The benefits of privacy-invading expression

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1 Introduction

Although it has received less coverage than the Leveson Inquiry, the Joint Committee on Privacy and Injunctions, chaired by John Whittingdale MP (the Whittingdale Committee) has also investigated media freedom recently, focusing particularly on the impact of developments in privacy law. Consistent with its quiet performance, it may be said that the Whittingdale Committee's chief findings are relatively mundane, amounting to little more than a gloss on rubber-stamping common law developments. Whilst this may no doubt disappoint certain sections of the press, it is also disappointing from a legal commentary perspective, particularly for its treatment of public interest. For, although the Whittingdale Committee recognises the problematic nature of identifying this quality with precision, it does remarkably little to address it. Arguably, the imperative for deeper discussion has been provided by a discernible liberal shift in judicial reasoning in recent privacy cases whereby unauthorised media disclosures of often embarrassing facts about an individual have been treated as instances of strong free speech claims.

This shift in position is contrary to orthodox thinking on the value of privacy-invading expression, doctrinally and normatively, under art 10 of the European Convention on Human Rights (ECHR). Since the conventional debate frames art 10 as primarily concerned with protecting expression that advances democratic participation, the claim that privacy-invading expression deserves minimal, if any, protection is difficult to resist. Yet these recent cases suggest a developing disconnect between the orthodox view of the public interest in privacy-invading expression and the emergent jurisprudence. In philosophical

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¹ See eg E Barendt, Freedom of Speech (2nd edn, OUP 2005) 155-62.

² R Barnes, Outrageons Invasions: Celebrities' Private Lives, Media, and the Law (OUP 2010); H Fenwick and G Phillipson, Media Freedom under the Human Rights Act (OUP 2006) 779–86; J Rowbottom, 'To Rant, Vent and Converse: Protecting Low Level Digital Speech' (2012) 71(2) CLJ 355, 369–71; J W Devine, 'Privacy and Hypocrisy' (2011) 3(2) Journal of Media Law 169–77; P Wragg, 'A Freedom to Criticise? Evaluating the Public Interest in Celebrity Gossip after Mosley and Terry' (2010) 2(2) Journal of Media Law 295–320.

terms, the conceptualisation of free speech is not limited to the democratic process value alone. For instance, a variety of arguments have been presented that link protection of speech with enhanced human faculties.³ However, it may be said these arguments are not taken seriously in the academic literature as a means of rationalising judicial interpretation of art 10.⁴ Contrary to that commentary, the primary concern of this article is to show that this 'benefits-to-self' analysis squares with the broader dimensions of the public interest test observable in recent privacy cases and so has utility in determining the parameters of protection for privacy-invading expression in the UK. The article, therefore, advances a positivist claim that this form of expression is protected to the extent it benefits the individual. Naturally, the normative appeal of such a regime is a different matter and certain doctrinal issues arise as well. These are explored in the final part.

2 The Whittingdale Committee

In recognition of intense media and political debate about injunctions preventing privacyinvading expression and in light of high-profile breaches of injunctions on social networking sites and in Parliament,⁵ the Whittingdale Committee was tasked with reviewing common law developments in privacy under the Human Rights Act 1998, including their effectiveness, in order to consider whether statutory intervention might be necessary to clarify the law, and to review the effectiveness of the Press Complaints Commission's ability to regulate media intrusions into privacy (recognising the duplication with the Leveson Inquiry into the culture, practice and ethics of the press). Of key significance for the following discussion, the Committee, in its report, 6 recommended no change to the existing law through statute on the basis that, first, judicial developments had been legitimate and struck the appropriate balance between privacy and free speech⁷ and, secondly, in any event, it was doubted such a statute could provide a meaningful definition of 'public interest' since it may become outdated quickly or require satellite litigation concerning its interpretation. Moreover, they concluded that the term defied simple definition albeit they did suggest a future reformed media regulator might publish a clearer set of guidelines on its meaning.⁸ Overall, the Committee concluded that the courts were best placed to determine whether a particular publication was in the public interest or not. Thus, the Committee approved of the misuse of private information tort, developed by the House of Lords in Campbell v MGN Ltd,¹⁰ elaborated upon in Re S,¹¹ and similarly approved of by the European Court of Human Rights (ECtHR) in MGN Ltd v UK, 12 by which private information is protected where it discloses a reasonable expectation of privacy (the threshold test) and its comparable value is not outweighed by the public interest in publication. In Re S, the House of Lords held that the second stage of the Campbell test involved four elements: first, neither right has precedence over the other (ie a fully functional system of privacy is just as important to society as a fully functional system of freedom of expression); secondly, that

³ See below.

⁴ See eg Barendt (n 1) 13–18; Fenwick and Phillipson (n 2) 18–19.

⁵ In the aftermath of the Ryan Giggs affair, CTB v News Group Newspapers Ltd [2011] EWHC 1232 (QB).

⁶ Report of the Joint Committee on Privacy and Injunctions (the Report) (HL 2010–12 273, HC 1443, 27 March 2012) [32].

⁷ Ibid [32].

⁸ Ibid [50].

⁹ Ibid.

¹⁰ Campbell v MGN Ltd [2004] UKHL 22, (2004) 2 AC 457.

¹¹ In Re S (FC) (A Child) [2004] UKHL 47.

¹² MGN Ltd v UK (2011) 53 EHRR 5 [131].

'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, that the justifications for interfering with each must be taken into account and, finally, any interference must be proportionate.¹³

Apart from its political value in response to those sections of the press claiming enhanced privacy protection is 'undemocratic', ¹⁴ the findings of the Committee about the term 'public interest' are fairly lightweight and somewhat disappointing, particularly the timorous acceptance that it defies precise definition. Although this article focuses exclusively on the legal apparatus to determine the public interest in the speech at stake, there is also, of course, a public interest in maintaining privacy, which ought to be taken into account in determining the strength of the privacy claim. There may even be a public interest against maintaining privacy that is unrelated or only tangentially related to freedom of expression, say privacy-invading photography by a government agency to catch a benefits cheat. ¹⁵ These broader notions of public interest at the different stages of the *Campbell* test were apparently overlooked by the Committee. Also, there is no real recognition that, whatever meaning is assigned to the term 'public interest' in a free speech context, ¹⁶ it must be regarded as a continuum, rather than an absolute, with some expression only lightly engaging the term and other speech doing so much more fully. This criticism can also be made of the case law, see discussion below. ¹⁷

Despite recognising the central importance of the public interest test in determining the weight of the free speech claim by noting, in particular, ¹⁸ the Court of Appeal's view that it is the 'decisive factor', 19 it would be a stretch to describe the Committee's scrutiny of the methodology employed by the judiciary to determine public interest as anything more than light touch. No specific cases are referred to and nothing is said about the principles informing the court's approach to determining its meaning. It is difficult to reconcile this narrowness with the Committee's overarching objective of determining whether the law was 'working' 20 and, consequently, what is said about the term is largely superficial such that a number of points arising from the jurisprudence go unobserved. Perhaps the most significant observation missed is the tremendous scope within the current law for judicial idiosyncrasy in identifying the qualities that generate 'public interest'.²¹ Clearly, the term is open to a broad range of interpretations, as graphically demonstrated by the diverse spectrum of viewpoints offered by those giving evidence to the Committee, particularly on the question of whether the revelation of embarrassing facts about individuals is a prima facie legitimate matter of public interest. Whereas several commentators (including the National Union of Journalists) suggested this was not of itself in the public interest, with one saying 'the presumption must be that what people do in private places is their business alone, providing it is within the law',²² others disagreed, with the most extreme viewpoint

¹³ In Re S (FC) (A Child) [2004] UKHL 47 [17].

¹⁴ See eg P Dacre, 'The Threat to Our Press', Guardian (London, 10 November 2008).

¹⁵ See eg Wood v Commissioner of Police for the Metropolis [2010] EMLR 1 (CA) on the limits of art 8.

¹⁶ It is recognised throughout this article that the term 'public interest' is a contested and controversial term in the academic literature. See eg Barendt (n 1) 27–30. For a useful discussion of the philosophical literature, see I O'Flynn, 'Deliberating about the Public Interest' (2010) 16(3) Res Publica 299.

¹⁷ S 3(b).

¹⁸ The Report (n 6) [43].

¹⁹ ETK v News Group Newspapers Ltd [2011] EWCA Civ 439 [23], [2011] 1 WLR 1827.

²⁰ The Report (n 6) 7.

²¹ See Wragg (n 2).

²² Joint Committee on Privacy and Injunctions, 'Oral and Written Evidence', 16 March 2012, 30, evidence of Professor Brian Cathcart [15].

emanating (unsurprisingly, perhaps) from the Chartered Institute of Journalists who argued that the term ought to include what is of interest to the public, for no other discernible reason than the somewhat circular argument that 'the public has demonstrated, by the tens of thousands, that it is interested in it'.²³

As this evidence demonstrates, the term 'public interest' is essentially a blank canvas onto which may be projected a multitude of preconceptions and predilections. It may have assisted the Whittingdale Committee to recall that, as a matter of principle, the meaning of public interest depends entirely upon the value underpinning freedom of expression since it is through that lens that the term must be seen. One of the difficulties inherent in the Committee's conclusion that the meaning of public interest should be left to the judiciary is the discernible lack of clarity by the judiciary in specifying this value (and therefore it might have been useful for the Committee to identify it). In its assessment of freedom of speech, the Committee expresses the view that it 'is essential for discovering new truths and thus enabling social progress; it allows for the moral and cultural self-development of individuals; and it is necessary for the flourishing of a healthy democracy'. 24 This view reflects the well-established philosophical appraisal of free speech²⁵ but is controversial as a description of the legal regime for determining protection since, according to the orthodox view, this plurality of free speech values does not ultimately animate judicial protection of art 10 even though references to such may be found in its rhetorical commentary on the right; instead, expression is protected to the extent it furthers democratic participation.²⁶

Thus the ECtHR jurisprudence reveals a fairly tough stance on privacy-invading expression, as seen, for example, in the principle that speech intended only to satisfy public curiosity is not a matter of public interest regardless of how famous that individual is.²⁷ The emphasis on self-rule is also apparent in the domestic case law, for example, in Baroness Hale's judgment in *Campbell*, such as the view that 'top of the list is political speech',²⁸ and the longstanding principle that the public interest is not to be confused with what interests the public.²⁹ In *Mosley*, Mr Justice Eady regarded the principle that public interest is determined by the contribution of the expression to public debate as importing 'a very high test'.³⁰ However, in light of recent case law, the established view in the academic commentary may need modification since there appears to be a distinct softening of this stance so as to protect a broader range of privacy-invading expression from interference, as a brief survey of the case law reveals.

In Ferdinand v MGN Ltd,³¹ the High Court found it was in the public interest to know that Premier League footballer and England captain Rio Ferdinand was not, as his autobiography suggested, a reformed character but had cheated on his wife prior to marriage. In Hutcheson v News Group Newspapers Ltd,³² public disclosure of the bare fact that the claimant had a secret second family was not only justified as part of an allegation that

²³ oint Committee on Privacy and Injunctions (n 23) 51, evidence of Chartered Institute of Journalists.

²⁴ The Report (n 6) 9 [10].

²⁵ See eg F Schauer, Free Speech: A Philosophical Enquiry (CUP 1982); K Greenawalt, 'Free Speech Justifications' (1989) 89 Columbia Law Review 119–55.

²⁶ Barendt (n 1) 155; Fenwick and Phillipson (n 2) 50.

²⁷ Von Hannover v Germany (2005) 40 EHRR 1.

²⁸ Campbell (n 10) 499.

²⁹ See eg Jameel v Wall Street Journal Europe Sprl [2007] 1 AC 359 [147].

³⁰ Mosley v News Group Newspapers Ltd [2008] EWHC 1777 (QB) [131].

³¹ Ferdinand v MGN Ltd [2011] EWHC 2454 (QB).

³² Hutcheson v News Group Newspapers Ltd [2011] EWCA Civ 808.

he had misappropriated funds from the business he ran with his famous son-in-law, Gordon Ramsay, to support this family but also amounted to a 'strong claim' to freedom of expression because, since being dismissed from that business, Hutcheson had had a 'very public slanging match' with Ramsay, which limited his ability to complain of public discussion about him, not least because these allegations invoked the media's right to disclose matters of wrong-doing. In Spelman v Express Newspapers Ltd, 33 Environment Secretary Caroline Spelman MP's 17-year-old son Jonathan applied unsuccessfully for an injunction against the Daily Star. The nature of the private information is not specified in the judgment although it has since become known that Ionathan had been banned from playing rugby for 21 months for taking banned substances to expedite his recovery from injury.³⁴ Since he had played rugby at England under-16s level and for Harlequins, the Daily Star argued that there was a 'clear public interest' in reporting this matter because it highlighted 'the pressures on elite athletes from the very beginning of their sporting careers' and 'although he is only 17, he is already a role model to other youngsters who aspire to follow in his footsteps and play for their country'. 35 This, they said, amounted to 'a much bigger public interest issue than the fact the Claimant is the son of a Conservative politician ... Exposing ... pressures on those who are young at elite level informs and educates those below at grass roots level and helps to promote a culture in the public and in sport . . . ', with the identity of his mother representing only an 'incidental dimension'. The High Court does not specify the nature of the public interest in any detail in the open judgment, although it is stated that the newspaper had a 'good prospect' of establishing a public interest in the information. In Goodwin v News Group Newspapers Ltd, 37 it was a matter of public interest that infamous banker Fred Goodwin had had an affair with a colleague whilst in charge of troubled bank Royal Bank of Scotland since it raised a legitimate issue about the standard of acceptable behaviour of public figures.³⁸ Similarly, in SKA & PLM v CRH & Persons Unknown, 39 the High Court would not grant a septuagenarian businessman an injunction to prevent the defendant (an alleged blackmailer) from disclosing to the claimant's wife and grown-up children the bare fact of his adultery with, and impregnation of, the second claimant, due shortly to deliver twins. Tugendhat I concluded that it could not be said that this disclosure about the claimant (not a public figure so far as one can tell) should not be allowed because, even if the defendant was a blackmailer, it could not be said he was deprived of his art 10 rights⁴⁰ and, in this case, 'to tell a grown up child that his or her father . . . is, or is about to be, the father of twins, is speech of a high order of importance'.41 Clearly, these cases were not decided on any narrow conception of the democratic process value.

³³ Spelman v Express Newspapers Ltd [2012] EWHC 355 (QB).

^{34 &}lt;www.bbc.co.uk/news/uk-17731143> accessed 16 April 2012.

³⁵ Spelman (n 33) [22].

³⁶ Ibid [22] and [25].

³⁷ Goodwin v News Group Newspapers Ltd [2011] EWHC 1309.

³⁸ Cf WXY v Genanter, Positive Profile Ltd & Burby [2012] EWHC 496 (QB) where disclosure by the third defendant of the claimant's (a wealthy woman closely connected to a foreign head of state) alleged affair was prohibited.

³⁹ SKA & PLM v CRH & Persons Unknown [2012] EWHC 766 (QB).

⁴⁰ Cf Sharp J in DFT v TFD [2010] EWHC 2335 [23]: 'I accept Mr Tomlinson's submission that the expression rights of blackmailers are extremely weak, (if they are engaged at all)' and also WXY v Gewanter et al (n 38).

⁴¹ SKA (n 39) [77].

These may be contrasted with other recent decisions where the revelation of a sexual relationship did not amount to a discussion of public interest of itself.⁴² To the extent that the proposed publication would contain substantial details of the affair, such a finding is consistent with Lord Hoffmann's view in *Campbell* that 'the addition of salacious details or intimate photographs is disproportionate and unacceptable [and] even if accompanying a legitimate disclosure of the sexual relationship, would be too intrusive and demeaning'.⁴³ For example, in *CDE v MGN Ltd*, the first claimant, a married TV personality, had conducted what the court described as a 'quasi relationship' with the second defendant, which involved, allegedly, telephone sex and other intimate and personal discussions containing 'a good deal of flirtation and sexual innuendo' as well as the exchange of intimate photographs of themselves.⁴⁴ The *Sunday Mirror* wished to publish these details, arguing that there was a public interest in the story because the second defendant had a history of mental health problems and that the first claimant had taken advantage of her vulnerability. However, the court did not accept this argument on the facts.

Of course, the question of whether publication of the bare fact of the relationship or limited details⁴⁵ may be prevented depends not only on the asserted public interest but also on the nature of the privacy claim. The latter is invariably strengthened if both parties to the relationship wish for it to be kept secret⁴⁶ or if the claimant has young children who would be adversely affected by the revelation and/or subsequent press scrutiny.⁴⁷ Other cases show that the media may decide not to contest the non-disclosure order nor advance a public interest claim,⁴⁸ although, as the court has repeatedly said, the question of whether an anonymity or non-disclosure order should be granted is for the court to decide, not the parties, because the 'parties cannot waive the rights of the public'.⁴⁹ These cases suggest that for the public interest argument to be successful, an additional dimension beyond the mere fact of an adulterous affair is required. As the following section argues, the nature of this additional dimension may be read consistently with the 'benefits-to-self' analysis.

3 The 'benefits-to-self' argument

A) PRINCIPLE

The argument that freedom of speech deserves special protection because it benefits the self is well established in the academic literature and has been presented in a variety of forms. It is, for example, apparent in John Stuart Mill's classic argument from truth in the claim that liberty of thought and discussion 'enable average human beings to attain the mental stature which they are capable of'. ⁵⁰ Likewise, pre-eminent free speech theorist,

⁴² ETK (n 19); MNB v News Group Newspapers Ltd [2011] EWHC 528 (QB); CTB (n 5); TSE v News Group Newspapers Ltd [2011] EWHC 1308 (QB); MJN v News Group Newspapers Ltd [2011] EWHC 1192 (QB); JIH v News Group Newspapers Ltd [2011] EWCA Civ 42; CDE v MGN Ltd [2010] EWHC 3308; AMM v HXW [2010] EWHC 2457 (QB).

⁴³ Campbell (n 10) 475.

⁴⁴ *CDE* (n 42) [5], [45] and [65].

⁴⁵ See eg Trimingham v Associated Newspapers Ltd [2012] EWHC 1296 (QB) [306]–[08], in which the claimant complained unsuccessfully about various newspaper reports that she had told friends sex with Chris Huhne MP was 'wild', 'amazing', 'incredible'. Tugendhat J accepted that these descriptions were a matter of editorial judgment.

⁴⁶ ETK (n 19).

⁴⁷ CDE (n 42); ETK (n 19).

⁴⁸ MJN (n 42).

⁴⁹ JIH (n 42) [12].

⁵⁰ J S Mill, On Liberty in Collected Works of John Stuart Mill vol XVIII (University of Toronto Press 1977) 243.

Thomas Emerson, specified self-fulfilment as one of four values advanced by the system of freedom of expression: 'the proper end of man is the realisation of his character and potentialities as a human being. For the achievement of this self-realisation, the mind must be free'. 51 Consistent with this assessment, Raz has expressed the view that, since speech often portrays different ways of living, it benefits self-development by validating those lifestyles and, therefore, censorship equates to disapproval of those ways of life, is an insult to those who live that way and alienates them from society.⁵² Arguably, the benefits-to-self analysis is apparent in its most undiluted form in the separate works of Martin Redish⁵³ and C Edwin Baker, 54 who express the view that it is the primary – if not only – value advanced by a system of free speech. According to them, this value comprises of two elements: individual self-rule (ie expression relating to public decision-making) and self-development (ie expression relating to private decision-making), although they disagree on certain key conceptual issues. Redish, for example, conceives freedom of speech as an audienceorientated right so that speech is protected to the extent it benefits those who receive the information whereas Baker conceives of it as a speaker-orientated right⁵⁵ (although he makes a special case for the media, discussed below) and so, for example, would exclude commercial speech from protection because it is generated by market demands and not by a 'manifestation of individual liberty'. 56 Both agree that interference is justified where speech is seriously harmful.⁵⁷ Baker, for example, articulates this level of harm as excluding speech leading to violence or amounting to coercion. 58 Such a high standard of interference is important, they argue, to ensure the autonomy of the audience (in Redish's case)⁵⁹ and the speaker (in Baker's)⁶⁰ is respected. This high level of protection applies to a broad range of speech categories, not simply that defined as 'political' (as the argument from participation in a democracy tends to do)⁶¹ nor that 'objectively' defined as beneficial to the individual, since no such objective criteria could be established, certainly not by the state.⁶²

⁵¹ T Emerson, The System of Freedom of Expression (Vintage Books 1971) 6.

⁵² J Raz, 'Free Expression and Personal Identification' (1991) 11 OJLS 303.

⁵³ See M Redish, 'The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression' (1971) 39 George Washington Law Review 429–73 which sets the tone for his later research, particularly 'The Value of Free Speech' (1982) 130 University of Pennsylvania Law Review 591–645 which presents the argument in its most complete form. See also 'First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy' (1997) 24 Northern Kentucky Law Review 553–584 and 'Understanding Post's and Meiklejohn's Mistakes: the Central Role of Adversary Democracy in the Theory of Free Expression' (2009) 103 Northwestern University Law Review 1303–70.

⁵⁴ See C E Baker, Human Liberty and Freedom of Speech (OUP 1989) which develops earlier themes in his work. Chapter 3 is particularly valuable in summarising his claim that the First Amendment protects the speaker's uses of speech for self-realisation and to promote change. See also 'Giving the Audience What it Wants' (1997) 58 Ohio State Law Journal 311–417; 'Campaign Expenditures and Free Speech' (1998) 33 Harvard CR–CLL Law Review 1–55; 'The First Amendment and Commercial Speech' (2009) 84 Indiana Law Journal 981–98; 'Is Democracy a Sound Basis for a Free Speech Principle?' (2011) 97(3) Virginia Law Review 515–30; 'Autonomy and Free Speech' (2011) 27 Constitutional Commentary 251.

⁵⁵ Their disagreement unfolds in C E Baker, 'Realizing Self-Realization: Corporate Political Expenditures' and M Redish's The Value of Free Speech' (1982) 130 University of Pennsylvania Law Review 646–77 and M Redish, 'Self-Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker' (1982) 130 University of Pennsylvania Law Review 678–88.

⁵⁶ Baker, Human Liberty (n 54) 225.

⁵⁷ Redish, 'The Value of Free Speech' (n 53) 627.

⁵⁸ Baker, Human Liberty (n 54) 59.

⁵⁹ Redish, 'The Value of Free Speech' (n 53) 605-07.

⁶⁰ Baker, Human Liberty (n 54) 47-69.

⁶¹ R Bork, 'Neutral Principles and Some First Amendment Problems' (1971) 47 Indiana Law Journal 1.

⁶² Redish, 'The Value of Free Speech' (n 53) 627-28; Baker, Human Liberty (n 54) 59.

This resistance to the prioritisation of 'political' expression reflects the belief that information relevant to private decision-making is equally important to that benefiting public decision-making ⁶³ and is also due to a deep-rooted mistrust of any attempt to define 'political expression' reliably. ⁶⁴

The appeal of the benefits-to-self argument to defending the protection of privacyinvading expression is obvious. Privacy-invading expression may be said to encourage selfreflection, personal growth and maturity in its audience, particularly where it is disapproving of celebrity excess. It may also help develop positive personality traits and generally enhance a deeper understanding of what it is to be a member of society and to be human. For those who are morally outraged, the story may become a platform by which to educate others or condemn those who engage in the problematic behaviour and, in that case, displays of media moral outrage about the personality's behaviour reinforce their own impression of social or moral accountability. Likewise, these stories may make others feel better about themselves (say, because they have had similar experiences or feelings) because, to them, it normalises the behaviour and so develops their sense of confidence and boosts self-esteem. More mischievously, an individual may benefit from witnessing a celebrity's downfall either because they enjoy the perverse pleasure of Schadenfreude or more simply because it gives them a topic of conversation by which to discover, and develop relationships with, likeminded people. These benefits are, of course, irrelevant where free speech is wholly conceived in democratic process terms but become pivotal where it is re-imagined as primarily benefiting personal development. In each case, however, it is unnecessary to precisely calculate the benefit to the individual, there only needs to be recognition of a conceivable benefit.

It is the contention of this article that these features of the benefits-to-self analysis can be located in the UK privacy jurisprudence and, therefore, it is possible to construct a positivist argument that privacy-invading expression is protected in the UK for its contribution to individual self-development. Since, at an abstract level, free speech theory should identify both the value(s) served by affording expression special treatment and the circumstances in which the state may legitimately interfere with it, these will also be set out in the following. The accounts of Baker, Redish and Emerson are informative in this respect, although they do not provide a complete solution since they adhere to certain key principles not found in the UK case law, such as the centrality of viewpoint neutrality in determining free speech protection, 65 which, as a principle, is largely alien to the UK and Strasbourg jurisprudence (see discussion below). For the following discussion, it is useful to apply an audience-orientated perspective to the analysis.⁶⁶ Such an approach is consistent with both UK⁶⁷ and Strasbourg⁶⁸ case law. For the purposes of discussion, the audience may be defined as those who want to receive the information as opposed to those who happen upon it (who may be thought of as bystanders whose interests may be largely inimical to freedom of expression).⁶⁹

⁶³ Redish, 'The Value of Free Speech' (n 53) 605-07; Baker, Human Liberty (n 54) 33.

⁶⁴ Baker, Human Liberty (n 54) 32-33.

⁶⁵ See, for example, M Redish, 'Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination' (2007) 41 Loyola of Los Angeles Law Review 67–132.

⁶⁶ See Barendt (n 1) 23-30, for analysis of the different interest groups.

⁶⁷ See eg R (On the Application of ProLife Alliance) v BBC [2003] UKHL 23 and discussion below.

⁶⁸ See eg Jersild v Denmark (1995) 19 EHRR 1 [31]: 'Not only does the press have the task of imparting . . . information and ideas: the public also has the right to receive them.'; Krone Verlags Gmbh & Co KG v Austria (No 3) (2006) 42 EHRR 28 [31]: 'For the public, advertising is a means of discovering the characteristics of services and goods offered to them.'

⁶⁹ Barendt (n 1) 27-30.

B) IMPACT ON THE 'PUBLIC INTEREST' TEST

By viewing the domestic privacy jurisprudence through the lens of the benefits-to-self analysis, a number of points emerge. First, although the decisions outlined in the previous section may or may not be justifiable in strict democratic process terms, it is notable that the judges in these cases do not identify the public interest in such terms and certainly not so narrowly. Instead, three distinct interpretations of the term 'public interest' are at work, all of which are notably broad: that the public has a right not to be misled and therefore the media is entitled to report any misleading behaviour (this right is also apparent in Campbell v MGN Ltd;⁷⁰ that, as role models, public figures must adhere to a high standard of behaviour, and that the media enjoys a general freedom to criticise the behaviour of others (this principle was first articulated in Terry v Persons Unknown).⁷¹ Ferdinand v MGN Ltd⁷² discloses all three interpretations, applied in varying degrees. Thus, the media's public interest claim comprised of a right to correct the public misperception created by Ferdinand's autobiography and other interviews that he was a reformed character. Of additional weight to the free speech claim was the fact that he was England captain at the time;⁷³ 'a job that carried with it an expectation of high standards',⁷⁴ and therefore spoke to the role model responsibilities that Ferdinand had, in terms reminiscent of the highly criticised Court of Appeal decision in A v B plk in which Lord Woolf held that 'role models' (which he described as public figures holding 'a position where higher standards can be rightly expected by the public') may be the 'legitimate subject of public attention', whether they have courted publicity or not, since 'the public have an understandable and so a legitimate interest in being told the information; ⁷⁵ 'undesirable behaviour on their part can set an unfortunate example'. 76 Citing passages from Terry, the court in Ferdinand agreed that the media is entitled to criticise 'the conduct of other members of society as being socially harmful, or wrong'.⁷⁷ Clearly, the judiciary in Ferdinand cannot have had in mind notions of a legal wrong but, instead, some moral imperative. Yet the connection between Ferdinand's behaviour and its actual impact on the fabric of society is not established or, even, meaningfully addressed and remains entirely unspoken.

In *Hutcheson*,⁷⁸ the Court of Appeal likewise spoke of the media's 'freedom to criticise', describing it as a 'powerful' argument.⁷⁹ Applying this principle, the court held that there were two grounds on which publication was justified. First, the public nature of the dispute counted against Mr Hutcheson:

to my mind, those who choose to conduct their quarrels in such a fashion take the risk that they may not be able to insist thereafter on clear boundary lines between what is public and what is private – regardless of whether they were, hitherto, only public personalities in a very limited sense. In the present case, as

⁷⁰ Campbell (n 10) [24].

⁷¹ Terry (Previously LNS) v Persons Unknown [2010] EMLR 16 [100].

⁷² Ferdinand (n 31) [65].

⁷³ Ibid [89].

⁷⁴ Ibid [89].

⁷⁵ A v B plc [2003] QB 195 [11(xii)]; see sustained criticism in Barendt (n 1) 232–33; Fenwick and Phillipson (n 2) 794–800.

⁷⁶ A v B plc (n 75) [43(vi)].

⁷⁷ Ferdinand (n 31) [63].

⁷⁸ Hutcheson v News Group Newspapers Ltd [2011] EWCA Civ 808.

⁷⁹ Ibid [29].

it seems to me, there is a very real risk of a distorted and partial picture being presented to the public of this dispute 80

Thus, they concluded on this point, there was a 'powerful interest in publication'. 81 Clearly, there is a lack of sympathy for the claimant's position but this cannot account for the obscured imperative for the audience to hold a 'complete' picture or, rather, why the audience would be disadvantaged by an 'incomplete' one. An explanation is only partially provided by the second ground, that the disclosure authenticated the allegation of wrongdoing.⁸² since this is, of itself, insufficient to wholly account for the significance of greater public knowledge about these events. Arguably, it is only by reading in the benefits-to-self analysis that the court's overall finding of a 'strong claim to freedom of expression in the public interest'83 becomes understandable. Similarly, and as noted above, in *Spelman*, the Daily Star refers to the claimant as a role model when arguing that a significant public interest exists.⁸⁴ These broader notions of public interest speak to the benefit derived by the audience of knowing of wrong-doing, primarily in a moral sense, not because the knowledge impacts on public decision-making (clearly, it does not) but because it may benefit private decision-making, say, because the audience learns something valuable that they might apply to their own everyday lives: that cheating (either on a partner, in business, or in sport) is, at the very least, morally wrong and therefore should not be indulged in or, otherwise, they learn something about the individual concerned that changes their perception of them. From this, the audience might gain a deeper insight of how to behave in society and what to expect of others. Moreover, they might modify their behaviour in respect of the well-known figure publicly, for example, by not purchasing associated products or not providing support in some other way (booing at a football match, say), or, privately, in their discussions with friends about that figure.

However, the case law reveals an inconsistent approach toward the assessment of public interest. For example, the Court of Appeal decision in ETK discloses a fairly narrow approach to the issue. Here, the appellant and X, described as 'figures known to the public'85 and working in the entertainment industry, had had an affair whilst working together and the appellant ended it after his wife found out. The appellant told his employer of the affair and asked not to work with X again, which led them to dispense with X's services, publicly announcing it was a 'convenient moment' to make the change. 86 At first instance, Collins I refused to grant the injunction, stating there was a public interest in the real reason for X's departure. However, the Court of Appeal disagreed for two reasons: first, Collins J had underestimated the strength of the privacy claim (particularly by minimising the impact on the children involved) and, secondly, because there was no public interest in the disclosure, finding instead that publication would only serve public prurience'.87 Even on traditional democratic process grounds, this reasoning may be questionable given the apparent equality issue (why were X's services dispensed with and not the appellant's?) and, arguably, this claim is strengthened on a benefits-to-self analysis. This is not to say, though, that in the final analysis the injunction ought not to have been

⁸⁰ Hutcheson (n 78) [45].

⁸¹ Ibid [45].

⁸² Ibid [46].

⁸³ Ibid [48].

⁸⁴ Spelman (n 33) [22].

⁸⁵ ETK (n 19) [21].

⁸⁶ Ibid [8].

⁸⁷ Ibid [23].

granted but rather that Mr Justice Collins's initial assessment of the public interest is consistent with the benefits-to-self analysis (and, arguably, other case law).

Likewise, as noted above, the reasoning in Mosley discloses a narrow interpretation of the public interest, however, application of the benefits-to-self analysis would recognise the broader range of discussions that may follow from this information that might have benefited individual self-development at the time, such as, but not limited to, the appropriateness of Max Mosley's continued role as head of the Fédération Internationale de l'Automobile amidst the scandal surrounding his sex life. This would have accorded with the view of one commentator giving evidence to the Whittingdale Committee: 'Why the exposure of Max Mosley as head of F1 behaving in a quite extraordinary manner with prostitutes in a basement in Chelsea is not in the public interest . . . may not be immediately apparent to the average man in the street.'88 In Mosley, Eady I concluded that the discussion did no more than satisfy public curiosity and, therefore, was contrary to the Von Hannover principle on public interest.⁸⁹ The benefits-to-self analysis need not conflict with this principle if 'satisfying public curiosity' is taken as a passive activity and the benefits-to-self analysis accepted as more purposeful by explicating a positive contribution to individual self-development. In this way, the Von Hannover principle may be respected, although the circumstances in which it may apply would be substantially reduced. It may be that, in light of the recent decisions in Springer 90 and Von Hannover II, 91 this reduction in protection is in line with ECtHR case law in any event (see discussion below).

To say discussion of immoral behaviour by well-known figures is a legitimate matter of public discussion by reason of these three broader treatments of the public interest test – the public right not to be misled by the mere fact of lying or hypocrisy, the freedom to criticise doctrine and the role-model argument - is problematic to justify solely on democratic process grounds. For example, by revealing an affair, a newspaper might legitimately question the suitability of that figure for the role they hold but only if that individual holds public office. 92 Yet, absent that aspect, the appeal to the democratic process value is less convincing. For example, the media is often expressing no more than disdain about immoral behaviour, such as alcohol abuse or adultery. Of course, this might provoke broader discussions about contemporary attitudes toward the consumption of alcohol, or its wide availability, or attitudes toward marriage or sexual promiscuity. Clearly, media discussion of these social norms is a matter of legitimate public discourse, 93 when expressed in general terms to identify patterns or trends, and may inform public debate on political or legal issues, such as devoting greater public money toward education on the health risks of excessive alcohol use or promiscuity, or setting minimum prices for alcohol, or harsher outcomes in divorce proceedings where there has been adultery. However, these discussions are not prevented by a ban on scrutinising the behaviour of particular celebrities.⁹⁴ Where the media's lobbying function is not engaged on the facts of a specific case, the claim to advancing democratic participation seems particularly thin. When newspapers criticise celebrity excess they are not so much concerned with what Fuller calls the morality of duty (ie those norms that identify minimum standards of behaviour in a society) but the morality of aspiration (ie those norms that articulate excellence and the

^{88 &#}x27;Oral and Written Evidence' (n 22) 82, Alastair Brett.

⁸⁹ Von Hannover (n 27) [65]-[66].

⁹⁰ Springer v Germany [2012] EMLR 15.

⁹¹ Von Hannover v Germany (No 2) [2012] EMLR 16.

⁹² Eg the facts of Trimingham (n 45).

⁹³ See C R Sunstein, Democracy and the Problem of Free Speech (Simon & Schuster 1995).

⁹⁴ Wragg (n 2) 319.

fullest realisation of human ability and powers). The state's legitimate interest in the political and legal ordering of this behaviour must end at the point where duty becomes aspiration since, as Fuller argues, it is not for the law (or politics) to determine questions of aspiration since these are more a matter of aesthetics, not least because it is impossible to say with any degree of clarity what aspirations an individual ought to have or by what standard success in this regard is to be judged; instead, the role of law is confined to the question of duty. Thus, information concerning morality of aspiration has no value to democratic participation because the law cannot respond to it. Framing protection in terms of benefit-to-self renders this link nugatory.

C) WEIGHT OF THE FREE SPEECH CLAIM

Secondly, the methodology in determining the weight of the free speech claim is consistent with the view that the court cannot accurately determine the benefit to be derived by the audience. It is a discernible feature of these cases that there is a lack of judicial assessment of the comparative value of the public interest in the expression. Instead, the mere presence of a public interest is sufficient to imbue the expression with a high value. This can be seen in the Ferdinand and Hutcheson decisions, in particular, where the main thrust of the reasoning focuses on the capacity to contribute to the public interest rather than in determining the extent of that contribution for the purposes of balancing. This is arguably at odds with the Campbell test in two respects: first, it does not adhere to the second stage of the Re S elaboration of Campbell because there is no 'intense focus' on the actual contribution of the expression and, likewise, secondly, it conflicts with the principle that both rights are treated equally since it assigns a potential value to freedom of expression. The cause of this curtailment may be due to the Supreme Court's appraisal of the ECtHR's art 8/10 jurisprudence in Re Guardian: that, where the public interest is at stake, there is scarcely any room to interfere with freedom of expression.⁹⁷ Frankly, this is a miserly reading of the relevant case law. Although the ECtHR consistently states that the media has a duty to impart information and ideas on matters of public interest and the public has a right to receive them, 98 the analysis does not end there because the right is not absolute. On a conventional reading of the Strasbourg jurisprudence, the imperative to protect expression under art 10 does not arise simply because there is a public interest at stake (eg there may be a public interest at stake in all manner of expression that is rightly protected, such as sensitive official secrets) but where there is sufficient public interest at stake and, thus, the judiciary's job is not just about determining what the public interest is but the weight of it. This much is apparent from the Court of Appeal decision in HRH Prince of Wales v Associated Newspapers Ltd, 99 where Lord Phillips stressed that the question is not simply whether the information is a matter of public interest but whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached'.

The decision in *Ferdinand* may be criticised for the failure to identify the public interest in the lie itself. Thus, the High Court treated the *fact* of misleading behaviour to be a matter of public interest rather than identifying what *effect* this had or might have as a matter of public interest. Moreover, the High Court appears to treat the mere fact of lying as being of not just public interest but *sufficient* public interest to outweigh the accompanying

⁹⁵ L Fuller, The Morality of Law (Yale UP 1969) 13-15.

⁹⁶ Ibid 15-19.

⁹⁷ Re Guardian News and Media Ltd (2010) 2 WLR 325 [51].

⁹⁸ MGN Ltd v UK (n 12) [141] where the court refers to Observer v UK (1992) 14 EHRR 153 [59]; Thorgeirson v Iceland (1992) 14 EHRR 843 [63]; Bladet Tromso v Norway (2000) 29 EHRR 125 [62]; Jersild v Denmark (n 68) [31].

⁹⁹ HRH Prince of Wales v Associated Newspapers Ltd [2008] Ch 57, 124-25 [68].

invasion of privacy. Yet the fact of Ferdinand being England captain is hardly a relevant consideration in this regard and in democratic process terms is particularly problematic given the court's failure to identify the *public* nature of this role. Since the Football Association is not a public body, 100 nor is it publicly funded, 101 it cannot be said that public money was at stake. Instead, the court seems to have confused what is of interest to the public (the popularity of the England football team) with what is in the public interest. It is interesting that *Ferdinand* is one of the few recent privacy decisions that the Whittingdale Committee refers to, yet these distinctive features in its reasoning go entirely unobserved despite the Committee's repeated insistence that the public interest does not equate to what interests the public. 102

Interestingly, theoretical models advocating the benefits-to-self argument do not tend to consider balancing to be a satisfactory method of determining privacy claims, 103 primarily due to the view that ad hoc balancing is an unprincipled method of deciding cases. Emerson is particularly critical of such an approach. ¹⁰⁴ Instead, he conceives freedom of expression and privacy as two separate zones of activity whose boundaries abut without intersecting. For him, therefore, the judicial task is one of determining where the appropriate boundaries lie. Although the UK system is conceived differently, something of this zonal thinking could be read into the approach in recent privacy cases. It might be said that, rather than balancing the two rights, expression displaying the 'public interest' quality falls within the zone of protection irrespective of any corollary interference with private life or, even, a discernible primary motivation to titillate its audience but is outside the zone where it causes serious harm to the individual involved either because it amounts to coercion (such as blackmail)¹⁰⁵ or a threat of violence or because it touches on what Emerson calls 'the inner core of intimacy'. 106 Examples of the latter might be seen in the facts of CDE (discussed above), the humiliation experienced by Max Mosley or, more recently, in Contostavlos v Mendahun¹⁰⁷ where pop star and X Factor judge Tulisa Contostavlos obtained a non-disclosure order in interim proceedings concerning graphic footage of her engaged in a sex act, which had appeared on the internet. No public interest defence was advanced in this case and surely any attempt to construct one based on individual selfdevelopment would be bound to fail. However, media discussion of the subject matter in Contostavlos, that she had been videoed performing a sex act, could be justified by reference to the benefit-to-self argument, for example, because others in a similar situation might empathise with her or have subsequent views on her suitability as an X Factor judge (a show popular with children), as a result, ¹⁰⁸ whereas it would not be on strict democratic process grounds. Thus, conceived in this way, the judicial task is not one of balancing the comparative value of the competing claims but of discerning the qualities of the expression so as to consign it to a particular zone.

¹⁰⁰ Nor even a quasi-public body subject to judicial review on Datafin grounds (R v Panel on Takeovers and Mergers ex parte Datafin ple [1987] QB 815), see R v Football Association ex parte Football League [1993] 2 All ER 833.

¹⁰¹ Although it does receive public funding for community projects.

¹⁰² The Report (n 6) [79].

¹⁰³ Cf Redish, 'The Value of Free Speech' (n 53) 623–25, who considers balancing is acceptable so long as there is 'a thumb on the scales' in favour of speech.

¹⁰⁴ Emerson (n 51) 548-57.

¹⁰⁵ TFD v DFT [2010] EWHC 2335 (QB).

¹⁰⁶ Emerson (n 51) 557.

¹⁰⁷ Contostavlos v Mendahun [2012] EWHC 850 (QB); see, similarly, AMP v Persons Unknown [2011] EWHC 3454 (TCC).

¹⁰⁸ See also Theakston v MGN Ltd [2002] EWHC 137.

D) DEFINING 'PUBLIC FIGURES'

Thirdly, the sheer breadth of the term 'public figure', apparent in these decisions, is consistent with the benefits-to-self analysis since the audience may derive information crucial to their self-development just as much from knowing about the behaviour of celebrities as that of politicians or other public office-holders. 109 As the court recognised in Spelman¹¹⁰ (and as earlier recognised by the Court of Appeal in A v B plc), ¹¹¹ the Council of Europe defines public figures as 'persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain'. 112 Although the court appears to find the definition helpful, it is hard to see what assistance the definition provides; indeed, it is hard to conceive of it as a definition at all given its all-encompassing nature. Surveying the case law, two observations arise on the characteristics required to be classified as a public figure: first, there is no requirement that the individual is in public office or directly relevant to any sort of public decision-making; second, the individual has, for whatever reason, piqued the media's interest. For that reason Samantha Brick¹¹³ is just as much a public figure as the Queen. The need for such a far-reaching definition of public figure is not obviously supported by the conventional claim that art 10 reserves special protection to speech advancing the democratic process value. The suggestion in a recent case that it is only a limited class of public figures - those holding 'important roles in national affairs' - who should expect a reduced level of privacy protection is somewhat undermined by the adjoining inclusion of footballers (and, presumably, notorious bankers and estranged fathers-in-law to celebrity chefs) within that class. 114

E) IMPACT ON NON-DISCLOSURE ORDERS

A fourth issue arises in the context of applications for non-disclosure orders prior to full trial. Here, the court is required to apply the test set out in s 12 of the Human Rights Act 1998, of whether the claimant can demonstrate that the claim is 'more likely than not' to succeed at full trial. 115 In such cases, however, there is a discernible trend by which the court weighs the determinable parameters of the privacy claim against an actual or hypothetical public interest claim, to be made by either the actual defendant or a hypothetical one, with the alarming result that the court treats the two parties very differently. For example, in *Terry v Persons Unknown*, 116 Tugendhat J was particularly critical of the claimant's procedural failure to provide testimony to the prospective impact of disclosure on his private life and did not speculate on what that impact might be. 117 By contrast, the judgment discloses a vociferous examination of the various hypothetical claims about the public interest in Terry's extra-marital affair. 118 In cases where no defendant is present perhaps it is understandable why the court would proceed so cautiously, although, of course, even if the court issued an injunction for want of an opposing free speech claim, any interested media

¹⁰⁹ Redish, 'The Value of Free Speech' (n 53) 644.

¹¹⁰ Spelman (n 33) [49].

¹¹¹ A v B plc (n 75) [11 (xii)].

¹¹² Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the Right to Privacy.

¹¹³ S Brick, "There are Downsides to Looking this Pretty": Why Women Hate Me for Being Beautiful', *Daily Mail* (London, 3 April 2012).

¹¹⁴ RocknRoll v News Group Newspapers Ltd [2013] EWHC 24 (Ch) [15].

¹¹⁵ Cream Holdings Ltd v Banerjee [2004] UKHL 44 [22].

¹¹⁶ Terry (n 71).

¹¹⁷ Ibid [31]-[36].

¹¹⁸ Ibid [97]-[105].

party could later apply for the order to be varied or discharged and, in doing so, specify the nature of the public interest claim in detail. 119 Perhaps more problematic, though, is the danger of optimisation of this hypothetical claim whereby the public interest claim is expressed in the strongest possible potential terms without any apparent discounting for the possibility that such a strong public interest claim might not be realisable on the specific facts. This process of optimisation is evident in SKA, for example, in the view that the information at stake was 'certainly not trivial'. 120 In democratic process terms, this view is hard to accept but becomes more understandable when applying the benefits-to-self analysis given the claimant's children's obvious interest in knowing the true identity of their father. Likewise the process of optimisation seems more justifiable since it recognises the narrow circumstances in which such expression ought to be interfered with and the court's inability to judge what is of benefit.

4 Problems

A) NORMATIVE CONCERNS

Separate to the positivist claim is the normative issue of whether privacy-invading expression *should* be protected on such grounds and the doctrinal issue of whether such protection is compatible with both the domestic and Strasbourg art 10 jurisprudence. Given that the first issue is largely open-ended in nature, the following discussion is geared more toward highlighting prospective issues and possible responses rather than anything more definitive, particularly since it is recognised that the question of whether art 10 ought to be understood so broadly deserves much more debate than it currently receives.

In the academic commentary, the benefits-to-self argument is commonly regarded as a problematic justification for freedom of speech. Schauer, for example, is particularly critical: the argument 'suffers from a failure to distinguish intellectual self-fulfilment from other wants and needs, and thus fails to support a distinct principle of free speech'121 and that 'even if communication is a sufficient condition for intellectual self-fulfilment, it does not follow that it is a necessary condition': expression is not more important to understanding than experience, say, by travelling the world or driving a fast car. 122 This is a common complaint 123 and closely allied to it is the problem of distinguishing 'genuine' free speech claims from others based on self-development, such as claims to education or housing 124 Moreover, although it might be accepted that judges cannot decide whether particular speech improves an individual or not, it is at least arguable that certain types of speech do stunt or damage an individual's personal and moral growth, such as hate speech or pornography.¹²⁵ In the context of privacy-invading expression, Fenwick and Phillipson suggest that the justification 'far from inevitably opposing the right to privacy must support it to some extent since . . . a reasonable degree of privacy is a requirement for individual selfdevelopment, particularly the ability to form intimate relationships, without which the capacity for individual growth would be severely curtailed'. 126 Therefore, applying Raz's argument that speech validates different lifestyles, they argue that the restriction of privacy-

^{119 &#}x27;Practice Guidance: Interim Non-Disclosure Orders', White Book 2012 (Sweet & Maxwell 2012) B13-074.

¹²⁰ SKA (n 39) [77].

¹²¹ Schauer (n 25) 56.

¹²² Ibid 57.

¹²³ See Greenawalt (n 25) 143-45; Barendt (n 1) 13-15.

¹²⁴ Barendt (n 1) 14.

¹²⁵ See ibid (n 1) 31-34.

¹²⁶ Fenwick and Phillipson (n 2) 686.

invading expression 'far from suggesting condemnation or contempt for the lifestyle revealed, in fact displays respect for the ability of the individual to decide for himself whether he wishes to share his life-decisions with the public at large'. 127

These criticisms demand careful consideration although perhaps some might be more easily dealt with than others. For example, Schauer's normative concern that the justification would protect a greater range of activity than expression alone is countered by the positivist observation that art 10 is limited to protecting expression only. 128 In a privacy context, the normative issue of defining expression is unlikely to arise. Similarly, difficulties in distinguishing between a genuine free speech claim and other claims based on self-fulfilment are unlikely to trouble the courts in this field. Fenwick and Phillipson's point is perhaps most problematic to deal with since they are surely right that the public interest in individual selfdevelopment ought to be as equally significant in calculating the privacy claim as it is in determining the free speech claim. Arguably, there is little evidence in the jurisprudence that the court does sufficiently consider the public interest in privacy in determining the strength of each claimant's claim. The focus of this article has been squarely on the calculation of the public interest in freedom of expression, to the exclusion of any discussion of how the corresponding privacy claim is calculated, yet nothing in this discussion is intended to denigrate the significance of that corresponding public interest in privacy and, if the judiciary were to explicitly articulate the value of privacy-invading expression in benefits-toself terms then it should equally articulate the value of privacy in such terms as well. Applying the logic of the argument above, the court's task is a matter of line-drawing rather than balancing. In doing so, it may be possible to map out a zone of protection that is broader than the 'zone of intimacy' to capture information that is not especially damaging to the individual concerned but nevertheless is something that the public ought not to know about. This may include, for example, knowledge that the individual is having marital or financial difficulties or has an eating disorder or is pregnant or suffers from low moods. This additional category may suit the contours of the cases outlined above which have tended to relate to expression that criticises the claimant's character in some way since it would tend to exclude behaviour that lacks that quality of 'blameworthiness' and, therefore, acts as a check on the tremendous breadth that the benefits-to-self argument would otherwise exhibit. Similarly, it has been argued that the potential adverse effect caused by reputational damage on the ability to form and/or sustain relationships with others is recognised within the domestic judicial interpretation of art 8.¹²⁹

Yet it may be said that the explicit application of the benefits-to-self argument, as a means of determining the value of privacy-invading expression and in demarcating the zone of protection, inevitably weakens the right to privacy and is inconsistent with the principle in *Campbell* and *Re S* that neither right has precedence over the other. This criticism has some merit but then it may be said, in response, that this development is already present in the jurisprudence as shown by the cases outlined above. It may also be said that the treatment of each right as presumptively equal has always had more rhetorical force than anything else and that the more recent case law suggests a revised reading of the principle is required such that it says no more than that, although free speech is the stronger right, it does not automatically succeed. More tentatively, perhaps this greater protection for freedom of expression might be defended on the basis that although the benefits-to-self argument informs the value of both privacy and freedom of expression to society, that

¹²⁷ Fenwick and Phillipson (n 2) 686-87.

¹²⁸ See Baker, 'Autonomy and Free Speech' (n 54) 256-57.

¹²⁹ See discussion in A Mullis and A Scott, 'The Swing of the Pendulum: Reputation, Expression and the Recentring of English Libel Law' (2012) 63(1) NILQ 27, 41–43.

value is more hypothetical in the case of privacy than freedom of expression in the context of privacy-invading expression. Although every member of public is both a consumer and potential source of news, the chances of the latter happening are considerably less than the former such that it may be said that society's greater interest is in consumption and, therefore, this should be reflected in the court's treatment of the benefits-to-self argument.

Perhaps the most pressing concern raised by explicit protection on benefits-to-self grounds is the prospect of universal application to all art 10 claims. The orthodox approach to determining the parameters of a free speech guarantee is to identify the value or values that animate the protection of all categories of expression, not just one. However, such an approach is problematic since it may extend protection to a range of expression that currently does not benefit from such. For example, although the claim of pornography and hate speech to furthering democratic participation is particularly weak, ¹³⁰ the claim may be stronger on benefits-to-self analysis, although suppression may still be justified on account of harm. Judicial assessment of the value of public protest and unpopular political expression 131 (currently precarious where expression offends others) 132 would also be strengthened applying the benefits-to-self analysis. Yet, it is questionable whether there is scope to broaden protection for these forms of expression because the UK court has consistently stated it will 'keep pace' with developments at Strasbourg level 133 and the ECtHR jurisprudence discloses no imperative for improved protection. 134 Assuming the judiciary's attitude to these forms remains static, the preferential treatment of privacyinvading expression is not easily justified. It is surely not enough to say, on positivist grounds, that the distinction is justifiable because such discrimination is evident within the case law. However, a few points might be made in favour of such preferential treatment.

First, although theorists would object to such treatment due to the centrality of content neutrality in free speech theory, such arguments gain limited purchase when applied to the UK. Underpinning the orthodox theoretical approach to interpreting the free speech guarantee is the view that courts should adopt a position of content neutrality when determining the legitimacy of restrictions on expression. This view is a prominent feature of First Amendment analysis ¹³⁵ and any failure by theory to sufficiently adhere to the doctrine provides strong grounds for criticism. ¹³⁶ Since protection should not discriminate amongst content of expression it is a common feature in modern theoretical commentary that the identified value(s) apply equally to all forms of expression. However, the UK system of free speech clearly departs from the principle of content neutrality, for example, there are statutes that specifically prohibit discriminatory viewpoints. ¹³⁷ Similarly, the ECtHR allows for restriction of particular viewpoints that undermine the democratic

¹³⁰ See eg Hammond v DPP [2004] EWHC 69 (Admin); Norwood v DPP [2003] EWHC 1564 on hate speech; and Belfast City Council v Miss Behavin' Ltd (2007) UKHL 19 on pornography.

¹³¹ See eg Abdul v DPP [2011] EWHC 247 (Admin) on public protest and ProLife (n 67) on unpopular expression.

¹³² A Khan, 'A "right not to be offended" under article 10(2) ECHR? Concerns in the construction of the "rights of others" (2012) EHRLR 191–204; D Mead, The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Act Era (Hart Publishing 2010).

¹³³ R (Ullah) v Special Adjudicator [2004] 2 AC 323 [20].

¹³⁴ Hate speech is proscribed by virtue of art 17, Refah Partisi v Turkey (2002) 35 EHRR 3 [43], and member states are afforded a wide margin of appreciation where morality or public safety are at stake, Otto-Preminger Institute v Austria [1995] 19 EHRR 34.

¹³⁵ See C Sunstein, Democracy and the Problem of Free Speech (Simon & Schuster 1995) 5-16.

¹³⁶ See eg C E Baker 'Is Democracy a Sound Basis for a Free Speech Principle?' (2011) 97 Virginia Law Review 515, 528–29.

¹³⁷ Eg Race Relations Act 1976, Racial and Religious Hatred Act 2006.

underpinning of the Convention rights.¹³⁸ There can be no real objection to a failure to adhere to content neutrality by preferring a particular type of expression.

Secondly, it might be argued that the importance of media freedom justifies such preferential treatment on the basis that the media is particularly effective in influencing audience perceptions and decision-making. This phenomenon seems to be commonly accepted 139 and has been judicially recognised, most recently by the House of Lords in the context of the broadcast media, and with some concern. This may be contrasted with the judiciary's more dismissive approach to the importance of individual expression on influencing public attitudes, apparent in cases such as ProLife and Connolly 141 where the respective interferences with freedom of expression were justified because of the limited impact of the expression in effecting change. 142 The greater efficiency of the media in disseminating information to a broader spectrum of the populace might also underpin this differentiated approach¹⁴³ as might the orthodox view that this source of expression is also important due to its independence from government interference¹⁴⁴ or the view that the press is a 'high-level' source of authoritative information because of the considerable resources and research that (generally) underpins it. 145 There is some support for the special treatment of media freedom in the academic literature. Baker, ¹⁴⁶ amongst others, ¹⁴⁷ has argued that the separate reference to freedom of the press in the First Amendment justifies an independent meaning for the term and that the jurisprudence is 'incoherent' without such an interpretation. 148 However, Baker's 'fourth estate' argument differs significantly from his argument for individual freedom and is based on an instrumentalist interpretation that values the press as a checking function on government power. 149 There has been less appetite for privileging media freedom in the UK commentary. Barendt, for example, argues that the media's more substantial role in disseminating information is a 'thin basis' for special treatment (if 'media' is read as the traditional press) given the broad range of information providers in the market, particularly on the internet. 150 Elaborating on Barendt's analysis, 151 Fenwick and Phillipson express concern that the privileging of media freedom may cut 'sharply across the other underlying rationales for speech, such as self-

¹³⁸ Eg Refah Partisi (n 134) [43].

¹³⁹ In the context of contempt of court, Barendt (n 1) 323 notes: 'the burden of proof is surely on sceptics to show that media publicity is unlikely to have any, or any significant, impact on readers, listeners, and viewers'. See also P Wragg, 'Time to End the Tyranny: Leveson and the Failure of the Fourth Estate' (2013) 18(1) Communications and the Law 12.

¹⁴⁰ R (Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008] UKHL 15 [29] –[30] (Lord Bingham).

¹⁴¹ Connolly v DPP (2007) EWHC 237.

¹⁴² See ProLife (n 67) [68] (Lord Hoffmann) and Connolly (n 141) [31].

¹⁴³ See discussion of this model of interpreting press freedom in Barendt (n 1) 419-24.

¹⁴⁴ See eg Schauer (n 25).

¹⁴⁵ See recent discussion of high/low level speech in Rowbottom (n 2).

¹⁴⁶ Baker, Human Liberty, (n 54) 225–49 (elaborating on the normative arguments for a 'fourth estate' reading of the First Amendment); C E Baker 'The Independent Significance of the Press Clause under Existing Law' (2007) 35 Hofstra Law Review 955 (where, amongst other things, he identifies themes in the jurisprudence that seem to support an independent reading).

¹⁴⁷ P Stewart, 'Or of the Press' (1975) 26 Hastings Law Journal 631; F Abrams, 'The Press is Different: Reflections on Justice Stewart and the Autonomous Press' (1979) 7 Hofstra Law Review 563; D A Anderson, 'Freedom of the Press in Wartime' (2006) 77 University of Colorado Law Review 49.

¹⁴⁸ Baker, 'Autonomy and Free Speech' (n 54) 275.

¹⁴⁹ See Baker, Human Liberty (n 54) 229-34.

¹⁵⁰ Barendt (n 1) 421.

¹⁵¹ Ibid 419-24.

development and autonomy', 152 which is a particular concern in the context of privacy-invading expression.

Doctrinal support for the privileging of media protection is also doubtful. Although there is some evidence of a differentiated approach to art 10 in the Strasbourg jurisprudence, in particular, where the court has emphasised the importance of the media's role as 'public watchdog' to justify rigorous scrutiny of interferences with media freedom by member states, ¹⁵³ the court has not articulated a specific distinction between media and individual freedom under art 10. Indeed, the opportunity to do so arose on the facts of *Steel & Morris v UK*¹⁵⁴ following the submission by the UK government that the applicants in a defamation case (the 'McLibel' trial), who were not journalists, should not benefit from 'the high level of protection afforded to the press'. ¹⁵⁵ However, the court disagreed, emphasising that:

in a democratic society even small and informal campaign groups . . . must be able to carry out their activities effectively [since] there exists a strong public interest in enabling such groups . . . to contribute to the public debate . . . on matters of general public interest. 156

Thirdly, and in the alternative, it may be argued that the prospect of preferential treatment for privacy-invading expression by the application of the justification is illusory. Even if the justification were broadly applied, the resultant impact on free speech jurisprudence may not be as liberalising as it might initially appear. As noted, serious harm such as coercion or threats of violence remove privacy-invading expression from the zone of protection, so hate speech or pornography may be excluded on that basis (although the connection between pornography and serious harm is often disputed). ¹⁵⁷ Indeed, this analysis may be applied to decisions involving public protest, unpopular expression and defamation. Although there are cases in which the courts have attributed a low value to the contribution of the expression to the democratic process, the decision not to uphold the art 10 claim in those cases may also be explained by the high level of actual or potential harm of the speech. ¹⁵⁸

B) DOCTRINAL CONCERNS

As noted, it is now a well-established principle that the UK courts are required, under s 2 of the HRA 1998, to 'keep pace' with Strasbourg jurisprudence, 'no more, no less'. ¹⁵⁹ On this basis, the protection of privacy-invading expression for its contribution to self-development must be consistent with Strasbourg jurisprudence. Yet, as Fenwick and Phillipson have argued, whereas the 'rhetorical attachment to free speech is always strong, it is by now a familiar commentary . . . to observe that clearly political speech, which more directly engages the self-government rationale, receives a much more robust degree of protection than other types of expression' ¹⁶⁰ such that 'freedom of expression is valued not really as an aspect of individual autonomy or for the contribution it makes to the

¹⁵² Fenwick and Phillipson (n 2) 22.

¹⁵³ See eg Jersild v Denmark (n 68).

¹⁵⁴ Steel & Morris v UK [2005] 41 EHRR 22.

¹⁵⁵ Ibid [89].

¹⁵⁶ Ibid [89].

¹⁵⁷ Emerson, for example, has previously warned of the 'serious lack of evidence' to justify the US judiciary's approach to obscenity (n 51) 467.

¹⁵⁸ Eg Connolly (n 141), Abdul (n 131), Hammond (n 130), etc.

¹⁵⁹ Ullah (n 133) [20].

¹⁶⁰ Fenwick and Phillipson (n 2) 50.

flourishing of individuals, but for the part it plays in maintaining a democratic society'. ¹⁶¹ For example, in *Handyside v UK*, the ECtHR said 'freedom of expression constitutes one of the essential foundations of [a democratic society], one of the basic conditions for its progress and for the development of every man'. ¹⁶² This last clause has also appeared instead as 'and for each individual's self-fulfilment', ¹⁶³ although without accompanying explanation of the variation.

It is not clear from the jurisprudence whether 'development of every man' or 'individual's self-fulfilment' is to be read strictly in the context of democratic participation – that is, expression which improves an individual's ability to participate in a democracy, or separately – that is, expression which improves an individual regardless of whether it improves such participation or not. Given the ECtHR's favouring of political speech it is at least arguable that the narrower interpretation is more persuasive. In the UK jurisprudence, a similar interpretation might be applied to Lord Steyn's finding in *Ex parte Simms* that freedom of expression 'promotes the self-fulfilment of individuals *in society*'. ¹⁶⁴ This analysis can also be seen in Baroness Hale's treatment of free speech in *Campbell*:

intellectual and educational speech and expression are also important in a democracy, not least because they enable the development of individuals' potential to play a full part in society and in our democratic life. Artistic speech and expression is important for similar reasons, in fostering both individual originality and creativity and the free-thinking and dynamic society we so much value . . . [T]he intellectual, artistic or personal development of individuals, are not obviously assisted by poring over the intimate details of a fashion model's private life¹⁶⁵

These findings do not prevent the benefits-to-self analysis being applied overtly to justify the protection of privacy-invading expression, although they might provide some doubt that the references to self-fulfilment in the jurisprudence provide reliable precedent to justify the treatment. However, two recent ECtHR decisions, *Springer*¹⁶⁶ and *Von Hannover II*, ¹⁶⁷ might lend support to this broader reading of the privacy jurisprudence.

Springer concerned the publication of several articles about X's arrest for possession of cocaine at the Munich beer festival, Oktoberfest. The ECtHR dismissed X's complaint that the articles had disproportionately infringed his art 8 rights. The reporting of crime is not problematic to justify in democratic process terms. However, the ECtHR found that the public interest in the expression 'increased' because X was an actor famous for playing a superintendent on a well-known TV show 'whose mission was law enforcement and crime prevention'. ¹⁶⁸ Von Hannover II concerned photographs of Princess Caroline of Monaco on a skiing holiday at the time of her father, Prince Rainier, suffering from ill-health. The ECtHR dismissed the applicant's complaint on the basis that the prince's illness 'could be regarded as a matter of general interest' entitling the press to report 'on how the Prince's children reconciled their obligations of family solidarity with the legitimate needs of their

¹⁶¹ Fenwick and Phillipson (n 2) 71.

¹⁶² Handyside v UK (1979-80) 1 EHRR 737 [49].

¹⁶³ Lingens v Anstria (1986) 8 EHRR 407 [41]. The Lingens variation has been referred to in Tammer v Estonia (2003) 37 EHRR 43 [59] and Nilsen and Johnson v Norway (2000) 30 EHRR 878 [43].

¹⁶⁴ R v Secretary of State for the Home Department ex parte Simms (2000) 2 AC 115, 126 (emphasis added).

¹⁶⁵ Campbell (n 10) [148] -[49].

¹⁶⁶ Springer (n 90).

¹⁶⁷ Von Hannover II (n 91).

¹⁶⁸ Springer (n 90) [99].

private life, among which was the desire to go on holiday'. The broader aspects of the reasoning in both cases seems more consistent with the benefits-to-self analysis than the democratic process value. In *Springer* the audience derives a benefit from discussion of the irony in X's arrest whereas the subject matter in *Von Hannover* speaks to the audience's emotional development by observing how others handle grief.

5 Conclusion

Arguably, the task of determining the meaning of public interest – the vital component in the misuse of private information tort – has proven more problematic for the judiciary than the Whittingdale Committee (and, perhaps, even the judiciary itself) give credit. In particular, the compatibility of the judiciary's approach with the orthodox view that protection under art 10 depends upon the contribution of the expression to democratic participation deserved greater discussion by the Committee than it received. It has been argued above that the current judicial treatment of the qualities peculiar to the term 'public interest' in privacy cases is contrary to the orthodox view of art 10. Though the judiciary might not view its reasoning in such terms, there is an apparently more liberal approach emerging so that speech is valued for its benefit to individual self-development.

Yet protection on benefits-to-self grounds is anathema to contemporary legal commentary. It is commonly argued that this justification is unprincipled and hugely problematic. The question of whether privacy-invading expression ought to be protected on this basis is, therefore, a separate and vexed issue. Certainly, it has not been the object of this article to suggest privacy-invading expression is important to protect (as the case law and Leveson Inquiry attests, the behaviour of the media in obtaining such stories is often unseemly and morally repugnant) but rather that the explicit application of the benefits-toself analysis to achieve such protection has appeal for its greater consistency with established philosophical thinking on the value of free speech: it makes for a more convincing and coherent reason to protect such expression than protection on democratic process grounds. Given the criticisms in the academic commentary of the application of the argument from participation in a democracy to privacy-invading expression, it may be that this analysis represents a more intellectually honest means of justifying its protection. Privacy-invading expression may be said to benefit its audience's personal, social and moral outlook, although it is not for the court to determine the extent of this contribution (since it is plainly incapable of doing so) but rather to recognise its potential to do so. Applying the benefits-to-self analysis, it is arguable that privacy-invading expression should only be interfered with in narrow circumstances where the expression is seriously harmful, such that it amounts to violence or coercion (such as blackmail), or because it touches the 'inner core of intimacy'. This trend is also apparent in recent case law.

Perhaps the most obvious benefit derived by privacy-invading expression, which is not even discussed above, is the financial benefit to newspapers in celebrity gossip to ensure their survival. As Baroness Hale said in *Campbell*: 'It may be said the newspapers should be allowed considerable latitude in their intrusions into private grief so that they can maintain circulation and the rest of us can then continue to enjoy the variety of . . . media which are available in this country.' ¹⁷⁰ Although the Whittingdale Committee considered whether the commercial viability of the press ought to play a more explicit role in the common law, it

¹⁷⁰ Campbell (n 10) [143].

concluded that commercial viability, of itself, did not justify privacy-invading expression. ¹⁷¹ There is much to commend this conclusion for, although commercial viability might explain the newspaper's motivation for publishing celebrity gossip, the claim to freedom of expression must ultimately hang on the value of the expression specifically and not the value of the speaker in a global sense. As one commentator noted, 'the press would also be more "commercially viable" if (to give an extreme example) it had to pay no corporation tax, or could renege on an unprofitable contractual obligation'. ¹⁷²

¹⁷¹ In De Geillustreerde Pers NV v The Netherlands [1978] ECC 164 [88], the European Commission on Human Rights stated: 'the protection of the commercial interests of particular newspapers or groups of newspapers is not as such contemplated by the terms of Article 10'.

¹⁷² The Report (n 6) [84].