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Protecting Private Information of Public Interest: Campbell's Great Promise, Unfulfilled

Paul Wragg*

1. INTRODUCTION

*Campbell v MGN Ltd*¹ remains a momentous decision. It shows the sort of judicial activism that Lord Irvine claimed would define the Human Rights Act era: enabling British judges to pioneer effective rights protection and influence European human rights law.² In *Campbell*, the House of Lords elevated the status of privacy to the same standing as freedom of expression such that either right could be protected where of greater comparative importance. In this way, the Art 10 ECHR right of the press to publish public interest expression was preserved but qualified. Thus *Campbell* created not just a quasi-privacy right but a strong one at that: one capable of protecting privacy despite the presence of a competing public interest claim. This outcome is all the more remarkable given the reported effect of privacy-invasion on Ms *Campbell*. The House of Lords placed greater reliance on her sense of outrage at the invasion than its actual effect on her treatment for narcotics dependency. The Court was satisfied that her recovery could have been compromised.³ This is not to belittle her complaint. But it does suggest the fact of privacy intrusion was more important than the actual effect. This further evidences the great promise inherent in the *Campbell* decision.

Yet *Campbell* poses a question that it does not answer. If cases are to be determined by 'balancing' the respective claims then what is the unit of measurement by which the extent of public interest in expression is assessed? After all, determining the level of public interest at stake is very different to the more usual proposition of classifying speech as being of public interest or not. This is not a task that judges are familiar with. Yet, it seems this issue has not been sufficiently recognised by the courts, and, as a result, the misuse of private information ("MOP") jurisprudence wants for a method of determining this weight. Although the need to balance claims is mentioned frequently enough, the mechanics of resolving disputes in practice do not fulfil the term: judges do not balance but, instead, apply the simple rule that public interest expression trumps privacy, and so claims fail where it is at stake. After showing this, in the next section, the paper explores how a greater sense of balancing may be achieved. It does so, first, by defending the reasons why balancing based upon the significance of expression cannot be achieved, at least not in the manner *Campbell* foreshadows. Inevitably, it would engender judicial paternalism and idiosyncrasy concerning the nature and value of public interest expression, as has happened. Instead, it will be argued

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¹ [2004] 2 AC 457

² Lord Irvine of Lairg, 'Constitutional reform and a Bill of Rights' (1997) EHRLR 483, 485

³ *Campbell*, n 1, [158], discussed below

that the spirit of Campbell is better realised by limiting protection according to the effect of the expression on the claimant. On doctrinal and theoretical grounds, this ought to be where speech is unjustifiably coercive. The final section, therefore, proposes a revised four-part test that would protect public interest expression but allow interference where privacy invasion had a devastating effect. This safeguard for privacy interests would be subject to the narrow caveat that behaviour particularly damaging to societal concerns warrants coercion.

2. THE BALANCING ACT AND ITS FAILINGS

The exceptional level of privacy protection envisaged by Campbell is meant to be realised through the proportionality exercise at stage two of the Campbell test (stage one being the threshold question of whether there is a reasonable expectation of privacy), which is often referred to as the ‘balancing act’. Here, the courts decide whether the privacy claim is stronger than the competing free speech claim. This process is best illuminated by the four propositions that, in the contemporaneous House of Lords decision in *Re S*,⁴ Lord Steyn derived from the Campbell decision:

‘First, neither article [8 or 10] 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.’

The need for an ‘intense focus’ on the actual rights at stake is often referred to by courts when determining MOPI claims. The analysis, though, has a fatal superficiality to it. Although judges may talk at length about the privacy interests and free speech interests, typically the observations are siloed. There is usually little or no real comparison of the two. Allied to this, when judges discuss the free speech claim, they do not measure its weight. Consequently, judges do not balance the competing claims, at least not in the way that Campbell foreshadows. They do not decide which is greater in a specific way but rather a generalised way, according to whether there is a public interest in the expression. Thus, they employ a binary approach to determining stage two of the Campbell test. They subdivide each claim into its elemental parts and then classify accordingly: either the privacy claim fails because there is a public interest in publication or it succeeds because there is no such public interest at stake. In other words, at stage two, the claim is disposed of by deciding whether there is a public interest in disclosing each of the component parts or not. This is not balancing in *Re S* terms, as in the process of deciding whether the extent of privacy-invasion merits the degree of public interest to be derived from publication. It is, instead, a process of applying a simple rule: that free speech trumps privacy where public interest expression is at stake. Since privacy, therefore, can only succeed where public interest expression is not at stake, freedom of expression occupies a privileged position, rendering the prospective equality of the two rights largely redundant.

⁴ [2005] 1 AC 593 [17]

This thesis can be seen at work in *Campbell* itself – that there was a public interest in the first two categories of information (relating to the fact of her drug addiction and treatment) but not in the final three (relating to details of her treatment at Narcotics Anonymous and photographs of her departing a meeting). It was largely on this binary issue that the House of Lords was divided: Lords Nicholls and Hoffmann felt that there was a public interest in allowing newspapers to publish details about her treatment, and Hoffmann also thought there was in the photograph (Lord Nicholls felt it failed at stage one), whilst Lord Hope, Lord Carswell and Baroness Hale disagreed. It can also be seen in many other cases,⁵ including, more recently, the Court of Appeal decision in *AAA v Associated Newspapers Ltd*,⁶ which concerned an article about the identity of AAA’s father. The claim, at first instance, had been sub-divided into two categories: photographs of AAA and disclosure of his father’s identity. The Court of Appeal agreed with the High Court: there was no public interest in the publication of the photograph of AAA, therefore that portion of the claim succeeded, but there was a public interest in knowing his father’s identity given he was a prominent public official, and therefore that part failed.

Yet neither case demonstrates the proportionality exercise at work. For example, in *Campbell*, why was there a public interest in knowing that Naomi Campbell took drugs and why did this outweigh the harm caused? Admittedly, counsel for Ms Campbell conceded this point early on in proceedings but what is interesting is the general consensus amongst their Lordships that counsel was right to do so. Baroness Hale put this most strongly where she said ‘the possession and use of illegal drugs is a criminal offence and a matter of serious public concern. The press must be free to expose the truth and put the record straight’.⁷ It is understandable, perhaps, that a judge would not want to condone drug use but the criminal law treats use differently to possession and supply, and possession is usually treated as less serious. To suggest that any drug use is a matter of serious public concern surely exaggerates the issue. Also, Hale’s analysis sits in sharp contrast to the approach that Eady J would later take in *Mosley* where he was unconvinced that the commission of any crime is always a matter of public interest meriting publication.⁸ Of course, with *Campbell*, there was the additional point of exposing her public lie: that she did not take drugs. Yet it is also not clear why this public interest outweighed the privacy invasion that this information constituted. Why did the public need to know this? Or rather, why was this more important than her entitlement to keep this aspect of her private life away from public scrutiny or the detrimental effect this public knowledge might have on her rehabilitation? As Fenwick and Phillipson have previously said, this concession comes ‘perilously close to destroying’ the notion of informational autonomy underpinning the privacy right.⁹ Likewise, in *AAA*, it is not clear why the identity of the child’s father was of such public interest that it would outweigh the child’s privacy claim. At first instance, the court put it in these terms: ‘[i]t is said that such information goes to the issue of recklessness on the part of the supposed father, relevant both

⁵ See discussion in Paul Wragg, ‘The Benefits of Privacy-Invasive Expression’ (2013) 64(2) Northern Ireland Legal Quarterly 187 and ‘The Legitimacy of Press Regulation’ (2015) Public Law 290, 299-304

⁶ [2013] EWCA Civ 554

⁷ *Campbell*, n 1, [151]

⁸ *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB), [117]

⁹ Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act*, (OUP, 2006), 804

to his private and professional character, in particular his fitness for public office. I find that [it does].’ What is the value of this information, though, to the electorate and why does it matter? If the courts are serious about the proportionality exercise then we should expect to see this value quantified more explicitly.

As a result, the process of balancing often seems quite superficial. For example, in *In Re Guardian News and Media Ltd*,¹⁰ the Supreme Court agreed that anonymity orders protecting five applicants suspected of terrorist activity disproportionately interfered with press freedom. Since the applicants were challenging the designation process (and the freezing orders that accompanied it) the Court declared that the public had a ‘legitimate interest in not being kept in the dark’ about these individuals and were entitled to receive information supplementing that already in the public domain so that they might know the ‘true position’ of the challenge to the freezing order system. In this way, the public might make ‘informed judgment[s]’ about the applicants and the current law.¹¹ The deleterious effect of identification, though, was dismissed in short order. Although the press might be ‘outrageously hostile’, the risk of abuse was not a ‘sufficient reason’ to deny publication.¹² Even from this brief excerpt, it can be seen the ‘intense focus’ on comparative rights in this case pitted a speculative public benefit (public discourse will be enriched, somehow) against a dismissive evaluation of the detriment (some abuse may follow but that is the price of freedom). Objectively, the marginal benefit to public discourse seems disproportionate when set against the immediate harmful consequences of being labelled a suspected terrorist.

The issue in these cases, though, is not simply that the courts made judgments that others might not have made. It is much more fundamental than that. Neither the Campbell test nor *Re S* elucidation is expansive enough. It is all or nothing. Neither contains the analytical tools that would enable courts to compare the benefits and harms of the rights at stake. As Barak has argued, the proportionality test requires an evaluation not of the societal importance of one right compared to another but the marginal social importance of the rights at stake.¹³ In other words, the courts should evaluate the specific consequences caused by the actual interference with either right. Yet the Campbell test and *Re S* elucidation do not provide the means to do so. Criteria like ‘proportionality’, ‘comparative importance’ and ‘justified interference’ are too deeply value-laden to operate as functional guidance of themselves. As the ECtHR has made plain, it is for domestic courts to ‘interpret’ these criteria in light of local conditions.¹⁴ Further explication is required. Since this has not happened, judges are left to shoehorn claims uncomfortably into two narrow questions that leave other questions unanswered and largely unanswerable. Often the finding of a public interest at stake is understandable, but the idea that a privacy claim should be defeated as a consequence does not ring true. Likewise, the finding that there is no public interest at stake (because the court has concluded the expression is unimportant or simply prurient) can equally seem idiosyncratic and unprincipled. This can cause decisions to feel quite artificial. It makes comparisons between cases, and of identifying objective justifications for different

¹⁰ [2010] UKSC 1

¹¹ *Ibid*, [68]-[69]

¹² *Ibid*, [72]

¹³ Aharon Barak, *Proportionality* (CUP, 2012), 340-349

¹⁴ *Handyside v UK* (1979-80) 1 EHRR 737 [48]-[50]

outcomes, very difficult. For example, in *Goodwin*, it was held that there was a public interest in knowing about the fact of Fred Goodwin's affair with a colleague because

'there should be public discussion of the circumstances in which it is proper for a chief executive (or other person holding public office or exercising official functions) should be able to carry on a sexual relationship with an employee in the same organisation.'¹⁵

This seems all the more remarkable because in the earlier case of *K*, a case involving an extra-marital affair between colleagues, the Court of Appeal rejected the notion there was a public interest in publishing even the fact of the affair, despite noting that the woman involved was dismissed as a result (to placate her former lover and colleague); a decision that left her 'upset and angry'.¹⁶ The public interest in *Goodwin* seems little different to the issues raised in *K* – if anything they seem more heightened in *K*: why was the woman dismissed and not the man? One obvious difference is that *K* did not involve, so far as one can tell, actual or quasi public office holders, but this is distinctly unsatisfying as an explanation. It seems the employment had some public context – there is passing reference to a public announcement of her departure¹⁷ – and, as is well-established, the notion of a public figure is very broadly defined in the MOPI jurisprudence.¹⁸ Indeed, the inclusion of Fred Goodwin, a chief executive at a PLC, shows something of this flexibility.

The courts failure to employ proportionality in a satisfying manner, therefore, can be attributed to a fundamental problem with both the *Campbell* test and *Re S* elucidation. Neither articulates a test in the proper sense of the word. Instead, both establish a framework for determining rights conflicts that a test must satisfy, without providing the test itself. So, this framework says that conflicts will have to be settled in a manner that respects both sets of rights, in terms of both the merits and limitations of the respective claims, and should interfere with either only in a proportionate way. The need to articulate such a test has not been judicially recognised, at least not as regards the balancing act. It has been recognised for the threshold question at stage one, and therefore, partially recognised in respect of identifying the extent of privacy intrusion. Thus, in *Murray*, the Court of Appeal found the test requires the court to evaluate all the circumstances, including:

'...the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.'¹⁹

This passage is the leading authority on this point, as the Supreme Court recently confirmed.²⁰ It allows the court to make precise judgments about the strength of the privacy claim. Yet since a comparable evaluation cannot take place for the free speech claim, courts are left to conclude the balancing act by reference to two stark evaluations, the extent of the

¹⁵ *Goodwin v NGN Ltd* [2011] EWHC 1437 (QB), [133]

¹⁶ *K v NGN Ltd* [2011] 1 WLR 1827

¹⁷ *Ibid.*, [7]

¹⁸ *A v B plc* [2003] QB 195

¹⁹ *Murray v Express Newspapers plc* [2009] 1 Ch 481, [36]

²⁰ *Re JR38* [2015] UKSC 42

privacy-invasion and the bare classification of the expression as being of public interest or not, with no obvious means of comparing the two. This feature of the MOPI jurisprudence renders the ‘intense focus’ impotent once the expression is classified as being of public interest. Even though freedom of expression is not assumed to be of greater importance than privacy before the assessment starts, it acquires supremacy once that classification occurs. From that point, the Campbell test does remarkably little to protect the claimant.

This renders the common reference to Lord Hoffmann’s remark in Campbell that the ultimate question must be ‘whether there is sufficient public interest ... to justify curtailment of the conflicting right’²¹ little more than rhetorical. Neither Campbell nor Re S explains how to calculate sufficiency nor identifies legitimate justifications to interfere with public interest expression. This has left subsequent courts without the analytical means of determining the answer meaningfully. Instead, courts tend to answer a different question dressed up as that one. For example, in K, the Court of Appeal answered it by asking itself this: ‘Is a debate about the reasons why X’s employment terminated a matter of such public interest? ... The reasons for her leaving may interest some members of the public but the matters are not of public interest.’²² Yet this is an evaluation about classification passed off as one about degree. This sleight of hand is not uncommon. In Ntuli v Donald, Eady J said this at first instance:

‘I am not persuaded that there is any substantial argument for publication based on public interest...it seems to me that there is no reason to suppose that the revelation of the relationship would in any way contribute to a debate of general interest. Nor would it serve to prevent the public being misled or lead to the exposure of hypocrisy.’²³

In other words, it was not simply that Eady J could identify no substantial public interest, he could find none at all. The Court of Appeal, though, endorsed this approach, stating it could detect ‘no analytical deficiency’.²⁴ The problem of identifying the extent of the public interest is also revealed by the language employed by the judges to describe it. On those rare occasions where the courts say there is an insufficient amount at stake, they use some variant of the word ‘modicum’. For example, in YXB v TNO (a “kiss and tell” about a premiership footballer), the court held that there was ‘a modest degree of public interest in putting before the public the other side of the story’.²⁵ In HRH Prince of Wales v Associated Newspapers Ltd the contribution of Prince Charles’s private journal to matters of public interest was found to be ‘minimal’.²⁶ Yet to find there is a modicum of public interest is to say there is none at all. *De minimis non curat lex*.

Since press freedom is typically interpreted as an audience interest, the notion of proportionality is particularly difficult to realise. It would require judges to evaluate the effect caused by depriving the audience of the information or by imposing a financial penalty on the speaker, (which may (or may not) modify the speaker’s future behaviour). It is an empirical claim that a court simply cannot determine objectively. A court cannot say what

²¹ Campbell, n 1, [56]

²² K, n 16, [23]

²³ [2010] EWCA Civ 1276, [19]

²⁴ Ibid., [25]

²⁵ YXB v TNO [2015] EWHC 826 (QB) [61 (viii)]

²⁶ [2008] Ch 57, 126, [72]

the marginal social effect would be of depriving the audience of particular instances of public interest expression.²⁷ For example, if a court decides that public criticism of Rio Ferdinand's affair is a matter of public interest then it cannot say what the effect would be on public discourse if that condemnation could not take place. It could not evaluate how worse off society would be compared to how better off Rio Ferdinand would be without relying upon speculation and personal inclination. As Tugendhat J said in *Terry*, 'it is not for the judge to express personal views on such matters, still less to impose whatever personal views he might have'.²⁸ This sort of moralising, though, is apparent in the case law. For example, in *CTB* (the *Ryan Giggs* case), Eady J was particularly dismissive of the public interest value that 'kiss and tell' stories have:²⁹ 'As in so many "kiss and tell" cases, it seems to me that the answer, at stage two, is not far to seek.'³⁰ In *Ferdinand*, though, Nicol J was much more sympathetic.³¹ The courts lack an independent principle that would allow them to explicate the significance of public interest expression in objective terms. Imagining the public interest as occupying a scale of zero to ten, the courts lack the language to say what would count as a public interest claim with a magnitude of seven, or four, or whatever.

The difficulties inherent in balancing, what are essentially, two incommensurate rights have not gone entirely unnoticed by the judiciary. The Court of Appeal has previously explained away the problem in this way:

'In many cases, this balancing exercise is difficult. This is partly because the two rights are rather different in their constituent factors, partly because there are often powerful arguments pointing in opposite directions, partly because each case depends very much on its own particular facts, and partly because the exercise can involve a significant degree of subjectivity.'³²

This, though, is an unsatisfying account. The exercise involves not just a 'significant degree of subjectivity'. In some cases it seems to rely upon nothing but subjectivity. It sits uneasily with the view expressed by the House of Lords in *Scott v Scott* (the original privacy claim about the embarrassment caused by public knowledge of the defendant's impotence).

'...the power of an ordinary Court of justice to hear in private cannot rest merely on the discretion of the judge or on his individual view that it is desirable for the sake of public decency or morality that the hearing should take place in private. If there is any exception to the broad principle which requires the administration of justice to take place in open Court, that exception must be based on the application of some other and overriding principle which defines the field of exception and does not leave its limits to the individual discretion of the judge.'³³

The context is different but similar observations can be made about the MOPI jurisprudence. It relies upon 'mere discretion' and lacks an 'overriding principle' that determines how and when 'sufficient public interest' is established. Moreover, despite the recognition by the

²⁷ A point apparently recognised by Laing J in *AMC v News Group Newspapers Ltd* [2015] EWHC 2361 (QB), [27]

²⁸ *Terry v Persons Unknown* [2010] EMLR 16, [101]

²⁹ *CTB v News Group Newspapers Ltd* [2011] EWHC 1232 (QB), [26]

³⁰ See, similarly, *AMC*, n 27

³¹ *Ferdinand v MGN Ltd* [2011] EWHC 2454, [26]

³² *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42, [3]

³³ *Scott v Scott* (1913) AC 417, 435.

Supreme Court in *In Re Guardian News and Media* that absolute protection for public interest expression is not warranted (it can be interfered with, albeit ‘scarcely’), the jurisprudence offers no meaningful method of ensuring protection is qualified. Without such a principle ‘the field of exception’ is apocryphal. This cuts both ways, leaving public interest expression over- and under-protected. The public interest expression may be vulnerable if a judge has a preconceived mind-set toward particular types of speech. For example, in *YXB v TNO*, Warby J concluded that in disposing of the application he must bear ‘in mind that the case is of the “kiss-and-tell” variety, and that there is in general no public interest in the disclosure of details about matters of this kind’.³⁴ If MOPI cases are dealt with on specifics and not generalities (as they should be)³⁵ then this vulnerability is problematic.

The need to identify the principle by which ‘sufficient’ is established is not simply of academic interest. The courts’ propensity, of late, to define the term ‘public interest’ generously has seriously weakened the value of the MOPI claim. The failure by the House of Lords in *Campbell* to define the public right not to be misled in clear terms has caused difficulties in later cases, particularly *Hutcheson v NGN*,³⁶ *Ferdinand v NGN*³⁷ and *McClaren v NGN*³⁸ where this ‘right’ was used to justify publications concerning fairly trivial immorality by well-known (and less well-known) individuals. In addition, the courts have also employed the nebulous concepts of ‘role model’ status and ‘freedom to criticise’ to justify interferences with privacy.³⁹ These devices have protected the press where the claimant’s private life has been judged inconsistent with their public persona or incompatible with their chosen career or harmful to it. More generally, it allows newspapers to advance successful public interest claims on the basis the claimant’s behaviour was socially or morally ‘wrong’.⁴⁰

Having established the limitations of the judicial approach to balancing, the following seeks to outline reasons why at least some of these issues cannot be overcome. In particular, it will be argued that there are cogent and compelling reasons why balancing as a process of determining the significance of expression cannot be realised in a principled manner. The *Campbell* test and *Re S* elucidation rely too heavily upon abstract terms, or else have been interpreted in this way. To be sure, abstract principle (particularly that derived from philosophical theories) are vital to better understanding both rights but, as will be argued shortly, invite unwarranted paternalism to determine outcomes. Instead, it will be argued that a more pragmatic approach is advisable. As Solove has argued, a contextual approach to privacy, with specific problems and outcomes in mind, is more likely to yield reliable solutions.⁴¹ Thus it will be argued that judges should not balance by means of assigning hypothetical values to each claim and deciding which is greater. The courts can, however, make judgments about the effect of the expression on the claimant and decide whether those

³⁴ *YXB v TNO*, n 25, [60]

³⁵ *Ntuli v Donald*, n 23, [54]

³⁶ [2011] EWCA Civ 808

³⁷ N 31

³⁸ [2012] EWHC 2466 (QB)

³⁹ For further discussion see Wragg, ‘The Benefits of Privacy-Invasive Expression’, n 5

⁴⁰ *Terry*, n 28; cf *AMC*, n 27

⁴¹ Daniel J Solove, *Understanding Privacy*, (Harvard University Press, 2008)

effects are excessive. This would be balancing, but of a different kind. This argument is set out in the final section.

3. PROBLEMS IN EVALUATING THE SIGNIFICANCE OF THE PUBLIC INTEREST AT STAKE

The *Re S* formulation, at stages two and three, presupposes that the weight of the free speech claim is equivalent to the degree of engagement with the values underpinning Art 10. In *Campbell*, Baroness Hale advocated the adoption of a hierarchical approach to this process. She noted that ‘some [types of expression] are more deserving of protection in a democratic society than others’ and ‘top of the list is political speech’.⁴² This taxonomical approach is well-established in the academic literature. It is advocated by US scholars like Meiklejohn,⁴³ Sunstein⁴⁴ and Fiss.⁴⁵ Meiklejohn, for example, argued that to be self-governing, citizens must receive information and ideas necessary for democratic decision-making. It also chimes with Lord Justice Leveson’s appraisal of press freedom: that the importance of a free press lies in its capacity to enable democratic participation and act as a check on power.⁴⁶ These conceptions prioritise information vital to the process of electing and monitoring government. On this view, a judge might take into account the proximity of both the claimant’s occupation and their pernicious behaviour to the political process. For example, it is well-established that politicians are expected to show greater tolerance to intrusions into their private lives than ordinary members of the public.⁴⁷ In this way, exposing the extra-marital affairs of an England footballer might be held to be less significant than exposing corruption in public office. Also, a judge might make distinctions based upon the extent of public accountability involved in the claimant’s employment. Utilising this calculus, there would be a greater public interest in knowing of a politician’s involvement in embezzling public money than the misdemeanours of low level public servants.

Exclusive reliance on the democratic participation value, though, is problematic. There are other values that Art 10 champions. The ECtHR has consistently said that ‘freedom of expression ...constitutes one of the essential foundations of a democratic society, indeed one of the basic conditions for its progress and for the self-fulfilment of the individual’.⁴⁸ The UK courts have identified similar values, of which Lord Steyn’s view in *ex parte Simms* is particularly well-known:

‘Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J. (echoing John Stuart Mill), ‘the best test of truth is the power of the thought to get itself accepted in the

⁴² *Campbell*, n 1, [148]

⁴³ Alexander Meiklejohn, *Free Speech and its Relation to Self-Government*, (New York: Harper, 1948)

⁴⁴ Cass R Sunstein, *Democracy and the Problem of Free Speech*, (Free Press, 1995)

⁴⁵ Owen M Fiss, *Liberalism Divided*, (Westview Press, 1996)

⁴⁶ Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press: Report* (HC 780, 2012), 64-65

⁴⁷ *Lingens v. Austria* (1986) 8 EHRR 407

⁴⁸ *Vereinigung Bildender Künstler v Austria* [2007] ECDR 7, [26]

competition of the market:’ ... Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate.’⁴⁹

Exposure of the footballer’s affair may not further democratic participation (though see below) but could be said to engage values relating to truth, self-fulfilment and autonomy. Indeed, this seemed to be Tugendhat J’s view in *Terry v Persons Unknown*:

‘There is much public debate as to what conduct is or is not socially harmful. Not all conduct that is socially harmful is unlawful, and there is often said to be much inconsistency in the law... The fact that conduct is private and lawful is not, of itself, conclusive of the question whether or not it is in the public interest that it be discouraged. There is no suggestion that the conduct in question in the present case ought to be unlawful, or that any editor would ever suggest that it should be. But in a plural society there will be some who would suggest that it ought to be discouraged... Freedom to live as one chooses is one of the most valuable freedoms. But so is the freedom to criticise (within the limits of the law) the conduct of other members of society as being socially harmful, or wrong.’

This is a far broader set of values than are apparent in Meiklejohn’s and Leveson’s conceptions.

Neither can it be said that the domestic and supranational jurisprudence advocates the prioritisation of democratic participation value. Whilst speech enabling democratic participation is particularly important to protect, there is nothing to suggest that the Art 10 values are ranked. Admittedly, both UK and Strasbourg courts have emphasised the importance of protecting political expression. The Supreme Court, for example, has said that political communications ‘sit at the top of the hierarchy of free speech’⁵⁰ and, recently, the High Court has said that ‘freedom of political expression is one of the most important freedoms’.⁵¹ Likewise, the ECtHR has said that interferences with the expression of elected officials ‘call for the closest scrutiny’.⁵² Yet, the ECtHR has made it clear that ‘political expression’ is not limited to information about government but includes matters of ‘public interest and concern’.⁵³ Also, in articulating the press’s ‘public watchdog role’, which it describes as ‘vital’, it refers to the duty to disseminate ‘public interest expression’.⁵⁴ Given how broadly the term ‘public interest expression’ has been interpreted in the UK, it must be that the other values underpinning Art 10 – truth, autonomy and self-fulfilment – are also capable of falling within this category of higher order expression.

Alternatively, even if the democratic participation value was prioritised, it is such an elastic concept that it could not be confined to narrow understandings of the term, such as the process of public decision-making. As Greenawalt has memorably said, political speech cannot be ‘hermetically sealed’ from other concerns: ‘speech that is not explicitly political often has political implications’.⁵⁵ Or, as has been said of the first amendment, ‘a politically based approach... abandons history, precedent, and important values in pursuit of a

⁴⁹ *R v Secretary of State for the Home Department ex parte Simms* [2000]2 AC 115, 126

⁵⁰ *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60, [61]

⁵¹ *Barron v Collins* [2015] EWHC 1125 (QB), [12]

⁵² *Castells v Spain* (1992) 14 EHRR 445 [42]

⁵³ *Steel & Morris v UK* [2005] EMLR 15, [88]

⁵⁴ *Thorgeir v Iceland* (1992) 14 EHRR 843 [63]

⁵⁵ Kent Greenawalt, *Speech, Crime, and the Uses of Language*, (OUP, 1989), 45.

legitimacy that is founded on controversial question begging'.⁵⁶ For example, speech falling within Tugendhat J's freedom to criticise may be treated as a form of political expression by virtue of expressing views about societal morality. As another commentator has argued: 'it is simply confused to try to effect a separation between moral vision and political vision, between moral sensibilities and political sensibilities. To express a moral vision is inevitably to express a political vision.'⁵⁷ Accordingly, stories about the promiscuity of professional footballers and its effect on impressionable minds may be said to further the democratic participation value.⁵⁸ Such discussion contributes to public debate about the appropriateness of footballers as figures of influence.

It is doubtful whether the judiciary could confine the term 'public interest' to democratic decision-making or something narrower. Admittedly, the ECtHR has consistently said⁵⁹ that expression is not of public interest where the 'sole purpose is to satisfy the curiosity of a particular readership regarding the details of a public figure's private life... In such conditions, freedom of expression calls for a narrower interpretation'.⁶⁰ Subsequent ECtHR decisions, however, have cast doubt on the restrictiveness of this principle, as Von Hannover (No 2) shows: in that case photographs of the applicant on holiday at a time when her father was gravely ill contributed to a debate of public interest about how members of the royal family deal with such matters.⁶¹ As a result, the principle seems no more meaningful than the familiar UK rendition:

'it is important not to overlook the fact that what may be in the public interest to know and thus for the media to publicise in exercise of their freedom of speech is not to be confused with what is interesting to the public and, therefore, in a newspaper's commercial interest to publish.'⁶²

This comparison of polar opposites may be useful in obvious cases of unjustified privacy-invasion but none others. Ultimately, it relies upon – or otherwise encourages – the use of paternalism to decide what is important for the public to know and what is not. Yet the maxim lacks analytical bite. The phrase has become a sort of refuge in which to make idiosyncratic judgements about the quality of speech, usually accompanied by the stern moral disapproval that it is of prurient interest only.⁶³ This, though, is not a particularly helpful analytical tool to distinguish between, say, knowledge of adulterous behaviour that is in the public interest (eg, the extra-marital affairs of Steve McClaren, John Terry, and Rio Ferdinand) and that which is not (eg, the extra-marital affair of the claimant in *CC v AB*).⁶⁴

⁵⁶ Steven Shiffrin 'The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment' (1983) 78 *Northwestern Law Review* 1212, 1239

⁵⁷ Michael J Perry, 'Freedom of expression: an essay on theory and doctrine' (1984) 78(5) *Northwestern University Law Review* 1137, 1149

⁵⁸ For further discussion of the theoretical support for this position see Wragg, 'The Benefits of Privacy-Invasive Expression', n 5

⁵⁹ See *Von Hannover v Germany* (2005) 40 *EHRR* 1, [65] and, more recently, *MGN v UK*, n 87, [143]

⁶⁰ *Von Hannover*, *ibid*, [65]-[66]

⁶¹ *Von Hannover v Germany* (No 2) (2012) *EMLR* 16, [117]

⁶² *HRH Prince of Wales v Associated Newspapers Ltd* [2006] *EWCA Civ* 1776, [118]

⁶³ See, eg, *BBC v Roden*, *UKEAT/0385/14/DA*, [37]; *W v M* [2012] *EWHC* 1679 (Fam), [25]; *K*, n 16, [23]; *Independent News and Media Ltd v A* [2010] *EWCA Civ* 343, [22]; *Leeds City Council v Channel Four* [2005] *EWHC* 3522 (Fam), [33]

⁶⁴ [2006] *EWHC* 3083 (QB)

Further, the phrase ‘genuine public interest’,⁶⁵ often employed in the domestic case law, is a gloss that does nothing to clarify what is otherwise replica public interest. Without employing paternalism there is no way of knowing what constitutes the substandard form.

Also, it may be argued that the softer approach to the definition of public interest is defensible, not least for its consistency with the treatment of the term found elsewhere in the case law. For example, defamation law has long treated it generously. In *London Artists Ltd v Littler*, Lord Denning MR considered that ‘whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest...’.⁶⁶ Thus the issue on the facts – a published letter alleging a plot to force a successful play to close – was a matter of public interest. Per Edmund Davies LJ:

‘Just as the presentation of a new play is of public interest, so also, in my judgment, is the sudden and surprising closure of a play enjoying a highly successful run... For example, it might well lead to a discussion of whether the paucity of West End theatres is such that even highly successful plays have to be taken off to make way for new ones awaiting production, or to an examination of theatre finances, or to an assessment of the virtues and vices of the starring system, all such comment springing from and primarily illustrated by the abrupt taking off of one highly praised and successful production.’⁶⁷

This broad approach is consistent with the decision in *Campbell v Spottiswoode*: ‘Nothing is more important than that fair and full latitude of discussion should be allowed to writers upon any public matter, whether it be the conduct of public men, or the proceedings in courts of justice or in Parliament, or the publication of a scheme or of a literary work’.⁶⁸ Similarly, in the more recent case of *Branson v Bower*, Eady J noted:

‘In a modern democracy all those who venture into public life, in whatever capacity, must expect to have their motives subjected to scrutiny and discussed. Nor is it realistic today to demand that such debate should be hobbled by the constraints of conventional good manners – still less of deference.’⁶⁹

Given its doctrinal heritage, a narrowing of the common law’s generous interpretation of the term ‘public interest’ seems unlikely.

There are issues, then, in evaluating the strength of public interest expression by ranking the values apparently furthered by it. Even if all values are treated as equal, problems remain in evaluating the degree to which those values are furthered. Inevitably, such an approach invites courts to specify the importance of the expression as if it were some quantifiable commodity. Such observations can be found in the case law. For example, in *Belfast City Council v Miss Behavin’ Ltd*, the House of Lords accepted that pornography engages Art 10 but only ‘at a very low level’:⁷⁰ ‘The right to vend pornography is not the

⁶⁵ See, eg, *McKennitt v Ash* [2006] EMLR 178, [57] or, more recently, *ZYT v Associated Newspapers Ltd* [2015] EWHC 1162 (QB), [14]

⁶⁶ [1969] 2 WLR 409, 418

⁶⁷ *Ibid.*, 421

⁶⁸ (1863) 3 B & S 769, 778

⁶⁹ [2002] QB 737, [25]

⁷⁰ [2007] UKHL 19, [16]

most important right of free expression in a democratic society'⁷¹ and 'comes well below celebrity gossip in the hierarchy of speech which deserves the protection of the law'.⁷² In *Connolly v DPP*, a woman was prosecuted for sending unsettling images of aborted fetuses to her local chemist to dissuade them from selling the 'morning after' pill. The court found the prosecution was proportionate because, amongst other things, her campaign was 'hardly an effective way of promoting the anti-abortion cause'.⁷³ Similarly, in *R (Prolife) v BBC*, Lord Hoffmann, in determining a judicial review case about a party political broadcast, found it 'relevant to consider whether it has any impact upon the particular democratic interest which [it] was intended to advance'.⁷⁴ He concluded that since Prolife was a single-issue party seeking election in six Welsh constituencies, in which they gained very few votes, the impact was negligible.⁷⁵

These sorts of judgments about the societal significance of expression are problematic. First, since there is no independent means of determining the value of speech to the audience, idiosyncratic and/or paternalistic assessments will occur. This problem is well-recognised in the academic literature. Alexander, for example, has argued forcefully that there is 'no metaphysical basis' for determining units of value.⁷⁶ Similarly, Redish has said that the fetish for public decision-making is not only arbitrary but also confused since it overlooks entirely the more powerful individual need for informed private decision-making.⁷⁷ Meanwhile, Fish, adopting a more extreme position along the same spectrum, has insisted that the protection of 'important' speech is flawed because such judgments 'will always reflect a political decision to indemnify some kinds of verbal behaviour and devalue others'.⁷⁸ It is for reasons like this that Schauer has concluded that free speech clauses are best founded upon a deep mistrust of government (including courts) to appraise the value of speech reliably.⁷⁹ For obvious reasons, judges should not be foisting their own view of importance upon society at large. Secondly, this sort of approach undermines the long-standing principle that Art 10 protects unimportant expression, even that which 'shocks, offends or disturbs'.⁸⁰ If speech is protected to the extent of its 'importance' then it is inevitable that speech which is irresponsible, juvenile or unpersuasive will fare badly on this metric. 'Bad' speech, even that which is overtly political, will enjoy little or no protection at all. Yet the ECtHR has consistently said that, on matters of public interest, Art 10 allow for 'recourse to a degree of exaggeration or even provocation, or in other words to make somewhat immoderate statements'.⁸¹ Indeed, the Court has even said that Art 10 'as such does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful'.⁸² There is also the issue of editorial autonomy that both Strasbourg and the domestic courts recognise

⁷¹ Ibid,

⁷² Ibid, [38]

⁷³ *Connolly v DPP* [2007] EWHC 237 (Admin), [31]

⁷⁴ *R (Prolife) v BBC* [2004] 1 A.C. 185, [67]

⁷⁵ Ibid, [67]-[68]. See criticism in Eric Barendt, 'Free Speech and Abortion', [2003] Public Law 280

⁷⁶ Larry Alexander, *Is There a Right to Freedom of Expression?* (CUP, 2005), 139

⁷⁷ Martin Redish, 'The Value of Free Speech,' (1982) 130 *University of Pennsylvania Law Review* 591

⁷⁸ Stanley Fish, *There's No Such Thing as Free Speech*, (OUP, 1994), 15

⁷⁹ Frederick Schauer, *Free Speech: A Philosophical Enquiry*, (CUP, 1982)

⁸⁰ Handyside, n 14

⁸¹ See, most recently, *Maguire v UK* (2015) 60 EHRR 12

⁸² *Salov v Ukraine* (2007) 45 EHRR 51, [113]

as an equally important principle to respect when determining Art 10 claims. The ECtHR has said that since ‘methods of objective and balanced reporting may vary considerably’ it is not ‘for this Court, nor for the national courts, to substitute its own views for those of the press as to what technique of reporting should be adopted.’⁸³ In their dissenting opinions in *Campbell*, both Lord Hoffmann and Lord Nicholls⁸⁴ recognised this point. Lord Hoffmann expressed it this way: ‘One must...ask whether the journalists exceeded the latitude which should be allowed to them in presenting their story’.⁸⁵ Requiring courts to evaluate the significance of speech, though, invariably causes considerable tension with this principle, for it invites judicial comment on the form of the expression.

Finally, the weighing of public interest claims also sits uncomfortably with Strasbourg principle because it envisages the possibility of ‘weak’, ‘average’ or ‘imperfect’ public interest claims (or any other description of strength sitting on the spectrum between ‘modicum’ and ‘genuine’). Although it is intuitively appealing to believe that a strong privacy claim would trump a weak public interest claim, such an approach ignores the crucial normative and doctrinal point that public interest expression is always a strong form of free speech claim (for which interference is ‘scarcely justified’).⁸⁶ As the ECtHR has consistently said:

‘it is incumbent on [the press] to impart information and ideas on matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of “public watchdog”.’⁸⁷

This does not mean the public has an absolute right to receive the information since, as noted, Art 10 is a qualified right. Yet the Strasbourg jurisprudence suggests that the permissibility of interference must be determined by the nature of the legitimate aim at stake rather than the quality of the expression.⁸⁸ Admittedly, the ECtHR is not as emphatic on this point as it could be. In *MGN v UK*, for example, the Court approved the approach taken by the House of Lords in *Campbell* by noting its consistency with the established principle that, in resolving Art 8/Art 10 disputes, the domestic court ‘must balance the public interest in the publication of a photograph and the need to protect private life’.⁸⁹

Yet, the balancing approach adopted by the ECtHR does not seem reliant upon a valuation of the public interest at stake. Instead, when asking whether the interference met a ‘pressing social need’, the Court’s inquiry is confined to examining the effect of the expression on the victim. For example, in *MGN v UK*, the ECtHR supported its position on balancing by relying on⁹⁰ the case of *Hachette Filipacchi Associates v France*,⁹¹ which concerned photographs of a murder scene and of the deceased in an article about the murder.

⁸³ *MGN v UK* (2011) 53 EHRR 5 [141]

⁸⁴ *Campbell*, n 1, [29]

⁸⁵ *Ibid*, [68]

⁸⁶ *In re Guardian News and Media Ltd* [2010] UKSC 1, [51].

⁸⁷ *MGN v UK* (2011) 53 EHRR 5 [141]

⁸⁸ See, eg, *Hadjianastassiou v Greece* (1993) 16 EHRR 219, [39]; *Markt Intern v Germany* (1990) 12 EHRR 161, [26]; *Muller v Switzerland* (1991) 13 EHRR 212, [27]-[28]

⁸⁹ *MGN v UK*, n 87, [142]

⁹⁰ *Ibid*, at n 34.

⁹¹ (2009) 49 E.H.R.R. 23

The family of the victim complained successfully, in their domestic court, of a breach of Art 8. In finding that no violation of Art 10 had occurred, the ECtHR made no attempt to evaluate the significance of the photograph in public interest terms. Instead, having noted it was public interest expression, it concluded that it ‘intensified’ the trauma and grief suffered by the family to such a degree that the interference with Art 10 was justified.⁹² This approach is evident in other ECtHR cases. For example, in *Krone Verlags v Austria*,⁹³ a case about comparative advertising, the ECtHR resolved the case without determining the extent of the public interest at stake; instead, it determined that there was a public interest at stake and no convincing reason was established by the domestic court to interfere with it. In other words, it was the effect of expression on the claimant that the Court was most interested in.

For these reasons, it would be a mistake for judges to determine the weight of the public interest expression by assigning some value to it. Inevitably, such judgments would be paternalistic, idiosyncratic and unprincipled. Yet public interest expression should not enjoy absolute protection. In the final section, it will be argued that the overriding principle to determine its limits should be based on the specific effects of the speech upon the claimant, as intimated by the Strasbourg jurisprudence.

4. ACHIEVING GREATER PROPORTIONALITY IN MOPI CLAIMS

As noted above, following *Murray*, the courts may make some fine distinctions about the extent of privacy invasion. It is clear that, to pass the threshold test, the claimant must establish that their Art 8 interests are actually, not prospectively, affected, and sufficiently seriously, as both *Terry*⁹⁴ and *YXB* show. *YXB* is particularly illustrative of how strictly this principle is applied. Here, the claimant, following a newspaper report, wished to conceal his identity as the unnamed premier league footballer who had engaged in adulterous sexual conduct after his club’s Christmas party. Indeed, the court added a few extra details, which had not appeared in the newspaper report:

‘In the early hours of 16 December 2014, during a party ... the defendant performed oral sex on the claimant. They have never met again, but a month later the claimant initiated an exchange of messages between the two, via their mobile phones, in the course of which he wrote to her, and she to him, about having sex together. The claimant sent the defendant explicit images, including photographs of his erect penis, and video of himself masturbating. She also sent him images, but nothing so intimate.’⁹⁵

Yet the claimant failed to provide evidence of the effect that identification would have, which Mr Justice Warby was particularly critical of:

‘The claimant’s own attitude to the privacy rights relied on is a relevant, and important, factor. When applying an intense focus to the specific rights at issue in the individual case, the court can hardly be expected to attach great weight to the privacy rights asserted on the claimant’s behalf if he fails, without justification, to give any evidence himself. The most remarkable feature of this case is the

⁹² *Ibid*, [49]

⁹³ (2006) 42 EHRR 28

⁹⁴ *Terry*, n 28

⁹⁵ *YXB*, n 25, [1]

complete absence of any evidence from the claimant... What has been said by [counsel] on instructions suggests that the concern is embarrassment, and mainly directed at the images, which are to be protected anyway. This lends support to [opposing counsel's] submission that the claimant has not shown any great concern about privacy for his sexual conduct.⁹⁶

This is an apparent departure from *Campbell*. Here, the House of Lords examined the quality of the privacy invasion and concluded that it was of a type which, viewed objectively, interfered with privacy interests. It was less concerned with examining the actual effect. For example, Baroness Hale said

‘The trial judge... could tell whether the impact of the story on her was serious or trivial. The fact that the story had been published at all was bound to cause distress and possibly interfere with her progress. But he was best placed to judge whether the additional information and the photographs had added significantly both to the distress and the potential harm. He accepted her evidence that it had done so.’⁹⁷

The use of inference here illustrates the court’s more relaxed attitude toward the actual effect. There was no great scrutiny of that evidence in the balancing process. Instead, it was accepted that the information was capable of having a deleterious effect.

YXB may also be contrasted with *Weller v Associated Newspapers Ltd*,⁹⁸ which concerned the publication of photographs of Paul Weller, his 16-year-old daughter and infant twins shopping in Los Angeles. The photographs revealed nothing embarrassing or controversial. The court, however, was satisfied that since publication had caused shock, anger and embarrassment the action for misuse of private information was made out. In short, then, in these two cases the privacy claim failed in one because extreme information had a dismissible effect on the claimant and succeeded in the other because dismissible information had an extreme effect.

YXB may be further contrasted with *EF v AB*,⁹⁹ which concerned similar facts (and, coincidentally, was handed down on the same day) but decided by the employment appeal tribunal. Unlike in YXB, the interim relief application succeeded. In both, the parties involved had engaged in adulterous but lawful sexual activity and had exchanged intimate images. Although the differing outcomes might be justified (or criticised) on a number of grounds, the evidence of the potential effect that publication would have on the claimants varied significantly. In *EF* the distressing effect of privacy-invasion on *EF*, his wife and his child influenced the outcome strongly.¹⁰⁰ This sort of subjective approach has doctrinal authority. As Lord Hope said in *Campbell*, ‘the mind that has to be examined is that, not of the reader in general, but of the person who is affected by the publicity’.¹⁰¹

If, as seems increasingly clear, MOPI is concerned to protect privacy based not on an objective assessment of the nature of the information disclosed but upon the effect of

⁹⁶ *Ibid.*, [61, iii, c]

⁹⁷ *Campbell*, n 1, [158], emphasis added

⁹⁸ [2014] EWHC 1163 (QB)

⁹⁹ UKEAT/0525/13/DM

¹⁰⁰ *Ibid.*, at, eg, [65] and [84]

¹⁰¹ *Campbell*, n 1, [99]

disclosure on the claimant¹⁰² then the limits of public interest expression must lie where this effect would be so unbearable that the court feels compelled to protect the claimant. This approach is consistent with the judicial treatment of other free speech claims, particularly where governed by statute. For example, in contempt of court cases, the court focuses upon the effect upon the administration of justice (including open justice) that the expression would have.¹⁰³ In claims under the Protection from Harassment Act 1997, the court must decide, under s 7, whether the effect of the speech would be alarming or distressing.¹⁰⁴ Similarly, the Obscene Publications Act 1964 requires the court to decide, under s 1(2), whether the publication would ‘deprave and corrupt’ the audience.¹⁰⁵ There is, therefore, considerable judicial experience of determining the outcome of free speech claims based upon the effect of expression without resorting to speculation about its inherent worth.

Further, this sort of approach is entirely consistent with established liberal principle. John Stuart Mill, for example, claimed social pressure to conform loses its legitimacy where it amounts to coercion.¹⁰⁶ In Mill’s sense, this means ‘compulsion and control’ and includes ‘the moral coercion of public opinion’.¹⁰⁷ It is the point where forceful argument is exceeded. Society is always justified in seeking to persuade an individual to change their lifestyle but cannot force change unless harm would otherwise occur. Solove, endorsing Mill’s argument, notes that ‘privacy is a recognition that in certain circumstances, it is in society’s best interest to curtail the power of its norms’.¹⁰⁸ Coercion in this context does not only mean the use of unauthorised physical force or legal compulsion. It can also extend to the use of authority to compel an individual to comply. As Tugendhat J commented in *Terry*, newspapers remain a source of authority by which public opinion is formed.¹⁰⁹ And evidence given to the Leveson enquiry plainly attests to the dreadful effect that unwanted press scrutiny can have. Moreover, Leveson refers to the large body of evidence that reveals those who complain about press treatment are often made an example of through further privacy-invasion: ‘it is legitimate to conclude that the aim was to ‘pay back’ or ‘punish’ for the disagreement by causing distress, embarrassment or discomfort’.¹¹⁰

In distinguishing coercion from persuasion, a court should have regard to the form of expression as well as its effect. It should be satisfied that the expression exceeded persuasive debate. Interference with public interest expression on such grounds seems to be anticipated by the ECtHR in the hints it has given about the limits of the right. For example, the Court has found interferences with public interest expression to be unjustified because the speech was ‘not excessive’¹¹¹ or did not ‘constitute a gratuitous personal attack’.¹¹² Similarly, as

¹⁰² See also *Rocknroll v News Group Newspapers Ltd* [2013] EWHC 24 (Ch), [39]; and in a different context, *Z v News Group Newspapers Ltd* [2013] EWHC 1150 (Fam), [59] and [77]; *In Re E* [2014] EWHC 7, [53]

¹⁰³ See, eg, *Attorney General v Random House* [2009] EWHC 1727 (QB)

¹⁰⁴ See, eg, *Thomas v News Group Newspapers Ltd* [2002] EMLR 4

¹⁰⁵ See, eg, *DPP v Whyte* [1972] AC 849

¹⁰⁶ John Stuart Mill, *On Liberty* in *Collected Works of John Stuart Mill*, Vol XVIII, John M Robson, ed., (University of Toronto Press, 1977), 213

¹⁰⁷ *Ibid*, 225

¹⁰⁸ Solove, n 41, 95

¹⁰⁹ *Terry*, n 28, 104

¹¹⁰ N 46, 482, [2.42]

¹¹¹ *Standard Verlags GmbH v Austria* (2008) 47 EHRR 58, [55]

¹¹² *Unabhängige Initiative Informationsvielfalt v Austria* (2003) 37 EHRR 33, [43]

noted above, Art 10 permits ‘a degree of exaggeration or even provocation’.¹¹³ In a recent case, the court said ‘while some of the remarks ... portrayed the institution embodied by the King in a very negative light, with a hostile connotation, they did not advocate the use of violence, nor did they amount to hate speech, which in the Court’s view is the essential element to be taken into account.’¹¹⁴ These comments show it is the effect rather than significance of the expression that determines the limits of protection.

Applying this sort of approach to MOPI, the domestic court must be satisfied that the public interest expression exceeded robust criticism and that the claimant was severely affected by it. This would require a relatively high threshold if the strong protection for public interest expression is to be preserved. This might be evidenced by an effective withdrawal from society or the modification of behaviour simply to bring the unwanted scrutiny to an end. In both instances it may be concluded the individual is no longer autonomous because they have been deprived of genuine choice on how to act.¹¹⁵ In other words, the individual did not change their ways because they were persuaded by what the press said (because, say, they accepted what they did was wrong and were repentant) but because submission brought the unwanted press attention to an end. This might be the case where press attention is particularly invasive in the detail revealed, or in its intensity (say, where press reporting continues over a prolonged period). This sort of thinking is evident in *Mosley* where Eady J remarks

‘Everyone is naturally entitled to espouse moral or religious beliefs to the effect that certain types of sexual behaviour are wrong or demeaning to those participating. That does not mean that they are entitled to hound those who practise them or to detract from their right to live life as they choose.’¹¹⁶

In some cases there may be an element of harassment (and overlap with harassment claims) as in *Othman v The English National Resistance*¹¹⁷ where the court heard evidence that near constant demonstrations outside Abu Qatada’s house left his wife and children in fear of their lives. This was also the case in *Green Corns Ltd v Claverley Group Ltd*¹¹⁸ where local fury about the provision of care homes for troubled teenagers resulted in angry scenes, criminal damage and terrified residents transferred to other facilities by the police. Although in both cases the court decided that there was no public interest expression at stake (though this seems debatable), even if it had, the coercive effect of publication ought to have been sufficient to negate the free speech claim. The same principle could be applied to the *Mosley* case: even if the information had revealed a public interest matter, publication had a traumatic effect on Max Mosley. As Eady J noted, ‘[h]e is hardly exaggerating when he says that his life was ruined’.¹¹⁹ The effect of publication may be even more profound where the press victim has no experience of press attention. In some cases, this can have tragic consequences, as with trans primary school teacher Lucy Meadows who suffered miserably

¹¹³ *Prager and Oberschlick v Austria* (1996) 21 EHRR 1, [38]

¹¹⁴ *Mondragon v Spain* (2015) 60 EHRR 7, [54]

¹¹⁵ See John Gray, *Mill on Liberty: a Defence*, (Routledge, 2nd edn., 1996), 73-86

¹¹⁶ *Mosley*, n 8, [127]

¹¹⁷ [2013] EWHC 1421 (QB)

¹¹⁸ [2005] EWHC 958 (QB)

¹¹⁹ *Mosley*, n 8, [236]

from unwanted press attention about her transition.¹²⁰ Three months later she committed suicide.

To be sure, what is being proposed here is that, to succeed with a MOPI claim where public interest expression arises, the court must be satisfied that the intense public scrutiny caused severe harm to the claimant, such as conforming only to end unwanted scrutiny, or caused him/her to withdraw from society, or otherwise impacted severely on his/her mental health. This behaviour may result from the frequency of privacy-invasion or the severity of it. This approach is consistent with the *Re S* elucidation. It is a justification that legitimises interference with public interest expression at stage three of the *Re S* test. To develop the law more explicitly in this way offers a meaningful method of strengthening privacy protection, albeit it would be a weaker version of the Campbell promise. It would not restore the presumptive parity of Art 8 and Art 10 entirely but would afford a means of tempering the supremacy of public interest expression. It would also ensure that public interest expression is only ‘scarcely’ interfered with.

Admittedly, there might be occasions where even coercive public interest expression ought to be protected despite the interference with privacy rights. This possibility is also anticipated by liberal principle. For example, Mill argues that an individual should be unmolested by state or general society where their behaviour harms no one but themselves (self-regarding behaviour) but may be interfered with where it harms others (other-regarding behaviour). Thus, the invasion of privacy to expose behaviour harmful to society might be justified even though coercive in nature. Harm, though, should be given a high threshold. Since Mill’s chief concern is that individuality should not be undermined by a moralising and ‘tyrannical’ majority, the fact that other people disagree with particular behaviour does not make it wrong nor justify interference with it. As Lord Denning has previously said, extrajudicially, ‘What matters in England is that each man should be free to develop his own personality to the full: and the only duties which should restrict this freedom are those necessary to enable everyone else to do the same’.¹²¹ The coercive force of newspapers, therefore, is not justified if ‘a person’s conduct affects the interests of no persons besides himself, or needs not affect them unless they like it... In all such cases, there should be perfect freedom, legal and social, to do the action and stand the consequences’.¹²² This seems particularly apposite for the role model analysis. Members of society might choose role models but no one is forced to. So, for example, in the typical claim where a disappointed public learns their beloved role model is a philanderer, and not the wholesome character they believed, it could not be said this level of harm had been reached if the public could shun the claimant and take their business, devotion, etc, elsewhere. Similarly, individuals are not harmed simply because they believe the actor’s behaviour to be ‘foolish, perverse or wrong’.¹²³ As Ten has said of Mill’s position, this means that morality-dependent distress suffered from knowing of a person’s immorality does not constitute harm sufficient to justify

¹²⁰ See discussion in Paul Wragg, ‘Leveson and Disproportionate Public Interest Reporting’ (2013) 5(2) JML 241, 247-248

¹²¹ Sir Alfred Denning, *Freedom under the Law*, (Stevens & Sons Ltd, 1949), 4-5

¹²² Mill, n 106, 276 (emphasis added)

¹²³ *Ibid.*, 226

coercion.¹²⁴ Translated to MOPI, this means that although there may be a right to criticise others for behaviour that a newspaper (or wider society) thinks wrong or morally repugnant, there is no right to force a person to change their ways.

The harm, therefore, must be explicable in terms extending beyond morality-dependent distress or harm to interests over which the public has no control. It is justified, for example, where the police publish images asking the public to identify a person committing a public order offence.¹²⁵ The recent shaming of Lord Sewel, including claims he used his Parliamentary allowance to buy cocaine and prostitutes, which led to his resignation as deputy speaker of the House of Lords, may also be an example where such coercion is justified despite the gross interference with privacy.¹²⁶ Whether this level of harm is realisable where the claimant engages in immoral rather than illegal behaviour is doubtful. Certainly, there seems no obvious justification that would explain why a newspaper should be able to force an individual into submission where the law is not being broken. Given that coercion is the ultimate interference with individual autonomy, the courts are entitled to scrutinise closely the justification offered by the press for doing so. Laing J seemed to recognise this in *AMC* where she noted, caustically, of the claimant's alleged adultery: '...I do express a suitably diffident doubt whether this conduct was socially harmful. It caused private pain; but no-one was corrupted or co-erced. The conduct had no ramifications beyond [that]. It did not affect society in any way'.¹²⁷

One factor that might be relevant is whether the coercion was a direct or indirect consequence of the expression. For example, if a newspaper exercises its campaigning role in order to agitate legal reform, the claimant may be constantly discussed as a vivid example of why change should happen. Something of this nature occurred recently with the heated debate over the rehabilitation of rapist professional footballers following Ched Evans's release from prison. The popular response has made it near impossible for him to return to the game. Similarly, there has been much debate about tax avoidance schemes involving well-known companies and celebrities. Comedian Jimmy Carr became a major discussion point when his involvement in such a scheme was revealed. Amid intense press coverage, and despite the scheme being entirely legal, he publicly apologised for a 'terrible error of judgment' and was said to have exited the scheme shortly afterwards.¹²⁸ In January 2015, the *Mirror* reported that he had paid £500,000 in taxes and hailed him as a 'reformed tax avoider' who was now paying his 'full share'.¹²⁹

In situations like this, the court is capable of asking the defendant why it was necessary to hound a particular individual, especially if their behaviour was immoral rather than illegal. It would not be an unjustified interference with editorial autonomy to require a newspaper to demonstrate that no less intrusive measures were available. For example, if the newspapers sought ultimately to reform the law then this may be done without coercing

¹²⁴ C.L Ten, 'Mill's Defence of Liberty' in J.S. Mill On Liberty in Focus, John Gray and G. W. Smith, eds., (Routledge, 1991), 212-238

¹²⁵ Re JR38, n 20

¹²⁶ Of which pictures of him topless and wearing a bra seemed particularly extreme. See *The Sun* on Sunday, 26 July 2015

¹²⁷ *AMC*, n 27, [27]

¹²⁸ *The Guardian*, 21 June 2012

¹²⁹ *The Mirror*, 31 January 2015

particular individuals. Coercion of this sort is comparable to the use of subterfuge or covert surveillance. The Editors' Code of Conduct states, in clause 10, that such behaviour 'can generally be justified only in the public interest and then only when the material cannot be obtained by other means'. The Press Complaints Commission has previously upheld complaints where the press could offer no such persuasive reasons even though there was a public interest at stake in the information disclosed.¹³⁰

This revised approach to MOPI claims would utilise a different sort of balancing to that of weighing the respective claims by assigning some hypothetical value to them. Instead, it would allow judges to hold that although public interest expression is important to protect, it cannot be (and should not be) protected absolutely. The balance is achieved, therefore, by denying protection where the effect of the expression is so severe as to cause the claimant to become a pariah – unless the press is justified in doing so. Despite falling readership, newspapers continue to hold great authority. Condemnation by them can ruin lives. It is appropriate in those circumstances that the courts have the power to intervene and offer meaningful protection to victims, especially where they have engaged in immoral rather than illegal behaviour. This approach should appeal to the judiciary. It does not compromise the principle that public interest expression is the highest form of expression deserving of strong protection. Instead, it focuses them on a task more suited to their expertise: it requires them to determine the extent of interference with privacy based upon evidence, both of impact on the claimant and the degree to which this effect could have been anticipated by the defendants.

5. CONCLUSION

In the privacy/free speech dichotomy, public interest expression is supreme. Campbell's great promise has not been realised because the MOPI case law lacks an overriding principle to limit, effectively, the protection afforded to it. Redressing this balance, though, should not rely upon paternalistic judgments about its meaning or extent. Instead, judges should interfere where its effect is particularly severe and, it is submitted, amounts to coercion. This is a high threshold to reach, as it should be if robust protection for public interest expression is to be preserved. Yet it cannot command absolute protection. There will be cases where interference based on effect amounts to an 'egg shell skull' rule, especially, it may be imagined, where ordinary members of the public are claimants. So be it. Journalists and editors are perfectly capable of anticipating such consequences prior to publication. They can, for example, identify whether their target has experience of unwanted press attention, in order to gauge their resilience. This principle should be subject only to circumstances where society's interests are harmed by the private behaviour, in a manner greater than morality-dependent distress or where members of society cannot protect their interests by transferring them somewhere else (such as finding a different role model, etc). This development would recast the Campbell framework into a four-part test in which the court should ask: first, is there a reasonable expectation of privacy at stake? Secondly, is there a public interest at

¹³⁰ Liberal Democrat Party and The Independent, 10/05/2011. See also, *Haldimann v Switzerland* (21830/09), reported (2015) EHRLR 323

stake in the privacy-invading expression? Thirdly, if there is, is the effect of that expression coercive, such that the victim is forced to withdraw from society or conform simply to end the harm caused by the expression? Finally, if the expression is coercive, is it nevertheless justified because the claimant's private behaviour is harming a valid societal interest? This revised test would not realise Campbell's great promise, strictly. But it would come much closer than the present law does.