

Lord Neuberger at the UK Association of Jewish Lawyers and Jurists' Lecture

Privacy in the 21st Century

28 November 2012

(1) Introduction¹

1. Good evening. It is a pleasure to have been asked to give tonight's lecture.

Privacy is a subject which seems to be forever topical. It excites (in both senses of the word) public discussion, while demanding considered reflection. And it raises many difficult and, often, controversial questions. Is privacy a value which society should protect? If so, to what extent? Is protection of privacy a fetter on freedom of expression? If so, can and should a balance be struck between them? And if so, what type of balance? Should, for instance, freedom of expression always trump privacy, as it is sometimes suggested is the position in the United States? A suggestion, I may add, which ignores a variety of US statutes and constitutional provisions which protect certain aspects of privacy to varying degrees, subject to the First Amendment protection of freedom of speech and expression².

2. And is privacy a value which is, on deeper analysis, not inimical to or a fetter on freedom of expression: is it actually a necessary and vital aspect of

¹ I wish to thank John Sorabji for all his help in preparing this lecture.

² For a discussion see D. Anderson, *The Failure of American Privacy Law*, in B. Markesinis (ed), *Protecting Privacy* (OUP) (1999).

freedom of expression? Or should we maintain the straightforward and generally held view that the two are wholly distinct, indeed often in conflict?

3. These are all difficult questions. They go to the heart of issues concerning the very nature of society. It was, of course, to a large degree concerns about invasions of privacy which underpinned the decision to set up Lord Justice Leveson's Inquiry, which issues its report tomorrow, and will wholly drown the reverberations of anything I say this evening which is stupid or controversial.
4. Questions concerning privacy have become all the more pertinent over the last twenty years for three reasons, which are no doubt not entirely discrete from each other. The first is legal; the second is social; the third is technological.
5. The legal reason derives from the introduction of the Human Rights Act 1998 ("the HRA"), which incorporated the European Convention, and in particular Articles 8 and 10, into British law. For the first time, privacy, as a generalised free-standing (albeit not absolute) right, was enshrined in a British statute, and, it should be added, for the first time, freedom of expression, as a generalised free-standing (albeit not absolute) right, was enshrined in a British statute.

6. The social reason can be traced to changes which started in the 1960s, and became embedded by the 1990s. It was in the 1960s when the largely self-imposed restraints on the press and the rest of the media started to loosen, when the previously strong cohesion of the establishment started to break up, and when what Tony Blair called “respect” started to disappear. The Profumo Affair, and Lord Denning’s subsequent report on it³, is generally agreed to have been the watershed, although there is room for argument whether it was a cause of change or an early symptom of this change. One MP at the time recalled that, during the investigation, Lord Denning “*could not move an inch without being followed by the television cameras*”⁴, and that his report was published “*in an atmosphere of salesmanship and ballyhoo such as never previously pervaded the environs of Her Majesty’s Stationery Office.*”⁵ The Profumo Affair may have helped to instil in the media the confidence to challenge the establishment.

7. It was also in the 1960s that the seeds of the cult of celebrity (people who were famous simply for being famous – or even for not being famous) were sown, when what was previously unsayable and undoable in public started to

³ *The Denning Report: The Profumo Affair* (1963) Cmnd. 2152.

⁴ Hansard, HC Deb, 16 Dec 1963, vol 686, col 866, Mr Harold Wilson (Huyton)
<<http://hansard.millbanksystems.com/commons/1963/dec/16/security-and-the-denning-report>>.

⁵ Hansard, HC Deb, 16 Dec 1963, vol 686, col 862, Mr Harold Wilson (Huyton)
<<http://hansard.millbanksystems.com/commons/1963/dec/16/security-and-the-denning-report>>.

be said and done on television and in the press, and when activities which were thought to be shameful, immoral or illegal started to be accepted.

Legislation from the time highlights the increased acceptance of previously criminal activities: the Suicide Act 1961, the Abortion Act 1967, and the Sexual Offences Act 1967. At the same time, evolving social norms, as portrayed on television and in the press, were partly responsible for other legislation, such as the Race Relations Act 1965, the Equal Pay Act 1970, and the Sex Discrimination Act 1975. These rapid social changes may also have increased the confidence of the media, because they demonstrated how readily people react to what they heard and saw.

8. The technological reason stems, of course, from the exponential growth of electronic communication. In particular, there is the internet, which has spawned effortless, inexpensive and instant mass communication in forms such as emailing, social networking, blogging, and tweeting. Not so long ago, publication was effected via books, journals, magazines, newspapers, radio and TV. Now anyone, at no more than a mouse click, can blog their thoughts, post their photos and upload videos of themselves, or of anyone else it seems, onto the internet and thereby broadcast them to the world. Cyberspace has created a global village, of which we are all inhabitants, whether we want it or not. And another vital part of that global cyber-village

is mobile phones, which mean that it is very easy to contact us, to trace us, to photograph us, and to record us, and, it appears, to intercept our messages.

9. The development of this global cyber-village brings questions of privacy and freedom of speech into sharp focus. We have, I think, only just started to appreciate the fundamental effect of this technological development on our perception of the right to privacy and to freedom of expression. The pace of development of IT seems to be ever accelerating, and this adds to the problem, as it means that the way in which individuals view their rights to privacy, and to freedom of expression, is in turn changing. We are, as they say in America, always playing catch-up.

10. In tonight's lecture I want to consider some of the issues thrown up by these legal, social and technological changes. I shall start by considering the common law's approach to privacy prior to the HRA. If we are to consider properly how the future may develop, we need to ground it in the past. I then want to look at the influence of the HRA on the development of privacy. Next, I turn to the effect of technology on privacy. Finally I consider how the HRA and technology may jointly develop our approach to privacy going, as they say, forward.

(2) Privacy – the right to be ‘let alone’

11. We are sometimes led to believe that privacy has not in any way been protected in English law: that 1998 was for privacy, to use Larkin’s famous words, what 1963 (yes, I am on about the 1960s again) was for sexual intercourse, “*the time when it all began*”⁶. Well, 1998 was no more when privacy began in English law than 1963 was when sexual intercourse began.

12. Privacy was first protected by statute in 1361, when the Justices of the Peace Act made eavesdropping a criminal offence, and the offence remained on the statute book until 1967⁷. The first time that the common law was moved to protect privacy was in *Semayne’s Case*, which was reported in 1604 by the then Attorney-General, Sir Edward Coke⁸. The name of the case may not be all that familiar. The principle it established is well known. The case concerned the entry into a property by the Sheriff of London in order to execute a valid writ. In Coke’s words, the principle enunciated by *Semayne* was

*‘That the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose’*⁹

⁶ P. Larkin, *Annus Mirabilis*.

⁷ Criminal Law Act 1967, s 13.

⁸ (1604) 5 Co Rep 91; 77 E.R. 194.

⁹ (1604) 5 Co Rep 91; 77 E.R. 194 at 195.

The case recognised the right of a citizen to defend his property, and his peaceful repose within it, in other words, a citizen's privacy from intrusion into his or her property, including entry by the King's Sheriff.

13. The common law did not stop there. The case of *Entick v Carrington* in 1765¹⁰ is rightly celebrated for establishing the right to liberty, the right to security and the right to property. Lord Camden CJ put it this way in his judgment,

*'By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. . .'*¹¹

The principle can also be read as protecting privacy. Entick's house had been forcibly entered by agents of the State. They were looking for, amongst other things, pamphlets which were said to be seditious. Entick was an associate of John Wilkes, the English radical politician, and, it must be added, the famous, or, if you prefer, the notorious, pornographer. Entick's documents, and no doubt his diaries, journals and the private thoughts set out in them,

¹⁰ (1765) 19 St. Tr. 1029.

¹¹ Ibid at 1066.

were as protected by the principle articulated by Lord Camden as were his home and liberty.

14. This was a point not lost on the US Supreme Court, which in *Boyd v United States*¹² explained the judgment in this way,

*‘The principles laid down in [Lord Camden’s] opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man’s home and the privacies of life.’*¹³

15. Privacy protection developed further in the 19th Century, the leading case being concerned with Queen Victoria’s drawings and etchings of private and domestic subjects. They had not been made with a view to their publication, but were for her and Prince Albert’s own private interest. A certain Mr Strange and two others had managed to obtain some of them. They had catalogued them and intended to sell copies of the catalogue and put the etchings which they had obtained on display at a public exhibition. Unsurprisingly, the Queen and the Prince objected to this infringement of their privacy. An injunction was granted to Prince Albert restraining Strange and his associates from publication.

¹² 116 U.S. 616 (1886).

¹³ *Ibid* at 630.

16. The formal claim, or Bill, through which Prince Albert brought the proceedings in the Court of Chancery, stressed the private nature of the etchings, how they were of ‘*subjects of private and domestic interest*’, how the Queen and he had printed them using a ‘*private press*’ for their ‘*greater privacy*’ and how they had been placed in their ‘*private apartments*’.¹⁴ It was, simply put, an action to protect privacy.

17. The Prince’s action succeeded. While the Court did not base its decision on a general right to privacy, Knight Bruce V-C, at first instance, and Lord Cottenham LC on appeal, both adverted to an underlying value which the courts would protect. Lord Cottenham in particular observed that

‘. . . where privacy is the right invaded, postponing the injunction would be equivalent to denying it altogether. The interposition of this Court in these cases does not depend upon any legal right, and to be effectual, it must be immediate.’¹⁵

As in *Entick’s case*, privacy was something worthy of being protected, albeit not explicitly in its own right, but on a different legal basis. It was protected through real property rights in *Entick’s case*, intellectual property rights and breach of trust and confidence in *Prince Albert’s case*¹⁶.

¹⁴ *Prince Albert v Strange* (1849) 1 De G & SM 652 at 670.

¹⁵ (1849) 1 Mac & G at 26.

¹⁶ (1849) 1 Mac & G at 23.

18. A creative approach by the courts in the 19th Century could have developed the common law so as to result in a general right to privacy, thereby giving effect to the values apparently recognised in *Prince Albert's case*. That was certainly the view of Samuel Warren and future US Supreme Court Justice Louis Brandeis, when, as young lawyers, they wrote their seminal paper, *The Right to Privacy* in 1890. They concluded in the light of Lord Cottenham's statement concerning privacy in *Prince Albert's case*, that

' . . . if privacy is once recognized [which they took it Lord Cottenham had recognised] as a right entitled to legal protection, the interposition of the courts cannot depend on the particular nature of the injuries resulting.

*These considerations lead to the conclusion that the protection afforded . . . is merely an instance of the enforcement of the more general right of the individual to be let alone [which was the very right to repose acknowledged in *Semayne's Case*].¹⁷,*

19. The English courts did not take such an approach. Rather than develop a general right to privacy, as Warren and Brandeis suggested, the common law went in a different direction and built on the law of confidence as the means to give effect to a narrower, limited, and fact-specific form of privacy right. The fact that there was no general common law right to privacy was emphasised in uncompromising fashion by the Court of Appeal in 1991.

¹⁷ S. Warren & L. Brandeis, *The Right to Privacy*, (1890) 4 Harv. L. Rev. 193 at 205.

20. In *Kaye v Robertson*¹⁸, the actor and star of 'Allo 'Allo!, Gordon Kaye was recovering from brain surgery in a private hospital room. He was photographed by a journalist who sneaked into his room and falsely claimed to have interviewed him. Warren and Brandeis would no doubt have said that here was as obvious a case of invasion of privacy that you could imagine, and that the common law should protect it consistently with the approach taken by Lord Cottenham in *Prince Albert's case*.

21. The Court of Appeal in *Kaye's case* took a different view. It followed the narrower approach, stating that '*in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy*'.¹⁹ It would appear that, in the absence of a property right or a relationship of trust and confidence, there was no basis for the common law to give effect to a claim for privacy.

22. Thus, the point we had reached then in this country when the HRA was enacted was that there was no general right to privacy, no right to be let alone. Privacy as a value was however protected in a number of ways, not least through the tort of confidentiality, as the Court of Appeal made clear in

¹⁸ [1991] FSR 62

¹⁹ *Ibid* at 66.

*A v B*²⁰. It was a value which however was given limited protection, a point which the House of Lords had illustrated in *R v Director of Serious Fraud Office, ex parte Smith* in 1993²¹.

23. That case concerned the question of the right to silence. A company's managing director was charged with having knowingly been party to carrying on the company's business with intent to defraud its creditors. After having been cautioned, he was served with a notice requiring him to attend an interview with the Director of the Serious Fraud Office to answer questions. He challenged the notice by way of judicial review. The issue was whether the requirement to answer questions infringed the right to silence.

24. Lord Mustill gave the leading opinion in the House of Lords. He identified six different types of immunity which came under the umbrella of the right to silence, and identified the reasons which caused these immunities to '*become embedded in English law.*'²² He described the first of those reasons in these terms,

'[It] is a simple reflection of the common view that one person should so far as possible be entitled to tell another person to mind his own business. All civilised states recognise this assertion of

²⁰ [2003] QB 195 at [5], and see *Duchess of Argyll v Duke of Argyll* [1967] Ch 302; *Stephens v Avery* [1988] Ch 449.

²¹ [1993] AC 1 at 30E-32D.

²² [1993] AC 1 at 31.

*personal liberty and privacy. Equally, although there may be pronounced disagreements between states, and between individual citizens within states, about where the line should be drawn, few would dispute that some curtailment of the liberty is indispensable to the stability of society; and indeed in the United Kingdom today our lives are permeated by enforceable duties to provide information on demand, created by Parliament and tolerated by the majority, albeit in some cases with reluctance.*²³,

25. Lord Mustill's statement crystallises two fundamental points. First, it underlines the approach taken by the common law to privacy. On the one hand, it recognised privacy as a principle of general value; on the other hand, privacy had only been given discrete and specific protection at common law. It was a value which English society had developed to a certain extent, but had done so by giving due notice to other values: for instance, freedom of expression; the right of the State to investigate crime; or the right to enter property if properly and lawfully authorised. The line had been drawn between privacy and other values.

26. Secondly, Lord Mustill's statement underlines why it is necessary for the law to give expression to the value we place on privacy. Privacy underpins the law's protection of our repose in our homes – it limits the State's right to intrude into our home to those instances where specific statutory powers, for instance, authorise it; and it underpins the right to silence and the privilege

²³ Ibid.

against self-incrimination. It did not – and does not – simply underpin our right to confidentiality.

27. How has privacy, and the discrete, rather limited, manner in which we historically gave expression to it, been affected by the HRA?

(3) The HRA – a general right to privacy?

28. The background to the introduction of the HRA can be summarised this way.

English law protected privacy in a number of discrete ways, both via statute, such as through the Regulation of Investigatory Powers Act 2000 or the Data Protection Act 1998, and at common law through the tort of breach of confidence, and the notion that a person's home was his or her castle. It did not however protect privacy by way of a general law or tort of privacy; perhaps not for want of trying – a point made clear by Raymond Wacks in a paper entitled, *Why there will never be an English common law privacy tort*²⁴, in which he observed how '*[a] common law privacy tort has been long in gestation. For almost four decades, the courts have danced round the problem.*²⁵,

²⁴ R. Wacks, *Why there will never be an English common law privacy tort*, in A. Kenyon & M Richardson (eds), *New Dimensions in Privacy Law* (CUP) (2006).

²⁵ R. Wacks, *ibid* at 154.

29. There was an expectation that the HRA would bring the final curtain down on this dance: that it would finally bring the courts to the point where they would develop a general law, or tort, of privacy. Lord Phillips MR, as he then was, for instance noted in *Douglas v Hello! Ltd (No 6)*²⁶ how the Labour government responsible for the HRA anticipated that ‘*the judges [would] develop the law appropriately, having regard to the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms. . .*’²⁷.

30. In a previous Court of Appeal judgment in the *Douglas v Hello!*²⁸ litigation, Lord Justice Sedley had not been so coy. For him, the enactment of the HRA meant one thing: that we had ‘*reached a point at which it [could] be said with confidence that the law recognises and [would] appropriately protect a right of personal privacy.*’²⁹ More specifically, its enactment would, as he put it, provide ‘*the final impetus to the recognition of a right of privacy in English law.*’³⁰

31. Has the HRA given that final impetus? The Law Lords’ answer to that is not perhaps as clear as it could be. There is both a positive and a negative case.

²⁶ [2006] QB 125.

²⁷ Ibid at [46].

²⁸ *Douglas v Hello! Ltd (No. 1)* [2001] QB 967.

²⁹ Ibid at 997.

³⁰ Ibid at 998.

The latter is quite straightforward and can be found in the House of Lords' decision in *Wainwright v Home Office*³¹ from 2003. The Wainwrights – mother and son – were subject to a strip-search when visiting a prison in 1997. The search was carried out in accordance with the Prison Rules 1964, rule 86. The son, who was mentally impaired and suffered from cerebral palsy, later developed post-traumatic stress disorder. Claims for damages arising from trespass and trespass to the person were issued.

32. By the time the claim reached the House of Lords, the Wainwrights' claim centred, in one part at least, on the argument that the Lords should declare that there was, in the light of the 1998 Act making the Convention part of UK law (to put it in a shorthand way), and the United Kingdom's obligations under the European Convention, a tort of invasion of privacy³². Their Lordships were effectively being invited to take up Sedley LJ's challenge and to invoke the HRA to declare, finally, that a general tort of privacy formed part of English law.

33. That invitation was declined. The Law Lords refused to declare that Article 8 of the Convention had spawned a common law tort of privacy, stating that the creation of such a tort was a matter for Parliament. As for Sedley LJ's

³¹ [2004] 2 AC 406.

³² [2004] 2 AC 406 at [14].

challenge, it was explained by Lord Hoffmann in the following, minimalist terms,

‘I do not understand Sedley LJ to have been advocating the creation of a high-level principle of invasion of privacy. His observations are in my opinion no more (although certainly no less) than a plea for the extension and possibly renaming of the old action for breach of confidence.’³³

34. Thus, the position following *Wainwright’s case* is clear: there is no general tort of privacy in English law. The enactment of the HRA has not changed that, nor does it require it. As Raymond Wakes might put it, the dance goes on.

35. That is the negative case. There is, however, a positive version, which has been cogently supported by Professor Gavin Phillipson, who suggests that, notwithstanding the explicit rejection of a general tort of privacy by the House of Lords in *Wainwright’s case*, the courts have in fact used the HRA to transform the tort (or, as I would put it as a former Chancery lawyer, the equitable claim) of breach of confidence into a general privacy tort (or equitable claim). The argument as explained by Phillipson³⁴ is that the courts have effected two fundamental changes to the law of breach of confidence:

³³ [2004] 2 AC 406 at [30].

³⁴ G. Phillipson, *The ‘right’ of privacy in England and Strasbourg compared*, in A. Kenyon & M Richardson (eds), *New Dimensions in Privacy Law* (CUP) (2006); and see G. Phillipson, *Privacy* in D. Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law*, (Cambridge) (2011)

first, they have removed the requirement that there be an independent (tortious or equitable) obligation to maintain confidentiality in respect of the information disclosed; secondly, that the information disclosed does not need to be confidential information but rather must simply now be private or personal information. As he puts it,

‘The removal of the limb that most distinguished breach of confidence from a pure privacy action, and the shift from confidential to private information, together amount in effect to the creation of a new cause of action.’³⁵

This cause of action, it is said, has been renamed as a claim for *‘misuse of private information’*³⁶ by Lord Nicholls in the House of Lords in *Campbell v MGN*³⁷, only a year or so after *Wainwright’s case*.

36. This transformation, or act of creation depending on your point of view, was effected according to Phillipson through the House of Lords’ decision in *Campbell’s case*. The starting point was however Lord Woolf’s judgment in *A v B*, which was handed down in 2003, a year earlier. In particular, it was Lord Woolf’s statement concerning the need to establish a confidential relationship in order to establish liability under the tort. He said this,

³⁵ G. Phillipson, *ibid* at 185.

³⁶ Per Lord Nicholls in *Campbell v MGN Ltd* [2004] 2 AC 457 at [14].

³⁷ [2004] 2 AC 457.

‘The need for the existence of a confidential relationship should not give rise to problems as to the law . . . A duty of confidence will arise whenever a party subject to the duty is in a situation where he either knows or ought to know that the other person can reasonably expect his privacy to be protected.’³⁸

This statement was perhaps pregnant with possibility. If a duty of confidence arises when the party said to be subject to it knew or ought to have known that the other party reasonably expected their privacy to be protected, it might be said that the only aspect of the test doing any work is privacy.

37. The House of Lords in *Campbell’s case* built on Lord Woolf’s statement. In particular, Lord Hope stated that a duty of confidence will arise wherever the information concerned *‘is obviously private.’* In such circumstances, *‘the situation will be one where the person to whom it relates can reasonably expect his privacy to be respected.’³⁹* The upshot of this, and other dicta in *Campbell’s case* is, as Phillipson argues, one where having imposed liability for *‘the use of personal information, in the absence of any circumstances imposing the obligation save for the nature of the information itself’*, the tort has simply become *‘an action that protects against unauthorised publicity given to private facts.’⁴⁰* This point was underlined by Lord Phillips MR in *Douglas (No 6)* when he explained how

³⁸ [2003] QB 195 at 207.

³⁹ [2004] 2 AC 457 at [96], and see *Murray v Big Pictures (UK) Ltd* [2008] 3 WLR 1360 at [30].

⁴⁰ G. Phillipson, *ibid* at 191.

‘What the House [in Campbell] was agreed upon was that the knowledge, actual or imputed, that information is private will normally impose on anyone publishing that information the duty to justify what, in the absence of justification, will be a wrongful invasion of privacy.’⁴¹

Later, in the same judgment, he described privacy claims having been ‘*shoe-horn[ed] ... into the cause of action of breach of confidence*⁴²’, an apt description – but I would say that, as it was in a judgment of the Court of which I was a member.

38. For Phillipson, and no doubt others, this decision has one consequence, namely the creation of a tort of privacy. What else, it might be said, could a claim for misuse of private information be but a claim in privacy? No doubt at some point in the future, the courts will have to grapple with the question whether *Wainwright*’s denial of a tort of privacy is consistent with the way in which the law is said to have developed as a consequence of *Campbell*. Given more recent decisions, such as *HRH Prince of Wales v Associated Newspapers Ltd*⁴³, *McKennitt v Ash*⁴⁴, and *Murray v Express Newspapers Plc*⁴⁵, and, as the authors of *Clerk & Lindsell* have it, ‘*the continued movement towards reshaping the action [for misuse of private information]*

⁴¹ *Douglas v Hello! Ltd* (No. 6) [2006] QB 125 at [82].

⁴² *Ibid* at [96].

⁴³ [2008] Ch 57.

⁴⁴ [2008] QB 73.

⁴⁵ [2008] 3 WLR 1360.

*into something approaching a privacy action*⁴⁶, it may be that that day is not far off. Or, as I must add, as I may be called upon to help decide the point, maybe not.

39. The question I posed earlier is: how has the HRA changed things? On one view it hasn't, and there remains no general privacy tort. On another view it has proved the spur to a reshaping of the tort of misuse of confidential information into something akin to, or perhaps even actually, a privacy tort. But, it may be said, this is all very interesting and esoteric, but technological developments are rendering these developments redundant or irrelevant, because they render it impossible to enforce any tort of privacy.

(4) Technology, Twitter and Super-injunctions

40. In December 1995, 16 million people, or 0.4% of the world's population, used the internet⁴⁷. By December 2005, that figure had reached 1.018 billion people, or 15.7% of the world's population. By June 2012, according to the last set of available figures, the figure had risen to 2.4 billion people or 34.3% of the world's population. In that time, we have seen the advent of email, which now to those at the cutting edge of electronic communication, is almost as archaic as snail mail, and the advent of YouTube, Facebook and

⁴⁶ *Clerk & Lindsell on Torts* (20th ed) at 27-38.

⁴⁷ See <<http://www.internetworldstats.com/emarketing.htm>>.

Twitter. And half of those 2.4 billion people are able to access the internet through their mobile phones⁴⁸.

41. And, of course, mobile phones are not just passive receivers. Their users can not just surf the net, they can – as we all know – upload photographs taken by their phone to their Facebook accounts, upload videos again created by the phone on to YouTube, and publish their thoughts to the world via their blogs and Twitter accounts. Anyone who wants to do so can become, in the words of David Gillmor, ‘*We the media*’⁴⁹. These developments have had a profound effect, and one which we are really only now beginning properly to grasp – indeed, I doubt that we have yet really begun to grasp the extraordinary nature of these changes and their revolutionary consequences.

42. For some, these changes ordain a world where privacy is dead: where we will all live under the scrutinising, and perhaps censorious, eye of citizen Big Brother. Each of us watching the other, with our camera phones at the ready to record and broadcast anything we find interesting, amusing, offensive or improper. In many ways, that world would be little different from the prison Jeremy Bentham conceived in 1787, and called a Panopticon, where every prisoner could see exactly what every other prisoner was doing at all times.

⁴⁸ See <<http://mobithinking.com/mobile-marketing-tools/latest-mobile-stats/b#mobilebroadband>>.

⁴⁹ D. Gillmor, *We the media* <<http://oreilly.com/openbook/wemedia/book/index.html>>.

Such a world would be a virtual Panopticon. I wonder if that really is the world which those like Mark Zuckerberg anticipate we will live in. He is reported to believe that in future privacy will be a long outmoded and forgotten concept – as he put it, privacy will no longer be a ‘*social norm*⁵⁰’.

43. Bentham’s Panopticon was, of course, intended to reinforce social control of inmates in a prison. As Michel Foucault vividly said, it was ‘*to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power*⁵¹’. I very much doubt that any of us wants to live in a virtual prison where we are all virtual jailors and spies, as well as being virtual prisoners and victims, where each of us is able not merely to see and judge the private lives and foibles of others, but can also freely expose the private lives and foibles of others to the virtual judgment of the internet world at the flick of a switch. An all the more nightmare scenario when one remembers that the nature of the internet world is such that it leaves a permanent record searchable in seconds through search engines such as Google.

44. Whether or not privacy is really dead or dying, the growth of the internet had already posed significant challenges for privacy. Three examples come

⁵⁰ B. Johnson, *Privacy no longer a social norm*, (The Guardian, 11 January 2010)

<<http://www.guardian.co.uk/technology/2010/jan/11/facebook-privacy>>.

⁵¹ M. Foucault, *Discipline & Punish: The Birth of the Prison* (Vintage Books) (1995) at 195.

readily to mind: super-injunctions; video uploading; and Twitter. Super-injunctions were, last year at least, the burning issue of the hour. Celebrities were allegedly rushing to court every other day, seeking interim injunctions that not only enjoined the traditional print media from printing stories about their supposed misdeeds, but which prohibited disclosure of the existence of the injunction. The courts, it was said, were creating a form of totally secret justice. If that was true, and the evidence conclusively showed that it was not⁵², they were not being very successful at least in some cases, because the name of the individual who it was suggested had obtained such an injunction was, in a short time, often being circulated on the internet, through blogs and on Twitter.

45. Super-injunctions are no longer in the news. There are, I think, many different reasons for this. The establishment of the Leveson inquiry may have diverted the media's attention, as well as causing them to moderate their behaviour in anticipation of its findings. Individuals may have adopted a more reticent approach to seeking injunctions to protect their privacy in the light of the additional exposure that breaches of any court order through internet disclosure brings, and in the light of the costs of obtaining and maintaining such injunctions. The uncertainty as to whether an injunction

⁵² Report of the Committee on Super-injunctions (May 2011) *passim*
<<http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/super-injunction-report-20052011.pdf>>.

may be granted could be another deterrent to applying for an injunction following the John Terry case⁵³, and the fact that a failed application adds fuel to the fire. The report of the Committee I chaired has, I would hope, also played a part in showing that the number of so-called super-injunctions was greatly exaggerated, and the recommendations it made, I hope, also ensured that proper procedural safeguards were in place in respect of interim privacy injunctions.

46. The fact that the names of individuals who had obtained anonymised injunctions to protect their privacy were circulated on the internet raises two particular questions concerning privacy. First, it raises a question concerning the rule of law. The injunctions were breached with seeming impunity by many tens of thousands of people. Secondly, it raises a question concerning the rights of others: it was widely reported that a number of celebrities were wrongly identified as having obtained such injunctions. This gives rise to concerns regarding damage to individuals' reputations on the basis of false rumours, as well as invasions of their privacy.

47. Where celebrities are involved, there is perhaps a degree of reluctance on the part of some people to be concerned about the effect of false rumour and invasions of privacy. Such people think that celebrities, who need and

⁵³ *Terry (previously LNS) v Persons Unknown* [2010] EWHC 119 (QB), [2010] 1 FCR 659.

assiduously court the oxygen of publicity, have no right to complain.

However, it should be remembered that the internet isn't simply interested with celebrities. It is democratic, even indiscriminating, in its interest. Any member of the public can upload videos of any other member of the public. You can sit on the tube and find yourself recorded for posterity on YouTube. Sometimes this can bring to light criminality, but in many cases, it can be used to mock and ridicule, or simply to invade privacy. How do we deal with this?

48. Some would suggest that there is nothing we can do about it. That the internet is an entirely lawless zone, the wild west of the 21st Century. But a recent development which should go some way to debunking the myth that the internet is a law-free-zone are the much publicised consequences of the recent Newsnight programme coupled with the editorial decision not to name names in relation to a child sex abuse scandal.

49. A short acquaintance with the way in which internet users responded to many super-injunctions would have given some idea of what could happen. The internet – Twitter in particular – was awash with names. Various people were supposedly identified, but it was no more than speculation, and indeed turned out to be utterly wrong, as became clear in short order. There have been some apologies and prompt out of court settlements on the part of the

mainstream media. But what of the internet: are the tweeters and bloggers beyond the reach of a writ for libel, or the criminal law, where criminal offences have been committed? The answer to that is plainly no. Individuals can be traced through their twitter accounts and their ISPs. The law is capable of enforcement, although there can still be problems when the account is based abroad.

50. In such cases the public interest in enforcing the law in the face of invasions of privacy, or other tortious or even criminal behaviour, is clear. If the law is not enforced, we not only run the risk of undermining the rule of law itself, but we start to chip away at the nature of civil society. Do we become a sniggering, virtual lynch mob prejudging people on rumour and speculation? Do we ignore or debase our need for privacy, to have a space, as Lord Mustill put it, in which we can securely tell others that they should mind their own business?

51. What harm does the absence of such a private space cause to individuals, their ability to grow and develop, to make mistakes and learn from them? In the past, reputation was often a matter of life or death, as the Salem witch trials or the McCarthyite purges of the 1950s demonstrate. If the law did not protect privacy, and was not capable of enforcement, would this come again?

52. The internet may be in the process of having a profound transformative effect on our relationship with privacy and the value we place on it. It may have called into question both our willingness and our ability to enforce the law. It may also have brought into sharp focus the value we place on free speech, and its relationship with privacy. It is here, perhaps above all, where the intersection of legal and technological developments meet and will determine how we develop privacy in the 21st Century.

(5) Privacy in the 21st Century – A more nuanced view?

53. It is sometimes said that the internet has ushered in an age where free speech is for the first time in history truly free. Assuming that is true, it will arguably require a more sophisticated treatment of the conditions necessary to enable freedom of expression than is often proffered. In a large number of cases, a simplistic approach is adopted: free speech good, anything which cuts it down – like a right to privacy – bad. A more nuanced approach, which the courts in the UK have been encouraged to take both by Parliament and by the Strasbourg court, appears to me to be far more appropriate.

54. In some respects, freedom of speech and privacy may actually overlap.

Many people may wish to express themselves in a certain way, but would only feel comfortable about doing so in private. For such people in such

circumstances, the right to privacy is an aspect of the right to freedom of expression. Many of us have felt free to express views about, for instance, political issues, about social issues, about colleagues, about public figures, about friends, only on the strict understanding that those views are treated in strict confidence. We would be constrained from expressing ourselves as we wished if we could not rely on our right to privacy. In this sense, privacy might not be seen as contrary to freedom of expression, but rather an aspect of it.

55. But even putting that point to one side, freedom of expression and privacy are not always in conflict. In some very important cases, privacy is a necessary pre-condition to a full-blooded commitment to freedom of speech. We are all familiar with the right which journalists have to protect their sources. The right is reflected in UK statute⁵⁴ and in Strasbourg jurisprudence, which recognise the central importance which the protection of such sources – that is to say the ability to keep them private – plays in securing a free press. Absent the privilege and the privacy it affords journalistic sources, the press would not be able to play its role in helping to safeguard our democracy. Protecting privacy in this instance is not just in the public interest, it is in the interest of promoting freedom of speech. The privilege is not however an absolute one. The privilege, and the privacy it

⁵⁴ Contempt of Court Act 1981, s 10.

affords, and the role it plays in promoting freedom of speech, can however be set aside in limited circumstances where, for instance, it is necessary to do so in the interests of democratic society.

56. Privacy is not only necessary for effective free speech in some instances, but free speech can also be invoked to justify the protection of privacy rights. Imagine a case where a newspaper is provided with information from a confidential source. The editor knows who the source is, and knows that the story will be even better if he names the source. An untrammelled commitment to freedom of expression would suggest that the editor should be able to name the source. But what of the source's right to privacy? Should it be so easily set aside in the name of freedom of speech?

57. A question such as this was considered by the US Supreme Court in *Cohen v Cowles Media Co* in 1991⁵⁵. The editor in that case relied on his First Amendment rights: his right to freedom of speech could not be abridged. If the US Supreme Court had adopted a simplistic approach to the right to privacy it might well have agreed. It did not though. It required the newspaper to hold to its promise of anonymity. The underlying point being

⁵⁵ 501 U.S. 663 (1991).

that privacy was essential to the source's ability to fully assert their right to freedom of speech⁵⁶.

58. Respect for privacy arises in respect of freedom of speech and of expression in another way. In the case of *Mosley v News Group Newspapers Ltd*⁵⁷, Eady J, while describing the role of the state and the media in respect of individual rights, said that '*[w]here the law is not breached, ... the private conduct of adults is essentially no-one else's business.*'⁵⁸,

59. We are often very interested in the private conduct of others, whether they are our neighbours or public figures. Where public figures are concerned, there is sometimes good reason to be interested. Private conduct may in such cases have a bearing on their public conduct. Sometimes it does not. That General Petraeus is said to have had an affair with his biographer is a matter which interests some members of the public, but it is a more open question whether it is in the public interest to publish the fact. Many people would say that it is, but in many other peoples' view it is a matter between him, his wife and his biographer.

⁵⁶ See E. Barendt, *Privacy & Freedom of Speech*, in A. Kenyon & M Richardson (eds), *New Dimensions in Privacy Law* (CUP) (2006) at 25 – 26.

⁵⁷ [2008] EWHC 1777 (QB), [2008] EMLR 20.

⁵⁸ [2008] EWHC 1777 (QB), [2008] EMLR 20 at [127] – [128].

60. In this regard it is perhaps ironic that as we have become a more liberal society since the swinging sixties, we have also become more intrusive, critical and judgmental of the lives of public figures. We seem more interested in the conduct of our politicians now, than we did when Lloyd George was Prime Minister, or when FD Roosevelt or John F Kennedy was President of the US⁵⁹. But perhaps we are just more easily able to find out what they do in private, and, these days, the media are more willing to report it.

61. One question which we may have to tackle is whether the internet will result in society becoming more critical and censorious – not just of those in positions of power, or of celebrities, but of each other. Or will we simply become unabashed and less censorious as we become ever more familiar with people blogging their intimate thoughts, details of their own and other peoples' lives, loves and sexual liaisons on the net. Whatever the position, we are likely to have to consider how we properly balance the need to protect competing rights, such as the right of one person to blog details of a relationship with the need to protect the privacy of the other person in the relationship.

⁵⁹ See for instance, H. Paterson, *FDR's love nest in the park* (Daily Mail) (25 November 2012) <<http://www.dailymail.co.uk/news/article-2238223/FDRs-menagerie-alleged-mistresses-The-American-presidents-long-list-rumored-love-affairs-romanced-upstate-New-York-cottage.html>>.

62. Moreover, is the growth of blogging, social networking and tweeting giving rise to a danger that we will forget that what people do in private, at least so long as it is not criminal, is normally purely a matter for them? In a world where so much is voluntarily placed in the public square, are we likely to create a culture which expects that all things should be public? More importantly, are we going to find ourselves in the position where people are unable to fully express themselves in private, and therefore at all, for fear of outing on the internet? Are we then likely to drive the ambitious and the risk-takers from the public square; are we likely and more generally to forge a regressive and subtly repressive society?

63. If the public realm expands into the private realm, we will undermine our ability fully to realise freedom of expression and speech. If we cannot talk privately and confidentially with each other, how are we to develop our ideas and beliefs? How are we to make mistakes safe in the knowledge that they will not haunt us in twenty years' time when we are applying for a job? If the mistake is permanently recorded on the internet and readily accessible via Google, will we be judged not as our mature self, but by our private behaviour as a twenty year old?

64. One of the central challenges for us in the years to come, then, would appear to be to ensure that we can give proper effect to the social and philosophical

value of privacy, both in and of itself and as a necessary pre-condition to the full realisation of freedom of speech and expression. In order to meet that challenge we may have to consider more critically what we mean by privacy and freedom of expression, and the way in which these two ideas relate to each other. We are also going to have to consider how these ideas are likely to change in a world online.

65. We may well have to consider how the law of privacy should develop, and how we are going to be able to properly protect it. In this regard the idea, rejected by the Strasbourg court, that where the media is to print a story about someone, they should be required to give prior notice, may well become an idea suited to an old-fashioned world⁶⁰; one where the only media was print media. In a world where anything can be posted online by anyone, the idea of prior notice is one whose time may have gone.

66. In meeting the challenge, the courts, and Parliament, are going to have to consider how to ensure that the law can properly develop to meet the new social environment. Most importantly, we are going to have to ensure that the myth that the law does not apply to the internet is properly dispelled. It is often the case that where the shadow of the law is absent, ethical and social norms collapse or fail to take hold.

⁶⁰ *Mosley v The United Kingdom* [2011] ECHR 774, (2011) 53 EHRR 30 at [132].

67. In addition to dispelling the myth of impunity, we may also need to revisit the question of how we enforce judgments, and how contempt of court protects the proper administration of justice and the rule of law. We may also have to reconsider the nature of damages for breach of privacy, as well as the future development of the tort of misuse of private information and its relationship with freedom of expression. The issues are not straightforward.

68. I leave the final word tonight to Conor Gearty, who recently described the HRA in these terms,

‘ . . . the HRA stands ready as a handy vehicle with which to iron out defects in the law under scrutiny, giving judges a room for manoeuvre that might otherwise not have existed, performing in other words the kind of job once done by equity in the very early days, diluting the rigours of the common law with a dash of justice here and there.’⁶¹

In a world rapidly changing as a consequence of technological advances, we may well have need to iron out defects, old, new and not yet arisen, in the law relating to privacy and its enforcement. In doing so justice should, as always, be our guide.

69. Thank you.

David Neuberger
28th November 2012

⁶¹ C. Gearty, *Book review*, [2013] PL at 179.