregarded as it negates genuine conflicts
Strong absolutism	Logically applicable	Rights-ranking	Using a general structure of morality to explain and deal with conflicts and potential conflicts	The right, which must never be suspended in any circumstances	Not useful where the normative underpinnings of the conflicting rights are complex, unsettled and do not remain constant regardless of the circumstances in which the rights arise
Absolute precedence rules	Logically applicable	Rights-ranking	Employing rules determining precedence between norms	The right, which has precedence according to rules taking into account only the characteristics of the rights in the abstract and not the particular circumstances of the conflict	Not useful where the normative underpinnings of the conflicting rights are complex, unsettled and do not remain constant regardless of the circumstances in which the rights arise, or where the rights cannot be distinguished according to the characteristics that are meant to determine precedence
Innate value	Logically applicable	Rights-ranking	Focusing upon a right's innate value	The right with the greater innate value	Not useful where the normative underpinnings of the conflicting rights are complex, unsettled and do not remain constant regardless of the circumstances in which the rights arise

Optimality	Logically applicable	Context-based	Using a general structure of morality to explain and deal with conflicts and potential conflicts	The right, whose suspension would be a graver wrong than would the other right's suspension	Useful insofar as the specific normative underpinnings of the conflicting rights are incorporated into and supplement the resolution process
Proportionality	Logically applicable	Context-based	Focusing upon proportionality and commensurateness objectives	The right, which, when upheld, does not disproportionately undermine the other right's normative underpinnings	Useful insofar as it is supplemented by substantive moral-evaluative reasoning based upon the two rights' normative underpinnings and providing a means of comparison of the relevant values other than pure commensuration
Trade-off	Logically applicable	Context-based	Using trade-off reasoning and cost-benefit analysis	The right, which, when upheld, ensures the net-benefit	Not useful as it mandates quantitative comparison of incommensurable values, and should not be preferred as it tends to commodify rights
Public interest	Logically applicable	Context-based	Measuring values according to 'public interest'	The right, which it is more in the 'public interest' to uphold	Not useful as it provides no definition of 'public interest', and should not be preferred as it tends to weaken the protective capacity of rights, instrumentalise the holder of the suspended right, and put at risk minority or fringe interests

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