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Anonymity, Criminal Suspicion, and Mud that Sticks

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Should criminal suspects enjoy a right to anonymity before charge? This question has generated considerable debate among policymakers, practitioners, and academics. It has resulted in piecemeal legal reform through a series of appellate decisions and revisions to policy documents over the last decade. Owing to the complex constellation of countervailing interests it brings into conflict, the debate has exposed fault lines within the major political parties and has been the subject of a succession of abortive Private Members' Bills.[1] Through this debate a general, although by no means universal,[2] consensus has emerged that there should not be an open season on the public identification of criminal suspects.[3] This consensus reached an apex in the recent decision of *Bloomberg LP v ZXC*,[4] where the UK Supreme Court unanimously held that those falling under criminal suspicion by an agent of the state generally hold a reasonable expectation of privacy over any information linking them to the investigation until the point of charge. The argument in this chapter is that the Supreme Court in *ZXC* was correct, as a matter of principle, to recognise a general right to anonymity for criminal suspects. However, there are sound reasons to reform the law by placing the protection of suspects' anonymity on a statutory footing through the creation of an automatic reporting restriction, supplemented by a criminal sanction for breach. It is submit-

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[1] See Anonymity (Arrested Persons) Bill [HC] Session 2010–12. The second reading of the Bill can be found at HC Deb 4 February 2011, vol 522, col 1160. See also Anonymity (Arrested Persons) Bill [HL] Session 2017–19.

[2] F Gerry QC, 'Does the UK Really Need a Right to Anonymity?' *Huffington Post* (13 January 2015).

[3] See the discussion of Mann J in *Sir Cliff Richard v The British Broadcasting Corporation; The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch), [234]–[238].

[4] *Bloomberg LP v ZXC* [2022] UKSC 5.

ted that this reform is necessary, as the current legal framework is fractured and fails to provide a consistent, simplified, and principled approach to balancing the competing rights and interests at play. It is only with the creation of a criminal offence that the harmful practices of publishers can be effectively deterred in the digital age.

Following this introduction, the analysis comprises four sections. Sections 1 and 2 analyse how harmful publication practices and the consequent destruction of suspects' reputations in several high-profile cases led to general principles of police information management at common law being hardened into narrow legal rules and formal guidance governing the dissemination of suspects' personal information in various separate contexts. Through discussion of the courts' development of the misuse of privacy information tort to enhance protection of suspects, and resultant academic debates, this chapter defends the approach taken by the senior courts in extending the misuse of private information action. However, the legal framework still suffers from several deficiencies which leave suspects vulnerable to having their private lives disrupted and their reputations permanently tarnished from the very earliest stages at which they become the subject of a criminal investigation. Section 3 surveys these gaps in protection. It contemplates the future of anonymity protection, and particularly how the recent expansion in the misuse of private information tort to create a general presumption in favour of anonymity may soon be subject to more restrictive interpretation in the face of broader reforms in domestic human rights law. Section 4 proposes a draft legislative provision to ensure statutory anonymity protection for criminal suspects until the point of charge, which could remedy some of the deficiencies of the current legal framework whilst ensuring that core democratic values of press freedom and open justice are not unduly abrogated.

1. Early Attempts to Protect Anonymity

For over 60 years, the police have recognised that the public dissemination of personal information on their records can have detrimental consequences for suspects, and such disclosures should only be made where the interests of the individual are outweighed by the public interest. In 1954, a working party of chief officers of police outlined some of the principles which have underpinned the dissemination of personal information held on police records:

> It has been a fundamental rule that police information should not be used except for the purposes for which it was acquired, and therefore that it should not be disclosed to persons in authority however responsible, other than those concerned with police functions, unless the consideration of public interest is sufficiently weighty to justify departure from this general rule.[5]

[5] See Home Office, *Disclosure of Criminal Records for Employment Vetting Purposes*, Cm 2319 (HMSO, 1993) 4.

The question of whether suspects should enjoy anonymity has also been the subject of long-standing debate amongst legislators. At several junctures, Parliament has legislated to provide anonymity for suspects in the following particularised contexts:

1. The Sexual Offences (Amendment) Act 1976 extended anonymity protections to defendants at the same time as introducing these for complainants in rape cases. However, the provision was controversial and was ultimately removed by the enactment of the Criminal Justice Act 1988, s 158. When considering repeal of the defendant anonymity protections, legislators focused on the importance of ensuring that criminal trials were open to scrutiny. However, dissenting voices in the Commons highlighted how failing to protect the anonymity of defendants may lead to their accusers being identified through their known association to the defendant.[6] In 2011, the Coalition Government introduced a very specific anonymity provision restricting the reporting of alleged offences by a teacher in a school up to the point at which that teacher is charged. It created a criminal offence for breach of those reporting restrictions.[7] The provision was designed to protect teachers from spurious allegations by pupils in their school. It has drawn criticism not only from the Society of Editors and national newspapers, who were critical of this measure for undermining press freedom,[8] but also from those who favour increased anonymity for suspects, for focusing too narrowly on teachers subject to allegations in a school, to the exclusion of other professionals who might face similar complaints.[9]
2. The Contempt of Court Act 1981 also affords suspects some protection from harmful publication practices. Under section 1 of the Act – the 'strict liability rule' – it is a contempt of court to publish any matter which creates a substantial risk of serious prejudice or impediment to the course of justice in legal proceedings, irrespective of the intention behind the publication. Section 4(2) of the Act empowers a court to order that the publication of any report of its proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent. The Contempt of Court Act 1981, s 11 also gives a court the power to make a direction prohibiting the publication of a name or other specific matter in limited circumstances. These provisions provide some enduring protection for suspects' anonymity, but do not offer anything like the general protection of a suspect's privacy rights which is advanced in this chapter. The Contempt of Court Act 1981 is generally aimed at ensuring

[6] HC Deb 28 June 1988, vol 136, colls 205–214.

[7] Education Act 2011, s 13.

[8] O Bowcott, 'Teachers accused of crimes against pupils to be granted anonymity' *The Guardian* (28 September 2012).

[9] See, eg, the comments of Baroness Hughes of Stretford in HL Deb 6 July 2011, vol 729, col 157.

the proper administration of justice, and not specifically protecting the individual rights of those subject to its administration or regulating the reporting practices of the press generally.[10] Thus, the Act affords peripheral and limited protection for the broader harms that can come from the dissemination of information linking an individual to a criminal investigation.

3. Children or young persons under the age of 18 enjoy far stronger and entrenched anonymity protections than adults, which go beyond the investigation stage to protect the anonymity of defendants. Section 49 of the Children and Young Persons Act 1933 automatically imposes restrictions on the reporting of the identity of persons subject to proceedings in youth courts and to proceedings under the Sentencing Act 2020, Sch 7. The Children and Young Persons Act 1933, s 49(4–8) empowers a court to dispense with the restriction order (i) in the public interest; (ii) to avoid injustice; or (iii) where this is necessary for the purpose of apprehending a young person unlawfully at large for certain serious offences. Under s 45 of the Youth Justice and Criminal Evidence Act 1999, where a person under the age of 18 is subject to criminal proceedings, other than a youth court subject to the s 49 restriction, the court enjoys a discretionary power to direct that no matter be included in any publication if it is likely to lead members of the public to identify him as a person concerned in the proceedings.

At common law, any personal information, that is not generally available to the public and comes into the possession of a public body during the course of performing its public duties, ought not to be disclosed except where disclosure is judged necessary for the protection of the public.[11] On its face, this necessity requirement sets a high bar for the police to clear before releasing the identifying particulars of suspects to the media or circulating such information more widely. In practice, however, this has not served as a strong protection against the public identification of suspects. First, the rule only regulates what public authorities can disseminate. Moreover, prior to the enactment of the Human Rights Act 1998, there was no obvious domestic cause of action to remedy the 'unnecessary' dissemination of such information. Even in the years following the development of the tort of misuse of private information,[12] the disclosure practices of the police were subject to light touch regulation through Association of Chief Police Officers (ACPO) guidance. This guidance contained more caveats and equivocations highlighting the lack of legal constraint on police dissemination practices than

[10] The criteria for the strict liability rule are narrow, with the rule biting only where a publication creates a substantial and serious risk that court proceedings are impeded or prejudiced, applying the criminal burden and standard of proof. See *Attorney General v MGN* [1997] Entertainment and Media Law Reports 284, 289–91, per Schiemann LJ. The s 4(2) provision is also limited as it is aimed at postponement of publication rather than an indefinite restriction. See *R (Press Association) v Cambridge Crown Court* [2012] EWCA Crim 2434.

[11] See *Devon County Council, Ex parte L* [1991] 2 FLR 541.

[12] *Campbell v Mirror Group Newspapers Limited* [2004] UKHL 22.

rules regulating police conduct, as the emphasised text in the following passage indicates:

> 4.3. **Although there is no specific law** to prevent forces identifying those they have arrested, in practice they give general details of arrests which are designed to be informative but not to identify – for example 'a 27-year-old Brighton man'. In high profile cases which may cause major public concern – such as terrorism or murders – forces **sometimes provide** substantial detail about their investigations without identifying individuals.
> 4.4. The media frequently discover the name of people under investigation and seek confirmation. **Again, there is no law to prevent** forces giving confirmation. **Some forces do choose** to confirm the name; others choose not to do so but **may indicate** that a name is incorrect.
> 4.5. If a suspect is released without charge or bailed to reappear at a police station, the fact of the police action occurring is **generally released**, though the person remains unidentified. Again, **this is practice, rather than an approach dictated by any law**.[13]

The Guidance left vast discretion in the hands of individual police forces, which would result in inconsistent approaches to naming suspects between police forces. The approach described in paragraph 4.4 above, led some forces to indulge the media in a 'guessing-game' over who was being held in their custody and created a space for corrupt relationships between police officers and the media to develop, whereby the former would supply to the latter information about arrests and other records held on police computers.[14]

In the early 2000s, there was growing evidence of the existence of an 'illicit organised trade' in confidential personal information between journalists, corrupt public authority representatives such as police or prison officers, and private investigators acting as intermediaries.[15] Early investigations into this relationship, such as the Information Commissioner's Office's *Operation Motorman*, indicated that this illicit trade predominantly targeted celebrities and other public figures such as senior politicians.[16] However, further reports in *The Guardian* of phone hacking and police bribery by journalists working for the now defunct *News of the World* newspaper, revealed evidence suggesting that the voicemails of high-profile child murder victims and relatives of British soldiers killed in action in Iraq and Afghanistan had also been wire-tapped.[17] These developments had significant

[13] Association of Chief Police Officers, *Communication Advisory Group 2010 Guidance* (2010) 6. My emphasis.

[14] H Tomlinson QC, 'Leveson, "'secret arrests" and the rights of suspects: a question of balance' (10 April 2013) at: www.simkins.com/news/leveson-secret-arrests-and-the-rights-of-suspects-a-question-of-balance-hugh-tomlinson-qc.

[15] Information Commissioners' Office, *What Price Privacy? The Unlawful Trade in Confidential Personal Information* (TSO, 2006).

[16] ibid.

[17] N Davies and A Hill, 'Missing Milly Dowler's voicemail was hacked by News of the World' *The Guardian* (4 July 2011).

repercussions, leading not only to the dissolution of *News of the World*, but also to the Leveson Inquiry into the culture, ethics and practices of the media, and Operation Elveden – a police investigation into police bribery that led to the conviction of nine police officers and two journalists.[18]

The Emerging Anonymity Consensus

In the second volume of his report of his Inquiry into the Culture, Practices and Ethics of the Press, Brian Leveson LJ addressed the case of Christopher Jefferies. Jefferies was arrested on suspicion of the murder of Joanna Yeates in 2010. Jefferies was Yeates' landlord and was wholly innocent. Vincent Tabak, who lived in the same building as Yeates, was later convicted of her murder. However, Jefferies was subject to a vitriolic campaign of innuendo and vilification, such that he felt forced to leave his home and change his appearance. Jefferies later succeeded in a defamation claim against a national newspaper.[19] The case clearly demonstrated the ease with which arrest may generally be associated with guilt in the media. Leveson observed that 'save in exceptional and clearly identified circumstances (for example, where there may be an immediate risk to the public), the names or identifying details of those who are arrested or suspected of a crime should not be released to the press nor the public.'[20]

In a formal response of the judiciary to the Law Commission's 2013 consultation on Contempt of Court, Treacy LJ and Tugendhat J endorsed Leveson's view, drawing attention to the imbalance of publicity surrounding the initiation of proceedings versus subsequent decisions to discontinue them or take no further action. They also emphasised the role of the internet in creating searchable records of information surrounding an individual's arrest, that are freely accessible to the public.[21] Later in the same year, Theresa May, then Home Secretary, wrote to the College of Policing to express concern about inconsistent approaches taken by police forces regarding public identification and to urge that there should be a presumptive right to anonymity at arrest.[22] This prompted the College of Policing to issue new guidance on police relations with the media and suspect anonymity, which stated that 'save in clearly identified circumstances, or where legal restrictions apply, the names or identifying details of those who are arrested or suspected of a crime should not be released by police forces to the press or the public.'[23]

[18] 'Operation Elveden corruption probe ends' (BBC News, 26 February 2016).

[19] Above (n 4) para 82. See Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press: Report* HC 780-II (2012) vol 2; E Freer, 'Human rights: Bloomberg LP v ZXC' [2022] *Crim LR* 500, 504.

[20] HC 780-II (2012) vol 2 at 791.

[21] Treacy LJ and Tugendhat J, *Contempt of Court: A Judicial Response to Law Commission Consultation Paper No 209* (2013) 5.

[22] M Easton, 'Suspects should have right to anonymity at arrest – Theresa May' (*BBC*, 15 May 2013).

[23] College of Policing, 'Guidance on Relationships with the Media' (2013) para 3.5.2.

Further recognition of the potentially ruinous impact of the publication of criminal allegations followed in Sir Richard Henriques' independent review of the Metropolitan Police Service's handling of non-recent sexual offence investigations.[24] This review was commissioned following the collapse of Operation Midland, an ill-fated criminal investigation that the Metropolitan Police conducted into (what we now know to be false) accusations of past child abuse made by Carl Beech against a series of high profile public figures. Henriques expressed concern at what he described as a 'culture of belief' in policing, consisting of the failure of the police to 'appreciate the danger of false complaints'.[25]

Henriques highlighted one weakness of the police guidance and practice of not naming arrestees, but instead disclosing offence, age, and location – namely, that even the disclosure of this information would be 'all but certain' to result in loss of anonymity in cases involving a high profile arrestee, such as a celebrity or senior politician.[26] The routine release of such information as part of Operation Midland enabled journalists and the broader public to quickly identify arrestees, as anyone could 'piece together the jigsaw' of publicly available information using internet search engines and social media. Henriques made a formal recommendation that a suspect should have the right to anonymity prior to charge enforced by statute and criminal sanctions, and that any pre-charge identification should be exceptional and subject to strict control.[27]

Whilst statutory protection of anonymity has not yet taken hold, there have been further developments to strengthen such protections. The 2013 College of Policing guidance was supplemented by an Authorised Professional Practice in 2017, which has periodically been updated.[28] The guidance is *sans* the equivocation which characterised the ACPO approach pre-Leveson, and reflects an operational response to criticisms about the unfairness of previous police approaches to naming suspects.[29] It indicated that any pre-charge naming of criminal suspects should be authorised by a chief officer after consultation with the Crown Prosecution Service. The guidance sets out a general approach to be taken by all forces:

Police will not name those arrested, or suspected of a crime, save in exceptional circumstances where there is a legitimate policing purpose to do so …

> A legitimate policing purpose may include circumstances such as a threat to life, the prevention or detection of crime, or where police have made a public warning about a wanted individual …
>
> When someone is arrested, police can proactively release the person's gender, age, the place – for example, the town or city – where they live … This should not apply in cases

[24] Sir Richard Henriques, *An Independent Review of the Metropolitan Police Service's handling of non-recent sexual offence investigations alleged against persons of public prominence* (2016).
[25] ibid, para 1.41.
[26] ibid, para 1.52.
[27] ibid, para 1.67.
[28] College of Policing, 'APP: Engagement and Communications: Media Relations' (24 May 2017).
[29] See *ZXC v Bloomberg LP* [2020] EWCA Civ 611, [80], per Simon J.

> where, although not directly naming an arrested person, this information would nevertheless have the effect of confirming their identity.[30]

This guidance echoes the obligations on police under the Data Protection Act 2018, and human rights law more broadly, to only process personal information in a law enforcement context lawfully and fairly, in accordance with a specified legitimate aim.[31] It should be welcomed for clarifying the police position at national level. But the guidance also has its limits. It is not legally binding and only regulates what the police disclose to the media. Problems have persisted where the media identify individuals as the subject of a criminal investigation without relying on the police disclosing this information to them. For example, in 2018 dozens of flights were cancelled at Gatwick Airport following successive reports of drone sightings close to the runway over a period of three days. As part of the investigation into who was operating drones a couple were arrested on suspicion of a series of offences under the Aviation and Maritime Security Act 1990, but were later released without further action. Although wholly innocent, they were named by a series of media outlets and described feeling 'violated' by the treatment they received in certain sections of the media with one outlet famously running the headline 'Are these the morons who ruined Christmas?' underneath a picture of the couple.[32]

The guidance warns of the risks of disparate information about a suspect being pieced together to enable 'jigsaw identification'. However, as jigsaw identification is a continuing problem, it may be questioned whether this guidance alone will be sufficient to protect suspects from jigsaw identification, even where it is followed to the letter.[33] Added to this, there have been occasions where the police disclose such information contrary to their own guidance;[34] and where Members of Parliament use their parliamentary privilege to name a criminal suspect.[35]

2. Can Anonymity be Protected Through the Courts?

By virtue of section 6 of the Human Rights Act 1998, courts must act in a way which gives effect to individual's 'right to respect for a private life' under Article 8

[30] See n 28.

[31] See Data Protection Act 2018, Pt 3, Ch 2; Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950) (ECHR).

[32] See S Murphy, 'Pair held and released over Gatwick drone say they feel "violated"' *The Guardian* (24 December 2018).

[33] See, eg, the facts in *Sicri v Associated Newspapers Ltd* [2020] EWHC 3541 (QB).

[34] See n 3.

[35] In 2014, Jimmy Hood MP stated in a Parliamentary debate that there had been 'accusations of improper conduct with children' made against former Home Secretary, Sir Leon Brittan. Sir Leon Brittan was posthumously cleared of any wrongdoing once after it was established that these allegations were among the prolific lies of Carl Beech. See 'Suspect anonymity: The hypocrisy of parliamentary privilege' (*Brett Wilson Media and Communication Law Blog*, 2020) at www.brettwilson.co.uk/blog/suspect-anonymity-the-hypocrisy-of-parliamentary-privilege/.

of the European Convention on Human Rights. The common law tort of 'misuse of private information' emerged out of this obligation, and the senior courts have recognised this action as the primary mechanism of redress for the unjustified dissemination of information that someone is the subject of a police investigation before they have been charged. In *Sir Cliff Richard v The British Broadcasting Corporation*, the claimant successfully brought an action against the BBC for a broadcast showing police officers searching his home as part of an investigation into child sex abuse allegations made against him. The BBC were notified of the search by the South Yorkshire Police in advance, after an employee of the BBC gave the impression to police that the BBC had details of the investigation and were prepared to publish them. Senior officers provided the information on the proviso that the BBC would not publish a story based on the details they already had.

In finding that the claimant had a reasonable expectation of privacy with respect to this information, Mann J focused on the stigmatising effect and reputational damage that would likely result from the dissemination of information that an individual has been investigated, particularly in relation to offences related to child sexual abuse.[36] Whilst Mann J held that the balance of case law and extra-judicial material heard in argument (several of which are discussed above)[37] support the proposition that 'as a matter of general principle, a suspect has a reasonable expectation of privacy in relation to a police investigation',[38] he held that such an expectation should not be equated with an 'invariable right to privacy' and that '[t]here may be all sorts of reasons why, in a given case, there is no reasonable expectation of privacy, or why an original reasonable expectation is displaced.'[39] Mann J held that the public interest in the disclosure did not outweigh the claimant's interest in privacy in the immediate case, primarily as the information was disclosed with a 'significant degree of breathless sensationalism'.[40]

This approach was confirmed by the Court of Appeal in *ZXC v Bloomberg LP*, where it was held that, in general, a person has a reasonable expectation of privacy over details of their being subject to a police investigation, up to the point of charge. The defendant media company, Bloomberg, published details of an unnamed United Kingdom law enforcement body's investigation into a businessman's alleged involvement in corruption and bribery offences. The defendant's article was based on a Letter of Request for Mutual Legal Assistance sent by the UK law enforcement body to another authority abroad. It is not clear how Bloomberg obtained this letter, but it was marked as confidential.

[36] See n 3, [224].
[37] ibid, [234], citing *Hannon v News Group Newspapers Ltd* [2015] EMLR 1; *PNM v Times Newspapers Ltd* [2014] EMLR 30; *ERY v Associated Newspapers Ltd* [2017] EMLR 9; and *ZXC v Bloomberg LP* [2017] EMLR 21 inter alia.
[38] See n 3, [248].
[39] ibid, [251].
[40] ibid, [300].

Simon J, with whom Underhill LJ and Bean LJ concurred, focused on the damaging impact of being linked to a criminal investigation, given 'the human characteristic to assume the worst (that there is no smoke without fire); and to overlook the fundamental legal principle that those who are accused of an offence are deemed to be innocent until they are proven guilty.'[41] In rejecting the defendant's arguments regarding their justification for publishing the information, Simon J held that there was a significant distinction between 'a report about the alleged criminal conduct of an individual; and a report about a police investigation into that individual and preliminary conclusions drawn from those investigations', with only the latter falling within the sphere of protection.[42] Thus, whereas one could rarely be said to hold a reasonable expectation of privacy over his involvement in criminal activity, one could reasonably expect a prima facie expectation of privacy surrounding police investigations and suspicions, particularly at the early stages of an investigation.

The Court of Appeal's decision in *ZXC* was subsequently applied by a Divisional Court in *Sicri v Associated Newspapers Ltd.* The facts in *Sicri* exemplify the devastating impact of reports naming criminal suspects in high profile cases.[43] On 29 May 2017, in the aftermath of the Manchester Arena suicide bombing, the claimant was arrested on suspicion of offences contrary to the Terrorism Act 2000. The police issued a press release that a 23-year-old man had been arrested in connection with the attack but did not name the claimant. However, an article published by the *Mail Online* provided details of the claimant's name, nationality, the location of his home and his photograph. The claimant was subsequently released without charge. The *Mail Online* neither published this fact nor took down the online article. The article was published internationally, leading the claimant to fear for his safety, receive abusive messages on social media, and lose his employment. The *Mail Online* eventually took down the article in February 2018 when the claimant's solicitor sent a letter of claim.

Warby J held that English law now recognises 'a general rule in favour of pre-charge anonymity for suspects'[44] and that the rationale for this rule was based on the fact that 'disclosure of such information is likely to have a seriously harmful impact on the person's reputation, and thus their private life.'[45] Warby J went onto to summarise the exceptions to the 'general rule' or 'legitimate starting point' that had emerged in previous authorities, including the public nature of the activity under consideration,[46] and a decision by the police to release the suspect's name. Warby J also observed that the misuse of private information tort had developed in

[41] See n 29, [82].
[42] ibid, [96].
[43] See n 33. This point is also made in R Craig and G Phillipson, 'Privacy, reputation and anonymity until charge: *ZXC* goes to the Supreme Court' (2021) 13 *Journal of Media Law* 152.
[44] See n 33, [85].
[45] ibid, [75].
[46] ibid, [86].

a manner consistent with data protection laws in recognising 'personal data relating to "the … alleged commission by [the data subject] of any offence" as "sensitive personal data", the processing of which requires additional justification'.[47]

Finally, in 2022, the UKSC unanimously dismissed an appeal from Bloomberg in the *ZXC* case. Bloomberg argued that the Court of Appeal had been wrong to hold that, as a general rule, a person under criminal investigation had a reasonable expectation of privacy in respect of this information before the point of charge. Lord Hamblen and Lord Stephens (with whom Lord Reed, Lord Lloyd-Jones and Lord Sales agreed) clarified that the general rule or legitimate starting point described by the Court of Appeal was not a legal presumption: whether there was a reasonable expectation of privacy in the relevant information remained a fact-specific enquiry.[48] If the expectation did not arise, the information could be published and if the facts were such that an objective expectation of privacy was significantly reduced, that would bear on the weight to be attached to the Article 8 rights in the stage two balancing analysis. They explained that the rationale for the starting point was that publication of such information ordinarily caused damage to the person's reputation and to multiple aspects of the person's physical and social identity protected by Article 8 ECHR, as had been set out in the lower courts.[49]

Bloomberg further argued, among other things, that the application by the courts below of the starting point was unsound because it significantly overstated the capacity of publication of the information to cause damage to the claimant's reputation given the public's ability to observe the presumption of innocence. The Court rejected this argument, finding that when the fact that an individual is subject to criminal suspicion is publicised 'the person's reputation will ordinarily be adversely affected causing prejudice to personal enjoyment of the right to respect for private life such as the right to establish and develop relationships with other human beings.'[50]

The judicial development of protection for suspect anonymity under the misuse of private information tort has sparked academic debate. Moreham has criticised the extension because it unsettles the established principle of defamation law that a defendant should not be compensated for loss of a reputation which he or she might not deserve, and for creating an avenue for potential claimants to circumvent the defamation action's strong public interest expression protections.[51]

Commenting on the Court of Appeal decision in *ZXC*, Moreham argues that the *Marcel* principle under the tort of breach of confidence – that 'no person who obtains information pursuant to a legal power or in furtherance of a public duty

[47] ibid, [85]; Data Protection Act 2018, s 11(2)(a).
[48] See n 4, [68].
[49] ibid, [72].
[50] ibid, [108].
[51] See NA Moreham, 'Privacy and police investigations: *ZXC v Bloomberg*' (2021) 80 *Cambridge Law Journal* 5, 7 citing *Flood v Times Newspapers Ltd* [2012] UKSC 11 and *Bonnard v Perryman* [1891] 2 Ch 269.

is free to disclose it to others unless that disclosure is consistent with the original purpose for which the information was obtained'[52] – provides a better basis for liability in cases like *ZXC* and *Richard* than misuse of private information. Moreham advances several arguments in favour of this approach. First, breach of confidence 'homes in better than privacy on the central concern in these situations – namely, the fact that the police are sharing information about their investigations into named individuals without a good operational reason for doing so'.[53] Second, targeted liability in breach of confidence for the wrongful disclosure of police information would have less of a 'chilling effect' on media outlets and victims of crime than liability in misuse of private information.[54] Third, information pertaining to an individual falling under criminal suspicion is not related to private life in the traditional sense. Rather, the real complaint of individuals such as the claimant in *ZXC* is that publication is deleterious to reputation. For Moreham, in allowing claimants to protect their reputations through the misuse of private information tort, English courts risk compensating claimants for damage to reputations they may not deserve in the circumstances.[55]

In a recent article defending the emergent consensus that suspects should be anonymous until charge and that the misuse of private information tort is the appropriate action to protect this right, Craig and Phillipson provide a persuasive rebuttal of Moreham's main conclusions. On Moreham's argument that the expansion of the misuse of private information tort unsettles the established principle of defamation law that a claimant should not be compensated for loss of a reputation which he or she might not deserve, Craig and Phillipson argue that this concern is not well founded in practice as damages purely to vindicate reputational loss might not ordinarily be awarded in misuse of private information cases; and, in many cases, it will be clear by the time the civil case comes to trial that the claimant faces no prospect of being charged or convicted (as in *Sicri* and *Richard*). Moreover, in the rare cases that awarding damages in respect of an undeserved reputation may seem real, Craig and Phillipson contend that the civil case hearing could simply be deferred until after the criminal proceedings had concluded.[56]

Craig and Phillipson argue that the presumption of innocence (taken as a broad principle of political morality that the state should organise the criminal process in such a way as to treat all suspects as though they are innocent[57]) should

[52] See *Marcel v Commissioner of Police of the Metropolis* [1992] Ch 225.

[53] NA Moreham, 'Police investigations, privacy and the Marcel Principle in breach of confidence' (2020) 12 *Journal of Media Law* 1; NA Moreham, 'Police Investigations, Privacy and Breach of Confidence, Part 2' (30 July 2020) at inforrm.org/2020/07/30/police-investigations-privacy-and-breach-of-confidence-part-2-n-a-moreham/.

[54] ibid (2020) 12 *Journal of Media Law* 1.

[55] NA Moreham, 'Privacy, reputation and alleged wrongdoing: why police investigations should not be regarded as private' (2019) 11 *Journal of Media Law* 142, 152.

[56] See n 43 (2021) 13 *Journal of Media Law* 153, 169.

[57] ibid, 179. The authors noted that this broad conception of the presumption of innocence has found favour with ECtHR jurisprudence, which courts are specifically bound to act compatibly with by virtue of the Human Rights Act 1998. See, eg, *Worm v Austria* (1998) 25 EHRR 44; *Jishkariani v Georgia* App no 18925/09 ECtHR 20 September 2018.

serve as a 'guiding light' for judges in misuse of private information cases.[58] Craig and Philipson argue that, whilst it may be acceptable for the state to arrest, search, or detain criminal suspects on the basis of a reasonable suspicion, these necessary investigatory steps contrast sharply from the public identification of suspects in most cases. Such identification generally occasions unnecessary intrusions into the individual's private life and is potentially deleterious to the administration of justice.[59] Thus, to expose the fact of an individual's subjection to criminal process before the point of charge is to have inadequate respect for the individual's status of innocence.

By invoking the presumption of innocence as the grounding normative principle or 'guiding light' to navigate such cases, the authors introduce an unnecessary layer of conceptual complexity to their argument, which distracts from their central conclusion. Granted, the ECtHR has considered that an individual is 'not being treated as innocent' when assessing the impact of measures taken by the state against a suspect that may inflict stigma or reputational damage under the Article 8 heading.[60] However, this line of jurisprudence has prompted concern that the presumption of innocence is being extended too far beyond its traditional procedural parameters, and that this risks diluting its potency and eclipsing the normative value of the narrower procedural protection.[61] The authors do not engage with these broader debates on the scope and normative value of the presumption of innocence. However, it is submitted that such debates might be avoided altogether, as the harms occasioned by publication flow from the unjustified intrusion into the individual's private life occasioned by stigmatising publicity, and not from the state abrogating the individual's status of legal or factual innocence.

As the authors highlight, Moreham's point that information pertaining to an individual falling under criminal suspicion is not related to private life runs against a strong legal consensus cutting across European Court of Human Rights (ECtHR) jurisprudence, EU data protection law and domestic transposition and interpretation of these provisions through statutes and the common law.[62] It has been firmly established that an individual's reputation is an aspect of private life under Article 8 ECHR, and the authors are correct to conclude that public identification generally occasions unnecessary intrusions into the individual's enjoyment of this right. It is true that the ECtHR has held that Article 8 ECHR could not be relied on in order to complain of a loss of reputation which was the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence.[63] This modest limitation on article 8 prevents the use of this right to

[58] ibid (2021) 13 *Journal of Media Law* 153, 178.
[59] ibid, 178.
[60] See *S and Marper v United Kingdom* (2009) 48 EHRR 50, [119].
[61] See, eg, L Campbell, 'Criminal Labels, the European Convention on Human Rights and the Presumption of Innocence' (2013) 76 *MLR* 681, 691.
[62] See n 43 (2021) 13 *Journal of Media Law* 153, 169.
[63] *Sidabras v Lithuania* (2006) 42 EHRR 6.

suppress information pertaining to the individual's reputationally harmful actions, rather than the mere fact of being the object of suspicion by a public authority.

In *Mikolajová v Slovakia*, where police disclosed information pertaining to the applicant's arrest to the health insurer of his spouse, the ECtHR held that the dissemination of this information fell firmly within the sphere of Article 8 protection, finding that the text of the police decision to arrest the applicant 'cannot be considered to be the foreseeable consequence of the applicant's own doing, precisely because she has never been charged with, let alone proved to have committed, any crime.'[64] Here, the ECtHR seems to recognise that privacy protection is often warranted because, at the earliest stages of a criminal process, there is a high level of uncertainty as to whether any reputational damage concomitant to being the subject of police attention is or is not deserved.

There is good reason for human rights law to protect individuals from arbitrary reputational damage. This is because an individual's reputation functions to help them to form and maintain social relationships. Reputational damage can negatively impact health and well-being and reduce opportunities to gain access to resources in a community.[65] There is evidence to suggest that reputation loss increases the risk of suicide even in people for whom there existed no previous signs of mental disorder.[66]

A growing body of empirical research supports the accounts of reputational damage, loss of resources, and diminished well-being reported by the claimants in cases such as *Sicri* and *ZXC*, notwithstanding the accuracy of the reporting in these cases. A classic study by Schwartz and Skolnick – in which the researchers prepared four sets of resumes with varying criminal record disclosures to prospective employers – demonstrated that employers were significantly less likely to consider applicants who had prior contact with the criminal justice system, even if the applicant was not subsequently convicted.[67] The study even showed that, where a job applicant with an acquittal on their record supported their application with a letter from the judge certifying the applicant's acquittal and emphasising the presumption of innocence, this applicant was still less likely to be shortlisted for the position than the control applicant with no criminal record.[68] More recent studies have demonstrated similar findings,[69] and other empirical research indicates that

[64] *Mikolajová v Slovakia* 4479/03 ECtHR 18 April 2011, [57].

[65] For a very impressive summary of empirical research on the negative effects of social ostracism and reputation loss see D Howarth, 'Libel: Its Purpose and Reform' (2011) 74 *MLR* 845, 849–52.

[66] S Pridmore and M McArthur, 'Suicide and reputation damage' (2008) 16 *Australasian Psychiatry* 312, also discussed in Howarth, ibid, 849–52.

[67] R Schwartz and J Skolnick, 'Two Studies of Legal Stigma' (1962) 10 *Social Problems* 133.

[68] D Kirk and RJ Sampson, 'Juvenile Arrest and Collateral Educational Damage in the Transition to Adulthood' (2013) 86 *Sociology of Education* 36.

[69] See D Pager, 'The Mark of a Criminal Record' (2003) 108 *American Journal of Sociology* 937; C Uggen, M Vuolo, and S Lageson, 'The Edge of Stigma: An experimental audit of the effects of low-level criminal records on employment' (2014) 52 *Criminology* 627, 649.

the dissemination of arrest records can have detrimental impacts on educational attainment and school dropout rates.[70]

Although it may seem counterintuitive, anonymity may also serve the public's interest in crime prevention and public safety. This is because publishing information linking an individual to a criminal investigation could constitute a form of disintegrative stigmatisation:[71] it outcasts the individual, blocking his or her access to an avenue of legitimate participation in society (namely, through the pursuit of a chosen career). In doing so, such disclosure may – as is well documented in criminological literature – diminish the individual's social bonds to the community, increasing the likelihood that the individual will engage in offending behaviour.[72]

Given the analysis above, Moreham's point on breach of confidence providing more appropriate protection for suspects seems inadequate because the 'Marcel principle' is only equipped to remedy deliberate leaks of details of an investigation by the authorities to the press.[73] Moreham's position seems to be based on a mistaken premise that '*whenever* police are investigating a suspect there will be some reason to think that he or she might be guilty of an offence'.[74] This overlooks that mere investigation can be undertaken on any level of suspicion, and there will inevitably be situations where an individual will be wrongly suspected. Craig and Phillipson highlight that 'it is known that the police sometimes investigate multiple persons, where only one can have committed the offence, simply to eliminate them from their inquiries.'[75] Moreham's approach, which would restrict the protection of suspects' reputational interests only to cases where they are either outright defamed by the media or where there is a breach of confidence by the authorities, would leave the media free to identify criminal suspects at the earliest stages of police inquiries and the consequences of such publicity for suspects can be devastating.

3. Human Rights Reform and the Uncertain Future of Anonymity for Criminal Suspects

The preceding sections of this analysis have demonstrated that there is a broad and defensible consensus that those subject to criminal investigation should gener-

[70] For example, empirical research from the United States shows that the dissemination of an arrest on a job applicant's criminal record certificate will have a deleterious impact on his or her chances of gaining employment. See ibid (2014) 52 *Criminology* 627.

[71] J Braithwaite, *Crime, Shame and Reintegration* (CUP, 1989) 101.

[72] D Downes, P Rock, and E McLaughlin, *Understanding Deviance*, 7th edn (OUP, 2016) 160–84. For further discussion in the context of non-conviction criminal record disclosure, see J Purshouse, 'Non-conviction disclosure as part of an enhanced criminal record certificate: Assessing the legal framework from a fundamental human rights perspective' [2018] *Public Law* 668.

[73] See n 43 (2021) 13 *Journal of Media Law* 153, 171.

[74] See n 55 (2019) 11 *Journal of Media Law* 142, 155.

[75] See n 43 (2021) 13 *Journal of Media Law* 153, 178.

ally be entitled to anonymity until the point of charge. This consensus emerged in reaction to increased societal knowledge of the severe harm unwanted publicity of criminal suspicion can cause. This consensus, however, is by no means unanimous as the academic debate above has shown. Moreover, the recent victories for those who champion the pre-charge anonymity through the courts may also prove to be short lived. In December 2021, the Government published a consultation document outlining its proposals to reform the Human Rights Act 1998. It proposed that there should be strengthened protections for the right to freedom of expression and that 'courts should only grant relief impinging on [this right] where there are exceptional reasons.'[76] The Government articulated a preference for 'a presumption in favour of upholding the right to freedom of expression, subject to exceptional countervailing grounds clearly spelt out by Parliament.'[77]

Following the ruling of the UKSC in *Bloomberg v ZXC*, the Ministry of Justice hinted that the domestic courts' development of the misuse of private information tort to include anonymity for suspects might be in the crosshairs of government reform plans. In response to the judgment, a 'government spokesperson' reportedly told *The Guardian* that the Government was keen to safeguard freedom of the press and would 'study the implications of the judgment carefully.'[78]

The Government introduced the Bill of Rights Bill on 22 June 2022. The Bill would repeal and replace the Human Rights Act 1998, although some provisions are retained. Despite an overwhelming majority of respondents of its consultation on human rights reform indicating that a proposal to strengthen freedom of expression was not needed, the Government included such reforms as part of the Bill without explanation.[79]

In the months leading up to the publication of the Bill, the Society of Editors expressed concerns that press freedoms had been 'significantly weakened over the years by the emerging development of the tort of misuse of private information'.[80] Against this backdrop, a new provision, seemingly designed to protect free speech from 'creeping judicial-made privacy law',[81] is set out in clause 4(1) as follows:

> When determining a question which has arisen in connection with the right to freedom of speech, a court must give great weight to the importance of protecting the right.[82]

The Bill of Rights Bill aims to recalibrate the balance struck between freedom of expression and privacy rights in such a manner that will prioritise the former.

[76] *Human Rights Act Reform: A Modern Bill of Rights: A consultation to reform the Human Rights Act 1998* (Ministry of Justice, 2021), para 213.

[77] ibid, para 215.

[78] J Waterson, 'Privacy laws could be rolled back, UK government sources suggest' *The Guardian* (19 February 2022).

[79] See *Human Rights Act Reform: A Modern Bill of Rights, Consultation Response* (Ministry of Justice, 2022).

[80] M Fouzder, 'What will Dominic Raab's bill of rights look like?' (*Law Gazette*, 25 March 2022).

[81] ibid, where these comments were attributed to the sponsor of the Bill of Rights Bill, Dominic Raab MP.

[82] Bill of Rights Bill HC Bill (2022–23) [117], cl 4(1).

Clause 4 leaves the rule that suspects have a prima facie pre-charge 'reasonable expectation of privacy' over information that they are subject to criminal process untouched. However, clause 4 seems to place an obligation on courts to give 'great weight' to the interests of the press and other groups under Article 10 ECHR in its 'stage two' analysis where the suspects privacy rights are 'balanced' against the Article 10 rights of the publisher.

Much has happened in British politics between June and December 2022, the time of writing. Without retracing all that history here, Dominic Raab MP, the Secretary of State for Justice who sponsored the Bill under Boris Johnson's premiership, was relieved of his office for the duration of Liz Truss MP's ill-fated period as Prime Minister between 6 September and 25 October 2022 and, during this time, it appeared that the Bill would not proceed to a second reading. Upon succeeding Truss as Prime Minister, Rishi Sunak MP has reinstated Raab. However, it remains unclear when, if ever, the Bill will proceed to its second reading as it has reportedly been 'deprioritised' over concerns it could be blocked by the House of Lords, stalling the progress of other Bills.[83] Meanwhile, there have been some developments indicating the potential for a movement towards enhanced anonymity for suspects. A Private Members' Bill to protect the anonymity of suspects was presented to Parliament in June 2022 by Sir Christopher Chope, the Conservative MP for Christchurch. The second reading for this Bill is scheduled to take place in March 2023, but the Bill has yet to receive any explicit government support. The idea of protecting suspect anonymity seems to enjoy general support from the Home Secretary, though. In October 2022, in her first stint in the role, the recently reinstated Suella Braverman MP indicated to a meeting of the young conservatives that she wished to examine the possibility of giving anonymity to criminal suspects before charge.[84] This issue may yet expose a fissure within the governing party, which currently has no clear position on whether it is the press or criminal suspects that need greater protection through law reform in this area.

4. A Proposal for Criminal Law Reform

Irrespective of whether we see the misuse of private information tort fettered through the Bill of Rights Bill, the preceding analysis indicates that individuals subject to criminal suspicion should, subject to limited exceptions, remain anonymous until the point of charge. It is submitted that a statutory automatic reporting restriction on the publication of identifying particulars of criminal suspects, and

[83] A Allegretti, 'Sunak's next U-turn may be to ditch Raab's bill of rights' *The Guardian* (8 December 2022). *Editor's Note: Dominic Raab MP was in due course replaced by Alex Chalk MP in April 2023 and a Bill of Rights now seems highly unlikely in the time left to the current government.*.

[84] R Syal, 'Suella Braverman to consider giving anonymity to suspected criminals' *The Guardian* (3 October 2022).

the creation of a strict liability offence for breach, could remedy many of the deficiencies in the legal framework, increase legal certainty, and strike a fair balance between the competing principles and fundamental rights at stake. To make good this claim, this section of the analysis will first explicate what form such a statutory protection might take before considering and addressing potential objections to such a wide reaching and general protection. A statutory reporting restriction would break new ground in terms of offering encompassing anonymity protection to criminal suspects. However, the concept of a reporting restriction to protect suspects' anonymity is not alien to English law.[85] Drawing on the drafting of similar reporting restrictions, the proposed automatic restriction could take the following form:

1. Restriction on the publication of identifying particulars of a criminal suspect

(1) No matter relating to a person shall be included in any publication if it is likely to lead to members of the public to identify him as the subject of a criminal investigation.

(2) Subsection (1) does not apply after the earliest time when any of the following events occurs—

  (a) the person is charged with a criminal offence in relation to that investigation, or a prosecution is otherwise commenced.

  (b) the person is issued a diversionary caution, or a community caution in relation to the matter investigated

(3) In this section 'publication' includes any speech, writing, relevant programme or other communication in whatever form, which is addressed to the public at large or any section of the public, but does not include an indictment or other document prepared for use in particular legal proceedings.

(4) For the purposes of this section, a person is 'the subject of a criminal investigation' if he is arrested, searched, questioned under police caution, or otherwise investigated by a representative of a state agency with a view to it being ascertained whether he should be charged with a criminal offence.

(5) A representative of a state agency may dispense to any extent with the restriction imposed under subsection (1) insofar as to do so is necessary to apprehend a person unlawfully at large or wanted in connection with a criminal offence.

(6) Any person may make an application to a magistrates' court for an order dispensing with the restrictions imposed by subsection (1).

(7) A court may by order dispense to any specified extent with the restriction imposed under subsection (1) above if it is satisfied that to do so is strictly necessary—

  (a) in the public interest; or

  (b) to avoid injustice.

[85] See section 2 above. Recently, in Northern Ireland, the Justice (Sexual Offences and Trafficking Victims) Act 2022, s 12 created anonymity protections for suspects in certain sexual offence investigations.

(8) The court's power under subsection (7) above may be exercised by a single justice
(9) A court shall not exercise its power under subsection (7) above without—
  (a) affording the parties to the proceedings an opportunity to make representations; and
  (b) taking into account any representations which are duly made.
(10) The restriction in subsection (1) also ceases to apply if—
  (a) the person who is the subject of the investigation includes a matter in a publication, or
  (b) another person includes a matter in a publication with the consent of the person who is the subject of the investigation.

2. Offence of breach of restriction on publication

(1) Any person who includes in a publication material in breach of section 1(1) above is guilty of an offence.
(2) Where a person is charged with an offence under section 2, it is a defence for the person to prove that at the time of publication the person was not aware, and neither suspected nor had reason to suspect, that the publication included the matter in question.

The draft statutory provision addresses several of the deficiencies in the regulatory framework governing the publication of the identity of criminal suspects. First, the provision hardens further into law the growing judicial and political consensus that the fact of an individual's involvement as the subject of a criminal investigation should not be publicly disseminated save in exceptional circumstances. Currently, the discretion of police and publishers to disclose is not subject to prospective rules of law that provide adequate guidance as to the circumstances in which publication might be justified. The framework of protections for criminal suspects as it is currently constituted offers little by way of consistent protection generally, nor *ex ante* guidance on the limits of the rights of publishers. The guidance that does exist has proven ineffective in preventing 'jigsaw identification', and identification outside of large media outlets. As with similar reporting restrictions that protect other groups, the draft provision encourages publishers to be mindful of whether the dissemination of personal information is likely to lead to the identification of an individual as part of a criminal process, taking due account of how different types of personal information might be 'pieced together' even if the name of a criminal suspect is not disseminated.

The remedies for wrongful identification under the current framework are, as a matter of empirical reality, distributed unevenly. Whereas tort law has been a successful mechanism for celebrities and powerful businessmen to win sizeable sums in damages for the reputational harm caused by the sensationalist reporting of major media organisations, it has proven less effective at deterring the 'feeding frenzy' of online identification and smears that can follow involvement in a criminal process in less high-profile cases, where the publishers are often a disorganised

band of social media users.[86] The creation of a criminal offence would provide a stronger deterrent to malicious and harmful publication practices, and one that is of universal application.

The statutory publication restriction is not susceptible to Moreham's concerns that suspects might win damages for harm to reputations tainted as a result of their involvement in criminal acts. The focus of the statutory restriction is on calling to account the actions of publishers that are contrary to the public interest, and not on vindicating the conduct of, or compensating, particular individuals. At the point that a newspaper or online vigilante publicly identifies an individual as the object of criminal suspicion, the wrongfulness of the conduct in that moment turns on the potential harm to that individual, his or her relatives and friends, the administration of justice, and the existence of any countervailing justifications, and not on whether the targeted individual is eventually found guilty.

As we have seen, charge is generally accepted as a defensible point at which a suspect's identity may be revealed because of the significant change in the level of evidence-based suspicion of guilt, and the more pressing demands of open justice as a case progresses to trial.[87] This is because, where an individual has been charged, the state has taken the decision to formally prosecute the individual based on evidence that is, in the view of an independent prosecutor, at least: capable of being put into an admissible format for presentation in court, reliable, and credible.[88]

Section 1(2) also outlines that the reporting restriction will apply until the point of criminal charge or of a non-conviction disposal which is issued to an adult suspect as an alternative to formal prosecution. Section 1(2) is drafted in terms that incorporate the reforms of the out of court disposal framework contained in the Police, Crime, Sentencing and Courts Act 2022, Pt 6. This streamlines the range of available cautions, warnings and penalty notices into a two-tier framework of diversionary and community cautions. Both of these cautions can be given to a person aged 18 or over in respect of an offence, provided that there is sufficient evidence to charge the individual with the offence, the individual admits to having committed the offence; and consents to being given the caution.[89] Consequently, the reforms proposed here also preserve the heightened anonymity protections

[86] For an example of how, in the absence of targeted legal protections, rituals of shaming and stigmatisation of criminal suspects can proliferate online, see J Purshouse, '"Paedophile Hunters", Criminal Procedure, and Fundamental Human Rights' (2020) 47 *Journal of Law and Society* 384.

[87] See n 43 (2021) 13 *Journal of Media Law* 153, 155.

[88] For full details of the relevant tests that must be satisfied before a suspect is charged with a criminal offence, see *Code for Crown Prosecutors* (2018) 3.1–5.11. A joint inspection by HMIC (now HMICFRS) and HMCPSI showed that in 91.9% of the cases examined, the decision to charge an individual complied with the Code for Crown Prosecutors. See: HMIC/HMCPSI, *Joint Inspection of the Provision of Charging Decisions* (2015) 27.

[89] Police, Crime, Sentencing and Courts Act 2022, Pt 6, ss 99 and 108.

that apply to youths subject to criminal process, even where the state has taken the decision to subject a youth to formal prosecution.[90]

The proposed statutory offence also makes important accommodations to safeguard free expression and the role of the press in keeping the activities of states' agents in administering criminal justice open to public scrutiny. Much like the misuse of private information tort, the provision does not prohibit publishers from reporting information as to the result of their own investigations into wrongdoing, nor from publishing details surrounding the underlying facts of a criminal investigation, which do not result in the identification of an individual as the subject of a criminal process.[91]

One risk with any movement towards greater anonymity protections is that this may have a chilling effect on complainants, or even result in individuals being prosecuted for sharing their own experiences of victimisation. Whilst it is conceded that this risk could materialise under proposed legislative framework, there are several reasons for which this risk should, on balance, be tolerated in the face of the important reasons for protecting anonymity at the earliest stages of a criminal process outlined above. Given that the offence only applies to publishing personal information likely to lead the public at large to identify the alleged perpetrator as the subject of a criminal investigation before charge, it is a limited constraint, which does not prevent complainants publishing all material relating to their experiences, nor from talking about their experiences to friends or a therapist. A similar risk is already tolerated in English law. Section 1(1) of the Sexual Offences (Amendment) Act 1992 entitles complainants in certain sexual offence cases to lifelong anonymity, and breach of this automatic anonymity provision (outside of limited exceptions[92]) is a criminal offence. The effect of this provision is such that anyone who has been the subject of a false allegation could find themselves prohibited from naming their accuser unless and until that person is subject to separate proceedings in relation to their dishonesty.[93]

In the interests of ensuring that the media can report on 'whistleblowers' and expose corrupt practices by law enforcement agencies, section 1(10) also provides protections for individuals to waive their right to anonymity and section 1(6)–(8) allows for the restriction to be lifted on application to a single judge, if to do so is necessary in the public interest or to avoid injustice. As with similar reporting restrictions, section 2(2) creates a defence for publishers who are not aware, and neither suspected nor had reason to suspect, that the publication included material subject to the automatic restriction in section 1. The offence put forward here

[90] The more significant harms that might attach to the naming of youths subject to criminal process are recognised in international law under the so-called 'Beijing Rules'. See The UN Standard Minimum Rules for the Administration of Juvenile Justice 1985.

[91] This follows a similar model to that applied in Germany, where the identity of suspects is subject to stringent protection. See M Bohlander, 'Open justice or open season? Should the media report the names of suspects and defendants?' (2010) 74 *Journal of Criminal Law* 321.

[92] See Sexual Offences (Amendment) Act 1992, s 3.

[93] ibid, s 1(4) and *R v Jemma Beale* [2017] EWCA 1012 (Crim).

bears similarities to the structure of strict liability provisions in the Contempt of Court Act 1981. Notably, in interpreting the scope of these provisions, the courts have been prepared to place a degree of responsibility on would-be publishers to discover whether there are relevant reporting restrictions in place before publishing.[94]

One recurrent objection to any anonymity protection of this kind is that it may have a prohibitive effect on criminal investigations, and particularly that it could discourage other potential victims or witnesses from coming forward to report offences.[95] Whilst the provisions in section 1(6)–(8) address this concern to some extent, there is a need for great caution here. As was observed by Sir Richard Henriques in his review of Operation Midland, once a suspect is identified in the press, 'all subsequent complainants are exposed to the assertion that they have been influenced to make their allegation by what they have read in the press or in social media'.[96] Further complaints in a case where anonymity has prevailed are not amenable to this line of attack and are thus more likely to be believed. Whilst Henriques accepted that, in certain cases, it may be necessary to appeal for witnesses, he suggested that such occasions should be controlled by application to a court to guard against 'the use of publicity as "flypaper", namely releasing details of a suspect in the hope that others will come forward to support an insubstantial initial allegation'.[97]

Ordinarily, where there is sufficient evidence to justify the intrusions occasioned by using a suspect's identity as 'flypaper', the threshold for charging the suspect should have been met, which triggers the loss of anonymity in any event. The high threshold of 'strict necessity' in section 1(7) above serves as a constraint on law enforcement or media over-use of the single justice procedure in section 1(6)–(8), in recognition that the anonymity right of suspects should be protected unless there is truly exceptional reason for publication.

5. Conclusion

The laws and guidance which regulate the conduct of criminal justice agencies and publishers have developed through a series incremental and context-specific protections, which provide some protection to some suspects, but do not address consistent issues around 'jigsaw identification', police breaches of their own guidance, and a lack of meaningful deterrence for ad hoc publication by less organised groups or individuals (typically online), who are much less likely than large media outlets to be sued in civil courts. Even the protections that the courts have devel-

[94] See *Attorney General v Yaxley-Lennon* [2019] EWHC 1791 (QB).
[95] *Key issues for the 2015 Parliament* (House of Commons Library, 2015) 102.
[96] See n 24, para 1.66.
[97] See n 24, para 1.70.

oped through incremental extension of the misuse of private information tort may yet be weakened through broader statutory reforms, which aim to reset the balance between freedom of speech and privacy firmly in favour of the former.

This chapter sought to show that, despite the Government's preference for stronger free speech protections, there has been growing recognition among lawmakers and criminal justice practitioners that suspects should typically be entitled to remain anonymous until the point that they are charged with a criminal offence. This 'right to anonymity' is grounded in the lasting reputational damage that the individual is likely to suffer through being publicly identified as the subject of state suspicion, whatever the eventual outcome of the case. However, the legal framework provides inconsistent protection to suspects, and overlaps itself in prolix ways.

This chapter proposed the creation of a statutory reporting restriction and a criminal offence for any breach of this restriction. The proposed offence also makes accommodations to safeguard the fundamental rights of publishers, true victims and the value of open justice. It is hoped that Parliament will act to place the protection of suspects' anonymity on a statutory footing. This will ensure that those subject to a criminal investigation are no longer subject to gratuitous publicity before the state has so much as mounted a credible case against them, nor the attendant reputational damage that inevitably follows.