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By

George C. Christie

*Reprinted from Civil Justice
Quarterly,
Issue 4, 2012*

Sweet & Maxwell
100 Avenue Road
Swiss Cottage
London
NW3 3PF
(Law Publishers)

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George C. Christie

James B. Duke Professor of Law, Duke University School of Law, Durham, NC

☞ Comparative law; Defamation; Freedom of expression; Mental distress; Right to respect for private and family life

There have been many major developments in the law governing freedom of expression over the last 60 years. Some of these developments have strengthened the primacy traditionally given to freedom of expression by the common law of the English-speaking world. Other developments have been less friendly to freedom of expression. While I would argue that the favourable developments should be heartily welcomed, I shall devote much of the later portion of this article to many of what I consider the less felicitous developments that have created serious challenges for judges charged with adjudicating conflicts between expression and other basic values. In this article I am particularly, but not exclusively, concerned with the conflicts between freedom of expression and privacy. The growing differences between the law in the United States and that in Europe on these issues, is apparent to all. It is too glib simply to assert, as some people echoing Laurence Sterne might be prone to do, that “they order ... this matter better in France”, and leave it at that. The difficulty of enforcing judgments in the United States, in which the defendant has not received the benefit of the protections given to speech by the First Amendment to the Constitution of the United States, is well known.¹ Conversely, as I shall shortly briefly show, there are also hints in some decisions of the US Supreme Court during the past 20 odd years that open up the possibility that the court might use some of the concepts that are being used to favour privacy in Europe to narrow the very wide differences that are now taken for granted between American and European law. I would find such developments regrettable because I believe that the evolution of European law on freedom of expression contains elements that I contend not only seriously impinge on the freedom of expression but also impose impossible tasks on the courts that they are not really suited to perform, and which I hope are never adopted, even in a watered down form, in the United States.

Among the favourable developments have been the restriction, and in the United States even the elimination, of the laws governing blasphemy² as well as some significant limitations on the reach of obscenity laws.³ In the context of civil litigation perhaps the most favourable development has been the narrowing, and

¹ See 28 U.S.C. §§4102–4103, enacted in 2010. Similar “libel tourism” legislation had earlier been adopted in a number of states. See, for example, N.Y.C.L.R. §§302 and 5304.

² See *Burstyn v Wilson* 343 U.S. 495 (1952).

³ See *Pope v Illinois* 481 U.S. 497 (1987).

in the United States arguably the elimination, of the strict liability aspect of the traditional law of defamation. I say arguably because there are hints, to which I shall soon refer, that the Supreme Court may be prepared to take what I would contend is the regressive step of restoring traditional strict liability in certain types of defamation cases. The major positive development in this area has been the series of decisions in the United States that made it impossible for public officials or public figures to recover for defamation if they were unable to show with “clear and convincing evidence” that the defendant uttered his defamatory statements with knowledge of their falsity or reckless indifference to their truth or falsity.⁴ While the House of Lords was not prepared to take this gigantic step, the *Reynolds* case⁵ expanded the qualified privilege of common interest—which allows someone who had in good faith published a false and defamatory statement to someone with whom he shared a recognised common interest to escape liability—to include the “public interest”. This was likewise a major development that somewhat reflected and in turn greatly influenced developments in Australia, New Zealand and then later in Canada.⁶ As amplified in the *Jameel* case,⁷ this mutation of the common interest privilege into a public interest defense, at least in actions against the media, allows them to escape liability for false and defamatory statements if the published material is the product of “responsible journalism” and concerns a matter of legitimate “public interest”. Categories of expression that might claim this protection have been said by various law lords to include political expression, scientific expression, educational expression, and artistic expression, with none of these categories having, as a general matter, any heightened degree of privilege over any of the other categories. Their lordships, as is well known however, were in agreement that the fact that the public is interested in a matter does not mean that the matter is *really* of public interest. That is a question for the judiciary to decide, and it is not, as we shall see, without some serious difficulties. Nor is the problem confined to the United Kingdom. There are some indications that the Supreme Court of the United States might be prepared to cut back on what appeared to be a holding that even in litigation brought by private figures the plaintiff must still show some fault on the part of the defendant with regard to the ascertainment of the truth of his assertions.⁸ Some cases have hinted that the elimination of strict liability may be limited only to actions against the media,⁹ something which would be truly revolutionary, or, as hinted in one case, only to actions in which the statements concerned a matter of general or public concern.¹⁰ This suggests that, even in the United States, we might have a reprise, albeit to a lesser degree, of the issues which courts in the United Kingdom must confront. As we shall see,

⁴ The leading case is of course *New York Times v Sullivan* 376 U.S. 254 (1964). *Gertz v Robert Welch Inc* 418 U.S. 323 (1974), has been generally thought to have extended *Sullivan* to require some showing of fault even in actions brought by private figures. As we shall see that conclusion has been questioned in some later decisions.

⁵ *Reynolds v Times Newspapers Ltd* [2001] 2 A.C. 127; [1999] 3 W.L.R. 1010.

⁶ See *Lange v Australian Broadcasting Corp* (1997) 189 C.L.R. 520; *Lange v Atkinson* [2000] 3 N.Z.L.R. 385 CA; *Grant v Torstar Corp* (2008) 3 S.C.R. 640.

⁷ *Jameel v Wall Street Journal Europe SPRL (No.3)* [2006] UKHL 44; [2007] 1 A.C. 359. In the more recent *Flood v Times Newspapers Ltd* [2012] UKSC 11; [2012] 2 W.L.R. 760, the court rejected what I would agree is an overly restrictive interpretation of what could pass as responsible journalism.

⁸ See *Gertz v Robert Welch Inc* 418 U.S. 323 (1974).

⁹ *Philadelphia Newspapers Inc v Hepps* 475 U.S. 767 (1986); cf. *Dun & Bradstreet Inc v Greenmoss Builders Inc* 472 U.S. 749 (1985).

¹⁰ See *Dun & Bradstreet Inc* 472 U.S. 749 (1985).

defamation is not the only field in which such a reprise might conceivably take place.

At the same time as this amelioration of the traditional law of defamation was taking place, the twentieth century also produced some substantial new challenges to freedom of expression. These will be the primary focus of the remainder of this article. The challenges arose first in the United States. The most important such challenge was the recognition of a law of privacy which reached its zenith in the recognition by the *Restatement (Second) of Torts* §652D of tortious liability for publication of information concerning the

“private life of another ... that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.”

Lord Nicholls in *Campbell v MGN Ltd*¹¹ referred to that provision in the mistaken belief that it represented the current state of the law in America.¹² He was mistaken in that assumption. In *The Florida Star v BJF*,¹³ decided in 1989, the US Supreme Court overturned the award of damages to a woman who had been sexually assaulted, and whose name was posted in the press room of the local sheriff’s office despite a Florida statute forbidding publication of the names of victims of sexual crimes. A reporter who had lawful access to the press room wrote down the woman’s name which was included in a brief report of the incident in a local paper. That there was also a notice posted in the press room that the names of the victims of sexual offenses were not matters of public record and were not to be published, did not alter the situation. In his dissent, White J. declared that, if *BJF* had no remedy:

“I doubt that there remain any ‘private facts’ which a person may assume will not be published in the newspaper or broadcast on television.”¹⁴

While accepting that most applications of §652D would probably now be unconstitutional, the Supreme Court of California grudgingly tried to limit the holdings in the *BJF* case to apply only in actions brought by private plaintiffs concerning matters recorded in public records or, if not contained in public records, were otherwise of public concern.¹⁵ Finally, a subsequent decision of the US Supreme Court refused to allow a tort remedy against someone who had lawfully obtained and then published an illegally obtained recorded conversation of two union officials engaged in a contentious labour negotiation with a local school board because it involved an issue of “public concern”.¹⁶ If that distinction holds up, a person who is in lawful possession of what might be called private information which he knows has been illegally obtained, although without his complicity, might nevertheless be liable for damages in tort if he discloses that information to others unless the information pertained to a matter of public interest and concern. This of course again suggests that the questions confronting the British courts might also surface in America as well.

¹¹ *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 A.C. 457.

¹² *Campbell* [2004] UKHL 22; [2004] 2 A.C. 457 at [22].

¹³ *The Florida Star v BJF* 491 U.S. 524 (1989).

¹⁴ *BJF* 491 U.S. 524 (1989) at 551.

¹⁵ *Gates v Discovery Communications Inc* 34 Cal. 4th 679 (2004).

¹⁶ *Bartnicki v Vopper* 532 U.S. 531 (2001).

A final serious challenge to the primacy of expression is the rise in the United States of the tort of intentional infliction of emotional distress. Many of the actions in Europe based on invasion of privacy, or even Holocaust denial proceedings instigated by private persons, could arguably have been brought under that heading. As eventually described by §46 of the *Restatement (Second) of Torts* in 1965, someone who “by extreme and outrageous conduct intentionally or recklessly causes severe emotional harm to another” is subject to liability to that person. Barring significant last minute changes this provision, in substantially the same form, has been retained in the soon to be published Vol.II of *Restatement (Third) of Torts, Liability for Physical and Emotional Harm*. I find this curious because it is obvious that one of the ways people cause severe emotional harm to others, often outrageously, is by expressive activities and the two times such an action reached the US Supreme Court it had held that no action could constitutionally lie. The first of these occasions involved the famous evangelist Jerry Falwell who was the subject of a spoof in *Hustler* magazine of a well-known ad for Campari in which celebrities described the first time they tried Campari.¹⁷ In the spoof involving Falwell, the “first time” was in a drunken orgy with his mother in an outhouse. The court held that as a public figure Falwell could only recover if *Hustler* had said something untrue about him. In the *Falwell* case the jury had found against him on his libel claim on the ground that no reasonable person would have believed that the *Hustler* spoof was to be taken seriously as an allegation of incest or even that a teetotaling clergy man was a riotous drinker.

One would have thought that this decision might have put the matter to rest and required the *Restatement (Third)* to use less expansive language in the text of the section itself or at least to include further amplification in the current comments of the difficult constitutional issues raised by that provision. And indeed, in the spring of 2011 the court again struck down an attempt to recover for intentional infliction of emotional harm. Unfortunately, however, this decision left some loose ends that, as in the privacy situation, may come home to roost. The case, *Snyder v Phelps*,¹⁸ involved a demonstration organised by Phelps and the members of his Westboro Baptist Church near the church where the funeral of a marine who had been killed in Iraq was taking place. The demonstrators, though peaceful, held up signs saying “Thank God for Dead Soldiers” and other even more vulgar messages in protest of the US military’s changing policies regarding homosexuality. In an eight-to-one decision the court affirmed the Court of Appeals’ overturning of the substantial damages the father of the deceased marine had received in a jury trial at first instance. The court held that, as vulgar and unfeeling as the signs were, the demonstration was peaceful and involved a matter of public concern. One of the majority, as well as the dissenting justice, thought that the plaintiff might have had action under the so-called “fighting words”¹⁹ doctrine, a doctrine which although ostensibly still good law has not been applied by the Supreme Court for 60 years and was expressly rejected in the interim by important federal courts of appeals

¹⁷ *Hustler Magazine v Falwell* 485 U.S. 46 (1989).

¹⁸ *Snyder v Phelps* 131 S.Ct. 1207 (2011).

¹⁹ The leading case is *Chaplinsky v New Hampshire* 315 U.S. 568 (1942). No one could possibly contend that the supposed “fighting words” involved in that case, calling a “city marshal” a “god-damned racketeer” and a “damned fascist”, could possibly subject a person to legal liability today.

decisions.²⁰ Here again as in the privacy situation, by not ruling out a public concern requirement in some types of situations, there is a suggestion that the courts in the United States might possibly have to face some of the same problems that are now confronting the courts in the United Kingdom, problems that, as I shall now attempt to show, are not solvable in a way that gives adequate protection to freedom of expression.

In an article written largely for a British audience, only a fairly brief summary of the present state of the law in the United Kingdom is necessary before I present the reasons why I find these developments unsettling and why I would be very disappointed if they influenced the evolution of the law in the United States. As is well known, in *Campbell v MGN Ltd*,²¹ the House of Lords, in a three-to-two decision, expanded the nascent extension of the principle of “confidentiality” to create what Lord Nicholls more accurately described as a broader right of privacy than anything which had theretofore existed under English law. This was certainly one way of accommodating the requirements of art.8 of the European Convention for the Protection of Human Rights and Basic Freedoms which, since 1998, is directly applicable in litigation arising in the United Kingdom and declares that everyone “has the right to respect for his private and family life; his home and his correspondence”. At the same time art.10 of the Convention declares that everyone “has the right to freedom of expression”. Both these rights are defeasible for a variety of important reasons including “the protection of the rights of others”. Insofar as conflicts between individuals are concerned, the most obvious is that between one person’s right to privacy and another person’s freedom of expression. Resolving disputes involving a conflict between privacy rights and rights to freedom of expression would be difficult in any situation in which the expression consisted of true statements and did not involve any of the traditional common law restrictions on disclosures that violate fiduciary duties or duties arising from agreements to keep certain types of information confidential. The problem was made infinitely more difficult when, following a resolution of the Parliamentary Assembly of the Council of Europe,²² European courts have accepted that the rights of privacy and expression are of equal value. In the *Campbell* case, as is well-known, the House of Lords held that the disclosure that Ms Campbell had been addicted to narcotics was not actionable because she herself had put the issue into play by declaring that she did not use drugs. On whether the *Daily Mirror* could also disclose that she was attending Narcotics Anonymous and publish a photograph of her emerging from a Narcotics Anonymous meeting, their lordships divided three-to-two in Ms Campbell’s favour, although Lord Hope declared he would have ruled for the *Daily Mirror* were it not for the publication of the photograph.²³ It was accepted nevertheless by all the law lords that when the disclosure of information not already common knowledge is challenged on the basis of its being an invasion of the plaintiff’s privacy, a defendant claiming that his statements are protected by his

²⁰ See, for example, *Collin v Smith* 578 F.2d 1197 (7th Cir. 1978), cert. denied 439 U.S. 916. The case involved the failed attempt to deny a “Nazi” group the right to march in Skokie, Illinois, a predominantly Jewish suburb of Chicago, in the process of which an ordinance prohibiting the “dissemination of any material which promotes or incites hatred against persons by reason of their race, national origin or religion” was struck down.

²¹ *Campbell* [2004] UKHL 22; [2004] 2 A.C. 457.

²² Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe. The Resolution leaves no doubt that it was largely prompted by the tragic death of Princess Diana in August 1997.

²³ *Campbell* [2004] UKHL 22; [2004] 2 A.C. 457 at [121].

right to freedom of expression must demonstrate that his expression concerned matters of “public interest”.

Shortly after the *Campbell* decision, the European Court of Human Rights imposed a plausibly more stringent requirement on those seeking to justify expression claimed to interfere with another’s privacy. The case, *von Hanover v Germany*,²⁴ involved Princess Caroline of Monaco and photographs taken of her and her children or of her and male companions either in public spaces or in places clearly visible from public spaces. The German courts had ruled that, as a “figure of contemporary society ‘par excellence’”, she could not complain of photographs taken of her or of her and her male companions in public space or readily visible from public space, although they did grant a remedy for all of the photographs taken of her and her children on the ground that they invaded the family life of Princess Caroline and her children. The European Court for Human Rights rejected the German courts’ reasoning and held that all the photographs invaded Princess Caroline’s privacy. It felt that well-known private figures, such as Princess Caroline, and even public officials were entitled to some privacy even when they were in public space. When expression was challenged on privacy grounds, the speaker could only defeat the challenge if he could establish that his expression contributed to a “debate of general interest to society”.²⁵ This is obviously to grant greater weight to privacy in situations which do not meet that criterion. I have no hesitation in agreeing with the statement of David Thór Björgvinsson, the Icelandic judge who was the sole dissenter when the *Daily Mirror* unsuccessfully tried to overturn Ms Campbell’s victory on the merits in the European Court of Human Rights. Judge Björgvinsson declared:

“The test implied in ... [Lady Hale’s] opinion is the wrong one. From the point of view of journalistic discretion in the presentation of a legitimate story, it is the restrictions on freedom of expression that must be justified by reference to ‘necessity’ and not the publication as such.”²⁶

Regardless of whether one agrees with my position on the wisdom of allowing judges to decide what lawfully acquired information it is permissible to circulate to a wider audience, there is no disputing Judge Björgvinsson’s observation that, despite the insistence that freedom of expression and privacy are of equal value, as a practical matter one or the other value will be given primacy. In the United States that primacy will be given to expression, the only question will be how much primacy. In Europe, as all the cases indicate, privacy will normally be given primacy with the only question being again how much. This is inevitable. The belief that the matter can be satisfactorily worked out by a process of case-by-case adjudication in a way that expression and privacy are in fact accorded equal value is chimerical. It will be recalled that in the *Campbell* case, Lord Carswell expressly conceded that different judges could legitimately have decided that case differently.²⁷ Indeed, of the nine judges who heard the case—one at the trial level,

²⁴ *Von Hanover v Germany* (59320/00) [2004] E.M.L.R. 21; (2005) 40 E.H.R.R. 1.

²⁵ *Von Hanover* [2004] E.M.L.R. 21; (2005) 40 E.H.R.R. 1 at [76].

²⁶ *MGN Ltd v United Kingdom* (39401/04) [2011] E.M.L.R. 20; (2011) 53 E.H.R.R. 5 at [4] of his “partly dissenting opinion”. As is well known, the European Court, with some justification, unanimously ruled that the costs levied in that case were excessive.

²⁷ *Campbell* [2004] UKHL 22; [2004] 2 A.C. 457 at [168].

three in the Court of Appeal, and five in the House of Lords—five ruled for the defendant and only four for Naomi Campbell. She of course won because she won over three of the five law lords. The same observation was made by Judge Cabral Barreto in his brief separate opinion in the first *von Hannover* case. He noted that it would

“never be easy to define in concrete terms the situations that correspond to this ‘legitimate expectation’ [of privacy] and a case-by-case approach [was] therefore justified”,²⁸

while, at the same time, he admitted that such a “casuistic approach may also give rise to differences of opinion”. Why anyone should be surprised at this result is to me unfathomable. Any process that is truly based on ascertaining what is appropriate under all circumstances is bound to lead to conflicting results in similar cases because each case will to some extent be *sui generis*. That is why, in order to give direction to lower courts, appellate courts have been inclined to giving primacy to one or the other supposedly equal value in some particular type of cases. Any attempt to resort to rule-like factual solutions to put some constraints on such a decisional process can itself result in some very legalistic solutions. After Princess Caroline prevailed in the first *von Hannover* case, similar photographs of her were subsequently published. One of these sets contained pictures of her skiing in Switzerland. In the second *von Hannover* case,²⁹ the publication of this set of photographs was permitted because it was part of a story about what Prince Rainer’s children were doing when he was seriously ill. Princess Caroline’s sister had stayed at home with their father, but Princess Caroline and her brother, Prince Albert, were each somewhere else on holiday. The story, since it involved the ruler of Monaco, was held to be pertinent to a “debate of general concern”.

There is a more serious epistemological problem with a process of case-by-case balancing of two basic interests of supposedly equal value. To balance two of anything one needs some kind of common metric on the basis of which the two can be compared and a way of determining the weight to be accorded to the two competing entities. Even if one had a plausible method of weighing the value of expression and privacy in a given situation, one faces the greater problem that expression and privacy do not really have a common metric. Freedom of expression is largely a political value. It does have some moral value but, in the contexts which we are discussing, freedom of expression is a basic political value that relates to the citizen’s relationship to the state and, within the state apparatus, to the political appropriateness of having courts decide what the individual is permitted to say to others. Privacy, on the other hand, in the contexts that we are discussing, is largely a moral value. Privacy obviously has some political value but its political value is greatest when an individual is seeking to preserve his privacy from invasion by the state. There is no objective measure that I know of that can adequately solve those conflicts by some sort of balancing process in anything approaching an objective rather than a subjective manner. I certainly would agree that, from a

²⁸ *Von Hannover v Germany* (59320/00) [2004] E.M.L.R. 21; (2005) 40 E.H.R.R. 1 separate Opinion of Judge Cabral Barreto.

²⁹ *Von Hannover v Germany* (40660/08) [2012] E.M.L.R. 16.

moral perspective, one would be inclined to favour Princess Caroline's privacy interest and perhaps also the privacy interest of Naomi Campbell. On the political scale, namely the state's ability to prevent an individual from disclosing to others information that he has lawfully acquired through no breach of a pre-existing legal obligation, I do not believe the balance is even close. When there are different values in the varying scales on which expression and privacy can be weighed, it is no wonder that what happens is that one of the two competing equal rights will get preference as is indeed the case in Europe and the United States.³⁰

One appreciates that the notion of human rights which underlies all modern human rights conventions suggests something akin to a set of universal natural rights that are the basic building blocks upon which all modern "just" societies are based. As such it is not surprising that the rights recognised in these conventions take on a life of their own. As a matter of sheer logic one could accept that Eady J.'s defence of super-injunctions is well founded.³¹ He rightly points out that in defamation actions a judgment for the plaintiff gives him vindication. One might also say that an award for the unauthorised use of someone's name for commercial advantage compensates the plaintiff for a lost commercial opportunity. By contrast, in a case like *Campbell*, and even more so in the cases in which super-injunctions have been granted, the whole point of the legal proceeding is to prevent the information in question from being made public and not to insure that the plaintiff receives the economic benefit of the public disclosure of that evidence. That is undeniable, but what conclusions follow?

One could arguably find justification for resorting to super-injunctions in art.6 of the European Convention which guarantees "everyone ... a fair and public hearing" but permits closed hearings for a number of stated reasons one of which is "the protection of the private life of the parties". If taken literally, that permits closed hearings well beyond the traditional exceptions of national security, juvenile, and possibly family matters heretofore recognised by common law courts. One could find some support for such an expansive view of art.6 in the decision of the European Court of Human Rights in *Egeland v Norway*.³² That case involved two newspapers that, in reports about the conviction of a woman for a particularly brutal triple murder, included a photograph of the woman as she was leaving the courthouse after her conviction and sentencing to 21 years in prison. The editors of the two newspapers were acquitted in the trial court in a prosecution based on a Norwegian statute forbidding the taking of photographs of accused or convicted persons on their way to and from court. The Supreme Court of Norway, however, found the defendants guilty and imposed a fine upon them. When this case was taken to the European Court of Human Rights that court found no violation of the editors' rights to freedom of expression under art.10 because the application of the Norwegian statute in the circumstances under consideration was necessary not only to protect the privacy interests of the criminal defendant but also to avoid putting additional pressure on a defendant so as to ensure his right to the fair trial guaranteed by art.6 of the Convention.

³⁰ I have discussed these issues at great length in G. Christie, *Philosopher Kings? The Adjudication of Conflicting Human Rights and Social Values* (Oxford: Oxford University Press, 2011), particularly in Pts IV and V.

³¹ Sir David Eady, "Injunctions and the Protection of Privacy" (2010) 29 C.J.Q. 411.

³² *Egeland v Norway* (34438/04) (2010) 50 E.H.R.R. 2.

From my perspective I prefer the approach taken by Lord Steyn in the case of *Re S (A Child)*.³³ In that case the House of Lords denied a request that, in reporting about a criminal trial, the press should be restrained from printing the name of an eight-year-old boy as well as the names and pictures of his mother and his deceased older brother for whose murder the mother was being tried. While the case was pending the newspapers involved agreed not to publish the surviving brother's name. In the judicial proceedings there was expert testimony as to the possible harm to the younger brother should his schoolmates learn of his relationship to those involved in criminal prosecution. The mother, not surprisingly, supported this attempt to restrict the newspapers' reports about the trial. The trial judge and two of the judges on the Court of Appeal refused the injunction. Hale L.J., as she then was, dissented. The House of Lords affirmed the denial of the injunction. In his speech, with which all the other four members of the panel agreed, Lord Steyn said:

"In agreement with Hale LJ the majority of the Court of Appeal took the view that Hedley J had not analyzed the case correctly in accordance with the provisions of the ECHR. Given the weight traditionally given to the importance of open reporting of criminal proceedings, it was in my view appropriate for him, in carrying out the balance required by the ECHR, to begin by acknowledging the force of the argument under article 10 before considering whether the right of the child under article 8 was sufficient to outweigh it. He went too far in saying that he would have come to same conclusion even if he had been persuaded that this was a case where the child's welfare was indeed the paramount consideration under section 1(1) of the Children's Act 1989. But that was not the shape of the case before him."³⁴

Lord Steyn's position that fair and open trial provisions are, if anything, reasons for emphasising the importance of freedom of expression rather than a neutral factor or a reason for giving increased importance to a privacy interest makes eminent good sense to me.

My conclusion is simply this: a jurisprudence claiming to value expression and privacy equally will, in practice, give prima facie primacy to either the privacy interest or the interest of freedom of expression, for otherwise there will be chaotic inconsistency of result. My own preference is to give primacy to freedom of expression because, from a political perspective, it is the foundation of a democratic government. My second conclusion is that it is an elitist and extremely unwise policy in an increasingly heterogeneous world to let judges decide what people should know. I leave aside the obvious point that in a world connected by the internet most such attempts will fail because as long as a sufficient number of people are interested in the subject the information will get out. Forbidding the publication of intimate details of Tiger Woods' private troubles in the United Kingdom³⁵ was an exercise in futility since that information was already widely available in the United States and readily accessible online.

³³ *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 A.C. 593.

³⁴ *Re S (A Child)* [2005] 1 A.C. 593 at [37].

³⁵ See, for example, <http://www.guardian.co.uk/sport/2009/dec/11/tiger-woods-gags-english-media> [Accessed July 31, 2012].