

PRIVACY AND THE PRESS: THE IMPACT OF INCORPORATING THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE UNITED KINGDOM

I. INTRODUCTION

The incorporation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)¹ into the domestic laws of the United Kingdom² has sparked heated debates, not the least of which centers around the possibility of a common law right of privacy being introduced through the “back door.”³ Before

1. See European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953), reprinted in RICHARD B. LILICH, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 500.1 app. (2d ed. 1990) [hereinafter ECHR]. The Convention entered into force when it had been ratified by at least ten member states. See MANUAL OF THE COUNCIL OF EUROPE 263 (1970). The ECHR will be discussed further in Part IV, *infra*.

2. See Human Rights Act 1998, ch. 42 (Eng.). The Human Rights Act (Act) received the Royal Assent on November 9, 1998. The Act incorporates the ECHR into the domestic legislation of the United Kingdom. While the Act is now officially on the statute books, it will not be fully in force until the year 2000. See Clare Dyer, *Bringing Home the Basics*, GUARDIAN (London), Nov. 12, 1998, at 21, available in 1998 WL 18676809. The eighteen month delay between the time the Act was incorporated and the year 2000, when the Act comes into force, allows for judges and magistrates to undergo training as well as give public bodies enough time to come into compliance with the ECHR. See *id.* Great Britain includes the three mainland areas of England, Wales, and Scotland as well as several smaller islands such as the Channel Islands. To be entirely correct, these three mainland areas and Northern Ireland in turn make up the United Kingdom. See J. DENIS DERBYSHIRE & IAN DERBYSHIRE, POLITICAL SYSTEMS OF THE WORLD 517-23 (2d ed. 1996). While the United Kingdom is a unitary state, there are three separate and distinct legal systems. The English legal system comprises England and Wales while Northern Ireland and Scotland both have their own system of laws and courts. See KENNETH R. REDDEN & LINDA L. SCHLUETER, MODERN LEGAL CYCLOPEDIA 3.230.7 (1994). While Scotland has a separate legal system, the Houses of Parliament at Westminster currently operates as its legislature although some minor legislative functions are in the process of being developed. See *id.* at 3.240.23. Northern Ireland, on the other hand, has its own parliament and written constitution, though it is now heavily under British direct rule. See *id.* at 3.250.9, 3.250.13. The Act will be applicable throughout the United Kingdom and will become a source of rights in all three legal systems. See Human Rights Act, *supra*, cls. 4(5), 22(6). While it is important to remember that the Act will be in force throughout the United Kingdom, this Note will focus primarily on the effect of the Act in England. Additionally, this Note will focus on English common law and English courts.

3. See, e.g., Emma Wilkins, *Press at Risk from Privacy Law, Says Wakeham*, TIMES

the ECHR was incorporated, the United Kingdom had neither a statutory nor common law right of privacy.⁴ In fact, the United Kingdom remained one of only a handful of countries without a Bill of Rights.⁵

The following three cases—from different countries—offer a striking example of the different results that may arise depending upon whether a court recognizes a plaintiff's right to privacy. In the first case, the son of a famous stage actor was hospitalized in France. Several reporters stormed the private hospital room, photographed the nine-year-old boy, and conducted an interview.⁶ In the second

(London), Nov. 3, 1997, at 8, *available in* 1997 WL 9240169; Michael White, *No Back Door Privacy Laws, Pledges Blair*, THE GUARDIAN (London), Feb. 12, 1998, at 8, *available in* 1998 WL 3078497. Both the English media and politicians have frequently ascribed the phrase “back door” to the ongoing privacy debate. The metaphorical “front door” in this case would be a full and open debate of a positive privacy law in both the House of Commons and the House of Lords. The incorporation of the ECHR into the domestic law of the of the United Kingdom has raised fears that judges, whose role would be to interpret the ECHR, will use Article 8 of the ECHR to shape a new common law right of privacy, a right which has until now never been recognized in English jurisprudence. *See* James Landale & Frances Gibb, *Rights Bill is No Threat to Press, Irvine Insists*, TIMES (London), Nov. 4, 1997, at 8, *available in* 1997 WL 9240449.

4. *See* PNINA LAHAV, *PRESS LAW IN MODERN DEMOCRACIES: A COMPARATIVE STUDY* 41 (1985); *see also* JAMES MICHAEL, *PRIVACY AND HUMAN RIGHTS* 100 (1994). The history of the right of privacy in Britain remains a sporadic affair. Attempts to introduce such a right by positively legislating it have been considered, but these attempts by and large have failed. *See, e.g.*, COMMITTEE ON PRIVACY, *REPORT OF THE COMMITTEE ON PRIVACY 1972*, Cmnd. 5012, ¶¶ 13-16 [hereinafter *Younger Report*]. The Younger Committee is the most celebrated and complete attempt to introduce a right of privacy in England. The Younger Committee nevertheless concluded that such legislation was unnecessary. *See* LAHAV, *supra*, at 41. The Younger Committee will be discussed *infra* in Part III. The concept of “privacy,” as adopted by this Note, will be discussed and defined *infra* Part II.

5. *See* MICHAEL ZANDER, *A BILL OF RIGHTS?* 41 (4th ed. 1997). In the last decade alone, a number of countries have adopted a Bill of Rights. For instance, New Zealand adopted a Bill of Rights in 1990, *see* Bill of Rights Act (1990) (N.Z.); Hong Kong in 1991, *see* Hong Kong Bill of Rights Ordinance, Hong Kong Ordinance, ch. 383 (1991); Israel adopted a Basic Law in 1992, *see* Basic Law: Human Dignity and Liberty, 1992, S.H. 1391; and South Africa adopted a bill of rights in 1993 as part of its new constitution, *see* S. AFR. CONST. ch. 2.

6. *See* Cass. 2e civ., July 12, 1966, D.S. Jur., 1967, 181 (Fr.). The young boy, Oliver Philipe, was the son of the well-known, and deceased, French stage actor Gerard Philipe. The defendant, France-Dimanche, advertised the sale of their upcoming scoop throughout the country and was intent on releasing the article and photographs in their weekly magazine. The lower court, frowning on the actions of the reporters, ordered the removal of all advertising and seized all the copies of the magazine. The court of appeals affirmed, and found that there was “an intolerable intrusion into the private lives of the Philipe family” which clearly warranted the injunction. *See id.* This exacting remedy was made possible by France's robust privacy law, found in Article 9 of the Civil Code. *See* CODE CIVIL [C. CIV.] art. 9 (Fr.). This article states in part: “[e]ach person has the right to have his privacy respected. Judges are entitled, independently from the award of damages, to prescribe any measure, such as sequestration, seizure, or any other measure necessary to prevent violation of the intimacy of private life. . . .” Law No.

case, a woman in the United States was hospitalized with a severe and unusual eating disorder. A reporter broke into her hospital room, took pictures, and ultimately printed her story in a nationally published magazine.⁷ In the third case, a well-known actor was hospitalized in England after having been treated for a severe head injury. While the semi-conscious patient was recovering, journalists ignored several restricted entry notices on the door, conducted an interview, and took several pictures of the patient.⁸

While the factual similarities in these cases are striking—notably, none of the patients had consented to the media intrusion—only in the first two cases were the plaintiffs granted relief for the invasion of their privacy.⁹ In the third case, the English Court of Appeal discharged the lower court's injunction enjoining publication, and regretfully informed the plaintiff that English law does not recognize a right of privacy. The court nonetheless urged legislative action to give that "breadth of protection"¹⁰ necessary for a plaintiff

70-643 of July 17, 1970, J.O., July 19, 1970, p. 6751; 1970 D.S.L. 200 (Fr.), *translation in LAHAV supra* note 4, at 171. *See generally* Jeanne M. Hauch, *Protecting Private Facts in France: The Warren & Brandeis Tort is Alive and Well and Flourishing in Paris*, 68 TUL. L. REV. 1219, 1219-1301 (1994) (discussing in detail the right of privacy in France).

7. *See Barber v. Time Inc.*, 159 S.W.2d 291 (Mo. 1942). The magazine published its story and pictures above such captions as "Insatiable-eater Barber" and "She eats for ten." *Id.* at 293. The State of Missouri had recognized the right of privacy in an earlier case. *See Munden v. Harris*, 134 S.W. 1076 (Mo. Ct. App. 1911). In *Barber*, the court stated that liability exists if "the intrusion has gone beyond the limits of decency. . . . These limits are exceeded where intimate details of the life of one who has never manifested a desire to have publicity are exposed to the public, or where photographs of a person in an embarrassing pose are surreptitiously taken and published." *Barber*, 159 S.W.2d at 293-94. The court went on to affirm the jury's award of actual damages and denied Time's First Amendment defense. *Id.* at 295. *But see* discussion *infra* note 9.

8. *See Kaye v. Robertson*, [1991] F.S.R. 62 (Eng. C.A.). *Kaye* is the seminal Court of Appeal case addressing the need for a privacy law in Britain. The judges, individually, all make a strong case for such a right, going as far as urging legislative action and citing with approval the American inception of and experience with this right. *See id.* at 71 (Leggatt, L.J.). *Kaye*, a famous television actor, suffered a severe head accident when a piece of wood came loose from an advertising billboard and crashed through his car's windshield. *See id.* at 63 (Glidewell, L.J.). He was subsequently on life support for three days in the intensive care unit and was moved nine days later to a private room. *See id.* The court acknowledged that since there had been no trespass to the person, libel, or passing off, there was no remedy to vindicate *Kaye's* right of privacy. *See id.* at 66. This case will be discussed further in Part III, *infra*.

9. In light of recent, though sparse, Supreme Court privacy jurisprudence, it is unlikely that *Barber* would today be able to recover damages against *Time's* publication of these private but true facts. *See Florida Star v. B.J.F.*, 491 U.S. 524 (1989). The *Florida Star* decision is discussed in Part II. *See infra* note 24 and accompanying text. Today, it is likely *Barber's* only cause of action would be for intrusion. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 652B *illus.* 1 (1977).

10. *Kaye* [1991] F.S.R. at 70 (Bingham, L.J.).

faced with such “a monstrous invasion of his privacy.”¹¹

This Note will examine the incorporation of the ECHR into the domestic law of the United Kingdom and analyze how this move may affect the delicate balance between the right of the press to publish truthful information and the individual’s right to privacy. Part II will briefly canvass the origins of the right of privacy in the United States and delineate the discrete area of privacy this Note addresses. Part III will explore the shortcomings of the United Kingdom’s civil laws in bridging what some believe is a troubling privacy gap. Finally, Part IV will describe the process of incorporation in the United Kingdom, its effect on the press and non-governmental actors like the Press Complaints Commission, and the likelihood that English judges will ultimately be able to tip the balance in favor of a right of privacy—a right that judges have thus far been unable to acknowledge directly. The jurisprudence of the European Court of Human Rights will be examined to supplement this latter analysis in an attempt to gauge how this body has weighed the competing interests of privacy and free expression. Ultimately, this Note will conclude that the incorporation of the ECHR into the domestic laws of the United Kingdom will not lead to greater privacy protection in most cases. Instead, a plaintiff whose privacy has been invaded by the private media would best be protected through expansion of an existing common law remedy and a recent legislative enactment.

II. PRIVACY CONFINED

The American experience with privacy offers both an apposite backdrop and starting point for defining the contours of the privacy rights since the right first took root in this country. Moreover, this initial focus reveals a striking irony: while the famous article by Warren and Brandeis, *The Right to Privacy*,¹² claimed that there was an

11. *Id.* (quoting *Bernstein v. Skyviews Ltd.* [1978] Q.B. 479, 489G (Griffiths, J.)).

12. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). This article both inspired and outlined the right to privacy in the United States. See RAYMOND WACKS, *PRIVACY AND PRESS FREEDOM* 10 (1995). One commentator has gone as far as saying that the article did “nothing less than add a chapter to our law.” ALPHEUS T. MASON, *BRANDEIS, A FREE MAN’S LIFE* 70 (1956). The inspiration for the article was once believed to have been sparked by Warren’s outrage of press coverage of his daughter’s wedding. See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 383 (1960). More recent investigation, however, has revealed that the driving force behind the article most likely was motivated by press criticism of Warren’s father-in-law. See James H. Barron, *Warren and Brandeis, the Right to Privacy*, 4 *Harv. L. Rev.* 193 (1890): *Demystifying a Landmark Citation*, 13 SUFFOLK U. L. REV. 875, 904-07 (1979) (revealing that Warren’s daughter was only nine at the time). The article was so compelling that two years later the State of Georgia, followed by

implicit common law right of privacy in the United States—a conclusion supported entirely on English case law¹³—English jurisprudence has never recognized such a right.¹⁴

“Privacy” is an amorphous legal concept.¹⁵ In its most basic form, the right of privacy can be defined as the “right to be let alone.”¹⁶ The American Law Institute’s *Restatement (First) of Torts* provides that: “[a] person who unreasonably and seriously interferes with another’s interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other.”¹⁷ Drawing inspiration from Warren and Brandeis, Dean Prosser refined the single tort of invasion of privacy into “a complex of four.”¹⁸ These four relatively discrete torts are: “(1) intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.”¹⁹ Today in the United States, at least twenty-eight states have adopted this four-fold division of privacy²⁰ and almost all states have recognized an invasion of privacy tort in at least some form.²¹ Despite this seemingly widespread recognition, invasion of privacy ac-

fourteen other states, recognized a common law right of privacy. See, e.g., *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1904). In 1902, the New York Court of Appeals rejected the Warren and Brandeis argument and refused to recognize a common law right of privacy. See *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902). The New York legislature later passed such a law. See N.Y. CIV. RIGHTS LAW §§ 50-51 (1948).

13. See, e.g., *Prince Albert v. Strange*, 64 Eng. Rep. 293 (1849) (Warren and Brandeis relied heavily on this English case).

14. *Kaye* [1991] F.S.R. at 66 (Glidewell, L.J.); see also *Malone v. United Kingdom*, 7 Eur. Ct. H.R. (ser. A) at 14 (1984), where the Court of Appeals effectively closes the door on a common law right of privacy, leaving it up to Parliament to legislate in this area.

15. See RAYMOND WACKS, *THE PROTECTION OF PRIVACY* 10-13 (1980); see also Ronald J. Krotoszynski, *Autonomy, Community, and Traditions of Liberty: The Contrast of British and American Privacy Law*, 1990 DUKE L.J. 1398, 1401.

16. THOMAS M. COOLEY, *LAW OF TORTS* 29 (2d ed. 1888).

17. RESTATEMENT (FIRST) OF TORTS § 867 (1939).

18. Prosser, *supra* note 12, at 383, 389.

19. *Id.* at 389. But cf. Edward J. Blounstein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 962-64 (1964) (criticizing Prosser’s “mistaken” theory that “privacy is not an independent value”). Prosser’s delineation was adopted by the American Law Institute in their second restatement. See RESTATEMENT (SECOND) OF TORTS § 652A-D (1977).

20. See Andrew Jay McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 984, 998 n.41 (1995).

21. See W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 117, at 851 (5th ed. 1984).

tions in the United States have not been particularly successful.²² In particular, where media defendants are involved, the American guarantee of free expression, encapsulated in the First Amendment,²³ has often proved an obstacle too great to overcome. For example, the Supreme Court has on four occasions addressed the issue of whether truthful speech could be invasive of privacy. In each case, the Court found for the media defendant.²⁴

For purposes of this Note, “privacy” will be limited to what Dean Prosser describes as the tort of intrusion and the tort of public disclosure.²⁵ The two torts are similar in that both require the disclo-

22. See McClurg, *supra* note 20, at 996-1010; see also G. Michael Harvey, *Confidentiality: A Measured Response to the Failure of Privacy*, 140 U. PA. L. REV. 2385, 2413 (1992) (finding with respect to private facts cases that “[i]f the lower courts’ approach to private facts cases is heavily biased towards the press, then the Supreme Court’s test for restricting publication of truthful information positively capitulates it.”).

23. The First Amendment reads in pertinent part: “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I.

24. See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) (finding unconstitutional a civil damages award entered against a television station for broadcasting the name of a rape-murder victim when the name was obtained from courthouse records); *Oklahoma Publ’g Co. v. District Court*, 430 U.S. 308 (1977) (per curiam) (finding that a state court cannot enjoin the dissemination of the identity of a juvenile offender where members of the press were present at hearing on delinquency and no objections were made as to their presence); *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97 (1979) (finding unconstitutional the indictment of two newspapers for violating a state statute forbidding newspapers to publish, without written approval of the juvenile court, the name of any juvenile youth charged as a juvenile offender). In the most recent case, a rape victim sued a newspaper under a Florida statute and Florida’s common law public disclosure tort for printing her name in its “Police Report” column. See *Florida Star v. B.J.F.*, 491 U.S. 524, 527 (1989). The Court reversed the jury award of damages for the plaintiff finding that “where a newspaper publishes truthful information which it has lawfully obtained, punishment may be imposed, if at all, only when narrowly tailored to a state interest of the highest order.” *Id.* at 538-39. Since the newspaper had obtained the plaintiff’s name (“B.J.F.”) from a police department report mistakenly placed in the pressroom, the rape victim’s name had been lawfully obtained. See *id.* at 527 (note, however, that the newspaper admittedly violated its own internal policy of not publishing the names of sexual offense victims). In light of the very private nature of disclosing the name of a sexual assault victim, the dissent correctly points out that “[i]f the First Amendment prohibits wholly private persons (such as B.J.F.) from recovering for the publication of the fact that she was raped, I doubt that there remain any ‘private facts’ which persons may assume will not be published in the newspapers or broadcast on television.” *Id.* at 550-51 (White, J., dissenting). A poignant fact not to be overlooked in the case is that as a result of the rape victim’s name being published by the *Florida Star*, the victim “received harassing phone calls, required mental health counseling, was forced to move from her home, and was even threatened with being raped again.” *Id.* at 542-43.

25. See Prosser, *supra* note 12, at 389; see also RESTATEMENT (SECOND) OF TORTS §§ 652B, 652D (1977). The tort of intrusion upon the plaintiff’s seclusion is made out by showing that (1) there was an intentional prying, (2) the intrusion would be highly offensive to a reasonable person, and (3) the intrusion was on something private. See *id.* § 652B. The defendant commits the tort of public disclosure when (1) a disclosure is made to the public (there is no disclosure if the facts are revealed to only a few people), (2) the facts disclosed are private

sure of something so private about the plaintiff that a reasonable person would find the disclosure highly offensive. These two broad models offer a healthy comparison for highlighting what some commentators view as gaps in existing English tort remedies,²⁶ particularly as they affect the actions of media defendants.²⁷

III. PRIVACY AND THE PRESS IN ENGLAND

A. Legislative Failures

Without a written constitution,²⁸ and until the incorporation of the ECHR into domestic legislation, Parliament was fully responsible for protecting the individual rights of its citizens and the courts had no power of judicial review over Parliament's acts.²⁹ In short, Parliament was sovereign.³⁰

Although the right of privacy has never received explicit recognition under English law,³¹ British legislators have nevertheless realized the failure of their common law to mirror the early American development of a right to privacy. Accordingly, Parliament has made several attempts to create laws protecting privacy. These attempts, however, can best be described as a "patch work affair."³²

One such bill, introduced in 1969, sought to create "a general right of privacy applicable to all situations."³³ The proponents of this

facts, (3) the facts disclosed would be highly offensive to a reasonable person, and (4) the facts are not of legitimate concern to the public. *See id.* § 652D. The two other Prosser torts will not be addressed since the tort of appropriation of the plaintiff's name or likeness and the tort of false light are better understood as, respectively, a proprietary wrong and a derivative of defamation law. *See WACKS, supra* note 15, at 14; *see also* RESTATEMENT (SECOND) OF TORTS § 652A cmt. B (1977).

26. *See infra* Part III.B.

27. For the purposes of this Note, it is assumed that private facts made public by media defendants are true facts and thus no defamation action would lie.

28. *See* MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 738 (2d ed. 1994); *see also* text accompanying note 5, *supra*.

29. *See* BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 959-60 (2d ed. 1995).

30. Lord Bingham, the Lord Chief Justice, humorously epitomized Parliament's sovereignty by using the old saying: Parliament has the power "to do anything except make a man a woman or a woman man." T.H. Bingham, *The European Convention On Human Rights: Time to Incorporate*, 109 *LAW Q. REV.* 390, 391 (1993).

31. *See* Gerald Dworkin, *Privacy and the Law*, in *PRIVACY* 113, 115 (John B. Young ed., 1978); *see also* *Kaye v. Robertson*, [1991] F.S.R. 62; *Malone v. United Kingdom*, 7 *Eur. Ct. H.R.* (ser. A) at 14 (1984).

32. Krotoszynski, *supra* note 15, at 1402.

33. COMMITTEE ON PRIVACY, JUSTICE, PRIVACY AND THE LAW ¶ 128.

bill concluded that “English law is seriously defective as it now stands, and that there is an urgent need for legislation. Such legislation could take a variety of possible forms, but on balance we think that the best method would be to create a new statutory tort of ‘infringement of privacy.’”³⁴ Among other reasons, the bill failed over fear that it vested too much discretion in the courts.³⁵

Realizing a need for privacy protection, Parliament authorized a more comprehensive review of the right of privacy under the direction of Kenneth Younger.³⁶ The Younger Committee sought to “give further protection to the individual citizen and to commercial and industrial interests against intrusion into privacy by private persons and organization.”³⁷ The Committee agreed with Warren and Brandeis that privacy embodied values essential to a free society.³⁸ Ultimately, however, the Committee rejected the idea of a general right of privacy, reasoning that the equitable remedy of breach of confidence³⁹ offered adequate protection of privacy in England, although “the extent of its potential effectiveness is not widely recognized and that it should be.”⁴⁰ The Committee concluded that “the best way to ensure regard for privacy is to provide specific and effective sanctions against clearly defined activities which unreasonably frustrate the individual in his search of privacy.”⁴¹

As the Younger Committee conceded, however, “[t]his piecemeal approach leaves some gaps. In the private sector (with which alone we are concerned) it is not difficult to think of some kind of intrusions, most obviously by journalistic investigators or by prying neighbors, for which our recommendations provide no remedy.”⁴² The Committee’s conclusions relied in large part on its hopes that the media would reform itself: “some of our proposals frankly rely, to an extent which some may find over-optimistic, upon the readiness of potentially intrusive agencies, such as the press, to respond not to legal sanctions but to the pressures of public and professional criticism and to the climate of society.”⁴³

34. *Id.* ¶ 10.

35. *See* 794 PARL. DEB., H.C. (5th ser.) 943 (1970).

36. *See* WALTER F. PRATT, *PRIVACY IN BRITAIN* 183 (1979).

37. *Id.* at 183-84.

38. *See* Younger Report, *supra* note 4, ¶ 113.

39. *See infra* note 48.

40. Younger Report, *supra* note 4, ¶ 87.

41. *Id.* ¶ 663.

42. *Id.* ¶ 659.

43. *Id.*

A recent legislative enactment that could be traced back to the recommendations of the Younger Committee is the Protection from Harassment Act.⁴⁴ The Harassment Act provides civil, criminal, and injunctive remedies against a person who harasses a victim “if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.”⁴⁵ It is too early, however, to determine the extent to which the Harassment Act can be used by plaintiffs seeking to curb media intrusions or to compensate them for past intrusions. But in time, this legislative enactment may serve to protect privacy interests.

B. Domestic Privacy Gap?

The Younger Committee concluded that the equitable remedy for breach of confidence served to protect privacy interests in England.⁴⁶ The equitable remedy for breach of confidence⁴⁷ is made out when the plaintiff can show that (1) the information was confidential, (2) there was an implicit or explicit obligation of confidence, and (3) the party to whom the confidential information was imparted used that information without authorization.⁴⁸ The obvious limitation of this remedy is that there must be a prior confidential relationship before the tort can arise.⁴⁹ The impact of this limitation is illustrated by

44. Protection from Harassment Act of 1997, ch. 40 (Eng.). The British Act is similar to, and most likely drew its inspiration from, American stalking laws which have gained popularity in the last decade. The first such statute in the U.S. was California's Stalking Law. See CAL. PENAL CODE § 646.9 (1990).

45. Protection from Harassment Act § 1(2).

46. See Younger Report, *supra* note 4, ¶657.

47. See FRANCIS GURRY, BREACH OF CONFIDENCE (1984) for an exhaustive treatise on this topic. This remedy was traditionally used to protect commercial secrets but it has since grown to protect the disclosure of private facts. See WACKS, *supra* note 15, at 83.

48. See WACKS, *supra* note 12, at 50; see also *Saltman Eng'g Co. v. Campbell Eng'g Co.* [1963] All E.R. 413.

49. See WACKS, *supra* note 12, at 58. Wacks emphasizes that the equitable remedy for breach of confidence and the American disclosure tort serve different goals. “The American tort therefore protects the plaintiff against wide publicity being given to certain classes of information. The purpose of the law of confidence, on the other hand, though it requires the information to be ‘confidential,’ is essentially to maintain the fidelity or trust that the plaintiff has reposed in the person to whom he has confided certain information. . . . [T]he action for breach of confidence concentrates on the *source* rather than, as in the ‘privacy’ tort, the *content* of the information.” *Id.* While Wacks acknowledges that recent case law has enlarged the contours of the breach of confidence action, he nonetheless cautions that England has not yet reached a “new dawn of ‘privacy’ protection.” *Id.* at 79. Another author finds that “there is uncertainty as to the fundamental principles on which the action for breach of confidence is based; there are problems relating to the initial creation of the obligation of confidence; and there are doubts as to the position of the person acquiring information without actual or constructive

*Kaye v. Robinson.*⁵⁰

Gorden Kaye, a famous television actor in Britain, suffered a severe head injury when a piece of wood came loose from an advertising billboard and crashed through his car's windshield.⁵¹ He was subsequently placed on life support for three days in an intensive care unit and was moved nine days later to a private hospital room. The hospital placed a large notice outside Kaye's door asking visitors to check in with the staff before entering. A similar notice was placed at the entrance of the hospital ward. Ignoring both notices, a *Sunday Sport* journalist and photographer entered the room and got, as the editor of the newspaper put it in his affidavit to the court, their "great old fashioned scoop."⁵² The nursing staff entered the room some time later and failed in their attempts to persuade the journalist and photographer to leave. Finally, hospital security staff were called to the room and ejected the intruders. Kaye was so heavily sedated that he did not remember the incident fifteen minutes after it happened.

Kaye brought four causes of action against the *Sunday Sport* in an attempt to enjoin publication: libel, trespass to the person, passing off, and malicious falsehood. Kaye did not include a cause of action for breach of confidence, presumably realizing the limitations of this equitable remedy.

The court found that libel could not conclusively be shown, and therefore a complete injunction was denied.⁵³ The trespass to the person count failed because there was no proof of physical harm.⁵⁴ The passing off claim was rejected as baseless,⁵⁵ but the court did find sufficient merit in the malicious falsehood claim to enjoin the *Sunday Sport* from printing any inference that would lead a reader to believe the plaintiff consented to the interview.⁵⁶ In the end, the *Sunday Sport* got their story and printed their pictures.⁵⁷

knowledge of its confidential character." LAHAV, *supra* note 4, at 42.

50. See *Kaye v. Robertson*, [1991] F.S.R. 62.

51. See *id.* at 63 (Glidewell, L.J.).

52. *Id.* at 64.

53. See *id.* at 67, 69 (Glidewell, L.J.).

54. See *id.* at 68-69 (Glidewell, L.J.) (finding that the flash bulbs used by the photographer to take the patient's picture did not in fact cause the plaintiff prolonged recovery or actual harm).

55. See *id.* at 69 (Glidewell, L.J.) (finding that the plaintiff was not in the position of a trader in relation to his interest in the story about his accident and recovery).

56. See *id.* at 67-68 (Glidewell, L.J.) (finding that any jury would conclude that words in the article falsely represented that the article was obtained with the patient's consent).

57. See *id.* at 69.

The *Kaye* court went to great lengths to stress the need for a remedy in such cases. Judge Glidewell suggested 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.”⁵⁸ Judge Bingham added, “[t]his case nonetheless highlights, yet again, the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens.”⁵⁹ Finally, Judge Leggatt cited both the Warren and Brandeis article and *Barber v. Time, Inc.* to underscore the need for greater protection.⁶⁰ It is important to note that under English law a court will not award damages where there is a publication of true facts.⁶¹ In the United States, however, a plaintiff is able to recover damages for intrusion.⁶² (While the disclosure is weighed against the First Amendment, the intrusion is judged separately against the reasonableness standard determining the “highly offensive” nature of the facts disclosed.⁶³) In *Kaye*, it was not untruthful to report that the patient was indeed in the hospital recovering from an injury, thus the court could not impose pecuniary damages on the *Sunday Sport* for publication of that fact.⁶⁴

58. *Id.* at 66 (Glidewell, L.J.).

59. *Id.* at 70 (Bingham, L.J.). In stark contrast to *Kaye*, the French sensationalist magazine *Paris-Match* was ordered to pay \$18,600 for printing pictures of the late French President Francois Mitterrand on his deathbed. See *France Fines Magazine for Deathbed Photos of Mitterrand*, PORTLAND OREGONIAN, Jan. 14, 1997, at A03, available in 1997 WL 4133094. The photographer who took the pictures of the corpse was also ordered to pay a symbolic twenty cents to each member of the Mitterrand family. See *id.*

60. See *Kaye v. Robertson*, [1991] F.S.R. 62, 71 (Leggatt, L.J.).

61. See WACKS, *supra* note 12, at 145. Though Wacks overlooks the *Florida Star* decision, discussed *supra* Part II, it would seem that in a majority of cases this rule would also apply in the United States.

62. While placing a pecuniary value on the intrusion alone would be difficult—a matter left to the jury—courts have found that an invasion suit does not require proof of special damages. See, e.g., *Jones v. U.S. Child Support Recovery*, 961 F. Supp. 1518 (D. Utah 1997). With respect to physical intrusion, there is in the United States, as in the United Kingdom, no general press privilege to gather information. See *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978). The Supreme Court found that “[t]he right to speak and publish does not carry with it the unrestrained right to gather information.” *Id.* at 12 (quoting *Zemel v. Rusk*, 381 U.S. 1, 17 (1965)); see also WACKS, *supra* note 12, at 126.

63. See WACKS, *supra* note 12, at 145.

64. There can be no recovery for damages caused by mental distress, that is the annoyance, grief, or anxiety associated with the publication if, once again, the facts are true. See *id.* Such recoveries have been awarded in false imprisonment, nuisance, and trespass to goods cases. See *id.* Additionally, there can be no recovery for intentional infliction of emotional distress since this action requires that the defendant’s act was designed to cause physical harm. See *id.* at 87-88. The court in *Kaye* was faced with an appeal by *Sunday Sport* from the grant of

Kaye also illustrates the shortcomings of both nuisance and trespass causes of action. A prerequisite to any such action is having an interest in the land upon which the trespass or a nuisance occurred.⁶⁵ With respect to damages, such actions are often of little use since they are calculated according to how much the trespass interfered with the plaintiff's use of the land.⁶⁶ Where the intruder is a curious journalist, such damages will be difficult to establish.⁶⁷

However, in a recent English case, one judge in dicta took a position that would expand the current scope of the breach of confidence remedy.⁶⁸ The case involved a photograph of a convicted thief taken while the plaintiff had been in custody and which had subsequently been given by the police to neighborhood shopkeepers.⁶⁹ From these facts, Judge Laws ventured:

If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent disclosure of the photograph would, in my judgement, as surely amount to a breach of confidence as if he had found or stolen a letter or diary in which the act was recounted and proceeded to publish it. In such a case, the law would protect what might reasonably be called a right of privacy, although the name accorded to the cause of action would be breach of confidence. It is, of course, elementary that, in all such cases, a defence based on public interest would be availing.⁷⁰

Notwithstanding this unique perspective, some commentators still urge that English law recognize an action for intrusion and one for disclosure of private facts in order to fill the gaps left by the breach of confidence remedy.⁷¹

an interlocutory injunction. Though the publication could not be enjoined, the court did acknowledge that "Mr. Kaye's story was one for which other newspapers would be willing to pay 'large sums of money.' It needs little imagination to appreciate that whichever journal secured the first interview with Mr. Kaye would be willing to pay the most. Mr. Kaye thus has a potentially valuable right to sell the story of his accident and his recovery when he is fit enough to tell it." *Kaye* [1991] F.S.R. at 68 (Glidewell, L.J.).

65. See generally *Cunard v. Antifyre, Ltd.* [1933] 1 K.B. 551, 564. Though at least one commentator has noted that the hospital could have been joined as a co-plaintiff in the action against *Sunday Sport*. See WACKS, *supra* note 12, at 129 n.24.

66. See WACKS, *supra* note 12, at 144.

67. See *id.*

68. See *Hellewell v. Chief Constable of Derbyshire*, [1995] 1 W.L.R. 804, 811-12. The dicta in this case would still be unavailing in *Kaye*. Comparable expansions of the breach of confidence remedy were in fact one of the Younger Committee's recommendations. See Younger Report, *supra* note 4, ¶ 87.

69. See *Hellewell* [1995] 1 W.L.R. at 806.

70. *Id.* at 807.

71. See, e.g., WACKS, *supra* note 12, at 142.

C. Regulating the Press in England

At the same time *Kaye* was making headlines, the Committee on Privacy and Related Matters, better known as the Calcutt Committee, was preparing its final report.⁷² The Calcutt Committee was organized to inquire into abuses of personal privacy by the press; more accurately, the media's obsession with printing intimate facts about the lives of both politicians and the British royal family.⁷³ The *Kaye* decision was an additional factor in the Calcutt Committee's conclusions.⁷⁴

To better understand the role of the Calcutt Committee, it is helpful to first examine how the press had previously been regulated. In 1953, the Press Council was created by the Press Commission to act as a public relations agency and forum for grievances by angry individuals.⁷⁵ Its constitution was vague at best, and because members of the Council were almost exclusively composed of press representatives, the complaint process was viewed with suspicion.⁷⁶ The process forced a complainant to waive the right to adjudicate his claim in court as a precondition to having his complaint reviewed by the Press Council.⁷⁷ With public perception of the Press Council in decline, the Calcutt Committee was convened to find a solution.⁷⁸ The Calcutt

72. See COMMITTEE ON PRIVACY, REPORT OF THE COMMITTEE ON PRIVACY AND RELATED MATTERS, 1990, Cmnd. 1102 [hereinafter Calcutt Committee]. The Committee was chaired by David Calcutt, Q.C.

73. See WACKS, *supra* note 12, at 12.

74. See Raymond Snoddy, *The Press on a Slippery Slope*, FIN. TIMES, June 23, 1990, at 7, available in LEXIS, News Library, Arcnews File. The Calcutt Committee reprinted a copy of the *Kaye* decision in the appendix to their report. See Calcutt Committee, *supra* note 72, app. I.

75. See JAMES CURRAN & JEAN SEATON, POWER WITHOUT RESPONSIBILITY 295 (2d ed. 1985).

76. See LAHAV, *supra* note 4, at 47. The Press Council's constitution vaguely described the purposes of the organization: "(a) To preserve the established freedom of the British press. (b) To maintain the character of the British press in accordance with the highest professional and commercial standards. (c) To consider complaints about the conduct of the press or the conduct of persons and organizations towards the press, to deal with these complaints in whatever manner might seem practical and appropriate and record result and action." *Id.* The wording of the constitution alone tells a tale of an organization that is bound to disappoint.

77. See *id.* at 76 n.413; see also Calcutt Committee, *supra* note 72, ¶ 14.23.

78. See Snoddy, *supra* note 74, at 7. The reporter notes that in an interview, Calcutt admitted that the *Kaye* case was an important factor in deciding whether to change the law on privacy. See *id.* The article reports that in a public opinion poll, fifty-two percent of people believed that there was a decline in newspaper ethics over the past five years and that seventy-three percent agreed that newspapers intruded too much in the private lives of public figures. See *id.* One such reported case of gross intrusion on the part of journalists concerns a story in *The Sun* about Elton John's private life. See *id.* The singer ultimately reached a million pound out-of-court libel settlement with the paper. See *id.*

Committee came to a consensus on the elusive definition of privacy, finding it to be “the right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information.”⁷⁹

In accord with the Younger Committee, the Calcutt Committee found there was no need for a statutory right of privacy.⁸⁰ The Committee called for criminal sanctions when the media (1) entered private property without consent in order to gather personal information, (2) placed a surveillance device on private property without consent, or (3) took a photograph or recorded the voice of someone without his consent when that person was on private property.⁸¹ Parliament, however, has enacted none of these proposals.⁸²

To confront the problem of an undisciplined media, the Calcutt Committee recommended the media be “given one final chance to prove that voluntary self-regulation can be made to work”⁸³ and proposed a solution whereby the fatally flawed Press Council would be replaced with a new body, the Press Complaints Commission (PCC).⁸⁴

79. Calcutt Committee, *supra* note 72, ¶ 3.7.

80. *See id.* ¶ 12.5.

81. *See id.* ¶ 6.33.

82. The Calcutt Committee issued a follow-up report in 1993 which called for immediate legislation for the protection of privacy. *See* DEPARTMENT OF NATIONAL HERITAGE, REVIEW OF PRESS SELF-REGULATION, 1993, Cmnd. 2135, ¶ 8.2. In the same year, the Lord Chancellor's Department came out with a consultation paper entitled “Infringement of Privacy” which condemned the fact that the law did not adequately protect privacy and that there should be an actionable tort for infringement of privacy where the infringement caused “substantial distress.” *See* GOVERNMENT'S RESPONSE TO THE HOUSE OF COMMONS NATIONAL HERITAGE SELECT COMMITTEE, PRIVACY AND MEDIA INTRUSION, 1995, Cmnd. 2918, ¶ 1.1. The government responded in 1995 and once again rejected the idea of a general right of privacy finding that, *inter alia*, press self-regulation was working effectively, a privacy law would curb worthwhile investigative journalism, and there was insufficient popular pressure for this law. *See id.* ¶ 4.13. Notwithstanding the government's conclusion, a poll in 1993 found that seventy-six percent of Britons favored a right of privacy. *See* Stuart Weir, *Talking Liberties: Need for a U.K. Bill of Rights*, NEW STATESMAN & SOCIETY, Nov. 12, 1993, at 15, available in LEXIS, News Library, Arcnews File.

83. Calcutt Committee, *supra* note 68, ¶ 14.38. The recommendation of the Calcutt Committee reads, “[w]e therefore *recommend* that the Press Council should be disbanded and replaced by a new body, specifically charged with adjudicating on complaints of press malpractice. This body must be seen as authoritative, independent and impartial. It must also have jurisdiction over the press as a whole, must be adequately funded and must provide a means of seeking to prevent publication of intrusive material. We consider it particularly important to suggest a break from the past. The new body should, therefore, be called the Press Complaints Commission.” *Id.*

84. *See id.* Faced with the possibility of legislative action to curb media abuses, the press was given eighteen months to regulate itself, a move accomplished by setting up the Press Complaints Commission (PCC). *See* Jane Thynne, *Press Shows Intent to Toe the Line, Says Watchdog*, DAILY TELEGRAPH (London), Sept. 18, 1991, at 8, available in 1991 WL 3148045.

The PCC is a non-statutory independent organization that proudly views its mission as “ensur[ing] that British newspapers and magazines follow the letter and spirit of an ethical Code of Practice dealing with issues such as inaccuracy, privacy, misrepresentation, and harassment.”⁸⁵ As with the Press Council before it, many of the PCC members who oversee the complaint process are prominent media members.⁸⁶ The Code of Practice (Code) is the cornerstone of the organization.⁸⁷ The PCC adjudicates disputes involving alleged breaches of the Code if talks between the parties fail. In the words of the PCC, “[t]he code should not be interpreted so narrowly as to compromise its commitment to respect the rights of the individual, nor so broadly that it prevents publication in the public interest.”⁸⁸

The Code has evolved regularly, with its most recent changes coming in the wake of the Princess Diana tragedy in October of 1997.⁸⁹ The Code is an ambitious work that seeks, inter alia, to ban

The PCC was established in 1991, replacing the discredited Press Council. *See id.*

85. Press Complaints Commission, *About the PCC* (visited Apr. 1, 1998) <<http://www.pcc.org.uk/about/home.htm>>.

86. *See* Press Complaints Commission, *Commission Members* (visited Apr. 1, 1998) <<http://www.pcc.org.uk/about/members.htm>>.

87. *See* Press Complaints Commission, *Code of Practice* (visited Apr. 1, 1998) <<http://www.pcc.org.uk/about/complain/newcode.htm>> [hereinafter *Code*]. The Code of Practice was first drafted in November of 1990 under the auspices of the now defunct Press Council. *See generally* Press Given “Last Chance” to Regulate Itself in U.K., EDMONTON JOURNAL (Canada), June 22, 1990, at 14.

88. *Code*, *supra* note 87, pmb1.

89. The Princess of Wales was killed in a traffic accident in Paris on August 31, 1997. The chauffeur driven car was allegedly speeding away from photographers who were in hot pursuit of her vehicle. While blame first fell squarely on the photographers, it was later revealed that the chauffeur was driving while intoxicated. Soon after these reports came out, it was then suspected that her car had collided with another vehicle before crashing into the side of an underground tunnel. *See, e.g.*, Christopher Dickey & Mark Hosenball, *A Needless Tragedy*, NEWSWEEK, Sept. 22, 1997, at 54. *But see* Mark Hosenball & Christopher Dickey with Geoffrey Cowley, *Case Very Nearly Closed: Police are Looking for that Fiat and the Fayed's Hint of Conspiracy, but the Crash Looks Like a Routine Accident*, NEWSWEEK, Dec. 22, 1997, at 65. The late Princess of Wales had for many years been the target of intrusive press coverage. In one incident, the owner of a gym where the princess regularly worked out set up a hidden camera in the ceiling above a piece of equipment the princess was known to use. *See* Phil Taylor, *The Price of Privacy*, SUNDAY-STAR TIMES (London), at A10, available in 1997 WL 15280866. The gym owner then sold his pictures to a tabloid magazine for over a million dollars. *See id.* In an unusual move for a royal family member, the princess filed an action against the gym owner and the magazine. *See Princess Diana May Testify in Her Suit over Photos*, ORLANDO SENTINEL, Jan. 14, 1995, at A14, available in 1995 WL 6403495. The Code has undergone changes since the death of the princess to reflect stricter provisions on privacy, among which are a ban on persistent pursuit and explicit recognition that children should be protected from press coverage. *See Code*, *supra* note 87, § 4(i) (for persistent pursuit), § 6 (for the treatment of children). *See generally* British Press Given Stricter Privacy Code, L.A. DAILY NEWS, Sept. 26,

persistent pursuit by journalists,⁹⁰ require journalists to identify themselves before entering non-public areas in hospitals,⁹¹ and prevent editors from publishing materials from other sources that do not comply with the letter of the Code.⁹² The section of the Code which relates to privacy states that, “(i) [e]veryone is entitled to respect for his or her private and family life, home, health and correspondence. A publication will be expected to justify intrusions into any individual’s private life without consent; (ii) [t]he use of long lens photography to take pictures of people in private places without their consent is unacceptable.”⁹³ This section further clarifies that “[p]rivate places are public or private property where there is a reasonable expectation of privacy.”⁹⁴ It is interesting to note that the language in this section of the Code mirrors the language of the privacy guarantee in Article 8 of the ECHR.⁹⁵ Perhaps this similarity is an attempt by the drafters of the Code to give the appearance of being in conformity with the ECHR framework.

The only true remedy afforded by the PCC and the Code is the right to require publication of its adjudication in the offending newspaper or magazine, and, in limited circumstances, to provide a very limited “opportunity for reply.”⁹⁶ The PCC has no power to award compensation, impose fines, or prevent, in even the most egregious cases, an article from being published.⁹⁷ Unsurprisingly, in the wake of possible legislative action to curb media intrusions, the British press has been an increasingly enthusiastic supporter of its own self-regulation.⁹⁸

Indeed, the Code and the PCC may provide some useful background mechanisms for curbing media intrusions into certain recog-

1997, at N21, *available in* 1997 WL 4054231.

90. *See Code, supra* note 87, § 4(i).

91. *See id.* § 9(i). This section, undoubtedly a response to *Kaye*, notes further that “[t]he restrictions on intruding into privacy are particularly relevant to enquiries about individuals in hospitals or similar institutions.” *Id.* § 9(ii).

92. *See id.* § 4(iii).

93. *Id.* § 3(i-ii).

94. *Id.* § 3.

95. *See infra* Part IV.A for the full text of Article 8.

96. *See id.* § 2. Section 2 states that “[a] fair opportunity for reply to inaccuracies must be given to individuals or organizations when reasonably called for.” *Id.* The equivocal “when reasonably called for” language underlines that the right of reply is not mandatory in all cases, even where “inaccuracies” are present. *Id.*

97. *See WACKS, supra* note 12, at 6.

98. *See Britain’s Press Barons Promise Post-Diana Reform*, AGENCE FRANCE-PRESS (London), Sept. 17, 1997, *available in* 1997 WL 13396473.

nized private areas. The Code is effective, for example, in situations where the complainant brings a minor grievance to the PCC as an alternative to litigation. In such a case, the Chairman of the PCC, Lord Wakeham, is correct in saying that “[a] full-blooded privacy law, whether by common law or by a straightforward privacy law, would mean that anybody who wished to enforce their rights to privacy runs the risk of having to indulge in very expensive legal action.”⁹⁹ Nonetheless, neither the PCC nor the Code is of any help to those who wish to, or must, turn to a court to vindicate their rights. In such cases, a self-regulation scheme built on a dubious foundation of journalistic integrity, rather than on the legislative recommendations of the Calcutt Committee, provides little relief to aggrieved parties in court.

IV. THE EUROPEAN CONVENTION ON HUMAN RIGHTS

A. The International Dimension

The ECHR was drafted in 1949 and became the first convention signed under the auspices of the Council of Europe.¹⁰⁰ The Council of Europe was itself only one year away from its inception.¹⁰¹ The forty States who signed this document bound themselves to “secure to everyone within their jurisdiction the rights and freedoms”¹⁰² guaranteed under the treaty.

The ECHR regulates the relationship between an individual and the State. It gives the individual an expansive list of rights such as the right to life,¹⁰³ the right to respect for private life and family,¹⁰⁴ the right to freedom from torture and inhuman or degrading treatment,¹⁰⁵ the right to liberty and security of his person,¹⁰⁶ the right to freedom

99. Robert Shimey, *Wakeham Hopes His Press Code Will Head Off Privacy Law*, DAILY TELEGRAPH (London), Dec. 9, 1997, at 12, available in 1997 WL 2357522.

100. The drafting of the ECHR was strongly influenced by the United Nations Universal Declaration of Human Rights. See SUE FARRAN, *THE UK BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS: CASE LAW & COMMENTARY 1* (1996).

101. See Statute of the Council of Europe, May 5, 1949, reprinted in *MANUAL OF THE COUNCIL OF EUROPE* 299 (1970).

102. ECHR, *supra* note 1, art. 1. As of October 1997, there were forty signatories to the ECHR. See Council of Europe, *Chart of Signatures and Ratifications, Convention for the Protection of Human Rights and Fundamental Freedoms* (visited Apr. 1, 1998) <<http://www.coe.fr/tablconv/5t.htm>>.

103. See ECHR, *supra* note 1, art. 2.

104. See *id.* art. 8.

105. See *id.* art. 3.

106. See *id.* art. 5.

of expression,¹⁰⁷ and the right to freedom of thought, conscience, and religion.¹⁰⁸ An individual can bring a claim against any of the Contracting Parties that have accepted the right of individuals to petition for a breach of a ECHR right.¹⁰⁹

The European Court of Human Rights (European Court), located in Strasbourg, France, is the main judicial organ of the Council of Europe.¹¹⁰ Until recently, bringing a case to the European Court was a lengthy affair. First, a petitioner had to submit his or her application to the European Commission of Human Rights (European Commission) which reviewed the application for admissibility.¹¹¹ The European Commission could then reject a petition for a variety of reasons, for example, if the application was “manifestly ill-founded”¹¹² or if the petitioner had failed to first exhaust his domestic remedies.¹¹³ If the European Commission accepted the petition, it attempted to settle the dispute amicably.¹¹⁴ If settlement talks reached an impasse, the European Commission prepared a fact finding report, formed an opinion as to whether the Contracting Party had breached its obligation under the ECHR, and in the affirmative, forwarded the report to the Committee of Ministers of the Council of Europe.¹¹⁵ Only at this point could the petitioner have his claim reviewed by the European Court.¹¹⁶

According to the Council of Europe, it took “on average over five years for a case to be finally determined by the Court or the Committee of Ministers.”¹¹⁷ In response to this long delay, all forty Council of Europe members signed Protocol 11.¹¹⁸ On November 1, 1998, Protocol 11 came into force and effectively replaced the Euro-

107. *See id.* art. 10.

108. *See id.* art. 9.

109. *See id.* art. 25(1).

110. *See* BRICE DICKSON, HUMAN RIGHTS AND THE EUROPEAN CONVENTION 9 (1997).

111. *See* ECHR, *supra* note 1, arts. 24-29.

112. *Id.* art. 27(2).

113. *See id.* art. 26.

114. *See id.* art. 28(1)(b).

115. *See id.* art. 31(1)(2).

116. *See id.* art. 48. If the case was not referred to the European Court within three months, the Committee of Ministers of the Council of Europe could decide by a two-thirds vote whether there has been a violation of the ECHR. *See id.* art. 32(1); *see also* FARRAN, *supra* note 100, at 5-15 (explaining more fully this lengthy procedure).

117. Council of Europe: Explanatory Report and Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby ¶ 21 (May 11, 1994), *reprinted in* 33 I.L.M. 943 (1994).

118. *See id.* ¶23.

pean Court and the European Commission¹¹⁹ with a single European Court with full-time judges.¹²⁰ This transformation created the largest full-time international tribunal in the world with jurisdiction over 800 million people.¹²¹ Under this new structure, individuals have the right to petition the European Court directly.¹²² The task of overseeing the admissibility of cases, previously performed by the European Commission, will now be carried out by panels of three judges.¹²³ The criteria governing the admissibility of cases remains the same.¹²⁴ If a case is deemed admissible, the merits are then examined by a chamber of seven judges.¹²⁵ If the case “raises serious questions concerning the interpretation or application of the Convention or its protocols, or if the case raises an issue of general importance,”¹²⁶ the case can be referred to a Grand Chamber consisting of seventeen judges.¹²⁷ This new mechanism seeks to eliminate the overlap in work between the now defunct European Commission and the old European Court and ultimately enable a petitioner to achieve a faster resolution of a dispute.¹²⁸

The United Kingdom ratified the ECHR in 1950.¹²⁹ However, in the United Kingdom a treaty has no domestic effect until it has been incorporated into domestic law through an act of Parliament.¹³⁰ This anomaly forced British subjects to seek redress for a violation of their

119. See *id.* ¶ 26. The Committee of Ministers will retain its powers to effect enforcement along with other responsibilities.

120. See *id.* ¶ 26-37.

121. See Frances Gibb, *Human Rights Go to Court*, *TIMES* (London), Nov. 3, 1998, available in 1998 WL 4872482.

122. See Council of Europe, *supra* note 117, ¶ 38(a).

123. See *id.* ¶ 33-34.

124. See *id.* ¶ 41.

125. See *id.* ¶ 45.

126. *Id.* ¶ 46-47. Once a Chamber of seven judges has rendered a judgement, only the parties can at this stage request that the case be referred to a Grand Chamber.

127. See *id.* ¶ 36. The Grand Chamber also hears inter-State applications.

128. See *id.* ¶ 24. See generally Andrew Drzemczewski & Jens Meyer-Ladewig, *A Single European Court of Human Rights is to Replace the Existing Commission and Court in Strasbourg*, 15 *HUM. RTS. L.J.* 81 (1994) (providing a more detailed analysis of this fundamental change).

129. See FARRAN, *supra* note 100, at 1.

130. See GLENDON ET AL., *supra* note 28, at 741. In the United States, an international treaty follows this same rule unless the treaty is found to be self-executing. The self-executing doctrine receives no explicit recognition in the U.S. Constitution, but rather has surfaced as a product of judicial creation. For an explanation of this doctrine, see CARTER & TRIMBLE, *supra* note 29, at 183-96. In comparison, in countries such as Germany and France, the ratification of a treaty at the international level makes the treaty part of domestic law without any further action. See DICKSON, *supra* note 110, at 3 n.8.

treaty rights from judges in Strasbourg at the European Court because these claims were not justiciable in the courts of the United Kingdom.¹³¹ In contrast, countries which had incorporated the ECHR into their own law enabled their domestic judges to take full account of its provisions when considering a grievance.¹³²

In the absence of any omnibus protection of human rights, the United Kingdom has been before the European Court more times than any other signatory to the Convention, with the exception of Italy.¹³³ If the European Court finds that a country's practices are in violation of the ECHR, that country must change those practices to comply with the Convention.¹³⁴ In effect, by ratifying the ECHR, the British Parliament has compromised its once absolute sovereignty and bound itself to implement the European Court's decisions.¹³⁵

For the purposes of this Note, focus is given to specific articles of the ECHR—mainly Articles 8, 10, and 13. First, these articles will be set forth. Then we will explore how they affect the balance between privacy and the press in Britain.

Article 8 guarantees that:

Everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national secu-

131. See CARTER & TRIMBLE, *supra* note 29, at 960. The United Kingdom recognized the right of an individual to petition in 1966. See FARRAN, *supra* note 100, at 2.

132. See FARRAN, *supra* note 100, at 3-4.

133. See European Court of Human Rights, *Table Showing Referrals to and Judgments and Decisions of the Court, 1960-1998* (visited Apr. 1, 1998) <<http://www.dhcour.coe.fr/apercustab.htm>>. The European Court has decided fifty-two cases against the United Kingdom. See *id.* Additionally, a poll conducted in England in 1995 found that seventy-nine percent of respondents favored a bill of rights for Britain. See *Why Britain Needs a Bill of Rights*, ECONOMIST, Oct. 21, 1995, at 64. Norway, which is also a signatory to the ECHR, might be expected to be a frequent violator since it too has not incorporated the Convention into its domestic law. See *generally* DONALD W. JACKSON, *THE UNITED KINGDOM CONFRONTS THE EUROPEAN CONVENTION ON HUMAN RIGHTS 16-18* (1997). However, due largely to its written constitution, this is not the case. See *id.*

134. See Barry Newman, *Legal Anomaly: Lacking Bill of Rights, Britons Seek Redress at a Court in France*, WALL ST. J., Oct. 21, 1985, available in 1985 WL-WSJ 230430 (canvassing some of the most recent decisions by the European Court against the United Kingdom).

135. Article 46 of the ECHR states that the contracting parties may "recogniz[e] as compulsory . . . the jurisdiction of the Court in matters concerning the interpretation and application of the . . . Convention." ECHR, *supra* note 1, art. 46. The interrelation of this article, which the United Kingdom has recognized, and Article 25, which allows an individual to petition the European Court, gives an individual rights that his country must not abridge, but more importantly gives him a mechanism by which to enforce them.

erty, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.¹³⁶

Article 10 guarantees that:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.¹³⁷

Article 13 guarantees that:

Everyone 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.¹³⁸

B. The Domestic Dimension

The impetus for incorporating the ECHR into the domestic laws of the United Kingdom is one driven by practical considerations. In a White Paper entitled *Rights Brought Home: the Human Rights Bill*, the Labour government set out its reasons for incorporation.¹³⁹ In the words of Prime Minister Tony Blair, incorporation “will give people in the United Kingdom opportunities to enforce their rights under the European Convention in British courts rather than having to incur the cost and delay of taking a case to the European Human Rights Commission and Court in Strasbourg. It will enhance the awareness of human rights in our society.”¹⁴⁰ Instead of having only

136. *Id.* art. 8.

137. *Id.* art. 10.

138. *Id.* art. 13.

139. See RIGHTS BROUGHT HOME: THE HUMAN RIGHTS BILL, 1997, Cmnd. 3782.

140. *Id.* Preface by the Prime Minister. As one commentator in favor of incorporation put it, “[t]he main purpose of incorporating the Convention into U.K. law would be to make available a Bill of Rights that could be accessed more speedily, more cheaply, and more easily than is now the case.” Michael Zander, *A Bill of Rights for the United Kingdom-Now*, 32 TEX. INT’L

judges in Strasbourg interpret the treaty, courts in the United Kingdom will share in this responsibility.

As a result of the recently enacted Human Rights Act (Act),¹⁴¹ it is unlawful for a public authority to act in a way that is incompatible with the ECHR.¹⁴² Before the ECHR was incorporated domestically, English judges rarely recognized its guarantees in their decisions.¹⁴³ Reference was made to the ECHR where, for instance, ambiguous language in legislation was interpreted to be consistent with the obligations under the ECHR since Parliament was presumed not to legislate contrary to international obligations.¹⁴⁴ With respect to the common law, English judges referred to the ECHR where the rule was unclear.¹⁴⁵ Nonetheless, the ECHR had not been a direct source of rights and duties in the domestic courts of the United Kingdom.¹⁴⁶

Since a court is a public body under the Act, courts in the United Kingdom are now charged directly with a duty to invoke the Act's guarantees if they are being violated. This provision leads directly to another important aspect of the Act: the sovereignty of Parliament. British judges have never had the power of judicial review over Acts of Parliament, and thus cannot strike down its laws.¹⁴⁷ On this point, a compromise was reached requiring judges to interpret legislation, both past and prospective, in a way that is "compatible" with the Act.¹⁴⁸ If such a reading is impossible and legislation cannot be squared with ECHR obligations, judges can declare the law

L.J. 441, 442 (1997). This is not the first time that there have been attempts to introduce a bill of rights in the U.K. See DAVID KINLEY, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS: COMPLIANCE WITHOUT INCORPORATION* 1-2 (1993).

141. See Human Rights Act 1998, ch. 42 (Eng.).

142. See *id.* cl. 6. Clause 6 reads in part, "[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right. . . . In this section, 'public authority' includes (a) a court or tribunal, and (2) any person certain of whose functions are functions of a public nature. . . ." *Id.* cl. 6(1), 6(3)(a-b). Furthermore, "[a] person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by 6(1) may (a) bring proceedings against the authority under this Act in the appropriate . . . tribunal. . . ." *Id.* cl. 7(1)(a).

143. See FARRAN, *supra* note 100, at 3-4.

144. See, e.g., *Brind v. Secretary of State for the Home Dept.* [1991] 1 All E.R. 720.

145. See *Attorney-General v. Guardian Newspapers (No. 2)* [1988] 3 All E.R. 545, 580-82.

146. See *Malone v. Comm'r of Police of the Metropolis (No. 2)* [1979] 2 All E.R. 620, 621; see also *infra* note 157.

147. See CARTER & TRIMBLE, *supra* note 29, at 959-60.

148. See Human Rights Act 1998, ch. 42, cl. 3(1) (Eng.) ("So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights. . . .").

“incompatible.”¹⁴⁹ In such a case, judges have no power to strike down the law; they can only make a declaration of incompatibility and simply wait for Parliament to change it.¹⁵⁰

The Act nevertheless gives British judges relatively more power than they previously possessed. The broad language of the Act, which mirrors the language of the ECHR, leaves considerable room for interpretation. As a way of containing this potentially large scope for interpretation, the Act explicitly states that judges are to “take into account” the jurisprudence of the European Court.¹⁵¹ If the interpretation given by domestic courts is in error, a defeated British litigant can seek review of the domestic decision in the European Court.

C. Which Way Does the European Court Lean?

Articles 8 and 10 of the Act¹⁵² do not provide absolute rights. That is, they can be proscribed in certain situations.¹⁵³ The structure of these two articles is strikingly similar. The right to be protected is set out in broad language in the first paragraph. The second paragraph then sets out in equally broad terms certain conditions where

149. *See id.* cl. 4(2) (“If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.”).

150. *See id.* cl. 4(6)(a-b) (Any such declaration of incompatibility “(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and (b) is not binding on the parties to the proceedings in which it is made.”). A fast track mechanism is provided by the Act to ensure that a law that has been found to be incompatible with the ECHR gets to Parliament for review swiftly. *See id.* art. 10. This fast track has not been without its criticisms. *See, e.g.,* Andrew Le Sueur, *Rights Bill: Not Far Enough, or Too Far?*, *TIMES* (London), Oct. 31, 1997, at 21, available in 1997 WL 9239681.

151. *See* Human Rights Act cl. 2(1). The clause states:

A court or tribunal determining a question which has arisen under this Act in connection with a Convention right must take into account any:

- (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
- (b) opinion of the Commission given in a report adopted under Article 31 of the Convention,
- (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or
- (d) decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

152. The language of ECHR Articles 8 and 10 is adopted verbatim in the Human Rights Act.

153. These qualified rights oppose themselves to the non-derogable rights which a State is obliged in all circumstances to respect. *See* ECHR, *supra* note 1, arts. 8, 9, 10. Article 3 establishes such a right. It guarantees that “[n]o-one shall be subject to torture, or inhuman or degrading treatment or punishment.” *Id.* art. 3.

an interference with the right is justified. To be justified, an interference must be lawful, seek to achieve a legitimate goal, and must be necessary in a democratic society.

The European Court's analysis emulates this two-part structure. Thus, the Court first considers whether there has been an infringement of the right set out in the first paragraph; if the Court determines there has been an infringement, it then decides whether that infringement is in accord with the second qualifying paragraph.

1. *Article 8 Jurisprudence.* Article 8 defines a broad right of "respect" for one's private life, family life, home, and correspondence against intrusion by the State. The European Court delineated the contours of this right in *Marckx v. Belgium*¹⁵⁴ and reiterated this finding in *Airey v. Ireland*.¹⁵⁵ In particular, *Marckx* and *Airey* are important for their definition of the word "respect," a word which qualifies the many facets of privacy that Article 8 covers.¹⁵⁶ The right to "respect," the European Court found, implies a positive obligation on the part of the State to provide protection from infringements by third parties. Thus, Article 8 is violated not only when the State itself violates the complainant's privacy,¹⁵⁷ but also when the State does not

154. See *Marckx v. Belgium*, 2 Eur. Ct. H.R. (ser. A) at 330 (1979-1980). In this case the plaintiff complained that certain aspects of the illegitimacy laws in Belgium, such as the requirement that maternal affiliation could be established only by a formal act of recognition, violated Article 8 because the legislation failed to respect her family life and discriminated between illegitimate and legitimate families in violation of Article 14. The court found, with respect to Article 8, that respect for family life, be it a legitimate or illegitimate family, "implies in particular, in the court's view, the existence in domestic law of legal safeguards that render possible, as from the moment of birth, the child's integration in its family." *Id.* at 341-42.

155. See *Airey v. Ireland*, 2 Eur. Ct. H.R. (ser. A) at 305 (1979-1980). In this case the plaintiff wished to petition for judicial separation in the Irish High Court, but she could not afford an attorney. Since the State would not provide one in a civil case, she claimed that this constituted a violation of her Article 6 right to a fair trial as well as a violation of Article 8 because the State had failed to provide an accessible legal procedure for the determination of rights created by Irish family law. With respect to the Article 8 claim, the European Court found that Ireland had failed to respect her family life since she was effectively barred from petitioning for a judicial separation from her husband. See *id.* at 318-19.

156. The European Court expressly endorsed the view that the word "respect" qualifies not only family life but private life as well when it stated, "the court is led in the present case to clarify the meaning and purport of the words 'respect for . . . private and family life.'" *Marckx*, 2 Eur. Ct. H.R. at 341 (ellipses in original).

157. See *Malone v. Commiss'r of Police (No. 2)* [1979] 1 Ch. 344. *Malone* is a classic case with respect to Article 8 and intrusion by the State. The plaintiff was being prosecuted for receiving stolen goods. During the course of his criminal proceeding, he discovered that police had tapped his telephone. The Court of Appeals effectively closed the door on a common law right to privacy declaring that "[n]o new right in the law, fully fledged with all the appropriate safeguards, can spring from the head of a judge deciding a particular case: only Parliament can

provide a mechanism whereby the right of “respect for” privacy can be protected against the intrusions of others. In *Airey*, the European Court relied on its holding in *Marckx* to articulate the State’s twofold obligation:

Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for *private* or family life.¹⁵⁸

The Court summarized the State’s “positive obligations” by explaining that Article 8 protects a complainant who argues “not that the State has acted but that it has failed to act.”¹⁵⁹

2. *Article 10 Jurisprudence.* The European Court’s free expression jurisprudence cannot be easily summarized. Certainly any comparisons between the United States’ robust First Amendment and the ECHR’s Article 10 would be misplaced.

In *Sunday Times v. United Kingdom*,¹⁶⁰ for example, a newspaper challenged an injunction that prevented the publication of an article about mothers whose medications during pregnancy had caused birth defects in their children. The European Court disagreed with the English domestic court and found that the injunction was not justified under any of the three qualifiers in Article 10(2). In another case, the European Court found that an injunction preventing British newspapers from printing excerpts of the banned novel “*Spycatcher*” violated Article 10, because the injunction was unnecessary in light of the fact that the book had previously been published in the United States.¹⁶¹

Free expression was upheld, or more accurately not compelled,

create such a right.” *Id.* at 372-73. The Court of Appeals concluded that in the absence of legislation on the topic, the phone tapping had been legal because Parliament has recognized the Home Secretary’s power to authorize such action. Arguing that his Article 8 rights had been violated, Malone took his case all the way to the Strasbourg. A unanimous European Court agreed that the English practice of telephone-tapping by administrative warrant and the police practice of “metering” information about telephone calls without a warrant was a violation of Article 8. *See* *Malone v. United Kingdom*, 7 Eur. Ct. H.R. (ser. A) at 14 (1984). In response to this ruling, Parliament passed the Interception of Communications Act of 1985. *See* *Interception of Communications Act of 1985*, ch. 56 (Eng.).

158. *Airey*, 2 Eur. Ct. H.R. at 305 (emphasis added).

159. *Id.*

160. *See* *Sunday Times v. United Kingdom*, 2 Eur. Ct. H.R. (ser. A) at 245 (1979-1980).

161. *See* *The Observer and Guardian v. United Kingdom*, 14 Eur. Ct. H.R. (ser. A) at 86 (1991).

in *Goodwin v. United Kingdom*.¹⁶² Goodwin, a journalist who had legally obtained some sensitive and “strictly confidential” information concerning the finances of a company, was enjoined by an English court from publishing his discovery and further ordered to reveal his source. Goodwin refused to disclose his source and was found in contempt of court. The journalist took his case to Strasbourg, and the European Court found that although the interference was prescribed by law¹⁶³ and was in pursuit of a legitimate aim, the contempt order could not be said to be “necessary in a democratic society.”¹⁶⁴ The injunction alone adequately protected the company and therefore the disclosure order was disproportionate to the legitimate aim pursued. The European Court stressed that “[f]reedom of expression constitutes one of the essential foundations of a democratic society. . . . Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them.”¹⁶⁵ It is interesting to note that while the legality of the injunction was not an issue before the European Court, the Court implicitly accepted this remedy when it found that revealing the source of the information was unnecessary considering the injunction had already quashed the dissemination of the sensitive information.

Most recently, the European Court shed a little light on the standard governing journalistic conduct. The complainants were journalists who had published a series of caustic articles accusing judges of bias in a messy custody battle. The Belgian courts affirmed the judges’ defamation action against the journalists. The European Court disagreed, finding that there had been a breach of Article 10. The European Court held in part that “the press plays an essential role in a democratic society. Although it must not overstep certain bounds in respect of reputation and rights of others, its duty is nevertheless to impart—in a manner consistent with its obligations and responsibilities—information and ideas on all matters of public interest, including those relating to the functioning of the judiciary.”¹⁶⁶

3. *The Intersection of Article 8 and Article 10.* The European Court has never had occasion to police the intersection of the right of privacy guaranteed under Article 8 and the competing interest

162. See *Goodwin v. United Kingdom*, 22 Eur. Ct. H.R. (ser. A) at 123 (1996).

163. See Contempt of Court Act of 1981, ch. 49, § 10 (Eng.).

164. *Goodwin*, 22 Eur. Ct. H.R. at 149.

165. *Id.*

166. *De Haes and Gijssels v. Belgium*, 25 Eur. Ct. H.R. (ser. A.) at 1 (1998).

favoring free expression in Article 10. One recent case, had it reached the European Court, would have answered the question squarely. In *Earl Spencer and Countess Spencer v. United Kingdom*,¹⁶⁷ the brother and sister-in-law of the late Princess of Wales brought an application to the European Commission arguing that the absence of a right of privacy in England denied them the means of either stopping the publication or obtaining monetary damages after the publication of a lurid article about their marriage, family, and the Countess' health. The article in question, printed on the front page of the News of the World, included the headline "Di's Sister-in-Law in Booze and Bulimia Clinic." Beside the article, a photograph, obtained without consent, showed Earl Spencer's ex-wife walking the grounds of the clinic where she was being treated for eating disorders and alcoholism. The Spencers brought their claim under Article 8 arguing that their privacy had not been respected and that the breach of confidence remedy was wholly inadequate in such a situation.¹⁶⁸ It was inadequate because they did not know of the article until after it had been published and thus could not enjoin it prior to publication. Furthermore, the essential elements of a breach of confidence action had only limited effectiveness against such coverage, and even if they could establish a breach of confidence, there was no realistic chance of recovering money damages after publication.¹⁶⁹ The Earl Spencer argued that "this absence of a legal remedy is in violation of the positive obligation on the United Kingdom contained in Article 8 of the Convention to protect his right to respect for his private life."¹⁷⁰ The British government responded that the elements of a breach of confidence action could have been established in this case and that the Spencers would have been entitled to damages had they been successful in their action against the newspaper.¹⁷¹ The European Commission denied the application after a hearing, thus implicitly

167. See *Press Communiqué Issued by the Secretary of the European Commission of Human Rights* (visited Apr. 1, 1998) <<http://www.dhcommhr.coe.fr/eng/28851CEN.E.html>>; see also Charles Bremner, *Spencer Loses fight to Challenge Privacy Law*, *TIMES* (London), Jan. 17, 1998, at 6, available in 1998 WL 4810475.

168. See Bremner, *supra* note 167. The Spencers had previously brought a breach of confidence action against two acquaintances who had disclosed this personal information about the couple. The case was settled in 1997 on the basis of a consent order of the High Court that restrained the acquaintances from further disclosing any information about the Spencers' private lives or affairs. See *id.*

169. See *id.*

170. *Id.*

171. See *id.*

siding with the government's argument.¹⁷²

The result in the *Spencer* case was foreshadowed in an earlier case, rejected by the European Commission, in which the applicant had won a libel suit based on false allegations in a book. The applicant could not, however, recover damages in an English court for allegations in the book that were true but invaded his right to privacy. The European Commission accepted that the State could have a positive obligation in this area, but found existing remedies, such as breach of confidence and defamation, were sufficient.¹⁷³

D. Privacy and The Press Under the Act

The incorporation of the ECHR brings a right of privacy to the United Kingdom. As with any other statute, when it is made a part of domestic legislation, British subjects are given a right to bring a cause of action under it. As noted above, however, the Act applies only to "public authorities."¹⁷⁴ Seemingly, since the various magazines and newspapers that comprise the British press are private bodies, they are beyond the reach of the Act. Such a conclusion, however, would overlook the teaching of both *Airey* and *Marckx*. In certain situations under Article 8, governments have a positive obligation to ensure that privacy rights are being respected. The European Commission's decisions in this area, since no case has yet been forwarded to the European Court, seem to establish a fairly low threshold: if there are remedies available at the national level which afford some degree of protection of privacy, then the State has fulfilled its positive obligation under Article 8 of the ECHR. The *Spencer* case is in accord with this low threshold principle.

The *Kaye* case, however, offers a poignant example of where the lack of remedies under English law could be held to be in violation of Article 8 privacy rights. Since the press does not come within the ambit of the Act's definition of a "public authority," litigants whose

172. See *id.* The outcome in this case must be examined against the background of Article 26. See ECHR, *supra* note 1, art. 26. Article 26 states: "The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken." *Id.*

173. See Ben Emmerson, *Law: Reporting Restrictions Newspapers Fear that Incorporating the European Convention on Human Rights into UK Law Will Restrict Investigative Reporting*, GUARDIAN (London), Nov. 4, 1997, at 17, available in 1997 WL 14739002; see also Clare Dyer, *Analysis: Privacy: The Media Takes A Shot in the Dark*, GUARDIAN (London), Dec. 19, 1997, at 15, available in 1997 WL 14747452.

174. See Human Rights Act 1998, ch. 42, cl. 6 (Eng.).

privacy rights have been infringed would be forced to bring an action under existing English tort law such as breach of confidence, libel, or malicious falsehood. Article 8 would give English courts the tools to bridge a specific gap in the existing legislation and common law causes of action. It already seems clear that English judges are prepared to apply this right of privacy.¹⁷⁵

The British press, as would be expected, did not take well to the possibility of a new right of privacy being created, and lobbied heavily for a political compromise. Such a compromise was reached, and the government inserted a special amendment in the Act to safeguard the rights of a free press.¹⁷⁶ Under the amendment, (1) judges are instructed that injunctions preventing publication should not be granted unless the respondent is present, represented, or “there are compelling reasons why the respondent should not be notified,”¹⁷⁷ and (2) an express provision reminds judges to “have particular regard” to freedom of expression guaranteed by Article 10 “where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material.”¹⁷⁸ If such material is at issue, judges must evaluate whether “the material has, or is about to, become available to the public or it is, or would be, in the public interest for the material to be published” as well as take into consideration “any relevant privacy code.”¹⁷⁹

This amendment, while lauded by the press, essentially restated Clause 2 of the Act, which already requires a judge to “take into consideration” the jurisprudence of the European Court. As seen above, the European Court, in interpreting Article 10, has itself characterized the press as a bastion of democracy whose right to investigate,

175. See *Press Freedom*, FIN. TIMES, Dec. 11, 1997, at 21, available in 1997 WL 1479909 (“[A]s Lord Bingham, the Lord Chief Justice, has remarked, the courts are set on developing a common law right of privacy, regardless of the convention.”); see also Dyer, *supra* note 173 (noting that “judges are on course to develop a right of privacy, with or without the Bill”); Clare Dyer, *Courts May Rule On Privacy Rights*, GUARDIAN (London), Oct. 9, 1997, at 2, available in 1997 WL 14734021 (Dyer quoted Lord Bingham’s comment that because the courts were an arm of the state, there would be “a clear duty on the courts to protect privacy. . . . What is going to have to be confronted is the demarcation of the boundary between privacy and free speech. I think it is difficult and debatable territory.”).

176. See Human Rights Act cl. 12; Philip Webster & Carol Midgley, *Ministers Move to Allay Media Fears on Privacy*, TIMES (London), Feb. 17, 1998, at 4, available in 1998 WL 4819279; see also *Free at Last . . . But Now Read the Fine Print*, GUARDIAN (London), Feb. 18, 1998, at 17, available in 1998 WL 3079493.

177. Human Rights Act cl. 12(3)(b).

178. *Id.* cl. 12(4).

179. *Id.* cl. 12(4)(a), (b). The PCC Code is an example of such a code.

report, and critique should only be abridged in extreme circumstances.¹⁸⁰ The purpose of incorporating the ECHR into the domestic law of the United Kingdom was in part to let British judges participate in the process of deciding questions of fundamental rights.¹⁸¹ Amendments that seek to curb the interpretive powers of British judges serve only to weaken treaty rights in the United Kingdom at the expense of British subjects, who, of course, can still go to Strasbourg to litigate those rights.

The status of the PCC after incorporation of the ECHR into the domestic law of the United Kingdom has raised considerable controversy.¹⁸² Since the PCC is a non-governmental organization, it seems to be beyond the reach of the Act. This conclusion, however, is not inevitable. Under Clause 3(b) of the Act, a “public authority” also includes “any person certain of whose functions are functions of a public nature.”¹⁸³ The PCC arguably serves a function of a public nature and therefore may well be within the ambit of the Act. If so, the PCC would have to be in compliance with the ECHR. In that event, the PCC would be entrusted with the power to balance what is considered to be in “the public interest” and the right of privacy. Courts would then only step in when the weighing of the balance was poorly done. But the more serious dilemma posed for the PCC by the ECHR is that the PCC can hardly be said to be in compliance with Article 13. This article guarantees everyone whose rights have been abridged “an effective remedy.”¹⁸⁴ Since the PCC cannot award dam-

180. See *Goodwin v. United Kingdom*, 22 Eur. Ct. H.R. (ser. A) at 123 (1996); see also *De Haes and Gijssels v. Belgium*, 25 Eur. Ct. H.R. (ser. A.) at 1 (1998).

181. See *Rights Brought Home: The Human Rights Bill*, *supra* note 139, ¶1.14. Here Tony Blair notes “the rights will be brought much more fully into the jurisprudence of the courts throughout the United Kingdom, and their interpretation will thus be far more subtly and powerfully woven into our law. And there will be another distinct benefit. British judges will be enabled to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe.” *Id.*

182. At first Lord Irvine, the current Lord Chancellor, was convinced that the Act did not reach the PCC. Lord Wakeham, the Chairman of the PCC thought otherwise. Lord Irvine soon admitted that he was wrong and that the PCC was indeed within the ambit of the Act. See Robert Shrimley, *Wakeham Hopes His Press Code Will Head Off Privacy Law*, DAILY TELEGRAPH (London), Dec. 9, 1997, at 12, available in 1997 WL 2357522; see also *Lord Chancellor's Department*, M2 PRESSWIRE, Dec. 2, 1997, available in 1997 WL 16293834. Fears that the PCC would be covered under the Act have prompted talks of exempting “voluntary organizations” from the Act. See Lord Wakeham, *Privacy Law Role Would Weaken Press Complaint Watchdog*, FIN. TIMES, Dec. 17, 1997, at 20, available in 1997 WL 14801367. The proposed amendments to the Act discussed above have laid to rest a specific exemption for the PCC.

183. Human Rights Act cl. 3(b).

184. For a good discussion of the Article 13 requirements, see FARRAN, *supra* note 100, at 303-08. Farran outlines the finding of the European Court in the *Silver* case. See *Silver v.*

ages and has no power of prior restraint, its function can hardly be reconciled with the Article 13 requirement. Perhaps foreseeing this dilemma, however, Article 13 was purposefully deleted from the Act during review in the House of Lords. This means that litigants would not be able to sue under Article 13 in courts of the United Kingdom. To invoke its protection, a plaintiff would have to follow the far less convenient road to Strasbourg. And indeed, even there, a British plaintiff might find no relief. The Commission's result in the *Spencer* case could be interpreted to mean that the PCC's system of self-regulation and the Code, coupled with various other statutory and common law remedies, viewed in their entirety, afford sufficient privacy protection to satisfy the requirements of Article 13. In contrast, it may be that a European Court faced with an egregious invasion of privacy would hold that a complaint to the PCC is incompatible with Article 13. Either way, the PCC is clearly at a crossroads. It must, in the face of its inadequate remedies, remain under the constant supervision of the British courts—which will lead plaintiffs to bypass its flimsy mechanism and head straight for the courts—or the PCC must fight off irrelevancy and restructure itself in such a way that its remedies are more than nugatory.

V. CONCLUSION

The incorporation of the European Convention for the Protection of Human Rights into the laws of the United Kingdom marks the beginning of a new chapter in British constitutional reform. The Human Rights Act empowers judges to apply the ECHR and enforce a broad range of guarantees and remedies that in the past were only available in Strasbourg.¹⁸⁵ Courts in the United Kingdom are given

United Kingdom, 5 Eur. Ct. H.R. (ser. A) at 437 (1983). In *Silver*, the European Court held that where the complainant has an "arguable claim" which violates his convention right, he would have a remedy before a national authority. *See id.* at 303. Furthermore, the national authority does not necessarily need to be a court, but if it is not, then that body's powers and the guarantees which it affords are relevant in considering whether the remedy it offers is effective. *See id.* Finally, although there may not be a single remedy which is entirely satisfactory, the aggregate of remedies provided under domestic law may be considered in evaluating the requirements of Article 13. *See id.*

185. *See* Human Rights Act art. 8. British courts are entitled to award damages for breaches of ECHR rights. In awarding such damages, the court is to "take into account the principles applied by the European Court" in awarding compensation, so as to enable Britons to receive compensation from a domestic court equivalent to the damages they would receive in Strasbourg. *Id.* In *De Haes and Gijssels v. Belgium*, for example, the European Court awarded the two journalists over a million Belgian francs. *See De Haes and Gijssels v. Belgium*, 25 Eur. Ct. H.R. (ser. A.) at 59 (1998).

the task of assessing the delicate balance between Article 8 guarantees and Article 10 freedoms. It would be premature, however, to conclude that incorporation of the ECHR signals the beginning of a full-fledged privacy right in the United Kingdom. Such a right of privacy, as the American experience shows, requires a difficult balancing of competing interests.

Moreover, the ECHR guarantees protect only the individual against the State and not private third parties. In the case of a plaintiff whose privacy has been invaded by the press, a privacy tort in the United Kingdom could best be achieved through a more elastic application of the breach of confidence remedy or by way of the still obscure Protection from Harassment Act.

One of the great oversights in this debate, however, has undoubtedly been that incorporation will, for the first time in British history, establish a guaranteed right of free expression for the press. This now explicit right could, in time, afford a responsible press a greater degree of protection as well. Incorporation means the press can now rely in English court on a largely favorable body of Article 10 case law.

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