THE RIGHT TO PRIVACY IN GREAT BRITAIN: WILL RENEWED ANTI-MEDIA SENTIMENT COMPEL GREAT BRITAIN TO CREATE A RIGHT TO BE LET ALONE?

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I. INTRODUCTION

The concept of privacy and the legal rights it implicates have historically proved difficult to define. In 1888, an English judge named Cooley coined one of the broadest yet most commonly used phrases to describe the right to privacy. He called it "the right to be let alone."¹


France has adopted a similarly broad definition by which privacy is the "antithesis of everything that is public: hence everything concerning an individual's home, family, religion, health, sexuality, personal legal, and personal financial affairs" is private.\(^2\) In the United States, the United States Supreme Court found a right to privacy to exist in a *penumbra* which *emanated* from the First, Fourth, Fifth, and Ninth Amendments.\(^3\) The right to make intimate decisions regarding contraceptives\(^4\) and the right choose whether to have an abortion\(^5\) have both been held to be aspects of the right to privacy. Though seemingly quite diverse, each of these elements does have something in common. They protect autonomy, liberty and human dignity. Justice Douglas captured this idea when he stated that one aspect of privacy is "the autonomous control over the development and expression of one's intellect, interests, tastes and personality."\(^6\)

This article will concentrate on the aspect of the right to privacy Alan Westin defined as "the claim of individuals, groups or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."\(^7\) The press often usurps that authority when, for example, it publishes personal information about public figures. Specifically, I will address the question whether there is or should be privacy protection from the kind of personally invasive publications commonly found in tabloids, and from the often invasive newsgathering techniques employed to gain access to the information published. In particular, I will examine the absence of this kind of privacy protection in England and explore whether International Human Rights law offers any protection which English law does not.

Because England has no privacy law, it is helpful to look first at American privacy law. I do this primarily for convenience, so that I may borrow American terminology to label the kinds of privacy protections England lacks. Beyond that, this paper is not intended as a comparison of English and American privacy law. Next, I will demonstrate the need for a right to privacy, especially in light of modern technology. In Section IV, I will provide an overview of Parliament's refusal to legislatively create a


\(^4\) *Id.*


\(^7\) *Alan F. Westin, Privacy and Freedom* 7 (1967).
right of privacy. This will include a discussion about the Press Complaints Commission, the private organization whom Parliament has chosen to defer claims of invasions of privacy by the press. In the two following sections, I will examine the treatment of the right to privacy by the English judiciary and by the European Court of Human Rights, and the competing interest of freedom of the press. Section VII will be dedicated exclusively to the historic Human Rights Bill now pending in Parliament. The Human Rights Bill, if passed, would incorporate the European Convention on Human Rights into domestic law and thereby preempt the inaction of both Parliament and the English judiciary in the area of privacy. So, before turning to a more in-depth discussion of the right to privacy in England, I begin now with a brief overview of the origins and subsequent development of the right to privacy in the United States.

II. HISTORICAL BACKGROUND OF THE RIGHT TO PRIVACY

The right to privacy has not enjoyed a long tradition in the United States. It was not until 1890, when Samuel Warren and Louis Brandeis wrote their famous Harvard Law Review article, that the “right to be let alone” was recognized at all. Seventy years after the Warren and Brandeis article, William Prosser divided the right to be let alone into four distinct torts: 1) intrusion into an individual’s seclusion or into his private affairs; 2) public disclosure of embarrassing private facts; 3) publicity which causes an individual to be seen in a false light; and 4) appropriation of an individual’s name or likeness for the defendant’s advantage.

Most states now follow a similar scheme. As first noted by Dean Prosser, there are two primary differences between these torts. Whereas the first requires no actual publication or intent to publish for an invasion of privacy to be actionable, the others do. This article is concerned with

8. While freedom of speech is an important concern and might better be considered earlier, I have chosen to delay the discussion until the issue of Article 10 under the European Convention arises because England, having no written constitution, does not possess the equivalent of a First Amendment. Free speech rights in England derive from the common law.


13. Intrusion into seclusion consists of an intentional interference with an individual’s interest in solitude or seclusion, either as to his person or as to his private affairs or concerns, of
the right of privacy as encompassed by intrusion into seclusion (as when the press stalks public figures from place to place) and public disclosure of private facts (as when, for example, personal information about the lives of public figures is published in the tabloids).

Since the Warren and Brandeis article, much has been written in an attempt to further define the right now embodied in the United States by various state statutes and a confusing body of case law. Despite one hundred years of development, there is still uncertainty regarding the scope of the right in the United States today.\(^\text{14}\)

England's development of the right to privacy has fared far worse. Although Warren and Brandeis based many of their privacy ideas on English cases,\(^\text{15}\) England does not explicitly provide a right to privacy at all.\(^\text{16}\) That two western nations, both of which are thought to be highly developed in the area of human rights law, could differ so radically regarding the notion of privacy makes one wonder whether the right to privacy is really all that important. If England has no explicit right of privacy, what form of regulation, if any, is there on intrusion into seclusion, a privacy right recognized and protected as a civil tort in the United States? Is there a similar right encompassed in international human rights law under Article 8 of the European Convention on Human Rights? Is the right to be let alone one of those fundamental human rights that both deserves and is afforded protection under customary international law? If so, how broad or narrow is the international understanding of the right?

\(^{14}\) For example, the Supreme Court, in Florida Star v. B.J.F., 491 U.S. 524 (1989), held that a newspaper who printed the name of a rape victim was not liable under a statute which forbade the publication. Some suggest that this case has effectively precluded any future tort actions involving the publication of true information, regardless of how private the information or outrageous or embarrassing its dissemination. See Andrew J. McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C.L. REV. 989, 1076-78 (1995); see also Mary Ellen Hockwalt, *Bad News: Privacy Ruling to Increase Press Litigation*. The Florida Star v. B.J.F., 23 AKRON L. REV. 561 (1990). However, it is my contention that because the name of the victim was a matter of public record, and therefore in the public domain, these authors are wrong. An action could still lie for publication of similar information not already in the public domain.

\(^{15}\) One such English privacy case involved an injunction awarded to Prince Albert against the publication of pictures he had drawn of himself and Queen Victoria. Though decided on grounds of breach of confidence, Warren and Brandeis interpreted it as an early right to privacy case. Brandeis, *supra* note 1, at 83. See also Eric Barendt, *End this Intrusion Now, Eric Barendt Says It's Closing Time at the Last Chance Saloon, and the Press Needs to be Curbed with a Law which will Punish Unwarranted Intrusion*, THE GUARDIAN (London), Sept. 24, 1997, available in 1997 WL 2403252.

Will the death of Diana have any real impact on privacy protection in England? It is these questions that this paper will address.

III. PRIVACY AS ESSENTIAL TO HUMAN DIGNITY

It has been argued by some that Warren and Brandeis gave birth to a trivial tort. However, their description of the societal ills symptomatic of a breach of the right to be let alone, astoundingly contemporary and even prophetic for the time, belies its triviality:

The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy the prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasion on his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.

Today, the right to privacy is more essential to the preservation of human dignity than ever before. Technological advances far beyond the imaginations of Warren and Brandeis have emerged which make finding Browning's "obscure nook" virtually impossible. The video camera and


I give the fight up: let there be an end,
A privacy, an obscure nook for me.
I want to be forgotten even by God.
telephoto lens, for example, have intruded upon our everyday lives in vast numbers of ways. Granted, there are many privacy invasions utilizing these technologies which are in fact quite innocent, even laudable. Video surveillance, for example, is most often concerned with the community’s need to know about the conduct of others in order to protect society. Banks, for example, are videotaping transactions at automated teller machines; employers are videotaping employees in the workplace; department stores are videotaping dressing rooms and bathrooms; parents are video-taping nannies while they care for their children. But there are an equal number of invasions that could be characterized as nefarious which, without an action for invasion of privacy, will go without redress.

Since there is no law in England specifically directed at protecting rights of privacy, plaintiffs must resort to other areas of the law for protection. Unfortunately, the protections afforded privacy via these alternative actions often prove inadequate. A good example is the infamous case where a man, for his personal amusement, bugged the bedroom of a neighbor.\(^2\) The defendant was found liable for civil trespass and fined a mere fifty-two pounds. The size of the award demonstrates the inability of alternative causes of action to adequately protect privacy interests. Civil trespass is intended to protect the enjoyment of the occupation of land.\(^2\)\(^1\) As to this interest, the intrusion was minimal — only a small unobtrusive device was placed in the neighbor’s bedroom. But the intrusion on the neighbor’s right to privacy was much greater. Had it been the aim of the action to consider the neighbor’s privacy interest, the amount of damages awarded would have been proportionately higher, as would the effectiveness of the deterrent.

To further demonstrate the ineffectiveness of alternative causes of action to protect privacy, let us consider a hypothetical provided in a recent law review article. “A takes his video camcorder to the beach. He records B who is sunbathing. A’s purpose if filming B is to use the videotape for sexual gratification, which he later does.”\(^2\)\(^2\) Under alternative English

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22. McClurg posed this hypothetical to demonstrate that motive should be a factor when considering whether an invasion of privacy which occurs in a public place should be actionable in the United States. McClurg, *supra* note 14, at 1076-78. I offer it here for an entirely different purpose.
criminal and tort remedies, B will be left unprotected all together. Briefly, here is how the various alternative actions fail. First, there is no action for trespass since this incident occurs at a public beach.\textsuperscript{23} Nor is there an action for breach of confidence because, under these circumstances, it can't be said that A owed B a duty of confidentiality.\textsuperscript{24} Finally, there is no action for criminal harassment\textsuperscript{25} or nuisance\textsuperscript{26} if A merely videotaped B without incident.

Now, let's change the above scenario somewhat. Suppose A is actually a member of the press and B is a public figure sunbathing topless on a private beach. A's motive is to broadcast the images on the Nightly Mirror Tabloid Television Show. The above shortcomings in the law apply here as well, but there are a few others worth mentioning. Now that B is on private property, trespass would seem to be implicated. However, since trespass is directed at protecting an individual's enjoyment and occupation of land,\textsuperscript{27} not at protecting privacy, there will be no action for trespass unless B's enjoyment of her occupation of the land had been directly interfered with. If in this instance, as is true in most, B took the video from an adjacent property using a telephoto lens, B may not have been aware of A's activity at all. Therefore, no interference could possibly have occurred. Now, suppose B is a member of Parliament and the images "tend to lower [her] in the estimation of right-thinking members of society generally."\textsuperscript{28} Though, by that definition, the images may be defamatory, no action for defamation or libel exists because the event depicted was true.\textsuperscript{29} Again, England's method of protecting privacy by bootstrapping it onto other already existing causes of action is ineffective.\textsuperscript{30}

\textsuperscript{23} REPORT OF THE COMMITTEE, supra note 2, para. 6.12.
\textsuperscript{24} Id. para. 8.1.
\textsuperscript{25} Sections 4 and 5 of the Public Order Act make it an offense to use "threatening, abusive or insulting words or behaviour" with intent to cause fear of or provoke immediate violence or to use such words "within the hearing or sight of a person likely to be caused harassment or harm." The offense may be committed on public or private property. Id. para. 6.3.
\textsuperscript{26} Id. para. 6.12.
\textsuperscript{27} Id.
\textsuperscript{28} Id. para. 7.3.
\textsuperscript{29} REPORT OF THE COMMITTEE, supra note 2, para. 7.3, 7.9.
\textsuperscript{30} There has been much scholarly discussion regarding England's hit and miss approach to the protection of privacy rights. See WALTER F. PRATT, PRIVACY IN BRITAIN 38-59 (1979). See also RAYMOND WACKS, PERSONAL INFORMATION: PRIVACY AND THE LAW 42-134 (1989). For a convenient overview of the various civil and criminal remedies available, see REPORT OF THE COMMITTEE, supra note 2, para. 6.1-12.37. For a detailed and comprehensive argument about similar failings in Ireland, many of which are analogous to England, see Eoin O'Dell,
Without a law specifically directed at maintaining privacy, we will continue to see scenarios like these played out over and over again in the press: Princess Diana kissing Dodi Al Fayed on his private yacht\textsuperscript{11} or exercising in her Isleworth gym;\textsuperscript{32} the Duchess of York sunbathing topless in the company of man not her husband;\textsuperscript{33} Hugh Grant arguing with Elizabeth Hurley in the garden of her West Country home.\textsuperscript{34} Should there be no action for any of these intrusions? For many, the answer has been no. One reason is that privacy intrusions often involve public figures who are said to have given up all claims to privacy when they entered public life. But this logic is faulty. First, it is far too broad an assumption. While public figures indeed have a lesser expectation of privacy regarding some matters, they are nonetheless entitled to retain a privacy interest in matters outside the legitimate public concern. Surely, the sexual conduct of an actor is of no legitimate concern to the public. Personal information in that regard merely serves to satisfy public curiosity.\textsuperscript{35} Second, this logic fails to recognize that privacy is a fundamental right that, without more, should not be held inapplicable to some people. Justice Brandeis rightfully pointed out that privacy is integral to the pursuit of happiness:

\begin{quote}

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feeling, and of his intellect. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the government, the right to be let alone - the most
\end{quote}

\begin{flushleft}


34. Culf, \textit{supra} note 31.

35. I concede that in some cases the public interest in a public figure may outweigh the right to privacy. Especially in matters implicating a public official's fitness for office, society's right to know can trump a public official's right to privacy. However, in the examples under consideration here, no such interest is implicated.

Because privacy is so fundamental and so highly valued, an implied contract that would completely disavow a person's right to it is unconscionable.

Another reason privacy rights are too quickly denied is that the seriousness of the intrusion is often mistakenly based on the value of the information revealed. Even though, practically speaking, the issue revolves around a photograph of someone kissing, exercising, sunbathing or arguing, this is the \textit{revelation}, not the \textit{intrusion}. The \textit{intrusion} is upon a person's ability to control what kind and how much information about him is revealed to others. Controlling the information known about us is the way we as individuals define ourselves. It is also the way that each of us remains able to redefine ourselves, free from the indefinite stigma associated with permanent records which can, and often do, reappear to haunt and undermine all our future endeavors. The intrusion, then, is upon a person's dignity. It should not be minimized because, at first glance, what \textit{seems} to be at issue is merely a true record (photograph, videotape, audio tape, etc.) about oneself made public.

Finally, because of present technology, these kinds of privacy intrusions have spread so far as to include \textit{everyone}, not just movie actors whose interests tend to be minimized by courts, or public officials whose otherwise private activities may implicate a genuine public interest. It is no longer true that only limited numbers of people, namely the press, control what information is disseminated to the public. Now, via the Internet, virtually everyone has access to the media. It has been said that the video camera is the \textit{great equalizer} which has \textit{democratized technology}\footnote{37. McClurg, \textit{supra} note 14, at 1022.} — that because of the new video vigilantism, the general public is able to expose violations and effect changes in society more efficiently than it ever has before.

I suggest that it is the Internet, not the video camera, which more properly deserves to be called the great equalizer. Just like photographs before the advent of the video camera, and sketches before the advent of the camera, images captured through surreptitious video taping were only made public when an editor decided they had commercial value. But now, the Internet has provided the masses with unlimited free access to a medium capable of instantaneously broadcasting private images to a global
audience. The Internet has replaced the editor, who sometimes, though all too infrequently, refused to publish information in poor taste or that was violative of privacy rights. A prime example is the set of photographs that were taken of Diana as she lay dying in that Paris tunnel. Editors all over the world announced that they would not publish the photographs. In spite of the self-restraint of editors, the photographs appeared on the Internet.

There are numerous other paparazzi Internet sites available where photographs of various celebrities can be viewed free of charge. Surely pay-per-view Internet sites, such as those now widely available for viewing other types of prurient material, are on the horizon. One particular incident comes to mind. Many years ago, a photographer snapped a photograph of the Queen just as a gust of wind blew her dress over her head. The photograph was never published, owing to a greater self-restraint by the press than exists today. The Internet provides a marketplace for photographs like this despite editors' efforts to minimize intrusions. There is no question that a photograph of the Queen in her skivvies on a pay-per-view Internet site would be enormously profitable. Because England fails to recognize a specific right to privacy, publication by the press or a member of the public on the Internet would not be actionable.

40. See, for example <http://www.dkiproductions.com/madonnal.html> where paparazzo Dave Kotinsky has posted exclusive photos of Madonna “caught leaving her Manhattan apartment for a night on the town,” among others.
41. One such pay per view site offers nude photographs for $29.95 for 30-day unlimited access or $39.95 for ninety days, payable by credit card. See <http://www.netnudes.com.> Another site, (visited Nov. 20, 1997) <http://www.barely18live.com.> charges $9.90 to view especially young-looking models for ten minutes.
42. A member of the press, in an interview for Frontline, Princess and the Press, PBS, broadcast on Nov. 18, 1997, told of how he photographed the incident as Queen Elizabeth was boarding a plane. He delivered the photo to the Windsors for their disposal and they were never published. A transcript of the interview is temporarily available on the internet at (visited Nov. 20, 1997) <http://www.pbs.org/wgbh/pages/frontline/shows/royals/interviews>.
43. Id.
44. In the United States, a similar photograph was held to be an invasion of the right to privacy. See Daily Times Democrat v. Graham, 162 So.2d 474 (Ala. 1964), where a woman’s dress blew over her head while in a carnival Fun House. A photographer was there and snapped the photo as part of a public scene at the carnival. It was subsequently published on the front page of his newspaper. The case has been cited as one of those rare instances where a United States court recognized a right to privacy in a public place. See McClurg, supra note 14, at 1022.
Such Internet sites needn't be limited to the exploitation of celebrity photographs. Private figures are also at risk. As evidenced by programs like America's Funniest Home Videos, the public also has an appetite for viewing private figures in a variety of embarrassing private situations. The Internet provides another as yet unexploited market for similar programs. The public could, for example, submit intrusive videos to a public-made Internet video show modeled after "America's Funniest Home Videos." Such submissions might include a male youth with a spontaneous erection, a woman temporarily deprived of her swimsuit after a dive into the ocean, or a couple making love in their back yard swimming pool. As was the case with B, the sunbather discussed earlier, these invasions would likewise go unprotected under England's current system.

The Warren and Brandeis right to be let alone is far from trivial, especially in light of modern technology. Without legally enforceable privacy rights, the Internet has the potential to become "the greatest leveler of human privacy ever known." It implicates a human right necessary to every person's dignity and pursuit of happiness. Unless England recognizes a general and independent right of privacy, public and private figures alike will be faced with the untenable choice of remaining prisoners in their homes or sacrificing an important human right.

IV. PARLIAMENT'S REJECTION OF THE RIGHT TO PRIVACY

Parliament has considered creating a statutory right of privacy on numerous occasions over the past fifty years. Unfortunately, all attempts to statutorily create a right to privacy have failed. In 1969, a general right to privacy bill was introduced in Parliament which not only addressed intrusions by publication, but also addressed intrusions into seclusion through "spying, prying, watching or besetting" and "unauthorized overhearing or recording" of both spoken words and visual images. The Bill was withdrawn on the grounds that the right was not well enough defined. It was feared that without a clearer definition, court discretion


46. One of the early calls for Parliament to create a right of privacy occurred in 1938, in a letter to the editor by a member of Parliament. See PRATT, supra note 30, at 82. For information regarding a right to privacy bill introduced in the House of Lords in 1961, see WACKS, supra note 30, at 40 n.38.

47. WACKS, supra note 30, at 40.
would be too broad, and that citizens, who might interpret the right too broadly, would flood the courts with unwarranted litigation.\footnote{48}{Id. at 41.}

In 1970, Parliament appointed a Committee on Privacy, chaired by Kenneth Younger, to determine whether a right of privacy enforceable against individuals and organizations was needed.\footnote{49}{Id.}
The Younger Committee conceded that privacy is "a basic need, essential to the development and maintenance of a free society and of a mature and stable individual personality."\footnote{50}{Id., citing REPORT OF THE COMMITTEE ON PRIVACY (chairman: Kenneth Younger) Cmnd. 5012, para. 113 (1972).}
However, it was reluctant to endorse the creation of a general right to privacy, echoing Parliament's concerns that the scope of a general right would be too uncertain.\footnote{51}{Id.}
The Committee nevertheless recommended the statutory creation of both a new crime and a new tort of unlawful surveillance.\footnote{52}{Id. para. 560-65.}
Though Parliament agreed with the Committee regarding the importance of the right of privacy, it still refused to provide even narrow protection against unwarranted surveillance.

In 1987, another right of privacy bill was before Parliament. That Bill defined the right of privacy as:

[t]he right of any person to be protected from intrusion upon himself, his home, his family, his relationships and communications with others, his property and his business affairs, including intrusion by: 1) spying, prying, watching or besetting; 2) the unauthorized overhearing or recording of spoken words; 3) the unauthorized making of visual images . . . \footnote{53}{Right of Privacy Bill 1987, \emph{reprinted as Appendix J in the REPORT OF THE COMMITTEE, supra note 2, at 107.}}

Like its 1969 predecessor, the 1987 bill would have created a general right of privacy. Practically speaking, it would have made actionable invasions of privacy which do not contain the incident of publication. Though the bill was given a second reading and completed its Committee stages in the House of Commons, it was not passed.

In the 1988-89 Parliamentary session, Parliament again rejected an opportunity to create a right of privacy.\footnote{54}{Krotoszynski, \emph{supra} note 16, at 1406.} This time, a bill was introduced which would create a tort action and a right of reply against members of
the press, but only for "public use or public disclosure of private information." The 1989 bill was narrower than its predecessors because it required publication or the intent to publish. The bill failed to address invasions of privacy by physical intrusion. Despite this apparent narrowing, competing concerns regarding press freedoms ultimately caused the Bill to be defeated.

In response to the introduction of the 1987 and 1989 bills and surrounding public concern about invasions of privacy by the press, Parliament formed yet another committee. The Committee on Privacy and Related Matters, chaired by Sir David Calcutt (Calcutt Committee), was given the task of "consider[ing] what measures (whether legislative or otherwise) are needed to give further protection to individual privacy from the activities of the press and improve recourse against the press for the individual citizen, . . . and to make recommendations." The Calcutt Committee concluded that there was no need for a privacy tort. As an alternative to legislative protections, the Calcutt Committee recommended that complaints regarding invasions of the press handle privacy themselves through a self-regulatory agency created for that purpose. Should this self-regulatory agency fail, the Calcutt Committee recommended Parliament create "a statutory system for handling complaints."

Self-regulation was no stranger to the press and had already been deemed a failure when Calcutt's new self-regulating agency was formed. In 1953, the self-regulatory agency known as the Press Council had been created to promote ethical journalistic practices. Almost forty years later, in response to the Calcutt Committee's recommendations, the Press Complaints Commission (PCC) replaced the failed Press Council. Unlike its predecessor, the majority of the PCC's sixteen members have no connection with the press. But this is not to suggest that the fox is no

55. Protection of Privacy Bill 1989, reprinted as Appendix K in the REPORT OF THE COMMITTEE, supra note 2, at 108. See also id.
58. REPORT OF THE COMMITTEE, supra note 2, at x, 46. See also Krotoszynski, supra note 16, at 1406.
59. REPORT OF THE COMMITTEE, supra note 2, at 65.
60. Id. at xi, 73. See also Press Complaints Commission, Scrutiny of Press Self-Regulation, (visited Nov. 3, 1997) <http://www.pcc.org.uk/about/scrutiny.htm>.
62. Id.
longer watching the hen house. Currently, seven of the PCC’s sixteen members are highly esteemed officials of the publishing industry. There is also a great deal of political power among its members. The Right Honorable Lord Wakeham is Chairman. Other Public Members include Lord Tordoff, who served in the House of Lords from 1988-94, and the Right Reverend John Waine, Bishop of Chelmsford from 1986-96. The requirement that the majority of the PCC members be selected from outside the publishing industry and the addition of politically persuasive Public Members has not made a difference in the PCC’s effectiveness. Parliament, by having delegated its responsibility to a private agency, seems to be more concerned with creating an organization that appears to be powerful and unbiased than with effectively protecting privacy rights.

In 1993, Sir David Calcutt, in his second report on press self-regulation, recommended abolition of the PCC. Calcutt concluded, as had his predecessors, that the PCC was “flawed in its procedures and not sufficiently independent of the press.” Calcutt also recommended that the government proceed with the introduction of new criminal offenses on physical intrusion and that it create a statutory tort for infringement of privacy. The government’s response was disappointing. While it accepted Calcutt’s findings regarding the ineffectiveness of the PCC, the government nevertheless urged, for the third time, a strengthening of the procedures for self-regulation. Again postponing its duty to provide a right of privacy, Parliament merely “reaffirmed its commitment to consider introducing new criminal offenses on physical intrusion and said

63. The seven members of the press currently on the Commission are Iris Burton, Editor in Chief, Women’s Realm and Woman’s Weekly; Jim Cassidy, Editor, The Sporting Life; Tom Clarke, Editor, The Sporting Life; Graham Collier, Editor, Surrey Advertiser; Sir David English, Chairman and Editor in Chief, Associated Newspapers; John Griffith, Editor, Liverpool Echo; John Witherow, Editor, The Sunday Times. The full list of Commission members is available at <http://www.pcc.org.uk/about/members.htm>.

64. Lord Wakeham has enjoyed a distinguished political career, having served as Lord Privy Seal and Leader of the House of Lords from 1992-94; Secretary of State for Energy from 1989-92; Lord President of the Council and Leader of the House of Commons 1988-89; Lord Privy Seal and Leader of the House of Commons from 1987-88 and Government Chief Whip from 1983-87. Id.

65. Id.


67. Id.

68. Id.

69. Id.
that it would give consideration to the merits of a new civil tort of privacy."  

Two months after Sir David Calcutt's call for statutory protections, the National Heritage Select Committee on Privacy and Media Intrusion also urged the Government to protect privacy rights. In their March 1993 report, the Committee recommended the creation of a yet another new self-regulatory agency that would be overseen by a statutorily created Press Ombudsman. Under their proposal, the Press Ombudsman would be empowered by statute to impose large fines. This proposal is interesting because it maintained the idea of self-regulation but, because it gave government authority to an overseer, the agency's decisions would have had the force of law. The Heritage Select Committee also recommended a criminal offense for physical intrusion and a civil tort for infringement of privacy be established. Parliament responded much as it had before, by giving a lip service promise to consider the merits of the Committee's recommendations.

In light of the utter failure of the PCC and its predecessor to protect privacy through self-regulation, it is inconceivable that Parliament could continue to delegate its duty to provide citizens effective remedies for invasions of privacy to this ineffective private body. But that is exactly what it did. Then came the tragedy of September 1997, when Princess Diana was killed during a paparazzi motorcycle chase. Though Diana's death occurred in Paris, and was further complicated by the intoxication of her driver, the appalling news gathering tactics which attended the tragedy again brought the issue of invasions of privacy by the press to the forefront. Earl Spencer, Diana's brother, who publicly proclaimed that every newspaper editor who had ever published intrusive photographs of

70. Id.
72. Id.
74. Press Complaints Commission, supra note 66.
75. Id.
Diana had her blood on his hands,77 appealed to Parliament for the creation of a privacy law. But his appeal fell on deaf ears. Tony Blair, England’s Prime Minister, stated that he’s “never been convinced about privacy laws”78, and his position that questions of privacy are best left to self-regulation by the newspaper industry remains unshaken.79 Astonishingly, even in the wake of the Diana tragedy and the public support of privacy laws which attended it, Parliament steadfastly maintained that privacy issues were best resolved by the PCC.80

Unless Parliament creates a right of privacy, either by specific legislation recognizing the right or by incorporation of the European Convention on Human Rights,81 the PCC will continue to be the sole arbiter of invasions of privacy by the press. In light of that prospect, Lord Wakeham has called for strong reform of the Commission’s Code of Practice. The current Code has very little to say about intrusion.82 While a broad interpretation of the Code would prohibit a great many of the

77. Id.
79. Bevins, supra note 76.
80. Earl Spencer had received 27,000 letters in support of his criticism of press newsgathering tactics by the time he spoke with the Prime Minister urging privacy law reform. See Johnston, supra note 78.
81. The European Convention on Human Rights and the Human Rights Bill are discussed herein at sections V and VI, respectively.
82. There are two articles from the Code which pertain to the right to be let alone and intrusion into seclusion:

Article 4. Privacy. i) Intrusions and enquiries into an individual’s private life without his or her consent, including the use of long-lens photography to take pictures of people on private property without their consent, are only acceptable when it can be shown that these are, or are reasonably believed to be, in the public interest. ii) Publication of material obtained under i) above is only justified when the facts show that the public interest is served. Note – Private property is defined as i) any private residence, together with its garden and outbuildings, but excluding any adjacent fields or parkland and the surrounding parts of the property within the unaided view of passers-by, ii) hotel bedrooms (but no other areas in a hotel) and iii) those parts of a hospital or nursing home where patients are treated or accommodated. . . . Article 8. Harassment. i) Journalists should neither obtain nor seek to obtain information or pictures through intimidation or harassment. ii) Unless their enquiries are in the public interest, journalists should not photograph individuals on private property (as defined in the note to Clause 4) without their consent; should not persist in telephoning or questioning individuals after having been asked to desist; should not remain on their property after having been asked to leave and should not follow them. iii) It is the responsibility of editors to ensure that these requirements are carried out.”

unsavory activities of the press, it appears to have been applied quite narrowly. The PCC adjudicates very few violations involving public figures and only one in eight complaints involves privacy.\textsuperscript{83} When asked why so few complaints of this nature were brought to the PCC, a spokesman conceded that the difficulty in proving a breach of the Code was a contributing factor.\textsuperscript{84} Several of Lord Wakeham's proposed reforms address some of the problems. For instance, Wakeham proposes to deal with harassment by prohibiting the publication of photos obtained through persistent pursuit, including those obtained by photographers "[w]ho stalk their prey."\textsuperscript{85}

Despite these reforms, the biggest problem with the resolution of privacy violations through the PCC still remains. The PCC is a private body with no authority to impose sanctions other than those agreed to by its members. At present, the only available sanction is that the offending publication print the Commission's findings "in full and with due prominence."\textsuperscript{86} The PCC has been aptly described as a fraud because it can impose no real sanctions and cannot compensate victims.\textsuperscript{87} Even if victim compensation were made available, some members of the press would likely perceive fines of that sort as a necessary cost of doing business. Fines would have to be quite sizeable to be an effective deterrent, and it is unlikely that the PCC would agree to them if they were.\textsuperscript{88} However, it must be conceded that even if effective economic sanctions did exist, the PCC reaches only those editors willing to submit. To date, not all members of the press submit to the PCC, and if legitimate sanctions were to become a part of the ante, they likely never would.

\textsuperscript{83} Culf, supra note 73. For a compilation of complaints and adjudications, see The Press Complaints Commission (visited Nov. 3, 1997) <http://www.pcc.org.uk/ajud.htm>.

\textsuperscript{84} E-mail from Tim Toulmin, Press Complaints Commission, to Laura Mall (Nov. 6, 1997) (on file with author).


\textsuperscript{88} Apparently, the profits involved in checkbook journalism are quite staggering. For example, THE MIRROR paid 250,000 pounds for the photograph of Diana and Dodi Al Fayed kissing in St. Tropez. Culf, supra note 31.
V. Judicial Rejection of a Common Law Right To Privacy

The courts of England have done little for those in need of privacy protection. British judges believe that the creation of a new right rests with the legislature and, in light of Parliament’s refusal to create one, have been hesitant to act. The judiciary’s refusal to recognize a right of privacy where it does not legislatively exist was apparent in a case involving British-comedy star Gordon Kaye.9

In 1990, Mr. Kaye, star of the British comedy Allo, Allo, was in the hospital recuperating from brain surgery when a photographer from Sunday Sport violated the sanctity of his hospital room.90 The journalist asked him questions and took photographs without his permission (medical evidence proved Mr. Kaye’s condition was such that he was incapable of giving informed consent).91 Precisely because there is no privacy right in England, nor any other effective alternative action, Mr. Kaye was unable to prevent the printing of the photographs.92 Despite this complete lack for a remedy, the court refused to create a common law right to privacy. Court of Appeals judge Lord Justice Glidewell deferred to Parliament, concluding that “[t]he facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals.”93 In a concurring opinion, Lord Justice Leggett echoed that the right to privacy “has so long been disregarded here that it can be recognized now only by the Legislature.”94

Kaye is not the only example of the judiciary’s deference to Parliament regarding the right to privacy. Malone v. Metropolitan Police Commissioner also demonstrates the judiciary’s reluctance to step on the toes of Parliament:

No new right in the law, fully-fledged with all appropriate safeguards, can spring from the head of a judge deciding a particular case: only Parliament can create such a right. . . . One of the factors that must be relevant in such a case is the degree of particularity in the right that is claimed. The

89. Kaye v. Andrew Robertson and Sport Newspapers Ltd., 1990, appended to REPORT OF THE COMMITTEE ON PRIVACY AND RELATED MATTERS, supra note 2, at 98.
90. Id.
91. Id. at 99.
92. Four alternative rights of action were pursued but failed. These were libel, malicious falsehood, trespass to the person, and passing off. Id. at 100.
93. Id.
94. Id. at 104.
wider and more indefinite the right claimed, the greater the undesirability of holding that such a right exists.95

Malone has been cited as having essentially foreclosed any future attempts at a judicial creation of a common law right to privacy.96 But I disagree. While a broad and general right of privacy may not spring from the head of a judge, other language in the decision suggests that more limited equitable remedies for specific invasions of privacy may still be available under the common law. The Court limits its decision to the tapping of telephone lines in which the police have just cause or excuse, stating it "decide[s] nothing on tapping elected for other purposes, or by other persons, or by other means."97 The Malone case, then, has not necessarily foreclosed all common law creation of a right to privacy.

Malone is significant for another reason. The Malone judiciary rebuffed arguments that a right to privacy had been created in England by the European Convention on Human Rights. As regards the European Convention, the Court noted that:

The United Kingdom, as a High Contracting Party that ratified the Convention on March 8, 1951, has thus long been under an obligation to secure these rights and freedoms to everyone. That obligation, however, is an obligation under a treaty which is not justiciable in the courts of this country. Whether that obligation has been carried out is not for me to say . . . All that I do is to hold that the Convention does not, as a matter of English law, confer any direct rights on the plaintiff that he can enforce in English courts.98

The Malone Court correctly recognized that it was the obligation of the State, as a High Contracting Party, and not the province of the courts, to implement legislation which would give effect to the Convention. Since Parliament had neither created a statutory right to privacy, nor passed legislation giving effect to the European Convention on Human Rights, the Court ultimately concluded that it could "find nothing in the authorities or contentions . . . to support the plaintiff's claim based on the right of

95. Krotoszynski, supra note 16, at 1412, citing Malone, wherein the Malone case is cited as having foreclosed the creation of a common law right to privacy.
96. Id.
98. Id. at 339-40.
Malone appealed the decision directly to the European Commission of Human Rights. It was Malone's hope that a right to privacy would be found to exist under international law. If so, the United Kingdom, in violation of its treaty obligations under the European Convention on Human Rights, would be required to provide a remedy. I turn now to a discussion of privacy as addressed by the European Convention on Human Rights.

VI. THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 8 of the European Convention on Human Rights (the Convention), to which the United Kingdom has been a signatory since 1951, provides that “[E]veryone shall have the right to respect for his private and family life, his home and his correspondence.” As this is written quite broadly (just as most human rights documents are), it is uncertain from its face whether the right would encompass invasions of privacy by the media. Though the European Court of Human Rights has considered over sixty cases in which Article 8 was at issue, none has squarely put before it the question of an individual’s right to be let alone versus the media’s right to gather news. Notwithstanding the inherent difficulties in balancing of the right to privacy against freedom of the press, there are two additional obstacles that must be overcome if the European Convention is to provide the protection England lacks.

The first regards whether the Convention would apply to the press as a private actor at all. Traditionally, international law applies only to government action. The government has pledged that it will not violate, by its own actions, the rights named within the treaty. But the Convention has

99. Id. at 336.

100 In order for a case to be accepted by the European Commission of Human Rights, and ultimately referred to the European Court of Human Rights, Article 26 of the Convention requires that an individual must first have exhausted all domestic remedies available. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) [hereinafter ECHR]. Without a cause of action in England for invasions of privacy, no further remedy was available, Malone was found to have exhausted all available remedies and his individual petition was accepted then referred to the Court. Ultimately, the Court found a violation of Article 8's guarantee of a right to privacy, but it was only because the United Kingdom had failed to provide adequate safeguards against the abuse of wire-tapping by the police. There was no finding that the United Kingdom was in derogation because it lacks a privacy law. Malone v. United Kingdom, 82 Eur. Ct. H.R. (ser. A) at 36-37 (1984).

101. ECHR, supra note 100.

102. For a convenient listing of European Court of Human Rights cases, see the Department of International Law at the University of Salzburg where Christian Campbell maintains a list of cases according to Convention article available in (visited Nov. 10, 1997) <http://www.sbg.ac.at/var/docs/egmr/echrhome.htm>. http://www.sbg.ac.at/
imposed upon States the positive obligation to uphold the rights embodied in the Convention. This means that a State can violate the terms of the treaty for doing nothing. By failing to provide redress to its citizens for rights violations by private actors, for example, a State fails to uphold its positive obligations under the treaty. The European Court of Human Rights has specifically held that a State is under a positive obligation under Article 8 to respect family life. While it seems likely, it is nevertheless uncertain whether the Court in Strasbourg would extend positive obligations on a State to curb privacy intrusions by the media.

The second obstacle is whether the right to privacy as framed in Article 8 can be understood to include a general right to be let alone, one that is broad enough to encompass intrusion into seclusion, and the publication of private facts. If the application of Article 8 turns solely on the original intent of the Convention’s framers and on the definition of the right as historically interpreted by the members of the European Union, protection against intrusion and publication of private facts is likely to be found lacking. It must be remembered that the original purpose of the Convention was to combat totalitarian governments in the wake of World War II. Article 8 was framed in response to the invasions of homes by Nazi troops, not intrusions into private affairs by the news media. Furthermore, European union member states have not traditionally granted a broad right of privacy. As we have already seen, Parliament has consistently refused to create any general right to be let alone. France, often cited as the European nation with the most stringent privacy laws, did not develop a common law right to privacy until the 1960’s, and they did not codify the right until 1970. The most substantial protections for this aspect of privacy, then, did not exist in Europe until more than twenty-five years after the Convention was put into effect. While other privacy rights unrelated to Article 8’s original purpose have fallen within its scope, a common understanding among the High Contracting Parties is still often

103. Article 13 states that “[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.” Krotoszynski, supra note 56. See also Campbell & Cosons v. UK, 48 Eur. Ct. H.R. (ser. B) 17 (1982), where the Court defines the word respect used in Article 2 of the Convention to imply that a State is under a positive obligation to act. Article 8 uses the word respect when defining State obligations regarding the right to privacy. ECHR, supra note 100, art. 8.

104. See Gaskin, 160 Eur. Hum. Rts. Rep. (ser. A.) at 15, 17-20 (1989) where the Court held that the Government violated its positive obligations under Article 8 by failing to provide a system whereby Gaskin could retrieve a Government file relating to his care when he was a ward of the State.

105. PRATT, supra note 30, at 86-87.

106. REPORT OF THE COMMITTEE, supra note 2, at 14.
necessary. For example, the Court held that a United Kingdom law criminalizing homosexual conduct to be a violation of a homosexual's right to respect for his privacy and family life in part because of the modern day acceptance for this kind of lifestyle among other Member States, even if not in Ireland. If there is no common European understanding that the Article 8 right to privacy encompasses even a minimum of protection for the kinds of invasions at issue here, and I submit that there is none, any claim to the right under the Convention may fail.

Only when an applicant has overcome both the obstacles discussed above will the issue turn on a balancing of the interests between an individual's right to privacy and society's right to know. Of course, the right to know is part of the guarantee of freedom of expression as embodied in Article 10 of the European Convention. I turn now to a discussion of that competing interest.

A. Freedom of Expression under the European Convention on Human Rights

The right to privacy cannot be considered alone. It must be considered in tandem with the competing right of freedom of expression. Article 10 of the European Convention protects freedom of expression, including the right to receive and impart information without government interference. There is no question that freedom of the press is necessary to a democratic society, and I can add nothing to the debate that has already clearly established its high value. But, freedom of speech and of the press has never been regarded as absolute. Freedom of the press should not, and need not, be maintained at the expense of other important rights. Article 10 recognizes the necessity for limits to be placed on freedom of expression and of the press:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

108. ECHR, supra note 100.
109. Id. art.10, § 2.
Thus, Article 10 expressly recognizes boundaries regarding the publication of information in breach of confidence and which are libelous. But the phrase that refers to the rights of others indicates that this list is not meant to be exhaustive.\textsuperscript{110} While these rights might refer narrowly to the specific human rights as enumerated in Article I of the Convention, the preceding phrase, as are prescribed by law suggests an even broader reference. The rights of others is more likely meant to include domestically created rights as well as international human rights. Either way, the language of Article 10 leaves the door open for a privacy limitation on freedom of expression to be recognized.

The Strasbourg Court has yet to deal with any case that pits the rights of a free press against the privacy rights of an individual. However, the Court has dealt with privacy and free press issues separately. If anything may be gleaned from an overview of the two bodies of case law, it is that the right of a free press is broad and well defined, and the right to privacy is less so. This does not bode well for advocates of the right to privacy.

Though the Strasbourg Court has not yet dealt with any case concerning the intrusion of the media into the privacy of an individual, such as was the issue in Kaye,\textsuperscript{111} the Court has dealt with cases that are somewhat analogous. One such case involved the libelous publication of five articles about the private lives of certain Antwerp Magistrates.\textsuperscript{112} The articles severely criticized the Magistrates for having granted child custody to a father accused of sexually abusing the children, and concluded that the Magistrates based their decision on bias, cronyism and in misplaced right-wing politics. The judgement of the domestic courts against the newspaper were based on violations of domestic law which prohibits publication of “ill-considered accusations without sufficient evidence;” that “employs gratuitously offensive terms or exaggerated expression;” or that “fails to respect private life or the individual’s privacy.”\textsuperscript{113} According to the Brussels tribunal, the journalists were liable for defamation for having “besmirched the honor of the magistrates without being in possession of all

\textsuperscript{110} Id.


\textsuperscript{113} Id. para. 26.
the necessary information." The courts also held that in doing so, the newspaper had invaded the privacy of the Magistrates:

In the instant case the appellants dared to go one step further by maintaining, without a shred of evidence, that they were entitled to infer the alleged bias from the very personalities of the judges and the Advocate-General and thus interfere with private life, which is without any doubt unlawful.

The European Court disagreed. It held that the government had not violated Article 8. First, the Court noted that the applicants had not "cast doubt on the information published regarding the fate of the X children." That being the case, the inferences which the newspaper drew from their correct knowledge of the record of the case were value judgments, which the Court held distinguishable from facts. Also important to the Court's judgment was the idea that the issue at hand, regarding the impartiality of the judiciary, was of such significant public interest that the government was unjustified in its interference with freedom of expression.

There was one notable exception. The Court found that the journalists had invaded the privacy of the Magistrates for making reference to the activities of the family of one of the magistrates:

One of the allusions to the alleged political sympathies was inadmissible – the one concerning the past history of the father of one of the judges criticized . . . It is unacceptable that someone should be exposed to opprobrium because of matters concerning a member of his family. A penalty was justifiable on account of that allusion by itself.

It was, however, only one of the elements in this case. The applicants were convicted for the totality of the

114. Id. para. 27.
115. Id. para. 41.
116. Id. para. 49.
118. Id. para. 42.
119. Id. para. 37.
accusations of bias they made against the three judges and the Advocate-General in question.\footnote{120}

It is interesting that the Court found conclusions drawn from true facts regarding a public official's family violated Article 8 when similar conclusions drawn from other true facts did not. Was it the publication of private information about the family, or the "allusion" that the apple had not fallen far from the tree that the Court held objectionable? The distinction is critical. Action for the first is an invasion of privacy for publication of true embarrassing facts, while the other is for defamation. Each implicates Article 10's right to free speech, but only the former would implicate Article 8. It appears, by the use of the word "allusions" and "opprobrium" that what the Court found actionable was defamation, not invasion of privacy. Regretfully, the Court failed to make the distinction clear.

Notwithstanding that one small concession, the Court appears to be highly deferential to Article 10. Most notably, the Court virtually disregarded two arguments put forth by the government: first, that the Magistrates are different from most public officials, because owing to ethical constraints which prevent them from commenting about cases, they cannot respond to criticism about their decisions; and second, that the government's interest in preserving the public confidence in its judiciary justifies its protection against unfounded attacks. \footnote{121} This second justification appears to be specifically allowed under Article 10 to maintain "the authority and impartiality of the judiciary."

While the Court is often generous in providing a wide margin of appreciation to the government for its determination of what is "necessary in a democratic society . . . for the prevention of disorder or crime . . . or for the protection of the rights and freedoms of others,"\footnote{123} it is apparently less willing to do so when freedom of expression is implicated.

Another case involved a libel action over a book published about the private life of the applicant.\footnote{124} The United Kingdom provided a remedy for information published that was false, but offered no remedy where the

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120. \textit{Id.} para. 45. The newspaper had made reference to the fact that the father of one of the judges was "a big-wig in the gendarmerie who was convicted in 1948 of collaboration: he had, in close collaboration with the ‘\textit{Feldgendarmerie},’ restructured the Belgian gendarmerie along Nazi lines. [YB] is no less controversial as a \textit{magistrat}.” \textit{Id.} para. 19.


122. ECHR, \textit{supra} note 100.

123. \textit{Id.}

124. Emmerson, \textit{supra} note 111.}
information published was true. The applicant claimed that true information published about his private life was an invasion of his privacy. The European Commission on Human Rights held that the remedies provided by the United Kingdom under defamation and breach of confidence were sufficient, and so the United Kingdom was not held to have violated Article 8. This suggests that the Commission is unwilling to find a State in violation of its positive obligations when it offers some, even if insufficient, remedy. From this we might infer that where the State offers no remedy at all, as was illustrated in Kaye, the Commission would hold a State in violation. This precise question, whether other remedies such as trespass, defamation, and breach of confidence, or even those offered by the quasi-public PCC, are sufficient in their incidental protection of privacy, is precisely the one that Parliament has been faced with for quite some time. Parliament's response has been that those remedies do adequately protect privacy rights, even though cases like Kaye clearly belie that proposition. The Strasbourg Court may offer a wide margin of appreciation to the United Kingdom for their view that incidental protections to the right of privacy are enough. If they do, future holdings of the Strasbourg Court may closely resemble the deferential treatment English judges have paid to Parliament.

B. Potential Effect of a Violation of the European Convention

Article 1 of the Convention confers upon its signatories the obligation to "secure to everyone within their jurisdiction the rights and freedoms defined in Section I." Further, Article 53 obligates contracting parties to "abide by the decision of the Court in any case to which they are parties." Should a violation be found, the Court would issue a judgment so stating, and award a specific remedy, such as damages and costs, to the injured party. While the judgment of the Court does require that the State come into compliance with its Convention obligations, the Court is not empowered to dictate exactly how it should do so. The Court has confirmed that "the Contracting States remain free to choose the measures which they consider appropriate."

125. Id.
126. Id.
127. Id.
128. ECHR, supra note 100.
129. Id.
130. Damages are permitted under Article 50. Id.
In any case involving a State's positive obligations, there are difficulties regarding compliance that do not necessarily occur in negative obligation cases. In the latter, a State is directed to discontinue a specific practice. Assuming full compliance, the practical result for citizens is that the practice will no longer occur. In the former, there is the potential that a State will enact measures that only partially or otherwise unsatisfactorily protect the citizen against future violations. This is especially likely, as here, when the State has demonstrated reluctance to provide the protections. Furthermore, the Court has indicated that exceptions to freedom of expression must be narrowly interpreted. In the Thalidomide Case, the United Kingdom had issued an injunction against the publication of an article regarding the negligence of a company that manufactured and marketed a drug to pregnant women that subsequently caused severe birth defects. Civil cases against the company were at various stages of action and the government's injunction was intended to prevent trial by newspaper. An Article 10 violation was found despite the express provision allowing exceptions for "maintaining . . . impartiality of the judiciary." The injunction was held to be an unnecessary infringement on freedom of expression under the specific facts of the case. The Thalidomide Case, then, demonstrates how the Court might be inclined to apply narrowly any restrictions placed on freedom of expression.

So, given a State's freedom to prescribe for itself how it chooses to comply with a violation of the European Convention, Parliament's potential reluctance to implement broad privacy measures, and the Court's instruction that restrictions on freedom of expression should be narrowly applied, a violation of Article 8 may do little to impact privacy rights in England. Despite this pessimism, incorporation of the European Convention on Human Rights into domestic law may still provide for a general right of privacy.

VII. THE HUMAN RIGHTS BILL

Although the United Kingdom played a major part in drafting the Convention and was the first to ratify it in 1951, it has never incorporated the Convention into domestic law. As we have already seen, the result is that British citizens cannot enforce Article 8's privacy right's in British courts. Instead, they must appeal to the European Commission of Human Rights.

132. Id.
133. Id.
134. Id. at 42.
Rights who may, if the case meets certain criteria, refer the case to the European Court of Human Rights. On average, the process takes approximately five years to complete and will cost the petitioner approximately thirty thousand pounds. Practically speaking, such a costly and time-consuming process does not afford an effective remedy to the majority of British citizens. The better solution would be for the United Kingdom to finally incorporate the European Convention on Human Rights into domestic law. And this is exactly what is being considered.

On October 24, 1997, the British Government published a White Paper announcing the Government’s intention to bring UK law in line with the European Convention on Human Rights. If passed, the Human Rights Bill now pending before Parliament would incorporate the European Convention on Human Rights into domestic law. This would enable British citizens to enforce a right of privacy in domestic courts, making it unnecessary for Parliament to create a general right of privacy or enact specific privacy tort legislation.

While this seems like an ideal solution, whether any meaningful right to privacy will emerge will ultimately depend on how it is balanced against the rights of a free press. Lord Bingham, Britain’s highest-ranking judge, pointed out that “what is going to have to be confronted is the demarcation of the boundary between privacy and free speech. I think this is difficult and debatable territory. In deciding whether publication would infringe the right of privacy, the obvious criterion for judges to use would be ‘public interest’.” The problem with using a public interest criterion is that the term is subject to differing interpretations. The press, on the one hand, would argue for the narrowest possible definition. To them, anything that sells newspapers might be considered to be in the public interest. In the words of Sir John Donaldson, the press is “peculiarly vulnerable to the error of confusing public interest with their own interests.”

136. The Commission acts as a screening body to individuals, who may not directly appeal to the European Court of Human Rights. The Commission determines whether a case should go before the European Court of Human Rights. ECHR, supra note 100, art. 25-27.


interest. It is unlikely, however, that the term is susceptible to a definition that would include information that merely serves to satisfy public curiosity. The distinction between what satisfies prurient curiosity and what is in the public interest most often arises in the context of a public official. Those in favor of a broad interpretation would argue that the morals of a public official, as evidenced by his sex life and other private activity, directly relates to his fitness for public office. Those in favor of a narrower interpretation, however, would argue that only when there is a more direct interference with an official's ability to properly carry out his duties is private information in the public interest. Eric Barendt, Goodman Professor of Media Law at University College in London, put it this way:

Even public figures are entitled to privacy. There is no public interest justification for publishing details of a politician's sex life, unless that interferes with the discharge of his duties. The argument that the public has a right to know the truth about every aspect of his private life is particularly shabby. Taken seriously, this claim would empty the privacy right of all content.

While it remains to be seen how the courts will answer the question of what is in the public interest, any definition narrower than that which has been employed by the press will be a great victory for advocates of privacy.

VIII. CONCLUSION

The video camera, the telephoto lens and the Internet are just a few of the advances that necessitate a broader reading of the right of privacy in England and the international human rights community. Lord Wakeham recognized that there is little one country can do to solve the problems created by paparazzi operating in a global market. But while Lord Wakeham may be congratulated for making a heroic attempt to make a difference within the narrow scope of his authority, Parliament cannot. By deferring protection of the right of privacy to the PCC, Parliament failed to provide its citizenry effective redress for privacy violations by the press. Even if the PCC, under its revised Code, is successful in blocking the sale of ill-gotten paparazzo photographs, the day is gone when the press are the

140. REPORT OF THE COMMITTEE ON PRIVACY AND RELATED MATTERS, supra note 2, at para. 3.20.
141. Barendt, supra note 15.
142. Speech by the Rt. Hon. Lord Wakeham, supra note 85.
singular masters of mass media. Any boycott the PCC calls regarding photographs of a particular incident will only serve to stimulate market demand. Because this may in fact prove to be even more profitable for the paparazzi and individual violators, it could have the adverse effect of increasing privacy violations.

It will be up to the judiciary to create a right to privacy in England. Last year, Lord Bingham, the British equivalent to the United States Supreme Court's Chief Justice, was said to have forewarned Parliament that if it failed to protect personal privacy, "the judges would." It appears that Lord Bingham will soon have the opportunity to realize his threat. The seemingly inevitable incorporation of the European Convention of Human Rights into UK law will place the future of the right to privacy, not in the hands of the European Court of Human Rights, but in the hands of the English judiciary. Because Article 8's right to privacy as it relates to intrusions by the press has not been well defined by the Court in Strasbourg, it will remain necessary for British judges to determine its scope. The title and content of the White Paper itself makes this suggestion. "Rights Brought Home points out [that] British judges will have more, not less, impact on European Human Rights jurisprudence."  

Lord Bingham's remark also suggests that British judges, after years of frustration over the lack of authority to provide just remedies, are quite eager to protect privacy rights. It also appears likely that public sentiment since the death of Diana has provided yet another impetus to act. Continued denial of the right now, perhaps more than ever before, may serve to seriously undermine public confidence in the judiciary. So, despite their prior track record, British judges may well create a broader right than would have been defined by the European Court of Human Rights in the full course of time -- given the Court's limitation to define the right according to a common understanding within the European Community.

Prior to the drafting of the Human Rights Bill, it was the hope of privacy rights advocates that the Strasbourg Court would provide English citizens the privacy protection they lacked. Ironically, it now appears that


England, heretofore one of the few countries in the European Union with no right of privacy at all, may assist the Court in Strasbourg to define the right more broadly. Long overdue, the right to privacy is finally ripe for broad recognition in England and in Europe.