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IMAGINING PRIVACY IN THE COMMON LAW: OVERCOMING THE BARRIERS TO A COMMON LAW TORT OF INTRUSION

THOMAS D. C. BENNETT

ABSTRACT

This thesis is concerned with the relevance of imagination to the task of judicial elaboration of the common law. It brings this issue into focus by concentrating its analysis on the “intrusion lacuna” in domestic tort law’s protection of privacy interests. The thesis proposes that this lacuna, whereby the common law lacks a tort of intrusion into privacy, can be explained by identifying two “barriers” to the adoption of such a tort. A “formal” barrier inhibits development by causing the courts to believe that the development of a novel privacy tort would amount to an illegitimate exercise in judicial activism. A “semantic” barrier arises out of the difficulty in conceptualising the amorphous term “privacy”, which – it is often (wrongly) thought – is not amenable to sufficiently tight definition to drive the development of heads of liability apt to protect it.

The presence of both barriers indicates the dominance of a particularly restrictive mode of thinking in judicial decisions on privacy in recent years. This strongly resembles a mode of thinking associated with the left hemisphere of the human brain. Where this mode of thinking dominates, attentiveness to context is significantly diminished. The result is a privacy jurisprudence that possesses little awareness of the broader legal and social context within which it takes place. Crucially, this left hemisphere-dominated mode of thinking inhibits the exercise of imagination in our privacy jurisprudence.

The thesis argues that only by engaging in a more imaginative jurisprudence can the two barriers be overcome. To that end, it constructs a working understanding of “legal imagination” which makes plain the core role that attentiveness to context plays in creative endeavours, including developing the common law. It concludes that, if an intrusion tort is to be developed by the courts, they will first have to adopt this more imaginative jurisprudence.

IMAGINING PRIVACY IN THE COMMON LAW:
OVERCOMING THE BARRIERS TO A COMMON LAW TORT OF INTRUSION

THOMAS DANIEL CYNVELIN BENNETT

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Once upon a time, this thesis was going to be about the impact on English privacy law of the Human Rights Act 1998. According to the original research proposal, it would “answer the question of whether or not the courts have developed a uniform approach to the application of the HRA in a direct, horizontal manner, or whether there are still significant areas of disunity within the judiciary as to the way in which the Act should be applied.”

Well, that isn't what the thesis turned out to be about at all. It's been eight years since I first interviewed at Durham on the basis of that proposal. In that time, probably inevitably, things have changed. I've changed. The way I look at the law has changed. I've learned plenty and reworked my views on this (and other) fields of legal study time and time again. And throughout this process I've been fortunate to have a patient mentor who not only has the remarkable quality of realising it's generally best just to let me alone to get on with it, but who has responded with astonishing enthusiasm each time I've turned up for a supervision and, beaming, proclaimed a “new direction” for the thesis.

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- Thomas DC Bennett, 'Privacy, third parties and judicial method: *Wainwright*'s legacy of uncertainty' (2015) 7(2) *Journal of Media Law* 251
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- Thomas DC Bennett, 'Emerging privacy torts in Canada and New Zealand: an English perspective' (2014) 36(5) *European Intellectual Property Review* 298
- Thomas DC Bennett, 'Privacy, Corrective Justice and Incrementalism: Legal Imagination and the Recognition of a Privacy Tort in Ontario' (2013) 59(1) *McGill Law Journal* 49
- Thomas DC Bennett 'The Relevance and Importance of Third Party Interests in Privacy Cases' (2011) 127 *Law Quarterly Review* 531

Much of section 3 in Chapter 2 appears in 'Privacy, third parties and judicial method: *Wainwright*'s legacy of uncertainty'. An earlier version of some of this material appears in 'The Relevance and Importance of Third Party Interests in Privacy Cases'.

An earlier version of the analysis of the *Jones* case in Chapter 5 is the focus of 'Privacy, Corrective Justice and Incrementalism: Legal Imagination and the Recognition of a Privacy Tort in Ontario'. Some aspects of this, and an earlier version of the analysis of the *Holland* case (also Ch.5), appear in 'Emerging privacy torts in Canada and New Zealand: an English perspective'. A small portion of Chapter 5 (on the Australian position) appears in 'Privacy, Free Speech and Ruthlessness: The Australian Law Reform Commission's Report, *Serious Invasions of Privacy in the Digital Era*'.

Introduction

Imagining Privacy in the Common Law

1. A Tale of Two Problems

This thesis is concerned with two problems in English law. The first of these problems is relatively narrow in scope and has been well-documented.¹ It is the lacuna present in English tort law in respect of protection against intrusion-type violations of individuals' privacy. Intrusion-type violations of privacy are those that involve physical intrusions into personal space or property, as well as unwanted watching, recording or accessing of a person or their private information.

The USA has, since the *Second Restatement of Torts*, recognised intrusion upon a person's seclusion as tortious, in the following terms:

One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person.²

Other common law jurisdictions, including Ontario and New Zealand, have gone on to recognise intrusion-type torts in recent years, inspired – in no small part – by the American tort.³ By contrast, England, like Australia, has not.⁴ Whilst a cause of action lies in English tort law for protecting individuals' private information against unauthorised publication or dissemination (behaviour that falls within the remit of another of the USA's four, distinct privacy torts⁵), the courts in this jurisdiction have not yet recognised a head of liability apt to deal with wrongful intrusive conduct. A

¹ See notes 6-9, below, and accompanying text.

² *Restatement of the Law (Second): Torts* (2d), vol 3 (American Law Institute, 1977) 376.

³ When, in Chapter 5, we consider two cases in which intrusion torts have been recognised, from Ontario and New Zealand, we will see that both explicitly consider the US position in some detail.

⁴ Although a recent report of the Australian Law Reform Commission recommended the statutory introduction of an intrusion tort. See *Serious Invasions of Privacy in the Digital Era* (ALRC Report 123); also, for analysis, Thomas DC Bennett, 'Privacy, Free Speech and Ruthlessness: The Australian Law Reform Commission's Report, *Serious Invasions of Privacy in the Digital Era*' (2014) 6(2) *Journal of Media Law* 193.

⁵ William Prosser, 'Privacy' (1960) 48(3) *Cal LR* 383, 389.

number of writers have lamented this gap in the law. Nicole Moreham has consistently argued for over a decade that the courts ought to develop protection against privacy violations that occur by way of intrusive conduct.⁶ Patrick O’Callaghan is clearly concerned by the gap, though he seems resigned to its ongoing presence.⁷ Raymond Wacks, who was once deeply sceptical of the suitability of privacy as an interest amenable to legal protection,⁸ has recently come full circle and proposed the statutory creation of an intrusion tort (for which he has prepared a draft Bill).⁹ Moreham and Wacks in particular make strong arguments in favour of recognising or creating an intrusion tort. I will not seek to replicate those arguments in this thesis.

Instead, when I consider this issue, I will seek to contribute four matters to the intrusion debate that have not received sufficient attention. First, I offer an original analysis of *why* an intrusion tort has not yet come into being. Second, I explain *how* an intrusion tort *could* come into being through development of the common law. These related issues currently lack coverage in mainstream commentary.¹⁰ Moreham, for instance, argues for the recognition of an intrusion tort without specifying in detail how the courts might achieve this, save for the assertion that such common law development must be “incremental”.¹¹ In addition, I frame these issues in a novel way. I argue that scrutiny of key judicial decisions reveals the presence of two “barriers” to the recognition of such a tort – these constitute the third and fourth of my original contributions to this debate. The first of these is what I term the “formal” barrier: the courts consistently regard themselves as precluded from developing an intrusion tort by virtue of the constitutional limits on their law-making powers and the absence of favourable precedent in the privacy field. The second barrier I refer to as the “semantic” one; the judiciary (in no small part due to widespread academic disagreement surrounding the concept) has encountered difficulty in making

⁶ NA Moreham, ‘Douglas and others v Hello Ltd – the Protection of Privacy in English Private Law’ (2001) 64(5) MLR 767, 770; NA Moreham, ‘Privacy in the Common Law: A Doctrinal and Theoretical Analysis’ (2005) 121 LQR 628; NA Moreham, ‘Beyond Information: Physical Privacy in English Law’ (2014) 73(2) CLJ 350; NA Moreham, ‘Liability for listening: why phone hacking is an actionable breach of privacy’ (2015) 7(2) Journal of Media Law 155.

⁷ Patrick O’Callaghan, *Refining Privacy in Tort Law* (Springer-Verlag 2013).

⁸ Raymond Wacks, ‘The Poverty of Privacy’ (1980) 96 LQR 73.

⁹ Raymond Wacks, *Privacy and Media Freedom* (OUP 2013).

¹⁰ Whilst Wacks focuses on a method for reform, he prefers the statutory route to redressing the intrusion lacuna; my analysis deals with a common law approach.

¹¹ NA Moreham, ‘Beyond Information’, n 6, 364.

sufficiently precise use of the term “privacy” to utilise it confidently to drive forward the recognition of new liability rules. Put more bluntly, the judges think the concept of privacy is both too amorphous and too broad to be recognised as an action in itself.¹² They see it as too unwieldy a concept to ground a cause of action beyond one focused on a limited range of informational privacy interests (the existing action for misuse of private information).¹³ The judiciary has been troubled by the prospect of a general, “blockbuster” tort of privacy and this manifests in a refusal to contemplate novel heads of liability that would expand the range of privacy interests protected by the common law (for instance, into intrusion upon seclusion).¹⁴

In thus separating the formal (doctrinal) issues from the semantic ones, I adopt an approach that is unique in the English privacy field. Moreover, I argue that once this mode of analysis is adopted, it becomes apparent that these barriers are, in fact, illusory. They do not represent the unassailable obstacles for which they are regularly mistaken by the courts. This analysis leads me to make my second contribution based on the barriers thesis. This is to argue that both barriers can be overcome and to prescribe methods – tailored to each – by which this could happen. Thus far, then, the thesis has identified a problem, traced its roots, separated out its elements, challenged each and prescribed solutions. Yet in the course of my research, I have come to the conclusion that the barriers thesis actually represents the identification of a much deeper problem. And to my mind, it is this deeper problem that requires a solution far more urgently than does the first.

Both the formal and semantic barriers, I contend, are illusory. But this does not make them any less present or troubling in the minds of the judges before whom come opportunities to develop greater privacy protections. For these illusions are powerful ones; they lead judges to think there are certain things that they cannot do – including recognising a broader, privacy-protecting head of tort liability. Moreover, these barriers are not confined solely to the law of privacy. For the concerns that underpin

¹² See *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406, [18] (Lord Hoffmann). In *Wainwright*, Lord Hoffmann gives the only full judgment, with which the rest of the House of Lords agrees.

¹³ See, for example, *Douglas v Hello! Ltd (No.6)* [2003] EWHC 786 (Ch), [2003] 3 All ER 996, [229(iii)] (Lindsay J).

¹⁴ *Wainwright v Home Office* [2001] EWCA Civ 2081, [2002] QB 1334, 1351 (Mummery LJ).

the formal barrier – the perception of strong institutional and constitutional constraints on judicial power – pervade judicial common law thinking. Likewise, semantic under-determinacy troubles the judiciary not just in privacy matters but across the common law spectrum. (Consider the inherent difficulty in defining such a commonly-used term as “reasonableness”.¹⁵) The fact that both barriers have corollaries across the common law spectrum suggests some deeper root cause that pervades common law reasoning. This, then, is the deeper problem with which the thesis is concerned.

I will contend that the root cause of both barriers’ presence in common law reasoning is a particular, narrow mode of thinking. It is perhaps best explained by the psychiatrist Iain McGilchrist’s account of “left hemisphere thinking”.¹⁶ According to McGilchrist, this is a narrow, insular and self-referential mode of thought, capable of detailed and highly technical analysis. It is, however, inattentive to (and takes place in ignorance of) broader contextual matters that might render its highly technical conclusions incorrect, overly limited or obsolete. Attentiveness to broader context, vigilance to the world “out there” and receptiveness to novelty are features of the mode of thinking that McGilchrist associates with the right hemisphere of the human brain. For the purposes of this thesis, it does not matter whether McGilchrist is correct in attributing these modes of thinking to one hemisphere or the other in terms of their *location*. What matters is his observation that, in order to function properly (that is, to exhibit normal as opposed to pathological thought processes), the human brain requires co-operation between these two modes of thinking. Both modes of thinking must work in tandem in order sensibly and accurately to attribute meaning to observed phenomena and to make decisions about how to react to them. This is of particularly acute necessity when engaging in complex creative endeavours, such as those involved in common law elaboration. Irrespective of whether the bi-hemispheric analysis of the brain is neurologically correct (in terms of *location*), the implications of this collaborative mode of thinking, and of its absence in recent English privacy jurisprudence, are central to this thesis’ concerns.

¹⁵ See, for example, Benjamin C Zipursky, ‘Reasonableness in and out of Negligence Law’ (2015) 163 *University of Pennsylvania Law Review* 2131; Cynthia Lee, ‘The Elusive Meaning of Reasonableness’ (ch.8) in *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom* (New York University Press 2003).

¹⁶ Iain McGilchrist, *The Master and his Emissary: The Divided Brain and the Making of the Western World* (Yale University Press 2010).

When we consider the formal and semantic barriers, it becomes apparent that the mode of thinking informing and propagating the existence of both exhibits left hemisphere characteristics and excludes the kind of widely vigilant, broad attentiveness of right hemisphere thinking. For, in respect of the formal barrier, the self-referential nature of courts' rigid adherence to the limits of existing precedent, and the highly technical analyses conducted by some judges of the limits of their law-making role, pays little heed to the broader context within which these issues arise. Less restrictive conceptions of the judicial role are available and have been recognised by English courts,¹⁷ but in the privacy field a highly restrictive conception dominates; the courts simply do not pay attention to less restrictive conceptions.

When we consider the semantic barrier, we again see a preference for left hemisphere thinking; "privacy" is considered not in its broader context but in the abstract and, crucially, in isolation. Academic scholars in particular struggle to attribute meaning to it by seeking to locate its One True Meaning and to exclude all other possible meanings. Judges quickly find themselves struggling to make useful sense of the incomplete and consensus-free picture formed by the now vast literature, and are driven to conclude that privacy lacks a sufficiently objective, settled meaning to be useful as the foundation for legal development. But these rather insular analyses of privacy represent only narrow slices of the range of meanings in which the term is used in its broader societal context.¹⁸ The endeavour to locate the true, once-and-for-all meaning of privacy is thus shown to be a false errand. For, as Daniel Solove observes, the term "privacy" is pluralistic in nature.¹⁹ A failure to appreciate this leads scholars to propose definitions of the concept that, whilst purporting to be all-encompassing, invariably end up being either over- or under-inclusive (and sometimes even both).²⁰

The problem underlying the existence of the barriers, then, is the dominance of a left hemisphere style of thinking, present in both judicial and academic circles. This

¹⁷ For example, *Donoghue v Stevenson* [1932] AC 562, 1932 SC (HL); *Anns v Merton LBC* [1978] and *Watson v British Board of Boxing Control* [2000] EWCA Civ 2116, [2001] QB 1134 AC 728. See further section 3.1.2 in Chapter 1.

¹⁸ I consider these insular analyses in Chapter 3.

¹⁹ Daniel J Solove, *Understanding Privacy* (Harvard University Press 2009).

²⁰ *Ibid.*

suggests that English privacy law is, in effect, suffering from a pathology. Right hemisphere thinking – broad attentiveness to context – whilst not wholly absent, is routinely relegated to the side lines. Narrowly technical and formalistic thinking predominates. As a result, possible avenues of legal development – such as the recognition of an intrusion tort – pass unnoticed by the courts. Not only are they not perceived as possibilities; they are often not perceived at all.

An obvious criticism, then, that could be levelled at the English courts for failing, so far, to provide adequate protection in tort against intrusions into privacy, is that they have been sorely lacking in creativity. This is not an original criticism; indeed it lies at the heart of criticisms levelled at the courts in respect of privacy protections in recent decades. But it is not useful criticism. For merely telling a group of persons or an institution that they ought to be more creative is to tell them nothing of substance. It is to provide counsel without content, to borrow an aphorism from Stanley Fish.²¹

And yet it is intuitively apparent that a lack of creativity does have something to do with the problems with which I am concerned. This is a line of analysis that is worth pursuing, for it leads us to be able to provide more useful guidance than we might at first think. “Creativity” calls to mind “imagination”, and the concept of “legal imagination”, whilst not a mainstream idea, has gained currency in jurisprudential circles in recent years. In the course of my research, I was initially intrigued and encouraged by the possibility that greater or more effective use of “legal imagination” – whatever that might be – by the courts might provide the answer to this lack of creativity. Soon, however, I was frustrated by it. For the concept lacks detailed explication in any of the primary works that invoke it. At this point, the death knell of Fish’s criticism rang loudly in my ears; I found myself drowning in a sea of obscurity and abstraction. However, I have become convinced that, once the concept of legal imagination is unpacked and properly understood, it can provide us with an answer that will assist in moving the debate forward. But what it cannot do is provide a magic button that, if pressed, would simply gift us the perfect route towards the recognition of an intrusion tort.

²¹ Stanley Fish, ‘Dennis Martinez and the Uses of Theory’ (1987) 96 Yale Law Journal 1773, 1774.

In order to understand what “imagination” means in the legal context, we must seek to understand it at a more fundamental level. We must understand what the imaginative process *is* and what it involves. In order to shed light on it, I consider both philosophical and psychiatric approaches to defining and understanding the imagination. When I do so, two things become clear. First, imagination is not synonymous with creativity. When it is used as such, the word “imagination” is used under-inclusively. Imagination is best understood as a process that is as much about perception and meaning-attribution as it is about creativity. Second, the creativity that *can* (but not necessarily will) result from this process – and the novel ideas it can produce – is a very particular type of creativity. Imagination enables us to produce ideas that are novel in form, but not in substance. At base, all imagination involves a re-arranging, re-working and re-combining of existing “sense data”. This is a keystone of empiricist philosophy. But it is borne out not just in philosophy; it appears, time and again, across a number of disciplines. It features heavily in contemporary psychiatry’s understanding of imagination,²² for example, as it also does in musicology²³ and literary criticism.²⁴

I do not think that this fundamental empirical idea – that human imagination is a formal rather than a substantive endeavour – is wrong. But even if it is, I do not need to defend this conception of imagination as necessarily accounting for all imaginative human thinking across all contexts. For I am seeking to explain it specifically in the legal context. And in the legal context, it is not particularly controversial to say that lawyers are, in effect, curators; legal rules and other authoritative sources of law (such as legal principle) are the artefacts that they curate. Lawyers and judges seek to collect these existing legal materials – precedent, statute, principle and so forth – and arrange and re-arrange them so as to produce and communicate ideas. This they do by constructing arguments, judgments and, sometimes, novel legal rules from them. Seen in this light, arguments over the legitimate extent of judicial “activism” are really arguments about the sorts of source data that are the appropriate building blocks of novel legal norms

²² Arnold H Modell, *Imagination and the Meaningful Brain* (MIT Press 2006).

²³ David Hargreaves, Dorothy Miell and Raymond MacDonald (eds), *Musical Imaginations: Multidisciplinary Perspectives on Creativity, Performance, and Perception* (OUP 2012).

²⁴ IA Richards, *Coleridge on Imagination* (Indiana University Press 1965). The reader may be comforted to know that I do not propose to also delve into musicology or literary criticism in this already very busy thesis.

and the extent of the radicalness of the re-working of those materials that is permissible (or, possibly, desirable).

Ultimately, that is an unavoidably normative debate. And I do not seek here to provide an answer to it. Indeed, I am unconvinced that there can ever be any definitive normative answer. But understanding imagination properly tells us something that is nevertheless important. Whilst I cannot prescribe a particular mode of thinking that will *inevitably* lead a court to recognise an intrusion-type tort, I can demonstrate that a failure to think in an “imaginative” way – one that is attentive to the broad, background context – will absolutely prevent the courts from overcoming the formal and semantic barriers. For attentiveness to that background context enables meaning to be properly attributed to observed phenomena and thus enables those phenomena to be fully understood. It is only by engaging in this more “imaginative” thinking that these barriers can be overcome. And here I must be absolutely clear; I do not argue that more imaginative thinking will *necessarily* result in the barriers being overcome. Rather I argue in the negative; a failure to think more imaginatively can only result in the barriers continuing to obstruct the development of more sophisticated and comprehensive common law privacy protections. Whether judges thinking more imaginatively *actually* will overcome the barriers, only time will tell. All my argument can do is create space for the possibility that the barriers may be overcome.

Ronald Dworkin famously talks of the need to see law in its “best light”.²⁵ He entrusts the task of doing so to the judiciary, although he acknowledges it is one of Herculean proportions. The “best light”-based metaphor he makes use of is one that can provide an illustration of what I am arguing. I argue that a failure to be attentive to broad, background concerns prevents law from being fully illuminated at all. To see the law only in the manner of the left hemisphere is to see it in semi-darkness. In such circumstances, the Dworkinian enterprise cannot even hope to get off to a decent start; Hercules will be unable to see properly the object of his task. To borrow a phrase from Ludwig Wittgenstein (that will have particular relevance when we consider the

²⁵ Ronald Dworkin, *Law's Empire* (Hart 1998) ch.2.

semantic barrier), such an approach would render us “aspect blind” to important and relevant matters that might influence the decision-making process.²⁶

This thesis, then, is above all about judicial methodology. It is about the root causes of difficulties in envisaging common law development. It is about what it would mean to engage in a more imaginative jurisprudence. And it looks at these matters through the lens of the English law of privacy. But whilst it focuses on privacy, there is every reason to think that the issues raised in this thesis are of potentially far broader application. For an approach to legal reasoning that is inattentive to broad contextual matters is impoverished. Attending strictly to matters of precedent and narrowly construing the constitutional limitations on judicial activism hinders much of the creative enterprise traditionally associated with the courts – particularly in tort law. It may be that, on this point, public lawyers and private lawyers simply perceive the appropriate conception of the judicial role differently. Much public law scholarship is concerned with the constraints under which the judiciary operates, with the aim of limiting the powers of unelected judges to overturn the decisions of (in many cases) elected politicians, in the name of democracy.²⁷ By contrast, much private law scholarship proceeds on the understanding that the majority of private law doctrine is – necessarily and quite legitimately – developed by judicial action through common law cases. Put simply, “incrementalism” seems to sound as a limitation on judicial power in the ears of public lawyers, whereas private lawyers tend to see it primarily as an enabling device.

²⁶ Ludwig Wittgenstein, *Philosophical Investigations* (GEM Anscombe tr, 3rd edn, Basil Blackwell 1978) 213.

²⁷ The classic domestic statement of scepticism about judicial power is JAG Griffith, ‘The Political Constitution’ (1979) 42(1) MLR 1. A leading contemporary collection is T Campbell, KD Ewing and A Tomkins, *The Legal Protection of Human Rights: Sceptical Essays* (2nd edn, CUP 2011). For an influential theoretical account see Jeremy Waldron, *Law and Disagreement* (Clarendon Press 1999). The literature urging the need for judicial deference is now extensive, but see, for example, Conor Gearty, *Principles of Human Rights Adjudication* (OUP 2005), D Nicol, ‘Law and Politics after the Human Rights Act’ (2006) PL 722, and D Nicol, ‘Are Convention Rights a No-go Zone for Parliament?’ [2002] P L 438. For accounts arguing for a more moderate doctrine of ‘due deference’ see Murray Hunt, ‘Sovereignty’s Blight: Why Contemporary Public Law Needs the Concept of “Due Deference”’ in N Bamforth and P Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart 2003) and Aileen Kavanagh, ‘Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication’ in G Huscroft (ed) *Expounding the Constitution: Essays in Constitutional Theory* (CUP 2008).

2. A Route Map

The following will serve as a route map for the presentation of the argument in this thesis. The first two chapters concern the “formal barrier”, which is a complex issue that requires detailed examination. In Chapter 1, I start by giving an account of the status quo in English privacy law. I demonstrate that, whilst there has been development of the law pertaining to the protection of private information against unauthorised dissemination (albeit not always wholly clear or coherent), there remains a significant lacuna in respect of intrusive conduct. I also outline the contributions of key scholars to the intrusion debate and engage with Nicole Moreham’s recent argument that the intrusion lacuna has (at least partially) been resolved by the *Gulati*²⁸ case (which concerned several now infamous incidents of phone hacking by tabloid journalists).²⁹

In the second and third parts of Chapter 1, I explore and critique the restrictive, formalistic conception of the judicial role that has come to dominate the judicial landscape in the field of privacy. This conception has, at its heart, a commitment to a formalistic conception of the rule of law of the sort associated with the work of Joseph Raz. There are, however, broader conceptions of the judicial role that find mainstream expression in other areas of English law (including in negligence and nuisance). The third part of Chapter 1 presses this analysis further by identifying a spectrum of variants on the concept of “incrementalism” (referring to the method by which judges are said to elaborate the common law “incrementally”). Identification of the spectrum militates against the notion that a proper understanding of the rule of law’s requirements mandates that only a narrow approach to incremental common law development be adopted; it will be argued that wider conceptions of incrementalism – as featured in the accounts of adjudication offered by Richard Mullender and Stephen Perry – also form part of the English common law landscape. This sets the scene for the examination in Chapter 2 of key judgments in privacy law that exhibit a profound inattentiveness to the richness of this spectrum.

²⁸ *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch), [2016] FSR 12.

²⁹ NA Moreham, ‘Liability for Listening: why phone hacking is an actionable breach of privacy’ (2015) 7(2) *Journal of Media Law* 155.

Chapter 2 is, by some distance, the longest in the thesis. This is largely because, in its first part, I engage in a detailed analysis – by way of close reading – of three key cases in English privacy law. It is the judgments in these three cases – *Malone*,³⁰ *Wainwright*³¹ and *Campbell*³² – that, I claim, give the formal barrier its (illusory) substance. Engaging in a close reading of these judgments reveals a startling level of incoherence. Whilst judges pay lip service to the notion that there are ways in which English law could develop greater privacy protections, there is little coherent explanation of the method by which this could be achieved. Indeed, in the *Wainwright* case in particular, Lord Hoffmann’s leading judgment, once it is unpacked, actually *precludes* judicial development of privacy law (even though he expressly purports not to do so).

This analysis gives us reason to think that this narrowly rigid and formalistic approach to adjudication in privacy cases is unhealthy and represents something of a pathology in judicial thinking. For, as I demonstrate in the second and third parts of Chapter 2, the fruit of this mode of thinking (when applied to the – widely acknowledged – informational tort known as “misuse of private information”), far from achieving formalism’s informing ideals of legal certainty and stability, has resulted in considerable *uncertainty*.

As Chapter 2 will demonstrate, this uncertainty is exhibited in two areas in which English courts have encountered considerable difficulty in rendering formally coherent judgments. One of these involves some exceptionally murky reasoning lying behind the development of the “third party interests” doctrine (a term I coined in the course of my research). The third party interests doctrine is an emerging practice by which the courts consider (and often end up protecting indirectly) the interests of other people who are not parties to the litigation (frequently the children of the litigants) and who, frequently, do not even give evidence.³³ The murky reasoning it involves lacks even the most basic elements of a clear grounding in precedent or principle. The other area of uncertainty involves the very nature of the action for misuse of private

³⁰ *Malone v Metropolitan Police Commissioner* [1979] Ch 344.

³¹ *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406.

³² *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [2004] 2 AC 457.

³³ This doctrine recently received approval from the Supreme Court in the headline-grabbing judgment in *PJS v News Group Newspapers Ltd* [2016] UKSC 26, [2016] AC 1081.

information (hereafter “MPI”). For there is no clear explanation anywhere in the MPI jurisprudence of just *how* MPI came into existence. The cause of action’s formal basis is shrouded in mystery; it is unclear whether the doctrine should properly be regarded as equitable, tortious or something else entirely. A recent High Court decision, upheld by the Court of Appeal, has concluded that MPI is tortious (and that it exists parallel to the equitable doctrine of confidence). But upon close examination it is clear that neither the High Court nor the Court of Appeal’s reasoning on this point is either comprehensive or convincing.

Both the “third party interests” doctrine and this lack of clarity over the doctrinal roots of MPI itself show that the narrowly formalistic approach to adjudication is not even succeeding on its own terms. Formalism’s promise to achieve legal certainty is being broken – at least in this field. This self-contradiction lying at the heart of English privacy jurisprudence serves to highlight – metaphorically – the sort of pathology McGilchrist associates with a dysfunctional brain in which the left hemisphere dominates over the right.

In Chapter 3, I turn to the “semantic barrier”. I examine a number of common conceptualisations of “privacy” prevalent in judicial circles and, more commonly, in academic scholarship in the field. Understanding privacy properly is fundamentally an exercise in meaning-attribution, and to this end the linguistic philosophy of Wittgenstein is helpful. Drawing on his observations pertaining to the relevance of background context in attributing meaning to language, I examine the deficiencies in the approaches taken by contemporary scholars to the problem of defining privacy. Perhaps the most advanced scholarship on this issue to date has been undertaken by Daniel Solove, upon whose critique I dwell at some length and subject to detailed scrutiny. For Solove’s primary insight – that privacy can only be understood properly as a pluralistic concept – is valuable (and, in my view, entirely correct) and can be bolstered by building the Wittgensteinian analysis into it.

The prescriptive argument I go on to make in Chapter 3 flowing from this analysis is that privacy, whilst undoubtedly a nebulous, pluralistic concept, is nevertheless capable of *sufficiently* tight conceptualisation to ground an intrusion tort at common law. This is because it is possible to locate what I term “pockets of certainty” within

which strong consensus can be demonstrated as to the concept's meaning. In other words, whilst not all scholars agree on all aspects of privacy, there is broad agreement on the notion that intrusive conduct is both wrongful *and* amounts to a violation of privacy.³⁴ This pocket-based approach – one might call it a composite approach – is, to the best of my knowledge, an original one in the field.

Chapter 4 concerns “legal imagination” and it is in this chapter that I draw on insights from both psychiatry and empiricist philosophy to unpack the concept of imagination as a process. In the first part of the chapter, I explain McGilchrist's bi-hemispheric thesis in detail and use it to diagnose the dominance of a left hemisphere mode of thinking underpinning both the formal and semantic barriers examined in Chapters 1-3. I link the formalism present in English privacy cases, and the difficulties that have been encountered by those seeking a definition of privacy as a concept, to McGilchrist's account of left hemisphere thinking, and evidence a correlative absence of right hemisphere attentiveness to context.

In the second part of Chapter 4, I draw on the work of another psychiatrist, Arnold Modell, as well as empiricist philosophy, in order to gain a working understanding of the relationship between the nature of the imagination and “creativity”. I argue that imagination and creativity are not synonymous. Imagination is best understood as a process that includes the collection and collation of data and the attribution of meaning to encountered phenomena – a process that may, but will not necessarily, lead to a moment of creativity in which a novel idea comes into being. To work imaginatively is to put in place the building blocks of a novel idea, not simply to have one. This leads me to conclude that, in the legal context, an imaginative approach to lawyering and judging involves more than moments of judicial activism. It is a broader, ongoing and fundamentally necessary way of approaching adjudication, if meaning is to be sensibly attributed to legal rules that are applied and developed by the courts.

³⁴ This is not to downplay the existence of considerable disagreement between mainstream theorists as to matters such as when an intrusion takes place and what amounts to “intrusive” conduct. Rather my aim is to demonstrate that it is possible for the common law to make use of *broad* agreement about how to understand instances of intrusion looked at *as a whole*. I elaborate on this in Chapter 3, section 3.

In Chapter 5, I consider the implications that my proposed “more imaginative jurisprudence” would entail for the practice of judging. In order to illustrate the argument, I use judgments from two common law jurisdictions in which intrusion torts have been recognised by the courts in recent years: Ontario, Canada and New Zealand. I examine the judgments in which these new intrusion torts have been recognised in detail and demonstrate how each exemplifies this more imaginative approach to adjudication as they overcome both formal and semantic objections to the recognition of an intrusion tort. These two jurisdictions function as examples; the English courts would, if the calls for domestic recognition of an intrusion tort are to be heeded, do well to take note of the methodology they adopt.

The thesis then ends with a brief conclusion.

3. A Note on the Approach Taken in the Thesis

The intrusion lacuna in English law has been pointed up by other commentators. It is undoubtedly a problem, though I express no view on the magnitude of that problem as compared to others that have arisen in the field in recent years (such as the “third party interests” issue and the obfuscation over MPI’s formal basis). All are problematic, in their own ways.

The intrusion lacuna, however, is unique because, if it is to be resolved through the common law, it requires the recognition of a novel head of liability in tort.³⁵ The analysis I offer here explores and explains the reasons why an intrusion tort has not yet been recognised. And, in so doing, I uncover a much deeper problem. The deeper problem is to do with the way that the judiciary is going about the task of judging in English privacy cases. For the approach that is dominating not only inhibits the recognition of a novel head of liability to deal with intrusions into privacy, but actively

³⁵ There is no indication whatsoever of a desire in Parliament to enact an intrusion tort by statute. Indeed Parliament has passed up the opportunity each and every time it has arisen. The Calcutt Committee recommended, in 1990, the creation of a statutory tort of privacy (*Report of the Calcutt Committee on Privacy and Related Matters* (1990), Cm 1102), but Parliament declined to act in the light of that, despite calls to do so. See further David Eady, ‘A statutory right to privacy’ [1996] EHRLR 243. Despite clear evidence of press intrusion threatening individuals’ privacy on a large scale uncovered by the Leveson Inquiry into the *Culture, Practice and Ethics of the Press* in 2011-12, Parliament has shown no desire in its aftermath to legislate on the issue of intrusion.

causes other doctrinal difficulties (such as the two mentioned above). In order to resolve this, a more imaginative jurisprudence is required and it is to the task of outlining what that would entail that the thesis ultimately turns.

It will, by this point, be apparent to the reader that there is a lot going on in the thesis. Indeed, one criticism that might be levelled at the thesis is that it is rather “busy” – perhaps even capacious. It might be wondered whether the way in which it draws on insights from a broad selection of disciplines – including linguistic and empiricist philosophy and psychiatry/neurology – gives it an unsettlingly rangy feel. To such a criticism, I would say that the “busy-ness” of the thesis is not only conscious and deliberate, it is the *whole point* of the thesis. For in arguing that a more imaginative jurisprudence is the only way to overcome the formal and semantic barriers, I defend a way of thinking that is broadly attentive to background context. In writing the thesis in a way that exhibits wide vigilance to ideas and disciplines that make a contribution to understanding the matters upon which I am commenting, I am adopting – and practising – the very methodology that the thesis espouses.

The thesis is, in effect, an example of the kind of thinking I argue it would be necessary for English courts to adopt if they are to resolve the intrusion lacuna. In other words, the thesis itself embodies the position that it stakes out on the question of what good legal thinking involves.

1

Outlining the Formal Barrier: Privacy in the English Common Law

The recognition given by the Convention to the social value of privacy will, I think, encourage the courts to remedy what have been widely criticised as deficiencies in the existing law. But the common law scores its runs in singles: no boundaries, let alone sixes. The common law advances – to change the analogy – like the one venturing onto a frozen lake, uncertain whether the ice will bear, and proceeding in small, cautious steps, with pauses to see if disaster occurs.¹

Introduction

This chapter puts in place two important pieces of background that are necessary in order to pursue my argument that an illusory formal barrier inhibits English courts from developing an intrusion-type privacy tort. This chapter and the one that follows are inextricably linked and it is important to note at the outset that the argument made in these chapters will not be complete until the end of the second. The structure that I adopt first delves into relevant privacy doctrine, before looking at the more theoretical issues of the nature of the judicial law-making role and the ways in which “incrementalism” can be conceptualised. It is necessary to cover both these broad doctrinal and theoretical issues in order to set the scene for the more detailed doctrinal analysis that follows in Chapter 2.

In the first section of this chapter, I outline the current state of English privacy law and the lacuna surrounding protection against intrusive acts in the common law. This section is largely doctrinal and covers domestic common law and statutory provisions, as well as relevant Strasbourg jurisprudence.

In the second and third sections, I delve into the formalistic conception of the judicial role that has come to dominate the landscape in English privacy cases. The aim of these sections is twofold. First, they aim to explain the nature of this formalistic

¹ Tom Bingham, ‘The Way We Live Now: Human Rights in the New Millennium’ (1999) 1 Web JCLI (penultimate para).

conception and to point up its deficiencies. (The negative effects that it has upon privacy doctrine are further exemplified in Chapter 2.) Second, these sections introduce alternative conceptions of the judicial role by focusing on different understandings of “incrementalism” as a method of common law development. This puts in place the necessary background to make the claim (in Chapter 2) that insular, left-hemisphere thinking, of the sort that drives the courts to focus only on a prevailing, narrow conception of the judicial role (to the exclusion of more permissive variants), actually causes the very problem – lack of legal certainty – that the narrow conception of the judicial role aims to prevent.

1. Current English Privacy Law: an Overview

1.1 The Domestic Law

Protection for privacy interests in English law has long focused on the protection of information from unauthorised dissemination. A cause of action has lain in equity providing relief for “breach of confidence” for nearly two hundred years.² Whilst the jurisdiction of the courts of equity was primarily used in these early cases (and their predecessors based upon property rights) to guard against commercial breaches of confidence (often in an employment setting), it is clear that creative counsel were able to mobilise this doctrine as early as the 19th century to protect privacy interests.³ This cause of action for breach of confidence was not one which was used consistently, however. Nor did its elements become entrenched and remain settled. Rather, over a period of a century and a half, up to the mid-20th century, it ebbed and flowed in and out of use.⁴ During this uncertain period, the cause of action’s elements were recast

² The history of the doctrine of confidentiality is masterfully explored by Richardson et al in Megan Richardson, Michael Bryan, Martin Vranken and Katy Barnett, *Breach of Confidence: Social Origins and Modern Developments* (Edward Elgar Publishing Ltd 2012). The first case which Richardson et al (ibid) identify as appearing to resemble closely the modern form of breach of confidence was *Abernethy v Hutchinson* (1825) 1 H & Tw 28, 47 ER 1313. The better-known *Prince Albert v Strange* (1849) 1 H & Tw 1, 47 ER 1302, which post-dates *Abernethy* by a quarter of a century, is expressly described by Lord Cottenham LC as an action arising due to “a breach of trust, confidence or contract” (at 1311).

³ *Prince Albert v Strange*, ibid. The court even went so far as to state expressly that “privacy is the right invaded” (at 1312).

⁴ Richardson et al, see ch.4-6.

several times, in apparent response to the changing circumstances and uses to which it was being put.⁵

After a period of hiatus, breach of confidence reappeared in the mid-20th century in a form which is familiar to modern privacy lawyers. This was the formulation propounded by Megarry V-C in *Coco v Clark*:⁶

First, the information itself ... must “have the necessary quality of confidence about it”. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.

Under the *Coco* formulation, a successful action in breach of confidence required an express promise or agreement to maintain confidentiality, and that the disputed information must have been imparted in confidential circumstances. A reformulation appeared on the scene some twenty years later, by virtue of Lord Goff’s judgment in the House of Lords case of *Spycatcher*.⁷ This “‘new’ model of confidence”⁸ reworked the notion of what confidential circumstances consisted in. Information would now attract the protection of confidentiality law if the *nature* of the information itself was confidential.⁹ As such, Lord Goff’s reformulation recast the test as one of reasonableness, namely whether a reasonable person who came into possession of the information would regard it as confidential. This test of reasonableness became sufficient to trigger the obligation to maintain the confidence.¹⁰

Through the 1990s, a small number of cases pleaded in breach of confidence were brought to court with the aim of protecting individuals’ privacy.¹¹ Yet the courts’

⁵ *Ibid*, ch.5.

⁶ *Coco v AN Clark (Engineers) Ltd* [1968] FSR 415, 419.

⁷ *Attorney-General v Guardian Newspapers Ltd (No.2) (Spycatcher)* [1990] 1 AC 109, [1988] 3 WLR 776.

⁸ Gavin Phillipson and Helen Fenwick, ‘Breach of Confidence as a Privacy Remedy in the Human Rights Act Era’ (2000) 63(5) MLR 660, 672.

⁹ *Spycatcher*, n 7, 281.

¹⁰ Although we will not explore the issue at this stage, this is one point in time at which it might be argued that the “nature” of breach of confidence fundamentally changed, in the sense of abandoning the old equitable commitment to preserving relationships of confidence. See further Ch.2, section 2.

¹¹ See *HRH Princess of Wales v MGN Ltd* (1995) (unreported) and *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804. The most notable (and infamous) exception is *Kaye v Robertson*

treatment of these cases gave rise, in some quarters, to a belief that a distinct privacy action or “tort” was emerging, or had already emerged.¹² However, these cases were both pleaded and disposed of according to the *Spycatcher* formulation of confidentiality, and no explicit recognition of a free-standing privacy tort was, at that point, paid more than lip service by the judiciary.¹³

In 2000, the Human Rights Act 1998 (HRA) came into force, bringing with it the thorny issue of whether (and, if so, how) the European Convention on Human Rights (ECHR) might be given “horizontal effect” (that is, effect as between private parties).¹⁴ After a broad academic debate (which was highly nuanced and obsessive in its level of detail¹⁵), a consensus gathered around a notion of “indirect horizontal effect”.¹⁶ According to this (summarising at a level of generality) the courts would be

[1991] FSR 62, which was pleaded under numerous heads of liability but not confidentiality. See further Fenwick and Phillipson, ‘Confidence and Privacy: a Re-Examination’ (1996) 55(3) CLJ 447.

¹² Fenwick and Phillipson, writing in 1996 (*ibid*), observed that the confidence doctrine had, post-*Spycatcher*, changed significantly. The only necessary ingredient now required to satisfy the second limb of the *Coco* formulation (circumstances importing an obligation of confidence) was “that a reasonable person who acquired the information would have realised that it was confidential” (at 452), but at that point the authors remained focused on confidence as an equitable doctrine. Just four years later, the same authors suggested that the post-*Spycatcher* model of confidence had become “virtually indistinguishable from a ‘pure’ privacy tort” (n 8 at 672). In *Earl Spencer v UK* (1998) 25 EHRR CD105 the Strasbourg court rejected a claim that the UK was in breach of its Art.8 ECHR obligations by not providing an adequate privacy remedy in a case involving the publication of private information including photographs taken surreptitiously by a long-lens camera. The claimant had not brought a breach of confidence claim domestically and the court held that failure to do so constituted a failure to exhaust domestic remedies, lending candid support to the ability of confidence doctrine to respond to at least some situations involving breaches of privacy.

¹³ Per Laws J in *Hellewell* (n 11, above, at 807): “If someone with a telephoto lens were to take [an unauthorised] picture of another engaged in some private act, the ... disclosure of the photograph would ... amount to a breach of confidence. 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.”

¹⁴ The language of direct horizontal effect has its roots in the ECJ ruling in *Van Gend en Loos v Neder-Landse Tariefcommissie* (Case 26/62), [1963] ECR 1, and there has since been something of a (linguistic) spill-over effect into municipal law, making use of “horizontal effect” and “vertical effect” as terms of to describe the relationship between higher-order public law and both private individuals and the state respectively.

¹⁵ See particularly Alison Young, ‘Mapping Horizontal Effect’ in David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (CUP 2011).

¹⁶ For key contributions to this debate, see Murray Hunt, ‘The “horizontal effect” of the Human Rights Act’ [1998] *PL* 423; Richard Buxton, ‘The Human Rights Act and private law’ (2000) 116 *LQR* 48; William Wade, ‘Horizons of horizontality’ (2000) 116 *LQR* 217; Anthony Lester and David Pannick, ‘The Impact of the Human Rights Act on Private Law: The Knight’s Move’ (2000) 116 *LQR* 380; Nicholas Bamforth, ‘The true “horizontal effect” of the Human Rights Act 1998’ (2001) 117 *LQR* 34; Deryck Beyleveld and Shaun Pattinson, ‘Horizontal applicability and horizontal effect’ (2002) 118 *LQR* 623; Jonathan Morgan, ‘Privacy, Confidence and Horizontal Effect: “Hello” Trouble’ [2003] *CLJ* 444; Max Du Plessis and Jolyon Ford, ‘Developing the common law progressively - horizontality, the Human Rights Act and the South African experience’ [2004] *EHRLR* 286. Later contributions of note include Nicole Moreham, ‘Privacy and horizontality:

obliged to develop the common law in a Convention-compatible fashion in instances where claims involving Convention rights were brought within existing common law actions. There was disagreement on aspects of methodological detail. But there was broad agreement that the HRA required that the common law would be the vehicle through which horizontal human rights cases would be resolved.¹⁷

Privacy cases continued to be brought under the breach of confidence doctrine, most notably by celebrity claimants against the tabloid press, in the early years of the HRA. These claims were likely spurred by the recognition that Art.8 of the Convention was now a matter to which the courts were statutorily obliged to give serious consideration when adjudicating common law claims. In a line of cases in the early 2000s, also generally pleaded in breach of confidence, the courts couched their decisions in HRA-compatible language, paying explicit heed to the need to “balance” competing Convention rights (that is, the rights to privacy and freedom of expression under Arts 8 and 10 respectively).¹⁸

The case brought by the actors Michael Douglas and Catherine Zeta-Jones against a popular magazine, *Douglas v Hello!*, is a unique saga in English privacy litigation. For whilst it commenced (and went through several significant hearings) before the seminal 2004 *Campbell* case, it continued after that decision. It thus ends up straddling both the pre- and post-*Campbell* eras in privacy law’s development. The final aspects of that litigation came before the House of Lords in *OBG*, in which judgment was handed down in 2007.¹⁹ The most important matter to note for our purposes at this point is that at an early point in the case, Lindsay J gave judgment in the High Court on the basis that the claim was in *Spycatcher*-style breach of confidence. The case began on the basis of confidentiality, and it is on that basis that it continued to be dealt with.²⁰

relegating the common law’ (2007) 123 *LQR* 373; Gavin Phillipson, ‘Clarity postponed: horizontal effect after Campbell’ in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP 2007); Gavin Phillipson and Alexander Williams, ‘Horizontal Effect and the Constitutional Constraint’ (2011) 74(6) *MLR* 878.

¹⁷ In instances where a statutory provision was in play the issue might be resolved by imposing a rights-compatible interpretation upon it under s.3 HRA.

¹⁸ Notable examples include *A v B Plc* [2002] EWCA Civ 337, [2003] QB 195 and *Theakston v MGN Ltd* [2002] EWHC 137, [2002] EMLR 22.

¹⁹ *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1.

²⁰ Tugendhat J points this out in *Vidal-Hall* [2014] EWHC 13 (QB), [2014] WLR 4155 at [63]-[64].

In 2003, the House of Lords handed down judgment in the case of *Wainwright v Home Office*, expressly ruling out the recognition of a broad, general right to privacy in tort law.²¹ Lord Hoffmann, who gave the only substantial judgment, set down a clear marker: no broad, American-style tort of “invasion of privacy” would be developed in English law.²²

2004 was a landmark year for privacy rights in England and Wales. The seminal case of *Campbell v Mirror Group Newspapers Ltd* came before the House of Lords in January. The claimant sought damages in respect of photographs and articles detailing her attendance at Narcotics Anonymous meetings and her treatment regime for addiction to controlled drugs. The case resulted in the judicial recognition of a tort²³ that has come to be known by the nomenclature given to it by Lord Nicholls: “misuse of private information” (MPI).²⁴ This tort, which was born (in some murky way yet to be satisfactorily explained²⁵) out of the old equitable doctrine of confidence, quickly became the primary means by which claimants sought to protect private information from unauthorised dissemination.

Following *Campbell*, the European Court of Human Rights made clear that the Art.8 right to privacy applied even in circumstances where a person had been photographed going about a relatively mundane activity in a public place.²⁶ This went beyond *Campbell*, in which Baroness Hale had expressly said, *obiter*, that mundane, public activities (such as popping out for a pint of milk²⁷) would not be considered “private”.

Subsequently, a new line of domestic privacy cases appeared, citing *Campbell* as a key authority. In 2005, picking up on the new nomenclature, *Green Corns* became the

²¹ [2003] UKHL 53, [2004] 2 AC 406 (*Wainwright*).

²² *Wainwright* is examined in detail in Chapter 2.

²³ Whether identifying MPI as a tort is formally accurate (or even plausible) is contentious, for reasons we will return to in detail in the next chapter. For the purposes of this chapter I will, for ease of reference, refer to it as a tort but this should not be read as suggesting that the question of whether this label is appropriate is settled; it is not.

²⁴ [2004] UKHL 22, [2004] 2 AC 457, [14]. For comment see Jonathan Morgan, ‘Privacy in the House of Lords, Again’ (2004) 120 *Law Quarterly Review* 563; and NA Moreham, ‘Privacy in the Common Law: A Doctrinal and Theoretical Analysis’ (2005) 121 *LQR* 628.

²⁵ See section 2 in Chapter 2.

²⁶ *Von Hannover v Germany (No.1)* (2005) 40 EHRR 1. For comment see Gavin Phillipson, ‘The Common Law, Privacy and the Convention’ in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP 2007).

²⁷ *Campbell*, n 24 [154].

first case to be pleaded in both breach of confidence *and* MPI.²⁸ Throughout this line of cases, the methodology for resolving informational privacy cases was refined and developed, in the process expanding *Campbell* to embrace the *Von Hannover* ruling. In *Re S*, the House of Lords refined the rights-balancing methodology; Lord Steyn prescribing a four-stage “ultimate balancing test” for use in cases where the Convention right to respect for private life collided with the Art.10 right to freedom of expression – as would generally be the case.²⁹ In *Murray*, the Court of Appeal elaborated on *Campbell*, holding that a child of a celebrity had a reasonable expectation of privacy in respect of pictures taken by a paparazzo, notwithstanding the fame of his mother nor the public space in which the family was photographed.³⁰ The “ultimate balancing test” was applied in the High Court during a celebrity privacy case for the first time in *McKennitt v Ash*, and has since been incorporated into what has become known as the “new methodology”.³¹ In *Mosley*, Eady J set out the elements of “the new methodology”, clarifying the test as follows:

If the first hurdle can be overcome, by demonstrating a reasonable expectation of privacy, ... the court is required to carry out the next step of weighing the relevant competing Convention rights in the light of an “intense focus” upon the individual facts of the case...³²

This methodology has been adopted in virtually all major informational privacy cases since *Mosley*. In 2014, the case of *Weller* refined the new methodology once again, incorporating the Strasbourg court’s latest six-stage guidance for balancing Arts 8 and 10 as set out in the joint cases of *Von Hannover (No.2)* and *Axel Springer*.³³

1.2 The Intrusion Lacuna

With English law having focused on protecting against informational violations of privacy since the 19th century, the glaring gap in protection for privacy interests

²⁸ *Green Corns Ltd v Claverley Group Ltd* [2005] EWHC 958 (QB), [2005] EMLR 31, [48].

²⁹ *Re S (A Child)* [2004] UKHL 47, [2005] 1 AC 593, 603.

³⁰ *Murray v Express Newspapers Ltd* [2008] EWCA Civ 446, [2009] Ch 481.

³¹ *McKennitt v Ash* [2005] EWHC 3003 (QB), [2006] EMLR 10, [48].

³² *Mosley v News Group Newspaper Ltd* [2008] EWHC 1777 (QB), [2008] EMLR 20, [10].

³³ *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB); *Von Hannover v Germany (No.2)* (applications no. 40660/08 and 60641/08), [2012] ECHR 228; *Axel Springer v Germany* (application no 39954/08), [2012] ECHR 227.

jeopardised by physical intrusions into personal space went unaddressed. It became clear in the late 20th century that the equitable doctrine of confidence would not assist the victims of intrusion-style privacy violations. In 1990, the case of *Kaye v Robertson* came before the Court of Appeal.³⁴ It is perhaps the most notorious case in English privacy law. An actor, Gordon Kaye, had been seriously injured in a traffic accident. As he recovered in intensive care in hospital, two journalists from the *Sunday Sport* managed to gain access to his private room (in breach of clear instructions not to enter) and conducted what they described as an “interview” with the barely conscious Kaye. They also took photographs of him in that state to accompany their planned scoop. Lawyers for Kaye sought injunctive relief to restrain publication of the “interview” and the pictures.

The problem faced by Kaye’s lawyers was the lack of a cause of action that they could base a claim in. After ruling out any possibility of succeeding in the doctrine of confidence (which might, in hindsight, have been ruled out too hastily), his lawyers based their claim on other grounds. The Court of Appeal lamented – publicly – the lack of a privacy tort apt to assist Kaye in the circumstances. Bingham LJ opined

If ever a person has a right to be let alone by strangers with no public interest to pursue, it must surely be when he lies in hospital recovering from brain surgery and in no more than partial command of his faculties. It is this invasion of his privacy which underlies the plaintiff’s complaint. Yet it alone, however gross, does not entitle him to relief in English law.³⁵

Kaye’s lawyers did not plead the case in breach of confidence; as such, the Court had no opportunity to consider whether that doctrine could provide relief. Nevertheless, there is no indication in the judgment that the judges thought breach of confidence would have availed the plaintiff. In the end, the Court mobilised the lesser-known doctrine of malicious falsehood to grant the relief sought (on rather tenuous grounds, since it was far from clear that Kaye had suffered the special damage required by the doctrine). But a glaring gap in privacy protection had been exposed.³⁶

³⁴ [1991] FSR 62 (*Kaye*).

³⁵ *Ibid*, 70.

³⁶ Fenwick and Phillipson argued that Kaye might have succeeded in a claim for breach of confidence, had his lawyers pleaded it (n 11, at 454). Given that the “interview” was published, this

In the late 1990s, the case of *Wainwright v Home Office* highlighted the lacuna even more vividly.³⁷ For this case did not involve the publication of any private information whatsoever; it was, in essence, a case of “pure” intrusion. A mother and son were strip-searched on a visit to a Leeds prison in a manner that breached prison rules. Both were required to undress fully (the rules stating that a person being searched should not be required to expose both their top and bottom halves simultaneously). The mother was searched in a room that did not have adequate window coverings and was searched, improperly, by male officers. The son also suffered a battery; officers manipulated his penis in order to retract his foreskin. Both claimants suffered emotional distress; the son, who had physical and learning disabilities, also developed Post-Traumatic Stress Disorder. They brought a claim for, *inter alia*, invasion of privacy. After hearings in the County Court and Court of Appeal, the case was heard in – and the claim rejected by – the House of Lords. There were several grounds for the rejection of the claim, and we will scrutinise the judgment in detail when we examine the Formal Barrier in Chapter 2. For now, it suffices to note that a key ground for the rejection of the claim was the lack of any privacy-based cause of action in English law apt to respond to intrusion-type privacy violations such as these.

English law’s intrusion lacuna has attracted criticism from pro-privacy commentators. Raymond Wacks has recently proposed a statutory intrusion tort as a solution.³⁸ He argues that English law’s “failure conceptually to differentiate” between intrusion and disclosure of private facts, as discrete forms of privacy invasion, “discounts the particular interests of victims inherent in the two kinds of abuse.”³⁹ Currently, he says, the *Wainwright* ruling means that “[a] claimant who is subjected to an intrusion must ... look elsewhere for a remedy.”⁴⁰ By this he means that such a claimant must look outside of tort law as it presently stands.

seems entirely plausible. However, since none of his lawyers thought to plead breach of confidence, and none of the judges who heard the case thought it applicable, it is quite clear that the prevailing impression of the law at the time was that it did not cover these sorts of circumstances. Moreover, the intrusion lacuna would clearly subsist in cases where individuals are intrusively approached (in the way that Kaye was) but where the information thereby obtained is *not* published (ie where there is a “pure” intrusion).

³⁷ [2003] UKHL 53, [2004] 2 AC 406.

³⁸ Raymond Wacks, *Privacy and Media Freedom* (OUP 2013) 263-270.

³⁹ *Ibid*, 245.

⁴⁰ *Ibid*, 187.

Perhaps the most prominent and vociferous critic of the intrusion lacuna in the 2000s has been Nicole Moreham. Writing in 2005, Moreham made the case for the recognition of an intrusion tort, which, she urged, could be developed out of the existing confidence and MPI doctrine.⁴¹ Basing her argument on her own conceptualisation of privacy as a state of “desired inaccess”,⁴² Moreham finds that MPI doctrine as it stood then (and, largely, still stands today) provides inadequate protection for an individual’s right to protection from undesired access to his person. By this, she primarily has in mind acts of “unwanted watching, listening and recording”.⁴³ The common law is inadequate because “[n]either breach of confidence nor misuse of private information ... protects against the non-disclosure aspects of physical privacy.”⁴⁴ There is thus “no clear common law right protecting against unwanted observation and recording where subsequent dissemination of material has not occurred.”⁴⁵

Moreham has also conducted the most extensive survey of alternative legal remedies for intrusion-type privacy violations and has concluded that none of these provides a satisfactory substitute for an intrusion tort.⁴⁶ She considers the possibility of pressing into action the common law tort of intentional infliction of psychiatric harm⁴⁷ (also known as “the rule in *Wilkinson v Downton*”⁴⁸). She argues that, whilst there might be instances where an individual intrudes upon another’s privacy with the intention of causing psychiatric harm, there would still be a gap in coverage where there was no such intention.

It would be difficult, for example, to establish even an imputed intention to cause harm if the defendant intended his or her intrusion to remain

⁴¹ Moreham, n 24.

⁴² This was itself based on Ruth Gavison’s conception of privacy as “limited access”: Ruth Gavison, ‘Privacy and the Limits of Law’ (1980) 89(3) Yale LJ 412, 423. See further Chapter 3.

⁴³ NA Moreham, ‘Beyond Information: Physical Privacy in English Law’ (2014) 73(2) CLJ 350, 362.

⁴⁴ Ibid, 362.

⁴⁵ Ibid, 364.

⁴⁶ Ibid.

⁴⁷ Moreham identifies this as a tort of “intentional infliction of emotional distress” (ibid, 362) but this nomenclature suggests (unhelpfully) that the English tort is more similar to the US tort of the same name than it is in reality. The UK Supreme Court has recently revived the tort, seemingly re-labelling it as “the tort of wilful infringement of the right to personal safety” (*Rhodes v OPO* [2015] UKSC 32, [73] and [81]). In so doing, the Supreme Court has stated (albeit necessarily *obiter*) that the revived tort protects claimants only from “severe” mental or emotional distress, and only in circumstances where, as a result, the claimant suffers physical injury or recognised psychiatric illness (at [88]).

⁴⁸ *Wilkinson v Downton* [1897] 2 QB 7.

undetected – it is difficult to say that the defendant’s spying would “obviously” lead to physical harm when, if it had been up to the defendant, the claimant would have known nothing about it.⁴⁹

Since Moreham’s analysis was published, the Supreme Court has confirmed that the concept of imputed intention “has no proper role” to play in English tort law, consigning it to history (just as its criminal law counterpart was half a century ago).⁵⁰ Her conclusion on this point is thus all the more significant; it will be impossible to impute intention as a matter of law in the circumstances that she outlines (or, indeed, in any circumstances). Actual intention must thus be proved before liability can attach in the tort of wilful infringement of personal safety, although it may be inferred as a matter of *fact* (as opposed to imputation as a matter of *law*). Recklessness, the Supreme Court also confirmed, is not sufficient to attract liability.⁵¹

Moreham also considers whether the remaining common law intrusion lacuna has been filled by legislative provisions, including under the Protection from Harassment Act 1997 (PHA), the Data Protection Act 1998 (DPA), the Regulation of Investigatory Powers Act 2000 (RIPA) and the Sexual Offences Act 2003 (SOA).

The PHA introduces civil and criminal law remedies for the victims of courses of conduct amounting to harassment, such as “stalking and shadowing, spying, unwanted photography and video recording”.⁵² However, the Act is incapable of responding to one-off events; a course of conduct requires the harassment to take place on at least two occasions. The *Kaye* scenario would not fall within the ambit of the PHA’s protection if it occurred again today.

The DPA gives claimants wide-ranging rights over personal data. However, those who gather data for the “special purposes” of journalism, art or literary endeavour are exempt from the Act’s provisions.⁵³ There is also no provision under the DPA by which a claimant can obtain injunctive relief against future dissemination of personal

⁴⁹ NA Moreham, n 43, 363.

⁵⁰ *Rhodes*, n 47, [81].

⁵¹ *Ibid*, [87].

⁵² Moreham, n 43, 365.

⁵³ Data Protection Act 1998 s.32(1).

data. It is possible for the claimant to obtain delivery up and destruction of the data, but not the sort of injunctive relief that would bind third parties and prohibit broader dissemination (i.e. of the sort available at common law for breach of confidence and misuse of private information under the *Spycatcher* principles).⁵⁴ The DPA will shortly be superseded by the European Union's new General Data Protection Regulation (GDPR), due to come into (directly effective) force in March 2018. Whilst the GDPR does increase the strength of data protection provisions beyond those contained in the DPA (providing, for example, a simpler right to erasure of inaccurate or outdated personal data), it also does not bind third parties in respect of future publication. And most importantly, neither the DPA nor the GDPR respond to intrusions into privacy where no personal information is obtained or stored.

The RIPA makes it an offence to install a listening device in a telecommunications network,⁵⁵ but does not criminalise “bugging” of this sort *outside* such a network “in the home or car of another or on the outside of a telephone, for example.”⁵⁶

S.67 of the SOA creates the offence of voyeurism, which criminalises the act of observing and/or recording, for the purpose of sexual gratification, a person doing a “private act”, knowing that the victim does not consent to the observation or recording for that sexual purpose. This offence would cover situations such as that in the New Zealand case of *C v Holland* where a sexual purpose could be proven.⁵⁷ It would not, however, respond to non-sexual observations. For example, recording a person engaged in a private act for journalistic purposes – such as the recordings made of Mr Max Mosley’s sexual acts in the *Mosley* case – do not appear to be circumstances ripe for prosecution.⁵⁸ It would also not apply to observations of activities not amounting to “private acts”; those that do not involve using a toilet, engaging in sexual activity or exposing intimate body parts.

Thus Moreham concludes that legislative provisions fail to plug the gap in common law protection against intrusion.

⁵⁴ See *Attorney General v Times Newspapers Ltd and others* [1992] 1 AC 191.

⁵⁵ Regulation of Investigatory Powers Act 2000 ss.1-2.

⁵⁶ Moreham, n 43, 366.

⁵⁷ *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672.

⁵⁸ *Mosley*, n 32.

All this means that there is no obvious criminal or civil sanction against an individual who, for his or her own recreational purposes, videos his or her tenants in their living room, films the neighbours' children in their bedrooms, installs bugging devices in a former friend's car, or films his or her ex-spouse in the toilet in case he or she wants to use the footage for blackmail on some future occasion.⁵⁹

Patrick O'Callaghan concurs with this bleak assessment. Commenting on the "remarkable" lack of protection against intrusions in English law, he notes the "significant" gap it represents.⁶⁰ He sees "absolutely nothing in recent case law to suggest that the new tort [of MPI] could potentially encompass other forms of invasion of privacy."⁶¹ This leads him to the "unhappy conclusion" that, if *Kaye* were to be litigated once again in the light of the MPI tort, the courts would reach the same conclusion as before on the non-availability of protection against physical privacy intrusions. This must surely, as a matter of formal law, be correct. A remedy would only be available in a *Kaye*-type scenario if the information obtained (the photographs and the "interview") was published. If the journalists who entered his room obtained information that they subsequently decided was not newsworthy, there would be no remedy available for the "pure" intrusion.⁶² It might be argued that the mere storage of any private information obtained could amount to a "misuse" of private information for the purposes of MPI. However, only one case hints at the potential for such a line of argument to succeed. This is the case of *Tchenguiz v Imerman*, in which the Court of Appeal found that the copying of data from a hard drive and the passing of that data to a firm of solicitors (for use in acrimonious divorce proceedings) amounted to a breach of confidence, notwithstanding that the solicitors made no use of the data.⁶³ Two points must be made here, however. First, *Tchenguiz* was a breach of confidence case, not a case of MPI. And whilst it is arguable that these two causes of action ought to develop along similar lines, doing so would further muddy the already hazy distinction that the courts have drawn between them. Second, one would still not be responding to the *intrusion* itself. A scenario might be envisaged where no private

⁵⁹ Moreham, n.43, 366.

⁶⁰ Patrick O'Callaghan, *Refining Privacy in Tort Law* (Springer-Verlag 2013) 133, 146.

⁶¹ *Ibid*, 155.

⁶² See n 36. There might be a remedy under the DPA if the information has been stored in a manner incompatible with the Act's data protection principles but – as indicated above – the remedy would not be equivalent to injunctive relief prohibiting future publication and binding third parties to respect its terms.

⁶³ *Tchenguiz v Imerman* [2010] EWCA Civ 908, [2011] 2 WLR 592.

information whatsoever is obtained (perhaps only trivial information that would not attract a reasonable expectation of privacy is acquired) but where the intrusion itself is nevertheless distressing.

A further consideration is the litigation that resulted from the now infamous phone hacking scandal. This provided the courts with an opportunity to consider finding liability in circumstances that involved a mixture of informational and intrusion-type violations. It was discovered that a number of prominent public figures' voicemail boxes had been hacked into by journalists working for News Group Newspapers Ltd and Mirror Group Newspapers Ltd. This had been done in a bid to uncover juicy gossip which could then be reported. On some occasions, sensitive information was discovered and reported. On others, sensitive information was discovered but not reported. And on many other occasions, entirely mundane messages were listened-to and not reported. In the High Court, Mann J held that these instances of phone hacking amounted to misuses of private information and awarded a host of claimants record sums in damages for MPI.⁶⁴

Moreham has argued that this judgment demonstrates an increasing willingness on the part of the judiciary to provide relief for violations of "physical privacy".⁶⁵ This is because, she argues, the case goes beyond previous MPI doctrine in finding that liability can attach to the *acquisition* of private information (as opposed to only its publication). In so doing, Mann J impliedly applies the reasoning from the Court of Appeal's decision in *Tchenguiz*, although his judgment in *Gulati* does not refer to that case.⁶⁶ Moreover, Moreham points out that *Gulati* may be seen as part of a trend towards greater judicial recognition of the ways in which privacy interests may be violated by intrusions into physical space or belongings. In support of this, it may be noted that there has been increasingly prominent judicial reference, in recent years, to the term "intrusion" when describing privacy-violating misuses of private information.⁶⁷

⁶⁴ *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch), [2016] FSR 12.

⁶⁵ NA Moreham, 'Liability for listening: why phone hacking is an actionable breach of privacy' (2015) 7(2) *Journal of Media Law* 155, 164.

⁶⁶ In *Tchenguiz*, n 63, it was held that an obligation of confidence could attach to a person "who intentionally, and without authorisation, takes steps to obtain [confidential] information" (at [68]).

⁶⁷ For example, Eady J refers to "intrusion" or "intrusive" behaviour 24 times in his judgment in *Mosley*, n 32. The High Court in *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB),

However, this single decision of the High Court in *Gulati* certainly cannot, in formal, legal terms, be taken to have fundamentally altered the MPI doctrine's basis. Nor can it be thought to have introduced a novel head of intrusion-based liability. As Jacob Rowbottom points out, the Court was not asked to rule on the scope of the tort but rather merely on the appropriate level of damages.⁶⁸ Moreover, it must be kept in mind that the *Tchenguiz* case and the *Gulati* case both involved *surreptitious* efforts to obtain *information*. The MPI tort thus remains securely rooted as an information-focused cause of action that has been modified to attach liability to surreptitious behaviour that results in the acquisition of private information, even if no further publication is made of it. Whilst *Gulati* represents a step in the direction of recognising the wrongfulness of intrusive conduct, it stops far short of recognising intrusion as a free-standing head of liability. We must conclude, therefore, that O'Callaghan was right to determine that a repeat of a *Kaye*-type scenario (assuming a lack of publication, for the reasons given above) would not find English law any more receptive to a privacy claim today than it was in 1991.⁶⁹

1.3 Strasbourg on Intrusion and Physical Privacy

The Strasbourg Court has considered the scope of Article 8 ECHR on a number of occasions, extending its reach considerably.⁷⁰ The Court has developed a doctrine of

[2014] EMLR 24 did so six times, as did the Court of Appeal ([2015] EWCA Civ 1176, [2016] 1 WLR 1541). (I have counted only those instances in which the court refers to intrusion of its own volition, omitting any quoted references to it.) In *Goodwin v News Group Newspapers* [2011] EWHC 1309 (QB), Tugendhat J expressly distinguishes confidentiality from "intrusion" when discussing privacy interests (at [85]). However, the case was clearly dealt with as an MPI claim and did not mark the recognition of a novel head of liability.

In the recent Supreme Court case of *PJS v News Group Newspapers Ltd* [2016] UKSC 26, [2016] AC 1081, the Court makes 12 original (as opposed to quoted) references to "intrusion", and 4 references to "intrusiveness" or "intrusive". It also makes a significant further number of quoted references to both.

⁶⁸ Jacob Rowbottom, 'A landmark at a turning point: *Campbell* and the use of privacy law to constrain media power' (2015) 7(2) *Journal of Media Law* 170, 186.

⁶⁹ See n 36. There have been recent (at the time of writing, unconfirmed) reports of *Kaye*-like activity occurring in the aftermath of the Grenfell Tower disaster, with a journalist alleged to have posed as a relative in order to gain access to hospitalised victims (<https://www.theguardian.com/uk-news/2017/jun/16/sun-journalist-grenfell-tower-victim-hospital>, accessed 10 July 2017). If a privacy claim is forthcoming, it could potentially prove an interesting test of the argument set out in this thesis as a whole.

⁷⁰ For instance, in *Pfeifer v Austria* (2009) 48 EHRR 8, the Court held that reputational interests were embraced by the wide scope of Art.8. This has had a knock-on effect in English law, requiring domestic courts in defamation cases to balance reputational interests against freedom of speech from a starting point of presumptive equality (significantly altering the previous position under Reynolds).

“positive obligations” according to which signatory states are required to take positive steps to secure Art.8 rights. There is some indication that Strasbourg expects signatory states to make provision to secure physical privacy rights under Art.8. This jurisprudence is of significance to English courts as they are under a statutory obligation to take into account relevant Convention case law under s.2 HRA.

In *X and Y v The Netherlands*, the Court held that a signatory state’s obligations under the Convention extended to establishing a criminal law provision capable of responding to a serious sexual assault committed on a minor with mental health problems.⁷¹ A sixteen year old girl, who was under the care of a mental health facility, was subjected to a serious sexual assault by the son of a member of staff at the facility. Dutch law, as it stood at the time, had no capacity to entertain a criminal complaint made by the girl, who was not mentally competent. Nor was the law receptive to a complaint made on her behalf by her father. The Strasbourg Court held that this failure to provide an effective sanction and remedy for a serious breach of the girl’s physical and psychological integrity violated the Netherlands’ positive obligation to secure her Art.8 rights. Moreover, the Court held that, given the seriousness of the breach of the girl’s rights, only a criminal law sanction could discharge the state’s duty.

In a more recent case along similar lines, *Söderman v Sweden*, the Court found a violation of Art.8 in circumstances where Swedish law failed to provide either a criminal or civil law remedy for a fourteen year old girl who was surreptitiously videoed by her step-father (using a hidden camera) while she was showering.⁷² The Court once again held that the lack of either a criminal or civil sanction in Swedish law amounted to a breach of the state’s positive obligations under Art.8; it was unacceptable that such a violation of the girl’s physical and psychological integrity should go un-remedied. Unlike *X and Y*, however, the Court did not specify whether criminal or civil sanctions would be required in order to render Swedish law Convention-compatible; it was left to the state to determine the appropriate mechanism.

See *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 205; *Flood v Times Newspapers Ltd* [2009] EWHC 2375 (QB), [2010] EMLR 8, [138], [146].

⁷¹ (1986) 8 EHRR 235.

⁷² (2014) 58 EHRR 36.

The *X and Y* and *Söderman* cases provide authority for the broad proposition that signatory states incur a positive obligation to provide legal mechanisms to protect their citizenry from, or to provide a remedy for, breaches of their Art.8 rights that amount to violations of physical and/or psychological integrity. However, both these cases involved conduct that would amount, under English criminal law, to serious sexual offences (unlike in their “home” jurisdictions at the time). As such, they cannot be said to provide direct authority for the notion that English law is likely to be in breach of its Convention obligations if it fails to provide redress for less serious intrusions into privacy. The cases provide tentative movement in that direction but stop short of imposing such a wide-ranging obligation. A conservative reading of the cases, then, leads to the conclusion that Strasbourg does not mandate the establishment of intrusion-type torts (or equivalents) in signatory states.

This suggests that s.2 of the HRA does not provide a means by which domestic courts are likely to be persuaded that the development of an intrusion tort is *required* as a matter of Convention law. Whilst a “Strasbourg-enthusiast” might leap to the opposite conclusion, O’Callaghan cautions against such unchecked enthusiasm for positions that may be overstated.⁷³ The Strasbourg cases comprising this line of authority are relatively easily distinguishable by virtue of the seriousness of the offences committed therein. The intrusion lacuna in English law is thus likely to remain *prima facie* acceptable in the eyes of the Strasbourg Court.

2. Narrowly-focused Jurisprudence

The line of authority that began with the recognition of breach of confidence as an equitable wrong and which has, in recent times, led to the intrusion lacuna in English law discloses the dominance of a particular kind of thinking. This is a form of narrowly-focused, highly technical thinking of the order of that which Iain McGilchrist associates with the left hemisphere. It manifests, in large part, as a commitment to placing tight constraints on judicial law-making. This is attributed, in key cases (such as *Wainwright*, to which we will return in detail in the next chapter),

⁷³ “The Strasbourg-enthusiast believes that the application of Strasbourg principles and case law will automatically lead to an improved state of affairs.” Patrick O’Callaghan, ‘Monologism and Dialogism in Private Law’ (2010) 7 *The Journal Jurisprudence* 405, 424.

to a particular conception of the judicial role that displays classically formalist characteristics. This conception of the judicial role (and its impact upon the practice of judging) is a matter I will now turn to scrutinise in detail.

A key justification underpinning this formalistic conception of the judicial role is the notion that limiting judicial law-making will aid in the pursuit and maintenance of legal certainty. This is a classic rule of law concern, and it is not necessarily an objectionable goal; indeed it has a level of nobility about it. However, as I demonstrate in the next chapter, the decisions that have actually been rendered under this restrictive mode of judging show it to have abjectly failed on its own terms; it has not succeeded in securing or maintaining legal certainty. (I am doubtful, as a result, whether it would be possible in practical terms either to secure or maintain an absolute level of certainty in the common law. The goal of achieving certainty may thus be a noble one, but it is one that is necessarily going to require a degree of compromise.) Whilst the courts have (albeit often reluctantly⁷⁴) extended the protection of the confidence doctrine to information more fittingly labelled “private” than “confidential” (particularly in the HRA era), their narrowly doctrinal focus has excluded the possibility of recognising a broader (or a second, discrete) privacy tort.

Refusing to consider developing the law other than by shoe-horning all common law privacy claims into a relatively narrow informational tort has actively undermined legal certainty. I will evidence this undermining of legal certainty in the next chapter. In the remainder of this chapter, I set out the nature of this formalistic conception of the judicial role and show that it paints a flawed and incomplete picture of the practice of judging.

2.1 Conceptualising the Judicial Role: the Legislative/Judicial Distinction

Many judicial and academic commentators perceive far greater restrictions on judicial activity than are necessary. This results in a narrow conceptualisation of the judicial role that seriously curtails the scope for judicial creativity. The narrow conceptualisation has come to dominate the privacy landscape, as I demonstrate in the

⁷⁴ For example, *Douglas v Hello! Ltd (No.6)* [2005] EWCA Civ 595, [2006] QB 125, [53].

next chapter. Yet it does not reflect a consistently narrow attitude to judicial practice in the courts generally; indeed broader, competing conceptualisations of the judicial role can be seen to drive judicial practice in other common law fields (including negligence and nuisance law). The prevailing conception of the judicial role in privacy cases remains, however, a narrow and formalistic one. I will ultimately argue, at the close of the following chapter, that the “formal barrier” this narrow, formalistic conception of the judicial role constructs is, in fact, illusory. But the illusion is a powerful one and so its roots must be explored and understood. Only once it is understood can it be overcome.

Some of this overly restrictive perception is attributable to the use of indeterminate and under-determinate language to describe the limits on adjudicative activity. Use of such unhelpful language is regrettably commonplace. Much of what thus contributes to this restrictive perception comes out of a commitment to a formalistic ideal of judging that is inconsistently applied by the courts, is conceptually self-defeating, and can lead to incoherence within judgments that attempt to adhere to it.

A key distinction in numerous judicial and academic pronouncements about the boundaries of the judicial role is drawn between “legislative” and “judicial” forms of law-making. On the face of it, this distinction appears more refined than vague attacks on “judicial activism”.⁷⁵ It is, moreover, a distinction that has been relied upon in recent years in respect of the judicial role in the HRA era.⁷⁶ Judges, it is said, must confine themselves to engaging only in the “judicial” type of law-making. Law-making of the “legislative” type must be left to the legislature. For instance, on what

⁷⁵ An example of such an attack may be found in Dyson Heydon, ‘Judicial Activism and the Death of the Rule of Law’ (2001-2004) 10 *Otago Law Review* 493, 495:

The expression “judicial activism” is here used to mean using judicial power for a purpose other than that for which it was granted, namely doing justice according to law in the particular case. It means serving some function other than what is necessary for the decision of the particular dispute between the parties. Often the illegitimate function is the furthering of some political, moral or social programme: the law is seen not as the touchstone by which the case in hand is to be decided, but as a possible starting point or catalyst for developing a new system to solve a range of other cases. Even more commonly the function is a discursive and indecisive meander through various fields of learning for its own sake.

⁷⁶ Gavin Phillipson and Alexander Williams, ‘Horizontal Effect and the Constitutional Constraint’ (2011) 74(6) *MLR* 878 (Phillipson and Williams).

falls within the realms of “judicial” law-making, Lord Goff had this to say in the case of *Kleinwort Benson*:

When a judge decides a case which comes before him, he does so on the basis of what he understands the law to be... In the course of deciding the case before him he may, on occasion, develop the common law in the perceived interests of justice ... This means not only that he must act within the confines of the doctrine of precedent, but that the change must be seen as a development ... of existing principle and so can take its place as a congruent part of the common law as a whole. ... Occasionally, a judicial development of the law will be of a more radical nature, constituting a departure, even a major departure, from what has previously been considered to be established principle, and leading to a realignment of subsidiary principles within that branch of the law.⁷⁷

The distinction between “legislative” and “judicial” law-making is attractive in its simplicity. But, when scrutinised, it is revealed to be unhelpful. Primarily, this is because there is no straightforward, uncontroversial or indeed consistently maintained definition of either “judicial” or “legislative” forms of law-making. For instance, Keith Ewing refuses to acknowledge a meaningful distinction between legitimate “judicial” law-making and illegitimate (when undertaken by judges) “legislative” activity. Instead, he regards all law-making as “legislative”, including the judicial development (and, extraordinarily, even the *application*) of common law norms: “[w]hen acting to develop *and apply* the common law, the courts are clearly and unequivocally acting in a legislative capacity.”⁷⁸ Thus he classifies virtually all judicial activity as illegitimate. The common law, in Ewing’s view, is a field in which judicial activity is untrammelled. It “is a vast expanse of rule-making which remains completely untouched by the era of democracy.”⁷⁹ This, in his view, renders it wholly illegitimate, on the basis that it lacks a “democratic root”.

[T]he judicial role ought to be a limited one: it is not the job of the judicial branch to make the law, in the sense of laying down rules of general application which will apply to people other than the parties in

⁷⁷ *Kleinwort Benson v Lincoln CC* [1998] UKHL 38, [1999] 2 AC 349, 378.

⁷⁸ KD Ewing, ‘A Theory of Democratic Adjudication: Towards a Representative, Accountable and Independent Judiciary’ (2000) 38(3) *Alberta LR* 708, 712 (emphasis added).

⁷⁹ *Ibid*, 711.

a dispute before the courts. That is a legislative function for which the judicial process is wholly unsuited.⁸⁰

It is perhaps inappropriate that law should be made in this way, and it is perhaps obvious that there should be no role for the common law proper in a properly functioning democracy. The common law is a process of law-making developed in a pre-democratic era, and maintained by a non-democratic form. All law, public or private, should be codified with a transparent democratic root.⁸¹

So whilst Ewing suggests that there is still some scope for legitimate judicial activity, in his view this scope is very narrow indeed. Only judicial activity which falls short of pronouncing rules of general application beyond the confines of the parties to the case seems to be legitimate. He appears to have in mind a case-by-case judicial application of a pre-ordained, comprehensive legal code – something that is common practice in civil law jurisdictions but which is entirely unknown in the English legal order. It seems, then, that he believes the judicial application of any rules developed by judicial action is illegitimate. Only the application of those legal rules that have been laid down by an authority possessing democratic legitimacy is itself legitimate. This is an ultimately formalistic notion, prioritising democratic accountability and prior access to the law for its subjects (the citizenry) as a guide to regulating their own conduct. In this sense, much of what underpins Ewing’s conception of the proper judicial role also features in legal formalism of the sort associated with the work of Joseph Raz, the key features of which I outline below. Moreover, the fact of Ewing’s refusal to countenance drawing a distinction between forms of law-making that are “judicial” and “legislative” in character demonstrates the profound difficulty faced by scholars and judges in trying to articulate with any precision the parameters of such a distinction.

Before proceeding further, it will be helpful to outline the key features of Razian formalism, and their implications for a conception of the judicial role. The key theme of Raz’s account of the judicial obligation is the idea that the central function of law is the provision of authoritative guidance by which the law’s addressees may regulate

⁸⁰ Ibid, 710.

⁸¹ Ibid.

their conduct, and by which courts may judge that conduct.⁸² This central tenet of Raz's formalism pervades his work. It features heavily in his conception of the rule of law, which requires that legal rules be prospective, clear and (relatively) stable, with clear secondary rules for determining which pronouncements from the authority are to be regarded as laws (rules of recognition).

In advancing his concept of practical reason, Raz identifies first- and second-order reasons for decision-making. First-order reasons may comprise any reasons to make a decision one way or another. These might involve matters of policy, convenience, efficiency, financial concerns, moral inclinations and so forth (the list is not exhaustive). A decision made on a balance of these first-order reasons amounts to the exercise of discretion; the decision-maker has discretion to weigh these reasons (of presumptively equal weight) against one another and conclude as he sees fit.

Exclusionary reasons are second-order reasons not to act on the conclusion reached by balancing first-order reasons. They are secondary rules that override the first-order balancing exercise. Raz gives an example of such an exclusionary reason being a rule against making major investment decisions when tired or intoxicated.⁸³ Exclusionary reasons *always* override first-order reasons for action, such that a first-order balancing act is not even required. If an exclusionary reason commands a particular result in a certain instance, that is the only result that may legitimately be reached. This is justifiable on rule-consequentialist grounds; that is, that one may "be better off in the long run by always following a predetermined course of action" if one is required to make a decision "under conditions of impaired rationality or incomplete information."⁸⁴ Moreover, these sorts of "rules of thumb" are also justified on grounds of efficiency, since they save time and expense reconsidering first-order reasons on a regular basis "by adhering ... to a preconceived plan of action."⁸⁵

⁸² Joseph Raz, *The Authority of Law* (OUP 1979) (Raz, *AL*); *Practical Reason and Norms* (Princeton University Press 1990) (Raz, *PRN*).

⁸³ Raz, *PRN*, *ibid.*, 37-38.

⁸⁴ Stephen R Perry, 'Judicial Obligation, Precedent and the Common Law' (1987) 7(2) OJLS 215, 220.

⁸⁵ *Ibid.*

For Raz, legal rules issued by a jurisdiction's authoritative source, such as statute, operate on the law's addressees as exclusionary reasons. Compliance with the rules is therefore binding, overriding any decision on conduct that might be made by an addressee of the law on a balance of first-order reasons. This applies not just to statutory declarations of rules, but also to precedential authority, in Raz's view.

Compared to Ewing's all-or-nothing conception, the distinction that has been drawn by other commentators and jurists between legitimate "judicial" law-making and its illegitimate-for-judges "legislative" counterpart does have the benefit of being subtler. It at least recognises the potential for some form of legitimate law-making activity on the part of the judiciary. Gavin Phillipson and Alexander Williams are proponents of this (which they label the "correct") distinction.⁸⁶ Their article builds upon earlier work by Aileen Kavanagh, who coined the term "constitutional constraints" in 2003.⁸⁷ In order to flesh out the distinction, then, it is helpful to have recourse to her work. Kavanagh, writing in 2004, and exploring the "elusive divide" between the interpretation of statutes and judicial "legislation" under the auspices of the HRA, distinguished these two forms of law-making within the context of statutory interpretation.⁸⁸ Some forms of statutory interpretation are, she tells us, legitimately "judicial", whilst others go too far and are "legislative". Elaborating upon this, Kavanagh's thesis is that *legitimate* judicial activity regarding statutes only ever involves "interpretation" as opposed to "legislation".

Kavanagh's 2004 article is not an essay in which she primarily deals with common law development, focusing instead on statutory interpretation. However, she does briefly discuss common law adjudication, making clear her view that "judges are legally entitled to develop, modify, change and update the common law, through the techniques of distinguishing, extending and overruling rules established in previous case-law."⁸⁹ She goes on to provide a little more detail on the limits she perceives to be on judicial law-making generally:

⁸⁶ Phillipson and Williams, n 76, 903 (emphasis is original).

⁸⁷ Aileen Kavanagh, 'The Idea of a Living Constitution' (2003) 16 Canadian Journal of Law & Jurisprudence 55, 69.

⁸⁸ Aileen Kavanagh, 'The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998' (2004) 24(2) OJLS 259, 261 (Kavanagh (2004)).

⁸⁹ Kavanagh (2004), n 88, 266.

[R]adical and broad-ranging reform is generally not open to judges. ... In contrast to legislators ... it is not open to judges to tackle any legal area they wish: they are limited in the decision they can make by the vagaries of litigation. ... Rarely does a case encompass an entire area of law, or allow for possible radical reform of that area. The fact that judges must operate within existing legal structures and can only make law on a case-by-case basis in response to the accidents of litigation makes it difficult for them to provide a blueprint of reform for an entire area of the law. So judges possess the power to engage in partial and piecemeal reform, if at all, i.e. reform in one aspect of the application of the law. They do this by extending existing doctrines, adjusting them to changing circumstances or introducing small alterations to avoid an injustice in their application...⁹⁰

Kavanagh does not precisely explain what she has in mind when she talks of “radical and broad-ranging reform”. We can discern that this is the sort of thing Parliament engages in and that it is diametrically opposed to “partial and piecemeal reform”, which is defined as “reform in one aspect of the application of law”. Kavanagh opines that restricting the judicial role to the ability to engage in “partial and piecemeal reform” is “[c]learly ... reasonable”, given that judges are “neither well-placed nor qualified” to engage in radical reform.⁹¹ In this section, Kavanagh talks of “radical policy change” with “economic and social implications”, that “may require the reconciliation and balancing of a broad range of conflicting interests and viewpoints” as being beyond the role of judges.

As part of this analysis, Kavanagh offers a second – and potentially stronger – distinction between judicial and legislative law-making. For she notes that, while legislators are entitled to make law in an entirely “forward-looking” fashion (i.e. without regard for past legal rules of any sort), judges are “obliged to ... look backward at ... the existence and import of existing precedents.”⁹² This notion of the common law adjudicative process appears tightly circumscribed. Judges are constrained to develop the law only using particular judicial tools – these “techniques” of distinguishing, extending and overruling.⁹³ Kavanagh does not suggest that the judicial

⁹⁰ Kavanagh (2004), n 88, 272.

⁹¹ Ibid. Kavanagh also says this in her 2003 essay, n 87, at 72.

⁹² Kavanagh (2004), *ibid*, 271.

⁹³ See section 3.1.1.A on “Narrow Incrementalism”, below.

role includes, for instance, recognising a *novel* legal rule. Rather it seems that Kavanagh views the judicial common law role as being centred upon existing doctrine and allowing for some – tightly limited – modification of it.

As we will shortly see, when we examine different models of “incrementalism”, Kavanagh is right to acknowledge that judicial law-making is conditioned by pre-existing law. But this observation in itself does not help to clarify the methodological limitations on judges as they take account of this pre-existing law. It lacks detail and cannot form an adequate basis for a clear elucidation of *just how far* the courts are entitled to go in developing the common law. For the terms Kavanagh uses in making this point (“extending”, “adjusting”, “introducing small alterations”) are under-determinate. The impression which Kavanagh gives is that the judicial role *ought* to be tightly circumscribed, but she does not offer any detailed *guidance* as to just how judges ought to discharge their function in order to satisfy this concept of their role. Her approach instead seems to rely on a more intuitive, indefinite sense of the limits of the judicial law-making power. Moreover, in so far as Kavanagh’s thesis relies on a Razian concept of law as an authoritative body of rules, centralising the function of providing adequate guidance, this lack of clarity is surprising.⁹⁴ If, as she believes, there really are clear limits on the judicial role, it ought to be possible to speak of them in plainer terms (even if it is not possible to address them with absolute clarity).

The legislative/judicial distinction, then, is problematic and ill-equipped to provide an adequate conception of the judicial role in relation to the development of the common law. The two major problems with using these ostensibly opposed notions of law-making are (a) a lack of clear definitions for either term, and (b) a lack of consistency not only in their use but in making the argument that they are, in fact, distinct. Consider, for instance, this statement of Sir Robert Megarry V-C in *Malone*, when addressing the question of whether or not he ought to recognise a distinct right to privacy at common law:

[I]t is no function of the courts to legislate in a new field. The extension of the existing laws and principles is one thing, the creation of an altogether new right is another. At times judges must, and do, legislate;

⁹⁴ Kavanagh’s analysis has this feature in common with Heydon’s. See n 75.

but ... they do so only interstitially, and with molecular rather than molar motions... Anything beyond that must be left for legislation.⁹⁵

Megarry V-C's statement is drawn from the dissenting judgment of Holmes J in *Southern Pacific Co. v Jensen*.⁹⁶ According to Holmes J (and Megarry V-C), judges may legislate, but there is a limit on their legislative activity – the limit being to legislate only “interstitially”. The Oxford English Dictionary defines the noun “interstice”, from which the adjective “interstitial” derives, as:

An intervening space ... a relatively small or narrow space, between things or the parts of a body ... a narrow opening, chink, or crevice.⁹⁷

The notion of interstitial activity of any sort, then, inherently involves its performance within narrow confines. The notion of judges legislating interstitially features in John Bell's work on judicial decision-making.⁹⁸ This is, it is noteworthy, a notion that Phillipson and Williams adopt.⁹⁹ Bell proposes three models of judicial decision-making, of which one is the “interstitial legislator” model (we need not dwell on the other two, which in any event Bell disposes of in his book). The interstitial legislator model proceeds from the basis that existing legal materials (rules, principles and so forth) are often insufficient to provide an answer in every case. Thus, “since the rule itself does not dictate the answer”, judges are left “to make value-judgments about how the rule is best understood.”¹⁰⁰ The making of a value-judgment in any given case then involves a form of creative decision-making that is, in Bell's view, analogous to the legislative behaviour of Parliament. However, judges enjoy less freedom than Parliament – there are “limitations within which the judge exercises his choice.”¹⁰¹ First, is the requirement “to fit his decision into the framework of existing law.”¹⁰² Second, judicial law-making can only be “partial”, in that “[j]udges only create rules

⁹⁵ *Malone v Metropolitan Police Commissioner* [1979] Ch 344, 372.

⁹⁶ 244 US 205, 221 (1917).

⁹⁷ <http://www.oed.com/view/Entry/98353> (accessed 10 July 2017).

⁹⁸ John Bell, *Policy Arguments in Judicial Decisions* (OUP 1982), 226ff.

⁹⁹ Phillipson and Williams, n 76, 905. The authors do not, however, adopt Bell's “interstitial legislator” model unequivocally, finding scope in their conception of the post-HRA judicial role to include aspects of Bell's “rights model”, based on the work of Ronald Dworkin.

¹⁰⁰ Bell, n 98, 227.

¹⁰¹ *Ibid*, 228.

¹⁰² *Ibid*, 228.

or decide on discretionary standards when specific instances are presented to them”.¹⁰³ Third, judges must “consider” the “retrospective nature of judicially created rules.”¹⁰⁴ Such consideration, Bell states, “may deter judicial action.”¹⁰⁵ Thus, Bell tells us:

[B]ecause of its limitation to partial and essentially remedial legal development within the confines of reasonable coherence and consistency with the rest of the law, judicial activity is narrower in scope than parliamentary law-making or administrative discretion...¹⁰⁶

There is considerable overlap between Bell and Kavanagh’s conceptions of the judicial role. But whereas Kavanagh’s work is primarily concerned with constitutional law, Bell makes a more ambitious attempt to conceptualise as interstitial the judicial role across the range of judges’ work, including in elaborating the common law. Bell and Kavanagh’s conceptions, which delimit the judiciary from making “radical” changes to existing doctrine, are both rooted in a particular philosophy of adjudication that is in turn founded in a formalistic, procedural notion of the rule of law, of the sort propounded by Raz. Bell’s interstitial legislator is, however, ostensibly less strictly formalist than a judge following Kavanagh’s guidance, since in considering the retrospective nature of judicial law-making the interstitial legislator will be weighing the need for “coherence and consistency” as a first-order reason for action (or inaction).

We have seen in this section that the popular legislative/judicial distinction in conceptualising the judicial role is problematic. It is too often under-determinate in its pronouncements, leading to vagueness. We have, however, been able to locate within it a broader legal philosophy – formalistic positivism of the sort which Raz elaborates. This background will assist us as we consider models of incrementalism and the way in which they assert that judges should go about reasoning in novel cases.

¹⁰³ Ibid, 228.

¹⁰⁴ Ibid, 229.

¹⁰⁵ Ibid, 229.

¹⁰⁶ Ibid, 230.

3. Incrementalism

As a method for judicial development of the common law, “incrementalism” entered into the popular legal lexicon in Brennan J’s judgment in the Australian High Court case of *Sutherland Shire Council v Heyman*.¹⁰⁷ The case concerned the appropriate test for recognising novel duties of care in negligence law. The High Court rejected the English two-stage test from *Anns v Merton LBC* which was used in the UK at that time.¹⁰⁸ One possible method was the incremental method proposed by Brennan J. In a famous statement, he argued

It is preferable ... that the law should develop novel categories of negligence incrementally and by analogy with existing categories, rather than by massive extension of a prima facie duty of care...¹⁰⁹

This method was actually rejected by the High Court, which instead adopted a test based on a high degree of proximity between the parties, a test that has come to be known as the “salient features” test.¹¹⁰ Despite its rejection by the majority in *Sutherland*, Brennan J’s incrementalism expressly informed the House of Lords’ adoption of the three-stage duty of care test in *Caparo v Dickman Plc*.¹¹¹ This was a move that marked a retreat from the overtly principle-based *Anns* test that had been overruled, after several years of increasingly venomous criticism of its activist tendencies, in *Murphy v Brentwood*.¹¹² The history of the development of English law’s three general duty of care tests (from *Donoghue v Stevenson*,¹¹³ via *Anns* to *Caparo*) is well known and its rehearsal here is unnecessary. The key point is that, in adopting the three-stage test (inspired by Brennan J’s outline of incrementalism), the House of Lords made plain its desire to retreat from an expansionist, “imperialistic” approach to recognising novel duties.¹¹⁴ Its preferred approach was to be conservative,

¹⁰⁷ (1985) 157 CLR 424.

¹⁰⁸ *Anns v Merton LBC* [1978] AC 728.

¹⁰⁹ (1985) 157 CLR 424, 481.

¹¹⁰ See *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54 and *Caltex Refineries (Qld) Pty Limited v Stavara* [2009] NSWCA 258, [102].

¹¹¹ [1990] 2 AC 605 (*Caparo*).

¹¹² [1991] 1 AC 398 (*Murphy*).

¹¹³ [1932] AC 562, 1932 SC (HL) 31 (*Donoghue*).

¹¹⁴ *CBS Songs Ltd v Amstrad Plc* [1988] AC 1013, 1059, per Lord Templeman.

cautious, and respectful of what the House saw as the courts' proper role in the constitutional space in which judges render their decisions.

Incrementalism has, then, since *Caparo*, been a concept familiar to English tort lawyers. It is only relatively recently, however, that those constitutional lawyers who have championed the legislative/judicial distinction have seized upon incrementalism as a method capable of providing guidance to the courts as to how to go about their role within such a distinction.¹¹⁵ In particular, Phillipson and Williams have made a forceful case for incrementalism providing a model for the process of interstitial legislation.¹¹⁶ The implication is that the incremental method can clarify the operation of the legislative/judicial distinction, and perhaps cure some of the defects we identified above.

However, incrementalism as a concept needs to be refined if it is to provide a clear method for legal development. This is because “what is incremental is to an extent in the eye of the beholder”.¹¹⁷ As Alison Young puts it when discussing the *Wainwright* case, “creating a tort of privacy *could be* regarded as more than a merely incremental development of the common law.”¹¹⁸ Equally, creation of a privacy tort could be regarded as impeccably incremental.¹¹⁹ Thus, as Keith Stanton points out, the term “incrementalism” has a “range of conceivable meanings”.¹²⁰ Moreover, scrutiny of English, post-*Caparo* case law reveals a lack of consensus as to its meaning within the judicial pronouncements. Brennan J's dissenting guidance adds little further detail, on its face, to the legislative/judicial distinction, other than to declare a preference for analogical reasoning and distaste for “massive extensions” of the law.

¹¹⁵ For example, Kavanagh (2004), n 88, 272; Jeff A King, ‘Institutional Approaches to Judicial Restraint’ (2008) 28(3) OJLS 409, 429ff; Phillipson and Williams, n 76, 888-889.

¹¹⁶ Phillipson and Williams, n 76, 904-905.

¹¹⁷ *Bryan v Maloney* (1995) 182 CLR 609, 661 per Toohey J.

¹¹⁸ Alison L Young, ‘Horizontality and the Human Rights Act 1998’, ch.4 in David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (CUP 2011), 40 (emphasis added).

¹¹⁹ Phillipson and Williams, adopting – by implication – a wider notion of incrementalism than Kavanagh (n 88), lend some support to this notion (n 76, 884). Moreover, if the finding in *Vidal-Hall* (n 20) that MPI is a tort separate from equitable confidentiality is correct (upheld on appeal [2015] EWCA Civ 311, [2016] QB 1003), then it must surely have been “created” at some point (most likely in the *Campbell* case). I discuss the implications of *Vidal-Hall* in more detail in section 2 of Chapter 2.

¹²⁰ Keith M Stanton, ‘Incremental Approaches to the Duty of Care’ in Nicholas Mullany (ed), *Torts in the Nineties* (North Ryde 1997) 34.

3.1 Models of Incrementalism

Lesley Dolding and Richard Mullender offer a definition of incrementalism that provides a helpful starting point for refinement of the concept. They define it as:

a form of adjudication involving the articulation of liability rules which are, at once, new (and, hence, can properly be regarded as the fruit of judicial law-making) and yet are conditioned by pre-existing law.¹²¹

The authors further identify two models of incrementalism, which they term “narrow” and “wide” forms of the concept. Stanton’s analysis identifies two additional models, “gradualism”¹²² and a “pocket”¹²³ approach (focusing on the establishment of discrete “pockets of duty”). Both analyses identify these models of incrementalism as having been recognised and put to use by the courts at various times. I will examine each in turn, laying the groundwork for scrutinising (in the next chapter) the key judgments that have so far denied the possibility of recognising a broad privacy tort.

3.1.1 Stanton’s Models

Stanton suggests that, despite clearly indicating that, in future, the courts would pursue a less expansionist mode of adjudication in negligence, the House of Lords actually equivocated in *Caparo*. This is because, on his account, the three-stage test for duty of care enunciated in that case is not itself incremental. The *Caparo* test requires foreseeability of damage, proximity between the parties and “the court [to] consider[] it fair, just and reasonable that the law should impose a duty”.¹²⁴ The third stage openly invites the court to consider policy matters as determinative of the decision whether or not to impose a duty. Whilst the test reverses the presumption in favour of imposing a duty from *Anns*,¹²⁵ it retains express consideration of policy matters without any

¹²¹ Lesley Dolding and Richard Mullender, ‘Tort Law, Incrementalism, and the House of Lords’ (1996) 47(1) NILQ 12 (Dolding and Mullender), 13.

¹²² Stanton, n 120, 41.

¹²³ *Ibid*, 42.

¹²⁴ *Caparo*, n 111, 617-618, per Lord Bridge.

¹²⁵ The two-stage *Anns* test suggested that, once the relationship of proximity between the parties was established (essentially the *Donoghue* “neighbour principle”), policy considerations might come into play “to negative, or reduce or limit the scope of the duty” (*Anns*, n 108, 752). *Caparo* reverses this by requiring policy considerations to positively weigh in favour of the imposition of a duty, rather than merely weigh against its presumptive imposition.

specific limitations on them. This, in Stanton's view, is not incrementalism. It is, rather, formulaic, policy-based reasoning.

Incrementalism, in Stanton's view, evokes an older image of common law reasoning. For "[c]ommon law methodology is by its very nature incremental."¹²⁶ The process of incrementalism involves, on this view, the development and modification of bodies of doctrine "by the slow incremental accretion of case law."¹²⁷ This is the way that the common law developed pre-*Donoghue*. Thus for Stanton, "[t]he 'neighbour' principle derived from *Donoghue* ... represents a radical challenge to this picture because it is a principle which has the potential of applying to previously uncharted areas of activity".¹²⁸ Likewise, the replacements for the "neighbour principle", *Anns* and *Caparo*, are formulaic methods for expanding the law on duty of care into "previously uncharted areas". By contrast, the models of incrementalism which Stanton expounds defy this trend; they involve keeping developments within limits that prevent expansion into areas not previously covered.

A. Gradualism and Narrow Incrementalism

Gradualism is Stanton's first model of incrementalism. This "insists that any development ... is to be based on experience drawn from the existing body of authority."¹²⁹ It reflects the broad themes of the legislative/judicial distinction, in that it "assumes that tort should only move into new areas in small steps" and that "[i]f a large leap is required it is the task of the legislature to initiate" it.¹³⁰ Unlike the *Donoghue*, *Anns*, and *Caparo* approaches to developing the law, "[g]radualism rejects giving a great deal of scope to ... policy or fairness".¹³¹

Features of the operation of gradualism visible in the cases which Stanton argues have followed this method involve a statement of the accepted legal rule (or, in negligence, the category of duty) "followed by a discussion as to whether the facts of the case in

¹²⁶ Stanton, n 120, 40. See also Sir Anthony Mason, 'The Recovery and Calculation of Economic Loss', in Nicholas Mullany (ed) *Torts in the Nineties* (North Ryde 1997), ch.1.

¹²⁷ Stanton, n 120, 40.

¹²⁸ *Ibid*, 40.

¹²⁹ *Ibid*, 41.

¹³⁰ *Ibid*.

¹³¹ *Ibid*.

issue are such as to justify an extension of the [rule] to those facts.”¹³² If the facts of the instant case are sufficiently analogous to the existing case law in which the relevant rule has been applied, the rule may be applied to the novel case and thus the rule is gently extended.

Gradualism represents “law as a virtually static body of doctrine”, which “has the capacity to make the law certain and predictable”.¹³³ This coheres with the constitutional and democratic concerns underpinning the legislative/judicial distinction, “by insisting that courts do not enter the province of the legislature.”¹³⁴ Because it regards law as static, gradualism is a “formalist” concept of incrementalism – “a positivist doctrine which respects law for its own sake.”¹³⁵

Gradualism essentially encompasses the model of “narrow incrementalism” which Dolding and Mullender identify. Courts adopting a narrow incrementalist method to developing the common law tend in the direction of formalism. Formalism, in this sense, refers to

(i) the view that a deductive (syllogistic) adjudicative method capable of yielding determinate (and, as such, *uncontroversial*) solutions to legal disputes is an ideal which is worthy of pursuit ... and

(ii) a belief in the possibility of a method of legal justification which can clearly be contrasted with “open-ended disputes about the basic terms of social life”, disputes which are strongly *political* in character.¹³⁶

Narrow incrementalism treats precedent as having exclusionary force, and thus contains this feature of the Razian conception of the judicial function. In so far as precedent operates as an exclusionary reason, first-order concerns that might lead the court towards an opposite conclusion in the absence of precedent are not even considered. The presence (or absence) of precedent is determinative of the outcome. Likewise, “pure” gradualism in negligence involves identifying “[t]he underlying logic

¹³² Ibid, 45.

¹³³ Ibid, 42.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Dolding and Mullender, n 121, 23 (emphasis is original).

and policies of the recognised category ... in order to decide whether the case in issue is truly analogous.”¹³⁷ If there is a lack of existing case law indicating a rule capable of extension to cover the novel scenario, gradualism denies any opportunity for extending the law. It results in the courts “refus[ing] ... to contemplate” elaborating the law in novel situations.¹³⁸ So, in a novel case, if a sufficiently “tight” analogy can be drawn with an existing liability rule, liability will be imposed. Conversely, if such an analogy cannot be found, there will be no liability and, crucially, *no expansion of the law*.

Narrow incrementalism thus “reduces receptivity to strongly novel claims”.¹³⁹ The courts have no need of regard to overarching principles. As such, “the law progresses fitfully, with only furtive reference to ... community values.”¹⁴⁰ Dolding and Mullender noted, in negligence cases, a “passivist”¹⁴¹ tendency to justify the use of the narrow incremental approach by reference to issues of non-justiciability.¹⁴² By this they mean the notion that “certain disputes are unsuitable for judicial resolution”, either due to a lack of competency¹⁴³ or legitimacy,¹⁴⁴ or a “complex combination” of the two.¹⁴⁵

In the context of negligence law, narrow incrementalism has operated to confine the development of the law, in respect of the recognition of novel duties of care, to existing categories of such duties. This, Dolding and Mullender are concerned, is fundamentally at odds with both tort law’s “protective purpose”¹⁴⁶ and the specific negligence-related edict that “the categories of negligence are never closed”.¹⁴⁷ For

¹³⁷ Stanton, n 120, 45.

¹³⁸ Ibid, 46.

¹³⁹ Richard Mullender, ‘English Negligence Law as a Human Practice’ (2009) 21(3) Law & Literature 321, 326.

¹⁴⁰ EW Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (CUP 2005) 140.

¹⁴¹ Dolding and Mullender, n 121, 18.

¹⁴² Ibid, 21. This was most evident in the cases upon which their analysis dwells: *Murphy v Brentwood* [1991] 1 AC 398 and *Cambridge Water v Eastern Counties Leather* [1994] 1 All ER 53.

¹⁴³ That is, “the fact that the courts are (a) unable to provide a forum in which particular kinds of dispute can be adequately resolved or are (b) unable to provide as effective a setting for dispute resolution as that provided by, for example, the legislature” (ibid, 21).

¹⁴⁴ That is, “the principle of the separation of powers (according to which courts, even if able to do so, ought not to adjudicate on certain matters as a matter of constitutional propriety)” (ibid).

¹⁴⁵ Ibid.

¹⁴⁶ Ibid, 12-13.

¹⁴⁷ *Donoghue v Stevenson*, n 113, 612, per Lord Macmillan. Cited by Dolding and Mullender, ibid, 13.

Dolding and Mullender fall within the group of commentators Stanton identifies as seeking “to argue that the law of negligence has a protective or deterrent purpose which can only be fulfilled properly if the tort is allowed to provide a remedy when new examples of damaging situations are revealed”.¹⁴⁸ The operation of gradualism/narrow incrementalism in the post-*Campbell* privacy cases we will scrutinise in the next chapter has achieved a similar state of affairs, confining privacy rights to existing categories of case – most notably the category of informational rights. Narrow incrementalism in the privacy context, then, precludes as a matter of method the adoption of a *novel category* of privacy tort dealing with, for instance, intrusion into an individual’s seclusion.¹⁴⁹ Only cases within *existing* categories may provide a foundation for an analogy with a novel case. So long as courts operate in the narrow incremental mode, inspired by this formalist-leaning conception of the judicial role, they apparently find themselves “unable”¹⁵⁰ (rather than merely “unwilling”¹⁵¹) to recognise a new tort to guard against novel types of privacy violation.

As Dolding and Mullender point out, there is an inherent tension within the gradualist/narrow incremental mode between its developmental aspirations and its formalist inspiration. It is a tension we have noted previously, albeit couched in unhelpfully indeterminate language, in the notion that courts ought to engage in only small-scale development of the law, rather than making “radical” changes or “large leaps”. The tension really arises because formalism prescribes a *deductive* mode of reasoning, whereas *any* form of incrementalism, concerned as it is with driving law forward (at one pace or another), necessarily involves *analogical* reasoning.¹⁵² It thus becomes clear that narrow incrementalism, whilst tending towards formalism, cannot entirely fit within a strictly formalist conception of the judicial role. We might therefore surmise from the cases in which gradualism is adopted a reluctant judicial recognition that strict formalism is not sustainable in a common law system.

¹⁴⁸ Stanton, n 120, 55.

¹⁴⁹ William Prosser, ‘Privacy’ (1960) 48(3) Cal LR 383; *Restatement of the Law (Second): Torts* (2d), vol 3 (American Law Institute 1977) 376.

¹⁵⁰ *Wainright*, n 21, [18].

¹⁵¹ *Ibid.*

¹⁵² Dolding and Mullender, n 121, 25.

B. “Pocket” Incrementalism

Stanton’s second model of incrementalism is “pocket-based”, and as such has more obviously direct relevance to negligence law than to privacy. For the tort of negligence, prior to *Donoghue*, developed within discrete “pockets”. A pocket is a metaphor for a small normative space containing “discrete areas of authority concerning typical fact situations”.¹⁵³ In this form, “incrementalism concerns itself with the limited issue of whether expansion of particular pockets can be justified.”¹⁵⁴ Pocket incrementalism shuns “large general theories of tort liability”, in the belief that they “lack the capacity to produce the precise results called for by particular fact situations.”¹⁵⁵ This places emphasis on the “traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes.”¹⁵⁶

Stanton tells us that pocket incrementalism is particularly evident in the courts’ treatment of the duty of care question in cases of negligently inflicted psychiatric injury. In this area, the House of Lords in particular has dealt with the issues “on the basis that it is dealing with a self contained body of doctrine”.¹⁵⁷ Within these pockets, there is a role for principle and policy to play, in so far as the courts identify principles and policies that underpin the existing rules and use these as a guide to assist in their analogising with novel circumstances. This suggests that a less tightly factual analogical process may take place.

3.1.2 *Dolding and Mullender’s Wide Incrementalism*

The wide incremental (or principled¹⁵⁸) approach legitimises the court’s having regard to overarching principles in order to found novel causes of action, either in the complete absence of precedent, or where there are only hostile or unhelpful authorities.

¹⁵³ Stanton, n 120, 43.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid, 42.

¹⁵⁶ *Caparo*, n 111, 618, per Lord Bridge.

¹⁵⁷ Stanton, n 120, 48.

¹⁵⁸ John DR Craig, ‘Invasion of Privacy and Charter Values: The Common Law Tort Awakens’ (1997) 42 McGill LJ 355. Craig’s “principled approach” to Canadian charter adjudication essentially mirrors the wide incremental mode identified by Dolding and Mullender.

The creation of a new category of tort (to plug a gap in, for example, rights protection) can give effect to tort law's overarching, informing principle, which Dolding and Mullender argue is its "protective purpose".¹⁵⁹

Wide incrementalism is contrasted with "narrow incrementalism", whereby in a novel case a judge must establish "a *tight* analogy between the facts before [him/her] and a set of circumstances which engage an existing liability rule":

One way of expressing this difference between narrow and wide incrementalism is to note that while judges operating in the wide incrementalist mode look to presently existing doctrine for *guidance* as to the nature of the wrongful transactions comprehended by the law, they do not exhibit the degree of *doctrine-boundness* manifested by judges engaged in the practice of narrow incrementalism.¹⁶⁰

Wide incrementalism therefore shuns "the requirement that the facts of a novel claim have to be comprehended by an existing category of case in order to ground a cause of action" that is indicative of narrow incrementalism.¹⁶¹ It shuns the formalist quest for a single right answer. Thus a court operating in the wide incremental mode might legitimately reach any one of a number of defensible conclusions on a given point of law. This potential for the accommodation of "reasonable pluralism",¹⁶² or "reasonable disagreement"¹⁶³, has given rise to several further metaphors about the normative space in which judging takes place. Richard Posner talks of a "zone of reasonableness",¹⁶⁴ whilst Mullender, echoing Benjamin Cardozo, dwells on a "field of interpretative possibility"¹⁶⁵ within which judges operate when deciding "open cases"¹⁶⁶ (that is, cases in which precedent is not determinative of the outcome, as it would be for lower courts following a higher court's authority). This field is shaped by norms that (so far as the imperfections of language will allow) mark out its extent and that place

¹⁵⁹ Dolding and Mullender, n 121, 14; Craig, *ibid*, 373.

¹⁶⁰ Dolding and Mullender, 121, 16.

¹⁶¹ *Ibid* at 32.

¹⁶² John Rawls, *Political Liberalism* (Columbia University Press 1996).

¹⁶³ Jeremy Waldron, *Law and Disagreement* (Clarendon Press 1999); 'The Core of the Case Against Judicial Review' (2006) 115 *Yale LJ* 1347–1406.

¹⁶⁴ Richard A Posner, *How Judges Think* (Harvard University Press 2010) 87.

¹⁶⁵ Richard Mullender, 'Judging and Jurisprudence in the USA' (2012) 75(5) *MLR* 914, 921.

Benjamin Cardozo talks of judging proceeding in a "field" in *The Nature of the Judicial Process* (reprinted, Feather Trail Press 2009) 43.

¹⁶⁶ Mullender, 'Judging and Jurisprudence', n 165, 921.

constraints on judges.”¹⁶⁷ These constraints include (i) “the area-specific source (eg a rule or doctrine or concept) invoked by a judge in support of his or her decision,”¹⁶⁸ and (ii) “the system of law within which particular rules, doctrines, and concepts have force.”¹⁶⁹ Within this systemic “field”, judges “may specify a range of politically controversial norms”¹⁷⁰, each of which provides a “defensible” answer to the legal problem in issue.¹⁷¹

The model of wide incrementalism offered by Dolding and Mullender is not uncontroversial. Stanton has doubted whether it can properly be described as “incremental” at all, which is unsurprising given his account of the concept. Dolding and Mullender, for instance, identify *Donoghue* and *Anns* as decisions made in the wide incremental mode, something that, to Stanton, “seems inappropriate”, since it “possesses the capacity for developing the law ... radically.”¹⁷² It is defended by the authors, however, as a method by which courts can secure “fidelity to law”¹⁷³. This, on their account, “enjoins judges both to give effect (where applicable) to the law’s presently existing requirements (narrow fidelity) and to pursue the purposes which inform a particular body of law (wide fidelity).”¹⁷⁴ The purposes informing law (on their notion of wide fidelity) include “principles, policies, [and] models of human association”.¹⁷⁵ Their defence of the wide incremental method they have identified as encompassing the scope to secure fidelity to law shares its central features with Karl Llewellyn’s “grand style” of adjudication.¹⁷⁶ In developing their concept of wide incrementalism, then, Dolding and Mullender have endeavoured to elaborate a purposive method that accommodates the protective principles they see as underpinning tort law, whilst remaining sensitive to the need for some limits on judicial law-making.

¹⁶⁷ Ibid, 922.

¹⁶⁸ Ibid, 921.

¹⁶⁹ Ibid, 922.

¹⁷⁰ Ibid, 915.

¹⁷¹ Ibid, 921.

¹⁷² Stanton, n 120, 40.

¹⁷³ Dolding and Mullender, n 121, 31-32.

¹⁷⁴ Ibid, 32.

¹⁷⁵ Ibid, 31.

¹⁷⁶ See Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown & Co. 1960) 36-37. Wide incrementalism is expressly linked to the grand style in Dolding and Mullender (ibid, 32). The notion of fidelity to legal principle is also evocative of Ronald Dworkin’s interpretive approach to adjudication, but Dworkin would not count fidelity to “policy” as properly being the concern of judges (*Law’s Empire* (Hart 1998) 221-224).

3.1.3 Perry's *Burkean* Conceptions

Stephen Perry has identified two models of adjudication in the context of dealing with precedential authority. He does not use the term “incremental” in relation to them, but they have clear relevance to our concerns. These are his “weak Burkean” and “strong Burkean” conceptions.¹⁷⁷ Both are “adjudicative” approaches to conceptualising the judicial role. In this sense, Perry uses the term “adjudicative” to distinguish his conception from the classically positivist (Razian) and natural-law approaches (such as that which he associates with Ronald Dworkin). By this he means that the common law “is best regarded as the institutionalized process of adjudication itself, rather than as the body of relatively stable (but nonetheless constantly changing) dispute-settling standards which emerge from that process.”¹⁷⁸ It is thus notable from the outset that Perry is concerned to occupy some of the centre ground between positivism and natural law.¹⁷⁹

Perry is particularly critical of Raz’s notion that adjudicative practice under the doctrine of *stare decisis* involves precedent operating upon courts with exclusionary force (excluding them from deciding a case other than in accordance with precedent). He acknowledges that Raz’s notion of exclusionary reasons provides a useful analytical tool for the manner in which the courts deal with pre-existing, authoritative rules. But it is not, in his view, entirely dispositive of the courts’ treatment of *stare decisis*. Perry finds it possible that precedent might operate on courts as an exclusionary reason, as Raz believes. For the prior case might be “regarded as constituting, or somehow giving rise to, an exclusionary rule”.¹⁸⁰ But Perry offers two alternative conceptions. The first, his “weak Burkean conception” (WBC),

regard[s] a court as being bound by a previous decision, itself decided on a balance of [first-order] reasons, only until such time as it was convinced both that the balance of reasons had been wrongly assessed

¹⁷⁷ Perry, n 84. Of his use of “Burkean” as an adjective in his terminology, Perry explains that he “use[s] the term ‘Burkean’ not in order to invoke the political philosophy of [Edmund] Burke, but simply to convey the idea of a presumption of some sort in favour of previously-accepted practices” (221, note 5).

¹⁷⁸ *Ibid*, 257.

¹⁷⁹ This is reminiscent of the institutionalists’ endeavour to occupy centre ground between formalism and non-doctrinalism, which we will encounter in Chapter 2. See Ch.2, section 4.2.

¹⁸⁰ *Ibid*, 221.

on the prior occasion, and that the correct assessment in fact led to the opposite result.¹⁸¹

Thus, under the WBC, “[a] court could not depart from a previous decision ... unless it had a positive reason for doing so.”¹⁸²

Perry’s alternative (and preferred) model is the “strong Burkean conception” (SBC). Under the SBC, a court

does not look upon a previous decision as precluding it from taking account of any particular reason or set of reasons ... but ... nonetheless will not depart from a prior holding unless it is first satisfied that the collective weight of the reasons supporting the opposite result is of greater strength ... than the weight which would otherwise be required to reach that result on the ordinary balance of [first-order] reasons.¹⁸³

Thus, a court operating under the SBC “is bound by a previous decision unless it is convinced that there is a *strong* reason for holding otherwise.”¹⁸⁴ Perry argues that this model explains “what goes on in common law courts” better than Raz’s account of exclusionary rules.¹⁸⁵

Perry’s adjudicative account, however, differs considerably in its starting premise. For Perry, law is not to be regarded as a body of rules offering authoritative guidance, but as the fruit of an adjudicative process undertaken by judges whose key function is to resolve the disputes that come before them “on the basis of whatever principles of justice and other relevant dimensions of morality properly apply”.¹⁸⁶ This process does produce a body of relatively stable rules, but only “as a kind of by-product”.¹⁸⁷ Conceiving of the common law as a by-product in this way sits well alongside

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ Ibid, 222.

¹⁸⁴ Ibid (emphasis is original).

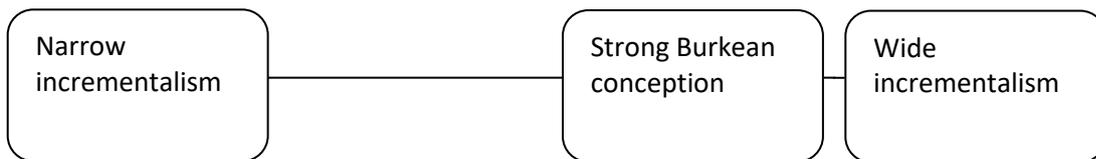
¹⁸⁵ Ibid, 257.

¹⁸⁶ Ibid, 240.

¹⁸⁷ Ibid.

Llewellyn’s observation that the common law represents a body of “slow-growing wisdom” – as opposed to a body of (slow- or otherwise-growing) *rules*.¹⁸⁸

Perry’s SBC sits between narrow incrementalism and wide incrementalism. If we were to plot all three approaches on a scale of adjudicative method along a formalist to non-formalist spectrum, it would probably sit towards the non-formalist end (rather than being equidistant). The diagram below is intended to be indicative, not precise.



It is less formalist, as it recognises the relevance of first-order factors, albeit weighed up alongside the precedential value of existing authority in a balance that is weighted towards following the precedent.¹⁸⁹ Thus, as Perry explains, if there is an existing precedent directly on point, the court will require strong reasons to depart from it. This enables the pursuit of a degree of continuity, if not certainty, in the law and as such this method does make a limited attempt to appease the formalist quest for predictability as to outcome. Perry’s SBC thus provides a method for dealing with precedent that purports to deal with the legal point in issue.

But the SBC does not address the situation where there is no, or no clear, existing authority on the legal point in issue. Wide incrementalism, however, does provide a method by which the courts can address such a situation. For (appellate) courts operating in the wide incremental mode look for existing doctrine that can provide *guidance* as to the direction in which the law ought to develop, but do not regard it as

¹⁸⁸ Karl N Llewellyn, *The Bramble Bush: The Classic Lectures on the Law and Law School* (OUP 2008) 41.

¹⁸⁹ The SBC also calls to mind Robert Keeton’s observation that: “[b]etween the areas as to which there is consensus [as to the proper division of work between the courts and the legislature] lies a substantial area in which the propriety of abruptly creative judicial action might be disputed. ... In general, however, the answer ‘depends on whether the policies which underlie the proposed rule are strong enough to outweigh both the policies which support the existing rule and the disadvantages of making a change.’” (Robert E Keeton, ‘Creative Continuity in the Law of Torts’ (1962) 75(3) Harvard LR 463, 476, quoting Walter V Schaefer, ‘Precedent and Policy’ (1966-7) 34 University of Chicago LR 3, 12).

necessarily binding. The result is that existing doctrinal guidance forms part of the first-order balance of reasons that is the only stage of inquiry for the court. Precedent in this mode of incrementalism has no exclusionary force. Most importantly, a lack of analogous case law indicating the presence of a category of tort capable of embracing the novel claim is not necessarily fatal to the claim. Moreover, since the courts look to existing doctrine for guidance rather than for binding authority, analogies may legitimately be drawn with cases somewhat further removed factually from the situation at hand. Analogies may, for instance, be drawn from cases lying within other categories of tort that are indicative of some underlying principle suggesting a need for tort's protective wing to embrace the claim at hand. Wide incrementalism thus involves analogical and inductive forms of reasoning. We see just this sort of reasoning in play in Lord Atkin's seminal judgment in *Donoghue*. A court operating in the narrow incremental mode in that instance would have regarded the lack of precedent for either an overarching, general duty of care, or a duty of care as between manufacturer and consumer, as fatal to the claim. But by taking the existing categories of duty as guidance, to be weighed alongside the (unnamed) principle that Lord Atkin perceives as demanding that the plaintiff be "sen[t] ... away with[] a remedy,"¹⁹⁰ the House of Lords inductively reasoned into existence a general duty.

Conclusion

The legislative/judicial distinction currently dominates much legal thinking and writing on the nature of the judicial role in English law. It prescribes only a narrow scope for development of the common law at the hands of judges. This seems immediately at odds with the common law's long-credited flexibility to develop and adapt to changing social circumstances and it is a conception mired in uncertainty and vagueness. Nevertheless, it looms large in the minds of judges – particularly in privacy cases – and it is this effect that creates an apparent "formal barrier" to the recognition of novel heads of tortious liability (such as an intrusion tort).

The uncertainty engendered by this formalistic conception of the judicial role may be partly tempered by a more detailed and nuanced understanding of the concept of

¹⁹⁰ *Donoghue*, n 113, 583.

incrementalism. Whilst some models of incrementalism suggest that only very limited, piecemeal development of the law is permissible in the courts, others make room for a more expansive approach, drawing on underlying principle rather than precedent alone. Recognising that the notion of incrementalism is not binary but a nuanced concept with a spectrum of meanings is the first step that must be taken in order to overcome this illusory formal barrier. Unfortunately, as we will see in the next chapter, English courts have developed a rigid, insular fixation with the narrow, formalistic conception of the judicial role. This lack of attentiveness to broader context prevents the courts from acknowledging other, broader models of incrementalism (and thus broader conceptions of the judicial role) as they go about their business. This leads, as we shall shortly see, to precisely the lack of legal certainty that formalism claims, on its face, to prevent.

Having identified a spectrum of models of adjudication that includes forms of incrementalism by which a more nuanced understanding of the judicial role might be put into practice (more or less “radically”, as may be the case), we are in a position now to scrutinise three key judgments that make up the formal barrier to the recognition of an intrusion tort in English privacy law.

Exploring the Formal Barrier: The Key Cases and their Problematic Legacy

[C]ertainty is treated as the paramount goal of adjudication. It is the Pole Star of much appellate decision-making. Far too many judges, lawyers and academics still worship it with an almost blind and superstitious veneration.

EW Thomas, *The Judicial Process*¹

Introduction

In this chapter, I first engage in a close reading of three judgments in three key cases that currently sit as precedential authority hostile to the recognition of either a broad, overarching privacy tort or the recognition of further discrete heads of tort liability for breach of privacy. These are the cases of *Wainwright*, *Campbell* and *Malone*. I scrutinise these judgments in the first section of the chapter, demonstrating that their rejection of enhanced privacy protections flows from a commitment to the Razian, formalistic conception of the judicial role identified in the previous chapter. This provides evidence that this restrictive conception of the judicial role dominates judicial thinking in key pronouncements on privacy. It is the dominance of this mode of thinking that leads to the impression that these cases erect a formal barrier to the recognition of an intrusion tort.

In the second and third sections, I analyse two discrete issues within post-*Campbell* MPI law that disclose a significant lack of legal certainty. Confusion over the nature of MPI (whether it is tortious or equitable, and how this could be discerned) has abounded ever since Lord Nicholls introduced the new nomenclature in *Campbell*. In the second section, I demonstrate that the confusion surrounding MPI's doctrinal roots is a direct result of the courts' insistence on shoe-horning all privacy-related common law claims into a confidence or confidence-like informational cause of action. I then turn, in the third section, to consider the issue of third party interests. The interests of

¹ EW Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (CUP 2005) 116.

parties other than the litigants have come to be regarded as potentially pivotal in MPI cases where, as is usually the case, privacy (Art.8 ECHR) and freedom of expression (Art.10) rights must be weighed and balanced against one another. This development, however, has no clear basis in formal law – either in precedent or statute. It is thus an example of an unforeseeable development that engenders considerable uncertainty for litigants (particularly defendants). Whilst the development may be normatively appealing, it must be acknowledged that it has undermined legal certainty. And once again, this issue can be traced back to the decision to shoe-horn ill-fitting privacy claims into a narrow, confidence-based doctrine.

In the fourth section, having established the existence of an illusory (yet powerfully so) formal barrier and evidenced the considerable difficulty it presents for maintaining legal certainty (which undermines the formalistic conception of the judicial role's *raison d'être*), I argue that it would be possible to overcome the illusion of the formal barrier by adopting a wider conception of incrementalism. Doing so, however, would require the courts to be broadly vigilant and attentive to the existence of alternative modes of incrementalism. It is that broader vigilance for which I am making a normative argument (an argument that will not be complete until the end of the thesis but to which this chapter contributes). For the desirability of broad attentiveness relates to the second, deeper problem with which the thesis is concerned – the dominance of insular, left hemisphere thinking – and is an issue to which I return in Chapter 4. For avoidance of doubt, because I am exploring *how* an intrusion tort could come about (rather than arguing that one *should* be recognised), I am not arguing in favour of wide incrementalism *per se*. I am simply making the argument that wide incrementalism ought to feature in the courts' consideration of their own law-making role. In the cases upon which I focus in this chapter, however, it is clear that only narrow incrementalism is being given judicial attention.

1. Judicial Method Under Scrutiny

In this section, I will scrutinise three key cases in which courts have directly addressed the question of whether or not they can, or should, recognise a general right to privacy in English law. I do not take the cases in chronological order. Instead, I start with *Wainwright*, since it represents the clearest judicial indication that a formal barrier

precludes the development of further heads of liability apt to protect personal privacy. I then consider *Campbell*, which is a seminal case in English privacy law and which re-iterates the *Wainwright* mantra on the nature of the judicial role. Finally, I turn to the earliest of the three cases, *Malone*, which deserves a mention (since it inspires *Wainwright*, in part) but which does not require detailed analysis (since as a High Court decision, its precedential power does not match that of the later House of Lords' cases).

1.1 *Wainwright v Home Office*

Wainwright v Home Office represents the clearest instance of the formal barrier in English privacy law.² It is the House of Lords case in which it is first stated, unequivocally, that the Court of Appeal's determination of the law in *Kaye* was correct. As such, it is one of just two cases in our highest court in which the potential development of a privacy tort of general application is expressly ruled out. The other is *Campbell*, which follows *Wainwright*, and to which we will return shortly.

The claimants in *Wainwright* who, it will be recalled, were subjected to strip-searches carried out in breach of the relevant rules whilst visiting a relative in prison, were awarded damages by the County Court at first instance for invasion of privacy. The first instance decision was, however, reversed by the Court of Appeal. In the claimants' appeal to the House of Lords, they based their argument around two submissions: first, that there was a hitherto unrecognised tort of invasion of privacy which the House ought to take this opportunity to confirm; second, and alternatively, that the action for intentional infliction of emotional distress from *Wilkinson v Downton*³ could be extended to provide relief in these circumstances.

The House of Lords rejected both arguments. Most important for our purposes is the manner in which the first argument was rejected. Lord Hoffmann gives the only full judgment in the case, and it is his rejection of the notion that the House could recognise a general tort of invasion of privacy that is most commonly cited as authority for the

² [2003] UKHL 53, [2004] 2 AC 406 (*Wainwright*).

³ [1897] 2 QB 57 (*Wilkinson*).

proposition that there is not – and cannot be – any such tort.⁴ When the judgment is scrutinised, we can locate within it a level of incoherence that is symptomatic of the unhelpfully formalist conceptions of the judicial role.

Lord Hoffmann notes that the seminal Harvard Law Review article, “The Right to Privacy” by Samuel Warren and Louis Brandeis,⁵ spawned the development of four distinct privacy torts in the United States which were codified by William Prosser in the 1960s.⁶ Warren and Brandeis, writing in 1891, drew upon existing doctrine in the fields of trespass, property rights and defamation, arguing that they were linked by an underlying value of personal privacy. From this, by a process of *inductive* reasoning, they proposed the recognition of a right of “inviolate personality,”⁷ or “the right to be let alone.”⁸

Lord Hoffmann distinguishes the US position from that of England, however, stating that “English law has so far been unwilling, perhaps unable, to formulate any such high-level principle.”⁹ He later remarks that the courts “have so far refused to ... formulate a general principle of ‘invasion of privacy’.”¹⁰ Whilst he acknowledges that, in apparent similarity to the US position in 1891, there are a number of English common law and statutory mechanisms “of which it may be said that one at least of the underlying values they protect is a right of privacy,”¹¹ there remain “gaps” where “invasion[s] of privacy [deserve] a remedy which the existing law does not offer.”¹²

⁴ It is cited for exactly this purpose in *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [2004] 2 AC 457 at 495. See also *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB), [2014] EMLR 24, [19]; *AAA v Associated Newspapers Ltd* [2012] EWHC 2103 (QB), [2013] EMLR 2, [10]; *Mosley v NGN Ltd* [2008] EWHC 1777 (QB), [2008] EMLR 20, [183]; *Murray v Express Newspapers Ltd* [2007] EWHC 1908 (Ch), [2007] EMLR 22, [18]; *OBG Ltd v Allen* [2007] UKHL 21, [2008] 1 AC 1, [272]; *McKennitt v Ash* [2006] EWCA Civ 1714, [2008] QB 73, [8]; *Douglas v Hello! Ltd (No.6)* [2005] EWCA Civ 595, [2006] QB 125, [50].

⁵ Samuel D Warren and Louis D Brandeis, ‘The Right to Privacy’ (1890) 4 Harv L Rev 193 (Warren and Brandeis).

⁶ William Prosser, ‘Privacy’ (1960) 48(3) Cal LR 383; *Restatement of the Law (Second): Torts* (2d), vol 3 (American Law Institute 1977) 376.

⁷ Warren and Brandeis, n 5, 205 and 211.

⁸ The phrase “the right to be let alone” is used for the first time in the second edition of Thomas McIntyre Cooley’s seminal text, *A Treatise on the Law of Torts: Or the Wrongs which Arise Independent of Contract* (2nd edn, Callaghan & Co. 1888) 29.

⁹ *Wainwright*, n 2, [18].

¹⁰ *Ibid*, [19].

¹¹ *Ibid*, [18].

¹² *Ibid*.

Lord Hoffmann is unequivocal in his lack of enthusiasm for adopting a US-style position, stating:

The need in the United States to break down the concept of ‘invasion of privacy’ into a number of loosely-linked torts must cast doubt upon the value of any high-level generalisation which can perform a useful function in enabling one to deduce the rule to be applied in a concrete case.¹³

Moreover, he sees

a great difference between identifying privacy as a value which underlies the existence of a rule of law (and may point the direction in which the law should develop) and privacy as a principle of law in itself. The English common law is familiar with the notion of underlying values – principles only in the broadest sense – which direct its development. A famous example is *Derbyshire County Council v Times Newspapers Ltd* ... in which freedom of speech was the underlying value which supported the decision to lay down the specific rule that a local authority could not sue for libel. But no one has suggested that freedom of speech is in itself a legal principle which is capable of sufficient definition to enable one to deduce specific rules to be applied in concrete cases. That is not the way the common law works.¹⁴

These segments of Lord Hoffmann’s judgment will be familiar to many commentators in the privacy field in England. It is worthwhile, however, to revisit them closely, in order to try to uncover Lord Hoffmann’s preferred conception of the judicial role. It is immediately apparent that Lord Hoffmann regards adjudication as a formalistic practice. His reference, in consecutive paragraphs, to deduction as the method by which “specific rules to be applied” are to be identified marks him out as a judge inclined towards formalism (on the definition adopted in the previous chapter).¹⁵ This, he tells us, bluntly, is “the way the common law works.”

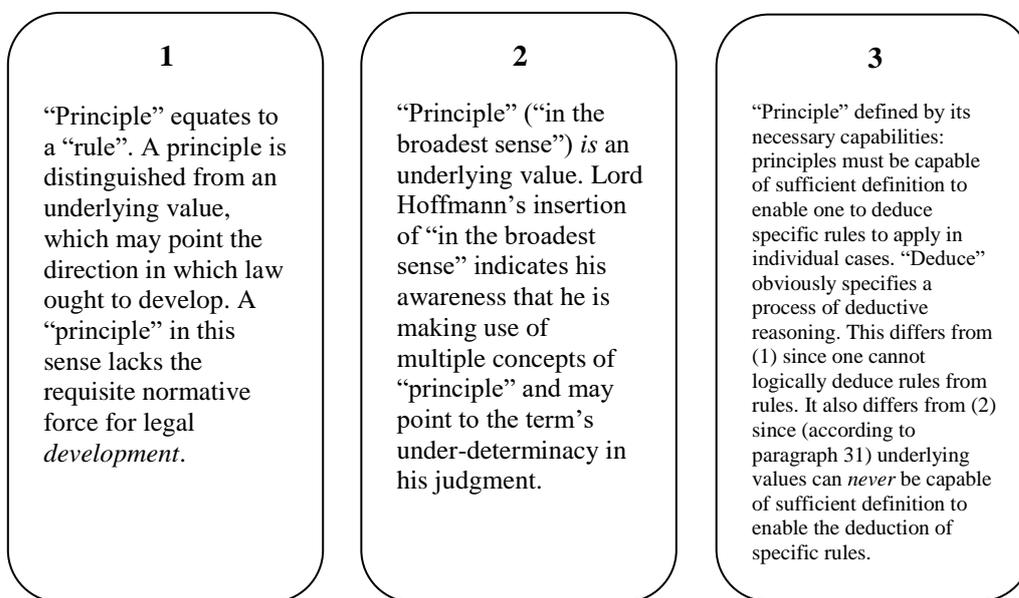
¹³ Ibid.

¹⁴ Ibid, [31].

¹⁵ The analysis in this section will reveal a level of incoherence in Lord Hoffmann’s reasoning that undermines his claims to adjudicate formalistically. A similar critique of another of Lord Hoffmann’s judgments, in a very different context, indicates that this is not an isolated event. See TT Arvind, “‘Though it Shocks One Very Much’: Formalism and Pragmatism in the *Zong* and *Bancoult*’ (2012) 32(1) OJLS 113.

Lord Hoffmann’s use of the term “principle” in the judgment is particularly revealing. He uses the term in several senses. First, “principle” is distinguished from a “value which underlies ... a rule”, suggesting he is equating a “principle” with a legal “rule”. But then he immediately uses “principle” in a second sense; “principles ... in the broadest sense” *are* “underlying values”. Third, he attributes to a “principle” the ability to be “capable of sufficient definition to enable one to deduce specific rules to be applied”, which offers us some degree of definition. This is a meaning which is distinct from either of the first two; here “principle” is clearly not a synonym for a legal “rule” since rules are to be deduced from it (rules, presumably, are not deduced from rules, or else this terminology is even more opaque than it at first seems). This third sense of “principle”, in which Lord Hoffmann might be said to be making an attempt at defining the concept by reference to its necessary attributes, also makes an appearance a little earlier in the judgment, when he talks of the courts’ refusal “to formulate a general principle of ‘invasion of privacy’ ... from which the conditions of liability in the particular case can be deduced.”¹⁶

Lord Hoffmann’s uses of “principle”:



When discussing Warren and Brandeis’ article, earlier still in the judgment, Lord Hoffmann similarly uses the term “principle” in two distinct ways. For he tells us that

¹⁶ *Wainwright*, n 2, [18].

the authors aimed to use “the right to be let alone” in order to “enable the courts to declare the existence of a general principle which protected a person’s appearance, sayings, acts and personal relations from being exposed in public.”¹⁷ This is too vague for us to be able to determine precisely what he means. But in an immediately preceding sentence, Lord Hoffmann tells us that what Warren and Brandeis actually identified in the doctrine they studied was a “common value” of privacy. At this point then, like the second sense identified above, he seems to be using the terms “value” and “principle” interchangeably.

Thus when he states that sometimes a “perceived gap [in the law] can be filled by judicious development of an existing principle”,¹⁸ it is not clear in what sense he is using the word. We are left to infer from his example of an attempt at a “radical change” in *Khorasandjian v Bush*¹⁹ (which was rejected in *Hunter v Canary Wharf Ltd*²⁰) as being “a step too far” that his notion of a “principle” is of something that is not amenable to “radical” extension. (The “radical change” sought by counsel in *Khorasandjian* was the extension of the tort of private nuisance to encompass telephone harassment.) At this point, let us consider each of the senses in which he has used the word “principle” in a bid to uncover his conception of the judicial role in the sentence above.

Lord Hoffmann may at this point be thinking of “principle” in sense 1. If so, his statement becomes:

A perceived gap in the law (i.e. the lack of a rule) can be filled by judicious development of an existing rule.

This shares features with Stanton’s account of gradualism, although it makes no mention of analogical reasoning. Without the express provision for analogical reasoning (and there can be no *tight* analogising in a situation that is factually novel, as *Wainwright* was), the law can only remain static. It is a highly formalistic conception (in an idealistic sense) of the process of legal development, whereby only

¹⁷ Ibid, [15].

¹⁸ Ibid, [18].

¹⁹ [1993] QB 727 (*Khorasandjian*).

²⁰ [1997] AC 655 (*Hunter*).

existing rules may be extended to fill gaps. A conception of the judicial role based around this process of development would be unresponsive to gaps in legal protection where no existing rule was capable of extension to fill them. If this is Lord Hoffmann's notion of the judicial role, he precludes himself from considering any principle or policy matters that might weigh in favour of adopting a broader privacy tort. On this view, those matters are irrelevant.

Lord Hoffmann cannot surely mean "principle" in sense 2, since this would not provide a practically useful method for legal development. He has already stated that underlying values are incapable of sufficient definition to enable the deduction of rules. An underlying value cannot, then, on his own analysis, lead to the deduction of a rule to fill the perceived gap.

Sense 3, like sense 2, fails to provide a logical *developmental* method. In this sense, a principle is a "thing" that *is* capable of sufficient definition to enable the deduction of specific rules. So using sense 3 to make sense of this part of his judgment would be self-defeating. For Lord Hoffmann states that a gap in the law may be filled by "development of an existing principle". If a principle is, as sense 3 sets out, something that is *already* sufficiently clear to enable the deduction of specific rules, there is no reason to suppose that principle would require further *development* in order to determine the rule needed to fill the gap. The mere *existence* of the principle, on these terms, ought to provide a sufficient basis for the deduction of the gap-filling rule.

In paragraph 18, then, Lord Hoffmann alludes to a process of legal development. This reflects his conception of the judicial role: judges are to develop existing principle in order to fill perceived gaps in the law. But the process he alludes to is self-defeating. Given the above analysis of his three senses of the term "principle", there are *no* circumstances in which courts would actually be empowered to develop the law under this formulation. His preferred method for legal development prescribes a formula that, when closely scrutinised, utterly precludes legal development.

Lord Hoffmann's preferred approach to adjudication, then, is even more restrictive than gradualism/narrow incrementalism, in that it precludes development at a practical level. Even narrow models of incrementalism strive (albeit slowly and piecemeal)

towards the development of new doctrine. This is not incrementalism, on any model. Rather it is a recipe for stagnation. Yet Lord Hoffmann insists that development is possible. From this we must draw one of two conclusions; the more charitable conclusion would be to suggest that his conception of the judicial role suffers from incoherence. A less charitable analysis might conclude that Lord Hoffmann has engaged in a particularly pernicious form of judicial chicanery, whereby he has set out a formula ostensibly designed to allow for judges to develop the common law but which he knows cannot, if strictly adhered to, in fact allow for any such development.

1.2 *Campbell v Mirror Group Newspapers*

Shortly after judgment was handed down by the House of Lords in *Wainwright*, the question of the extent to which the common law could protect privacy returned to the same court.²¹ In *Campbell*, the famous model, Naomi Campbell, was surreptitiously photographed leaving a meeting of Narcotics Anonymous, which she was attending as part of a regime of treatment for narcotics addiction. The photographs, along with details of her addiction and treatment regime, were published by the defendant's newspaper. Campbell brought an action for damages in respect of her right to privacy, making the argument through the old equitable doctrine of confidence. The House of Lords found in Campbell's favour by a majority of 3-2, extending the doctrine of confidentiality to embrace those aspects of informational privacy that engaged Art.8 ECHR.

In his judgment, Lord Hoffmann pursues a similar theme to that which he centred on in *Wainwright*, citing that case as authority for the proposition that "there is no general tort of invasion of privacy".²² From this starting point, Lord Hoffmann swiftly moves to repeat his *Wainwright* observation that privacy, as an underlying value, informs the existence of several discrete common law causes of action, including the equitable doctrine of confidentiality. This doctrine has been expanded, according to his Lordship, in a manner "typical of the capacity of the common law to adapt itself to the needs of contemporary life".²³

²¹ *Campbell*, n 4.

²² *Ibid*, [43].

²³ *Ibid*, [46].

However, in *Campbell*, it is the judgment of Baroness Hale that is worthy of particularly close scrutiny, since it is in her judgment that the potential for the judicial recognition of a broader privacy tort is once again most expressly ruled out.

In one of the first judgments that she gave upon being appointed to the House of Lords (her appointment commenced just six weeks before *Campbell* was heard) Baroness Hale joined Lord Hoffmann in forcefully ruling out the potential for the judicial recognition of a general privacy tort. Citing *Wainwright*, Baroness Hale is unequivocal when she states “the courts will not invent a new cause of action to cover types of activity which were not previously covered”.²⁴ In respect of victims of *Wainwright*-style (physical, as opposed to informational) intrusions upon privacy, “[t]he common law in this country is powerless to protect them.”²⁵ The case of *Wainwright*, according to Baroness Hale, “indicates that our law cannot, even if it wanted to, develop a general tort of invasion of privacy.”²⁶

These are three short statements, made in the course of a single paragraph. Yet, alongside Lord Hoffmann’s judgment in *Wainwright*, they represent the clearest statement from our highest court that there is a formal, legal barrier to the adoption of a general privacy tort. Moreover, in Baroness Hale’s judgment, this barrier is explicitly extended to prohibit the recognition of a novel head of liability in privacy, even if it were narrower than the general tort argued-for in *Wainwright*. Thus notwithstanding their brevity, these assertions are key, core statements of law that require detailed scrutiny.

In the space of this single paragraph, Baroness Hale makes two assertions of law. First, relying solely on one case for authority, she makes a sweeping declaration that under no apparent circumstances could the court ever develop a general privacy tort. Second, she may be read as making an even broader claim that the courts will not develop new causes of action to impose liability for *any* harmful activity that the law did not previously respond to. This would clearly also rule out the recognition of a novel tort protecting against a particular type of privacy violation such as intrusion.

²⁴ *Ibid.*, [133].

²⁵ *Ibid.*

²⁶ *Ibid.*

Both of these assertions of Baroness Hale’s are challengeable. Let us first consider the broader, second statement – that courts will not develop new causes of action to cover new “types of activity”. It is not clear why Baroness Hale is talking of new “types of activity” in the first place; for the taking and publication of objectionable pictures of a famous person in a public place was hardly breaking new ground, activity-wise, in 2004. In the context of her recalling the judgment of Lord Hoffmann, in this section of her judgment headed “Basic Principles”, she may simply be restating the law as she sees it. Alternatively, however, we might see her use of this phrase as an attempt at a subtle reframing of Lord Hoffmann’s *Wainwright* judgment. We concluded on his judgment that it suffered from incoherence. But if *Wainwright* is painted as a case to do with a new type of privacy-invading *activity* (i.e., strip-searching a person), then we might see Baroness Hale as stating that such activity lies outside the applicable “pocket” of privacy-invading activities that *can* attract liability. It is regrettable that Baroness Hale does not provide a counter-example of an instance in which an existing type of activity might give rise to a novel liability rule. Nevertheless, if we take her silence on this to imply that the courts would be able to extend the law to cover a novel circumstance in which a type of activity that was recognised as attracting liability was in issue, her approach calls to mind Stanton’s notion of “pockets” of liability.

Alternatively, it may be that Baroness Hale is simply making a comment on adjudication within the context of the court’s role under the Human Rights Act. After all, she does start this section of her judgment with reference to the HRA’s effect, stating that the Act “does not create any new cause of action between private persons”.²⁷ Moreover, to contextualise the judgment, this case was heard in the early 2000s, during a period in which there was a lack of clarity about the type of “horizontal” effect that the HRA would have (if any), which was the subject of considerable academic debate at the time.²⁸ Thus Baroness Hale might be taken as

²⁷ *Ibid*, [132].

²⁸ See, *inter alia*, Murray Hunt, ‘The “horizontal effect” of the Human Rights Act’ [1998] PL 423; Richard Buxton, ‘The Human Rights Act and private law’ (2000) 116 LQR 48; William Wade, ‘Horizons of horizontality’ (2000) 116 LQR 217; Anthony Lester and David Pannick, ‘The Impact of the Human Rights Act on Private Law: The Knight’s Move’ (2000) 116 LQR 380; Nicholas Bamforth, ‘The true “horizontal effect” of the Human Rights Act 1998’ (2001) 117 LQR 34; Deryck Beyleveld and Shaun Pattinson, ‘Horizontal applicability and horizontal effect’ (2002) 118 LQR 623; Jonathan Morgan, ‘Privacy, Confidence and Horizontal Effect: “Hello” Trouble’ [2003] CLJ 444; Max Du Plessis and Jolyon Ford, ‘Developing the common law progressively - horizontality, the Human Rights Act and the South African experience’ [2004] EHRLR 286. Later contributions of note

merely attempting to clarify the situation by staking out a position of the “indirect horizontality” genus.²⁹

Yet under a model of indirect horizontality the primary responsibility of the courts is, as Phillipson and Williams have persuasively argued,³⁰ to engage in their usual mode of common law adjudication, making such additional (i.e. *more* receptive) allowance as might be necessary in order to enable the common law to embrace Convention rights adequately. Thus the HRA’s requirements of the courts *adds to*, rather than restricts, standard common law adjudicative practice. Seen in this light, Baroness Hale’s statement must be taken to apply to common law adjudication generally (i.e. not just in an HRA context).

Baroness Hale’s first, narrower assertion, that “our *law* cannot, even if it wanted to, develop a general tort of invasion of privacy”,³¹ must also be scrutinised. There are two curious aspects to this statement. The first is that it seemingly ignores the powerful sentiments of the 1966 House of Lords’ Practice Statement that expressly recognises that the House *can* reverse its own rulings. It is implicit in the hierarchical structure of the English courts, coupled with the doctrine of *stare decisis*, that our highest court is not bound by *obiter* statements from its own previous cases (and it should be remembered that Lord Hoffmann’s statements from *Wainwright* set out above are largely *obiter*). Since the Practice Statement, however, it has also been *expressly* clear that the House of Lords is not so bound.³² Thus the blunt assertion that the House is “powerless to protect” victims of intrusion-type privacy violations is not, in a legalistic sense, true. Our highest court is capable of reconsidering and rejecting its own

include NA Moreham, ‘Privacy and horizontality: relegating the common law’ (2007) 123 LQR 373; Gavin Phillipson, ‘Clarity postponed: horizontal effect after Campbell’ in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP 2007); Gavin Phillipson and Alexander Williams, ‘Horizontal Effect and the Constitutional Constraint’ (2011) 74(6) MLR 878.

²⁹ For a comprehensive taxonomy of the various models of “horizontal effect” proposed by academics and the judiciary to explain the manner in which the Human Rights Act makes ECHR rights applicable in domestic private law, see Alison Young, ‘Mapping Horizontal Effect’ in David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (CUP 2011) 16.

³⁰ Phillipson and Williams, n 28.

³¹ *Campbell*, n 4, [133] (emphasis added).

³² [1966] 3 All ER 77 (Practice Statement). Logically, the House must always have been *able* to reverse its own rulings, for a practice statement cannot, presumably, actually accord the House new powers. The practice statement thus amounts to a clarification of the House’s position on the use of its existing powers to reverse the decisions of any domestic court, including itself.

statements from *Wainwright* – indeed there is precedent for a swift reversal of opinion in the House.³³

The second curious aspect of Baroness Hale’s statement may shed light on the first. This is the apparent divorcing of the court’s role in expounding the law from the existence of particular legal rules. For Baroness Hale actually states that it is “the law”, not the courts, that cannot develop a general privacy tort. Likewise, in the same paragraph, it is “the common law”, and *not* the courts, that is “powerless” to protect claimants in the *Wainwrights*’ situation.

Baroness Hale’s use of this terminology may be revealing. It would explain the first curious aspect in that it would exclude from the judicial remit the ability to recognise a novel tort; not because to do so would involve reversing *Wainwright*, but because the law has an existence independent from the courts. If the tort does not already exist, the courts cannot bring it into existence (and the law cannot bring a novel version of itself into existence). It would be commensurate with a conception of the judicial role that effectively denies the existence of judicial law-making, akin to the “fairy tale” declaratory theory of adjudication.³⁴ At the very least, it suggests a highly formalistic conception of the judicial role.

If this is what Baroness Hale meant, then it raises the question of just how a novel privacy tort *could* be brought into being. On this, her judgment is silent. More troublingly, it ostensibly conflicts with the pocket-based incrementalism she hints at. For it is logical to suggest that if the law cannot create new aspects of itself, and the courts cannot create new torts, then the only law-making body that remains capable of filling such gaps is Parliament. So, if what Baroness Hale is getting at is that reforms to law on the scale of recognising “a cause of action to cover types of activity which were not previously covered” are legislative in nature and should be left to Parliament, then we see evidence that it is the legislative/judicial distinction that is preoccupying her judgment. Moreover, it provides further evidence that, when this conception looms

³³ *Murphy v Brentwood* [1991] 1 AC 398 and *Caparo v Dickman Plc* [1990] 2 AC 605, of course, represent just this sort of reconsideration of earlier authority.

³⁴ Lord Reid, ‘The Judge as Law Maker’ (1972) 12 *Journal of the Society of Public Teachers of Law* 22.

large in the minds of the judiciary, it can do so in a manner that is unhelpfully restrictive. Baroness Hale’s judgment accords the legislative/judicial distinction the narrowest of the possible meanings that we considered earlier. This serves to further highlight the problem with the legislative/judicial distinction, in that it is so broadly and loosely defined that judges may end up declaring much of the judicial role to be “legislative” in nature, and thus off-limits. It encourages, for instance, inconsistent approaches to incrementalism. In this judgment, pocket-based incrementalism is hinted at one moment, before a swift reversal of position in the direction of Hoffmannesque high formalism.

Baroness Hale’s pithy but revealing statements on the judicial role in *Campbell* indicate an unwillingness to do “anything for a first time”,³⁵ in the form of recognising a general (or, indeed, a more limited but still novel) privacy tort. At the time, this aspect of the ruling attracted little controversy, which may be attributed to two factors. First, the claimant was still afforded a remedy through the extended confidence doctrine and so the violation of her privacy did not go unanswered. Second, with many of the English academic community’s eyes firmly fixed on the matter of the horizontal application of the HRA in the early 2000s, the stagnation of the common law in its own terms courted no substantial attention. Indeed, those who were in favour of limited horizontal effect had their fears of judges “threaten[ing] whole swathes of the common law with replacement by private HRA actions” largely assuaged by the House’s insistence that the HRA would not have such an effect.³⁶ But the position actually staked out – precluding the common law from developing in its own way to establish a general privacy tort – goes much further than appears to have been noticed at the time. (It also, of course, goes far further than was necessary to dispose of the case at hand; as such all of these remarks are *obiter dicta*, and whilst they take on the appearance of a formal barrier to the later recognition of a general privacy tort, are not technically binding even on lower courts.)

³⁵ EW Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (CUP 2006) 140.

³⁶ Gavin Phillipson, ‘Clarity postponed: Horizontal Effect after *Campbell* and *Re. S*’, in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial Reasoning under the UK Human Rights Act*, (CUP 2007) 152.

1.3 *Malone v Metropolitan Police Commissioner*

The judicial refusal to recognise a novel, general privacy tort (or a narrower tort focused on intrusion) is not confined to *Wainwright* and *Campbell*, albeit they represent the only two such refusals from our highest court. Although it may seem odd to discuss *Malone* out of order (as it pre-dates *Wainwright* and *Campbell* by over 20 years) the preceding analysis enables us to make sense of *Malone* relatively swiftly. In *Malone*,³⁷ Megarry V-C refused to recognise a right to privacy in tort. Like Baroness Hale's remarks in *Campbell*, scrutiny of Megarry V-C's judgment in *Malone* evinces the embracing of an unhelpfully restrictive conception of the judicial role. Since *Malone* sits as one of the first major decisions specifically to consider the potential for a privacy right in tort law, it is worth briefly dealing with his judgment.

Malone concerned the admissibility in criminal proceedings of evidence that was acquired by the Metropolitan Police by way of telephone tapping. The applicant argued that the police had violated his right to privacy. Megarry V-C considered the court's role in terms of the recognition of a privacy right. First, Megarry V-C notes the absence of previous authority on point and makes quite clear that whilst that absence "has to be borne in mind" it "certainly does not establish that no such right [to privacy in respect of telephone tapping] exists".³⁸ Indeed, "[i]f the true view is that such a right exists, then the court must say so, despite the absence of any prior authority."³⁹

Initially, then, Megarry V-C appears to have conceptualised the judicial role as potentially more expansive than under the unhelpful conceptions we dwelt on above. As he put it:

I am not unduly troubled by the absence of English authority: there has to be a first time for everything, and if the principles of English law, and not least analogies from the existing rules, together with the requirements of justice and common sense, pointed firmly to such a right existing, then I think the court should not be deterred from recognising the right.⁴⁰

³⁷ *Malone v Metropolitan Police Commissioner* [1979] Ch 344 (*Malone*).

³⁸ *Ibid*, 356.

³⁹ *Ibid*.

⁴⁰ *Ibid*, 372.

However, he immediately qualifies this in terms that we identified earlier as typical of the legislative/judicial distinction:

On the other hand, it is no function of the courts to legislate in a new field. The extension of the existing laws and principles is one thing, the creation of an altogether new right is another.⁴¹

Moreover, he invokes the notion of “interstitial legislation” that we encountered in Chapter 1.⁴² He insists that “[a]nything beyond [interstitial legislation] must be left for [Parliamentary] legislation.”⁴³ This, Megarry V-C determines, means 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 create such a right.”⁴⁴ Initially, then, he recognises scope for the judicial development of the law, not just by the narrowly incremental drawing of analogies with existing rules, but also taking into account “principles of English law” and “the requirements of justice” – matters relevant to the wide incremental mode. However, in an abrupt about-face, he then flags up the legislative/judicial distinction, makes reference to interstitiality, and denies the ability of the courts to recognise a new right.⁴⁵

1.4 Concluding Remarks

The intrusion lacuna is one problem that results from the dominance of this mode of thinking. But it is not the only one. Indeed, a close reading of the courts’ treatment of two further issues within the breach of confidence/MPI doctrine emphasises just how little certainty this way of thinking appears to be able to secure once it comes to dominate judging. In the next two sections, I give an account of two matters in privacy jurisprudence (other than the intrusion issue) in which considerable uncertainty has arisen in recent years. To be clear at the outset, however, I must emphasise that I am

⁴¹ Ibid.

⁴² See discussion of “interstitial legislation” in ch.1, pp 54-55.

⁴³ *Malone*, n 37, 372.

⁴⁴ Ibid.

⁴⁵ It should be noted that, following the domestic court’s ruling in *Malone*, the Strasbourg court found the UK to be in breach of its Convention obligations for failing to ensure that the telephone tapping that took place was authorised by law. See *Malone v UK* (1984) 7 EHRR 14. Following the Strasbourg ruling, Parliament enacted the Interception of Communications Act 1985 to correct the specific problem identified by the ECtHR.

not arguing that a lack of legal certainty is inherently objectionable. Rather I make the narrower claim that, since the pursuit of certainty is a core justification for the restrictive approach to judging that has informed the development of MPI, the failure of this approach to secure certainty must be seen as evidence that the approach is failing on its own terms.

2. The Nature of “Misuse of Private Information”

Since the seminal House of Lords’ privacy case of *Campbell*, English law has spent over a decade grappling with a cause of action with ambiguous doctrinal roots.⁴⁶ Until recently, there has been no pressing need to answer the decade-old question of how we ought to classify it; that is, whether the cause of action labelled “misuse of private information” is equitable (as some form of extension of the older, equitable doctrine of confidence), or tortious (and thus a novel head of liability). Mr Justice Eady, speaking extra-judicially in 2010, highlighted the problem colourfully: “[P]eople are still squabbling about whether the new law about private information is to be categorised as a tort or merely as an extension of old equitable principles governing the law of confidence.”⁴⁷ However, the recent case of *Vidal-Hall v Google Inc* has demanded that the question finally be answered, for the purposes of determining whether a claim for breach of privacy may be served outside the jurisdiction.⁴⁸ In the High Court, Mr Justice Tugendhat held that MPI is a tort, and is a cause of action distinct from the equitable doctrine of confidence. The Court of Appeal subsequently upheld this conclusion and reasoning. The Supreme Court then refused permission to appeal that aspect of the Court of Appeal’s ruling as disclosing no arguable point of law, and so implicitly endorsed the lower courts’ conclusion. Both the High Court and Court of Appeal judgments, however, provide disappointingly brief analyses of the doctrinal roots of this “tort”. As a result, their reasoning is regrettably underdeveloped.⁴⁹ As such, it cannot be said that either court has provided a wholly compelling, conclusive answer to this long-standing conundrum.

⁴⁶ *Campbell*, n 4.

⁴⁷ See David Eady, ‘Launch of New “Centre for Law, Justice & Journalism”’ (public lecture delivered at City University, London, 10 March 2010). The transcript is no longer available online but a copy can be supplied by the author on request.

⁴⁸ [2014] EWHC 13 (QB), [2014] 1 WLR 4155 (*Vidal-Hall*).

⁴⁹ However, this underdevelopment was almost certainly inevitable, given the time pressures on the courts in dealing with procedural matters – particularly in the High Court. It is certainly not my

2.1 Confusion Abounds

Despite considerable time having been spent analysing the intricacies of the seminal *Campbell* ruling, neither judges nor academics have really engaged with one of the biggest doctrinal questions that case raises; whether the House of Lords actually developed a novel cause of action in that case. The prevailing wisdom amongst most privacy academics at present is that, *somehow*, MPI was developed from the equitable doctrine of confidence in that case.⁵⁰ But an answer to the question of just *how* this was achieved remains elusive.

2.1.1 Campbell

Two elements of the *Campbell* decision merit examination at this point. First, we must consider the doctrinal changes wrought as a matter of formal law. Second, we need also to consider judicial statements about the implications of those doctrinal developments.

Campbell was pleaded in breach of confidence.⁵¹ Yet because both novel nomenclature and at least one novel formulation of the test for liability emerge from the House of Lords' opinions in the case,⁵² it is unclear whether the claim was disposed of using the same cause of action as that within which it was pleaded. As a matter of formal law, the doctrine emerging from *Campbell* is distinct from, though still reminiscent of, the law of confidence. Phillipson summarises the *Campbell* "transformation" of breach of confidence thus:

intention to cast any pejorative aspersions on the efforts of either the High Court or Court of Appeal to deal sufficiently with this complex issue in the context of the litigation before them.

⁵⁰ See, for example, Rebecca Moosavian, 'Charting the journey from confidence to the new methodology' (2012) 34(5) EIPR 324; Patrick O'Callaghan, *Refining Privacy in Tort Law* (Springer 2013) 97ff. Raymond Wacks describes breach of confidence as having undergone a "metamorphosis" into MPI in *Privacy and Media Freedom* (OUP 2013) at 69 and 103ff.

⁵¹ It will be recalled that the case, brought by the supermodel, Naomi Campbell, concerned the publication of photographs taken of her in public leaving a meeting of Narcotics Anonymous, along with details of her treatment for addiction to controlled drugs.

⁵² As Moreham points out, their Lordships also equivocate on the test for liability to be adopted, whichever cause of action might be in play; the judges in the case end up proposing three distinct tests for determining whether the published information is "private". See NA Moreham, 'Privacy in the Common Law: A Doctrinal and Theoretical Analysis' (2005) 121 LQR 628.

[T]he second limb of the breach of confidence action – requiring that there must, in addition to being unauthorised use of confidential information, be ‘circumstances importing an obligation of confidence’ – has been removed. Meanwhile, the first limb – that the information must have ‘the quality of confidence’ – has been transformed: the notion that the information must be ‘confidential’ has morphed into a requirement that it be ‘private’ or ‘personal’ information.⁵³

This “transformation”, however, raises the question of just what has happened to the equitable doctrine of confidence. It is far from obvious whether that cause of action endures but with a new formulation, or whether it has been replaced by a new, tortious formulation, or whether a novel cause of action has been recognised that, whilst similar to the doctrine of confidence, exists separately from it. The first option would rule out MPI being regarded as a separate doctrine, whilst the second would rule out the possibility that equitable confidence could continue to exist in its own right along its original lines. The third option would logically permit both MPI and equitable confidence to have their own, separate existences, and so, in the light of *Vidal-Hall*, it today seems the most ostensibly plausible. But this third option would raise further questions about the extent to which MPI is conceptually distinct from equitable confidence; whether it is a branch of the equitable tree (which, presumably, would render it equitable) or whether it is a *sui generis* tort. If it turns out to be the latter, this would indicate a more radical development. And that, in turn, might make the possible future development of an intrusion tort appear to be hardly any more radical.

The opinions of their Lordships in *Campbell* are ambiguous on these points. Whilst Lord Nicholls refers to the privacy action using novel nomenclature (“misuse of private information”),⁵⁴ his judgment also talks of the existence of only *one* such cause of action.⁵⁵ Indeed, he is consistent in referring only to one cause of action (in this judgment), which he initially describes in equitable terms⁵⁶ before moving to “better

⁵³ Gavin Phillipson, ‘The Common Law, Privacy and the Convention’ in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP 2007) 217, citing the traditional formulation from *Coco v AN Clark (Engineers) Ltd* [1968] FSR 415, 419.

⁵⁴ *Campbell*, n 4, [14].

⁵⁵ *Ibid*. “The essence of *the* tort is better encapsulated now as misuse of private information.” (Emphasis added.)

⁵⁶ *Ibid*, [13].

encapsulate[.]” it by calling it a “tort of misuse of private information”.⁵⁷ He regards the old breach of confidence “nomenclature” as “misleading”.⁵⁸ Lord Nicholls identifies the principle underpinning MPI, “however [the doctrine is] labelled”, as “respect for one [informational] aspect of an individual’s privacy”.⁵⁹ This, which is distinct from the equitable principles underpinning traditional confidence doctrine, reveals the doctrine to have “changed its nature” following the earlier *Spycatcher* ruling.⁶⁰ The doctrine is said to have “firmly shaken off the ... need for an initial confidential relationship”.⁶¹ In protecting privacy, the key question has become, he explains, “whether in respect of the disclosed facts the person in question had a *reasonable expectation of privacy*.”⁶² Thus Lord Nicholls paints a picture, in *Campbell*, whereby the equitable doctrine of confidence morphs into “misuse of private information” but without explaining how this has been achieved.

In his judgment in *Campbell*, Lord Hoffmann is not clear about how he sees the law as having developed, but there are indications that he perceives things differently to Lord Nicholls. He states that, following *Spycatcher* and the passing of the HRA, there “has been a shift in the centre of gravity of the action for breach of confidence *when it is used as a remedy for the unjustified publication of personal information*”.⁶³ Thus,

[i]nstead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity – the right to control the dissemination of information about one’s private life and the right to the esteem and respect of other people.⁶⁴

In this passage (and throughout the parts of his judgment where he discusses the development of the law of privacy), Lord Hoffmann hints at the emergence of a second branch of confidence law when he uses the qualifying statement “when it is used as a remedy for the unjustified publication of personal information”, since it suggests that,

⁵⁷ *Ibid*, [14].

⁵⁸ *Ibid*, [13].

⁵⁹ *Ibid*, [15].

⁶⁰ *Attorney General v Observer Ltd (No.2) (“Spycatcher”)* [1988] UKHL 6, [1990] 1 AC 109 (*Spycatcher*).

⁶¹ *Campbell*, n 4, [14].

⁶² *Ibid*, [21] (emphasis added).

⁶³ *Ibid*, [51] (emphasis added).

⁶⁴ *Ibid*.

when the doctrine of confidence is used for other reasons – such as the protection of trade secrets – there has *not* been a shift in its centre of gravity. This whole passage could thus be read as supporting the notion that there is just one operative cause of action (if one reads down the qualifying statement), or as tentatively suggesting that a new cause of action has emerged from (and now sits alongside) the earlier one (if one reads it up). As such, Lord Hoffmann equivocates. And, when taken in context with his judgments in *Wainwright* and the later case of *OBG*,⁶⁵ this equivocation indicates the presence of a disconcerting incoherence in his Lordship’s vision of the manner in which the law in this field has developed. It is also unclear (if he *is* in fact expressing some support for the notion of a new, parallel cause of action having come into being) whether he perceives the tangential line of authority dealing with private information as being tortious or equitable. For on the one hand, his discussion is rooted in confidence law and he continues to talk of “the action” in the singular sense.⁶⁶ But on the other hand, he gives us the tense-equivocal statement that “[b]reach of confidence *was* an equitable remedy and equity traditionally *fastens* on the conscience of one party to enforce equitable duties which arise out of his relationship with the other.”⁶⁷ This sentence relates equity in both the past and present tenses to either the historical shape of the doctrine or to its 2004 shape and thereby obscures his meaning.

Lord Hope’s judgment gives us a third way. He rejects Lord Hoffmann’s assertion that there has been a “shift in the centre of gravity”⁶⁸, and essentially applies the *Spycatcher* model of confidence to the facts of *Campbell*, with a nod to the need to balance the competing Art.8 and 10 rights when assessing the legitimacy of publication.⁶⁹ Whilst he uses the term “private” to describe the information later in the judgment,⁷⁰ Lord Hope does so in the clear belief that it is this single action for breach of confidence that is operative, having been expanded to provide a remedy for breaches of informational privacy. His approach, then, is to reject the notion that there has been any significant change to the doctrine of confidence post-*Spycatcher* (and thus he

⁶⁵ In *OBG v Allen*, n 4, Lord Hoffmann summed up the effect of the *Campbell* ruling in terms that seem to invoke Lord Nicholls’ approach rather than his own previous view: “In recent years, English law has adapted the action for breach of confidence to provide a remedy for the unauthorised disclosure of personal information...” (at [118]).

⁶⁶ *Campbell*, [44], [46]

⁶⁷ *Campbell*, [44]

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, [82-3], [86]. *Spycatcher*, n 60.

⁷⁰ *Ibid.*, esp. [92].

implicitly rejects the idea that the operative cause of action in *Campbell* is tortious rather than equitable).

2.1.2 Post-Campbell cases

Some later cases seem to confirm the existence of *both* equitable confidentiality *and* MPI as separate causes of action with differing focuses,⁷¹ whilst others prefer the notion of a single, modified cause of action.⁷² And yet other cases equivocate on whether these comprise one cause of action with interchangeable names or two separate doctrines.⁷³ A further possibility, barely touched upon in the case law, is that MPI is *neither* tortious *nor* equitable, but is instead something entirely new. Given the strong influence that European Convention rights have had on its development and content, the notion that it is a sort-of “hybrid”⁷⁴ doctrine encompassing equitable, tortious and higher-order public law principles (i.e. Convention rights) is one that might at the very least have been worth exploring. It is hinted at in the Court of Appeal’s judgment in *McKennitt*, wherein Buxton LJ comments that Arts 8 and 10 of the ECHR are now “the very content of the domestic tort that the English court has to enforce” but the courts have not pursued that line of thinking with any vigour since he made those remarks in 2006.⁷⁵

⁷¹ For example, *Tchenguz v Imerman* [2010] EWCA Civ 908, [2011] Fam 116 (*Imerman*); *Vidal-Hall v Google Inc.*, n 48.

⁷² In *Murray v Express Newspapers Ltd* [2007] EWHC 1908 (Ch), [2007] EMLR 22, Patten J clearly believes there to be only one cause of action – a modified doctrine of confidence (see [18]-[21]). The Court of Appeal, hearing an interlocutory appeal in *Murray* [2008] EWCA Civ 446, [2009] Ch 481, expressly adopts Lord Nicholls’ view from *Campbell* (at [24]).

⁷³ For example, see the summary of the position in English law attempted by the Court of Appeal in *McKennitt v Ash* [2006] EWCA Civ 1714, [2007] 3 WLR 194 at [8], which suggests both that the “tort of breach of confidence” (by which, presumably, the court means the equitable doctrine) has been “rechristened” as a tort of MPI, and also that the instant claim invokes “old-fashioned breach of confidence” (which, presumably, endures nonetheless). In *Green Corns Ltd v Claverley Group Ltd* [2005] EWHC 958 (QB), [2005] EMLR 31, Tugendhat J observed that the claim had been brought in both breach of confidence and misuse of private information (as alternatives), but declined to offer an opinion on which cause of action was applicable or, indeed, whether they were the same or distinct from one another. He disposed of the case according to “[t]he law of confidence” which, “so far as material, can be taken from the speeches of the House of Lords in *Campbell*” (at [48]).

In *OBG v Allan*, n 4, the House of Lords equivocates once again on the issue. Lord Hoffmann suggests (at [118]) that there is just one cause of action that has been “adapted”. Yet Lord Nicholls now seems more inclined towards separating the two (at [255]): “As the law has developed breach of confidence, or misuse of confidential information, now covers *two distinct causes of action*, protecting two different interests: privacy, and secret (‘confidential’) information. It is important to keep these two distinct.” (Emphasis added.) It is noteworthy that neither judge precisely repeats their views from *Campbell*, and, indeed, may each be thought to have changed their positions.

⁷⁴ Alastair Mullis and Ken Oliphant, *Torts* (4th edn, Palgrave MacMillan 2011) 3.

⁷⁵ *McKennitt*, n 73, [11].

To make matters worse, the confusion continues even within individual judgments in post-*Campbell* privacy cases. The 2014 case of *Weller v Associated Newspapers Ltd*⁷⁶ highlights this problem.⁷⁷ Mr Justice Dingemans identifies the claimants' claim in *Weller* as “an action for breach of confidence”, remarking that this cause of action has been “renamed ... misuse of private information”.⁷⁸ Elsewhere in the judgment, however, he paints a subtly different picture, for he tells us that “claims for misuse of private information were absorbed into the established claim for breach of confidence” some years ago.⁷⁹ And in yet another place he identifies MPI as a “new cause of action”.⁸⁰ Thus, in the space of just five paragraphs, Dingemans J stakes out three quite different positions on the nature of the claim at hand. It is highly unlikely that this was deliberate – indeed the learned judge may not even have considered the distinctions drawn within his own use of terminology. But this alone highlights the depth of the difficulty which the ambiguity surrounding this cause of action's doctrinal roots has caused.

The 2004 judgment of the New Zealand Court of Appeal in *Hosking v Runting* is also particularly revealing, since it provides a comparative.⁸¹ In *Hosking*, the Court was presented with an opportunity to clarify the manner in which New Zealand law dealt with informational privacy violations. Given the option to expand the existing doctrine of confidence, the court preferred to recognise openly a novel head of tortious liability protecting private information. In so doing, the court established a “private facts” tort. The judgment sheds light on the confusion engendered by the ways in which the English law of confidence was put to use, between the House of Lords' cases of *Spycatcher* in 1988 and *Campbell* (which was handed down shortly after *Hosking*) in 2004, in order to provide a remedy in cases dealing with the public disclosure of

⁷⁶ [2014] EWHC 1163 (QB), [2014] EMLR 24 (*Weller*). Dingemans J gave judgment on a claim for misuse of private information in respect of photographs taken by a paparazzo in California of Paul Weller's (a well-known musician) children.

⁷⁷ “It might be noted that the issue of whether the cause of action for misuse of private information is now a separate tort, as opposed to an equitable cause of action, is an issue to be addressed by the Court of Appeal on an appeal from the judgment of Tugendhat J. in *Vidal-Hall v Google Inc* ... I do not need to say anything further on that issue, and I do not do so.” (Ibid, [24].)

⁷⁸ *Weller*, n 76, [24] (emphasis added).

⁷⁹ Ibid, [20] (emphasis added).

⁸⁰ Ibid, [22] (emphasis added).

⁸¹ [2004] NZCA 34, [2005] 1 NZLR 1 (*Hosking*).

private matters.⁸² The New Zealand Court of Appeal, endeavouring to make sense of the English authorities, proclaimed that, by 2004 (just *before* the House of Lords' decision in *Campbell* was handed down) English law recognised “two quite distinct versions of the tort of breach of confidence.”⁸³

One is the long-standing cause of action applicable alike to companies and private individuals under which remedies are available in respect of use or disclosure where the information has been communicated in confidence. ... The second gives a right of action in respect of the publication of personal information of which the subject has a reasonable expectation of privacy irrespective of any burden of confidence... The first formulation reflects the historical approach to the law of torts with the focus on wrongful conduct whereas the second reflects more the impact of a developing rights-based approach.⁸⁴

This statement is starkly indicative of the problem this doctrinal uncertainty has caused. For it contains mutually incompatible statements on the nature of the English causes of action. Thus the New Zealand Court of Appeal is led to identify (wrongly, at least at a formal level) the long-standing equitable doctrine of confidence as a tort (an error the English Court of Appeal also made in *McKennitt*).⁸⁵ Having done so, it further recognises a second tort dealing with *private*, rather than *confidential*, information, which had apparently appeared at some point after *Spycatcher* but clearly *before* the House of Lords' decision in *Campbell* (which had not been handed down when *Hosking* was decided). The fault here lies not with the judges in *Hosking* but rather with the confused state of English law at the time and the lack of a clear, universal understanding of its development.

2.1.3 Vidal-Hall v Google Inc

Ten years after *Hosking*, the English courts were required, for the first time, to decide whether MPI is a tortious or equitable cause of action in the case of *Vidal-Hall v*

⁸² Cases pleaded and disposed of under the equitable doctrine of breach of confidence in circumstances where it might be said that the nub of the plaintiffs' complaints was to do with violations of their privacy include: *HRH Princess of Wales v Mirror Group Newspapers Ltd* (1995, unreported), *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804. See ch.1, p.31, n.11.

⁸³ *Hosking*, n 81 [42].

⁸⁴ *Ibid*, [42].

⁸⁵ See n 73.

*Google Inc.*⁸⁶ The claim was in respect of information obtained and (according to the claimants) misused by the defendant through the installation of “cookies” on their computers via their web browsers. At the case’s first hearing, in the High Court, this was decided as a preliminary matter; it was necessary to determine whether the claims – pleaded in *both* MPI and breach of confidence – were amenable to service upon Google Inc outside the jurisdiction of England and Wales. (Under the Civil Procedure Rules as they stood at the time, tort claims may be served extra-jurisdictionally, but non-tort claims may not.⁸⁷) Mr Justice Tugendhat concluded that MPI exists as a head of tortious liability, distinct from equitable confidentiality. The MPI claim could therefore be served, but the claim in breach of confidence – being equitable rather than tortious – could not.⁸⁸

Unfortunately, and most likely due to the necessarily brief nature of legal proceedings regarding preliminary issues, it must be said (with great respect) that the learned judge’s reasoning lacks the detail and depth needed to provide wholesome support for his conclusion. From the judgment, it is plain that Tugendhat J is convinced that MPI *is* tortious, but that he finds it difficult to pin down the requisite supporting evidence.

The case of *Douglas v Hello! Ltd (No.3)* was heavily relied on by counsel for Google, as they endeavoured to show that MPI was not tortious.⁸⁹ In *Douglas (No.3)*, the claimants brought a claim in breach of confidence in order to protect their privacy in respect of surreptitiously-taken photographs of their wedding ceremony in New York. This was the judgment in which the Court of Appeal infamously bemoaned that it could not

⁸⁶ *Vidal-Hall*, n 48.

⁸⁷ The law pertaining to out of jurisdiction service was, at the time, governed by rule 6.37 of the Civil Procedure Rules 1998. The practice direction to that rule, 6B, paragraph 3.1(9), provides that service outside the jurisdiction is permitted where: “A claim is made in tort where (a) damage was sustained within the jurisdiction; or (b) the damage sustained resulted from an act committed within the jurisdiction.” This provision has since been revised by the 81st update to the Civil Procedure Rules to enable out of jurisdiction service for claims in both breach of confidence and misuse of private information. This revision came into effect on 1 October 2015.

⁸⁸ Tugendhat J held that he was bound by the Court of Appeal’s decision in *Kitetchnology BV v Unicor GmbH Plastmaschinen* [1995] FSR 765 to hold that the action pleaded in breach of confidence was equitable (n 48 at [71]).

⁸⁹ [2003] EWHC 55 (Ch), [2003] EMLR 29 (*Douglas (No.3)*).

... pretend [to] find it satisfactory to be required to shoe-horn within the cause of action of breach of confidence claims for publication of unauthorised photographs of a private occasion.⁹⁰

In *Douglas (No.3)* (which Tugendhat J cites) the Court of Appeal held that “the effect of shoe-horning this type of claim into the cause of action [for] breach of confidence means that it does not fall to be treated as a tort under English law”.⁹¹ The court in *Douglas (No.3)* was, at this point, considering whether s.9 of the Private International Law (Miscellaneous Provisions) Act 1995 applied, a question which it answered in the negative. In *Vidal-Hall*, counsel for Google submitted that, in this part of *Douglas (No.3)*, the court was referring to what Lord Nicholls had (in *Campbell*) called the tort of misuse of private information. Tugendhat J rejected this, holding that the Court of Appeal’s remarks in *Douglas (No.3)* referred to the equitable doctrine of confidence only. In support of this, Tugendhat J noted that this was the only possible doctrine to which the judge in *Douglas (No.3)*, Lindsay J, could have been referring, given that the first instance decision pre-dated *Campbell* by nearly a year.⁹² He also states that Lord Nicholls’ reference in *OBG*, four years after *Campbell*, to “two distinct causes of action” supports his conclusion that MPI and breach of confidence are separate from one another.⁹³

Tugendhat J concludes this portion of his judgment by looking (much more briskly) at cases in which his brethren on the bench have identified MPI in tortious terms. He notes that the phrase “misuse of private information” has become a legal term of art which has frequently, if not consistently, been identified by courts as a tort.⁹⁴ These uses, he holds, “cannot be dismissed as all errors in the use of the words [sic] ‘tort’.”⁹⁵ The Court of Appeal, when it considered *Vidal-Hall*, also pursued this line of

⁹⁰ Ibid, [53].

⁹¹ Ibid, [96].

⁹² [2003] EWHC 786 (Ch), [2003] 3 All ER 996. See in particular [181]-[186] on breach of confidence. It is worth noting that, having himself acted as counsel for the claimants in a number of the *Douglas* cases, including nos. 3 and 6, Tugendhat J is well-placed to recall the cause of action relied upon.

⁹³ See n 73.

⁹⁴ Tugendhat J cites (at [68]): *Secretary of State for the Home Office v British Union for the Abolition of Vivisection* [2008] EWHC 892 (QB), per Eady J at para [28]; *Imerman v Tchenguiz*, n 71, [65] (“there is now a tort of misuse of private information”); and *Walsh v Shanahan* [2013] EWCA Civ 411, [2013] 2 P & CR DG7 per Rimer LJ at para [55].

⁹⁵ *Vidal-Hall*, n 48, [68].

reasoning, remarking that these judicial uses of the term “tort” in relation to MPI “connote an acknowledgement ... of the true nature of the cause of action.”⁹⁶

However, whilst there may be some underlying, intuitive veracity to the notion that if something is generally treated as a tort then it probably is one, the mere repeated judicial use of the term “tort” is not, in itself, conclusive proof of its accuracy. As Chris Hunt puts it, “repetition does not transform a falsity into a truth”.⁹⁷ Indeed, since Tugendhat J was the first judge to consider this question of MPI’s classification as a disputed point of law, it is apparent that no previous reference to the doctrine as tortious was founded on detailed judicial analysis or, indeed, detailed submissions from counsel. This must call into question the reliability and suitability of those references for the purpose for which Tugendhat J is using them.

When *Vidal-Hall* reached the Court of Appeal, the defendant repeated its argument based on the decision in *Douglas (No.3)*. It argued that the identification of the basis of that claim as equitable amounted to a binding declaration that the only cause of action available in these sorts of informational privacy cases was that one, same, equitable doctrine. The Court of Appeal rejected outright this argument of Google’s, remarking that the *Douglas (No.3)* observations were *obiter* rather than *ratio*.⁹⁸

The Court first noted counsel for Google’s “uncontroversial proposition” that, following the coming into force of the HRA, the gap in protection for Art.8 interests in respect of informational privacy was bridged by the courts “developing and adapting” the older equitable doctrine of confidence “to protect [claimants from] the misuse of private information”.⁹⁹ The Court pointed to the decision in *A v B* as an example of that process, wherein the Court of Appeal “absorb[ed] the rights which articles 8 and 10 protect into the long-established action for breach of confidence”.¹⁰⁰ One unfortunate aspect of the Court’s judgment becomes apparent at this point. This is that the Court is mobilising a range of under-determinate terminology in order to describe the process by which privacy law developed in the early years of the HRA.

⁹⁶ *Vidal-Hall v Google Inc* [2015] EWCA Civ 311, [2016] QB 1003 (*Vidal-Hall (CA)*), [26].

⁹⁷ Chris DL Hunt, ‘Rethinking surreptitious takings in the law of confidence’ [2011] IPQ 66, 83.

⁹⁸ *Vidal-Hall (CA)*, n 96, [38].

⁹⁹ *Ibid*, [19].

¹⁰⁰ *A v B Plc* [2002] EWCA Civ 337, [2003] QB 195, [4].

The developmental process (by which MPI ultimately came – at some point as yet unspecified – into being) is described as one of development, adaptation and absorption. There is a significant semantic tension between, on the one hand, these descriptions of the process and, on the other, the Court’s clear belief that “[a]lthough the process may have started as one of ‘absorption’ ... it is clear that ... there are now two separate and distinct causes of action”.¹⁰¹ For the descriptive terms used imply strong, internal continuity; they give rise to the intuitive understanding that a *single* cause of action has been “developed” and “adapted”, and that protection for a particular type of interest (i.e. privacy) has been “absorbed” into it. Thus when the Court, just a paragraph later, subsequently asserts that two distinct actions now exist, it is not at all apparent that (and no explanation is offered of how) this can be the case. Given this rather baffling use of language, it is clear that this judgment, too, requires close scrutiny.

When one unpacks the Court of Appeal’s reasoning in *Vidal-Hall*, it becomes apparent that it rests upon three strands of argument.¹⁰² The three strands may be summarised as follows: (i) as a matter of substance, “confidentiality” and “privacy” are distinct from one another and give expression to “different interests”; (ii) the law is still developing, and the ongoing process of development that began as one of “absorbing” privacy claims within confidentiality has reached a point where “there are now two separate and distinct causes of action”; and (iii) MPI has frequently (if not always consistently) been referred to by the judiciary as a “tort”.¹⁰³ Thus strand (i) is substantive, relating to the informing principles underpinning these causes of action, whilst (ii) and (iii) are essentially empirical (and purely descriptive) observations.

At a formal level, these three strands of the Court’s reasoning are problematic. None of them gives any hint of the method by which the *law relating to* “confidentiality” and “privacy” has developed in such a way as to give expression to these “different interests”. They say nothing about the doctrinal roots of MPI. The judgment is also unhelpfully vague about just what these “different interests” in strand (i) are. We are

¹⁰¹ *Vidal-Hall (CA)*, n 96, [21].

¹⁰² *Ibid.* These are summarised by the Court at [21].

¹⁰³ The Court of Appeal cites, as examples of MPI being described judicially as a “tort”, *McKennitt*, n 73; *Lord Browne of Madingley v Associated Newspapers Ltd* [2007] EWCA Civ 295, [2008] QB 103; *Murray v Express Newspapers*, n 72; *Tchengui v Imerman*, n 71.

likely to be on fairly safe ground if we assume the Court has in mind the protection of equitable ideals of trust and confidence (the maintenance of the relationship of trust between confidants) when it talks of “confidentiality”. We can similarly make the assumption (although we are arguably on less certain ground if we do¹⁰⁴) that it is drawing on the sorts of dignity and autonomy-based concerns that the Strasbourg Court regards as central to Art.8 when it talks of “privacy”.¹⁰⁵

Moreover, (ii) is not really a strand of argument at all (if it was, it would be entirely circular); rather it is the very question that the Court is considering. To simply assert that “there are now two separate and distinct causes of action” does not provide an explanation of *how* they came into being. Likewise strand (iii) says nothing about *how* MPI came into its own as a tort. Its reliance here on frequent judicial descriptions of MPI as a “tort” perhaps provides useful *evidence* that MPI appears, as a matter of semantic empiricism, to be tortious – but it cannot explain its emergence.

We are thus left with a judgment that provides a bare answer to the question posed. Its reasoning does not – at any point – give any clue as to the Court’s understanding of just how MPI emerged as a tort.

When the Court offers a (brief) account of the HRA era case law during which MPI has developed, it fares no better. For instance, the Court quite rightly identifies Lord Nicholls’ judgment in *Campbell* as “highly influential”.¹⁰⁶ Yet the Court – despite regarding this as “highly influential” – does not explicitly state that *Campbell* was the point at which MPI emerged in tortious form. Instead, it leaps ahead (with an appropriately dramatic “four years later”) to the House of Lords’ decision in *OBG* (in which Lord Nicholls stated that the law had developed “two distinct causes of action” for confidence and privacy).¹⁰⁷ Thus it leaves us with an analysis-free four-year period during which, presumably, the Court believes MPI gained its status as a distinct tort

¹⁰⁴ Given the history of judicial reluctance to define “privacy” in English law, we probably have less secure grounds to assume this is the Court’s understanding of “privacy” than we had for making our assumptions about its understanding of “confidentiality”.

¹⁰⁵ See, for example, *Reklos v Greece* [2009] EMLR 16, [39] (on “autonomy”); *Pretty v United Kingdom* (2002) 35 EHRR 1: “the notion of personal autonomy is an important principle underlying the interpretation of [the] guarantees [in Article 8]”, (at [61]); “The very essence of the Convention is respect for human dignity...” (at [65]).

¹⁰⁶ *Vidal-Hall (CA)*, n 96, [22].

¹⁰⁷ *OBG*, n 4, [255]; *Vidal-Hall (CA)*, *ibid*, [24].

(without being conclusively labelled as such by our highest court). Bafflingly, it is on the developments in the law *during* this remarkable – and clearly highly significant – period of change that the Court is silent.

The Court of Appeal rather lets the proverbial cat out of the bag when, in concluding on the issue of MPI’s classification, it remarks:

if one puts aside the circumstances of its “birth”, there is nothing in the nature of the claim itself to suggest that the more natural classification of it as a tort is wrong.¹⁰⁸

This is surely the clearest possible admission that the Court was unable to identify the “circumstances of [MPI’s] birth”. In this regard, it has thus fared no better than the High Court in its efforts (indeed, Tugendhat J’s analysis is arguably the more detailed of the two). And so irrespective of the correctness (or otherwise) of the conclusion reached, the judgment leaves unanswered a key question: if MPI *is* tortious then *how*, as a matter of formal law, did it come into being?

This question is not one that I set out to answer in this thesis – indeed it would probably take a piece close to thesis length to do so. But it is important to note the ongoing existence of the question. For it arises directly because of the “shoe horning” approach to the development of MPI that English courts have committed themselves to in the post-*Wainwright* era. Had the House of Lords considered the development of a novel head of liability in *Campbell* a legitimate judicial action and recognised MPI as a novel and distinct tort there and then, this problem would have been avoided. But that is not what happened. Instead their Lordships equivocated; some of the judgments suggest MPI is tortious, others deny its very existence and continue to talk in terms of equitable confidentiality, whilst some later cases avoid expressing a clear view entirely. The insistence on “shoe horning” privacy claims into the confidence/post-confidence vehicle is symptomatic of a highly restrictive conception of the judicial role coming to dominate the thinking of the House and the lower courts in recent years.¹⁰⁹ For now, we need only note the following point: the dominance of this restrictive conception of

¹⁰⁸ *Vidal-Hall (CA)*, *ibid*, [43].

¹⁰⁹ This mode of thinking will be explored further in Chapter 4.

the judicial role, whilst intended to secure and maintain legal certainty (by limiting the scope for judicial “activism”) has actually caused considerable uncertainty and confusion that goes so far as to render unclear the very nature of the only acknowledged English privacy tort.

3. A Second Problematic Issue

At this point, it might be objected that I am making too much fuss over an issue of limited practical significance. After all, the issue of MPI’s doctrinal roots has only arisen for consideration in a single case to do with a relatively obscure procedural rule (that has in any event since been changed¹¹⁰). Other than as a matter of academic interest to abstract-minded tort theorists, it might be said it does not really matter whether the courts fully understand the emergence of MPI from equitable confidence. It is possible to make practical use of both doctrines and so the problem has no real substance.

If the nature of MPI was the only area of confusion resulting from the “shoe horning” process by which the doctrine has developed, I might concede the point. But it is not.

In another aspect of MPI – one with very significant practical implications that arise in litigation with increasing frequency – clarity and legal certainty has again been undermined by this narrow developmental process. This is the area concerning the relevance and importance of third party interests in otherwise bilateral privacy claims. In this section, I engage in a detailed analysis of this problem, for the purposes of demonstrating its considerable practical significance. The key point I wish to make by this analysis is this: the unexpected – and, formally speaking, inexplicable – emergence of what I term the “third party interests” doctrine results from this same, narrow, restrictive conception of the judicial role.

In this section, I am concerned with the way in which the interests of unrepresented third parties (usually the children of claimants) have come to occupy a central place in MPI method. The development is portrayed by the courts as a straightforward

¹¹⁰ See n 87, above.

application of existing doctrine. However, a detailed examination of these cases reveals that the issue is anything but straightforward. It should be noted that, in order to make the revelation clear, a highly detailed examination is required, and that is what follows.

3.1 Third Party Interests

The significance of making third party interests relevant becomes apparent when one considers that, traditionally, private law claims are bilateral disputes; the only parties whose interests are relevant are the represented parties (the claimant and defendant). This is particularly true in equitable breach of confidence cases which, traditionally founded on a relationship between the parties akin to a trust, necessarily excluded the interests of others. In tort law, the bilateral nature of the claim is no less acute. As Ernest Weinrib observes, tort law is based upon “the bipolar procedure that links [claimant] and defendant”, in which “the [claimant] sues the defendant and, if successful, is entitled to the defendant’s performance of a remedial act.”¹¹¹

This section is concerned with ostensibly “pure” private law cases – specifically those brought in the tort of MPI which do not feature public bodies as parties to the litigation.¹¹² In the cases of *CDE v MGN* and *K v NGN*, upon which my analysis will

¹¹¹ Ernest J Weinrib, ‘Understanding Tort Law’ (1989) 23 Valparaiso University Law Review 485, 494.

¹¹² There are also some cases in which ostensibly private law actions take on a primarily public focus because they are brought by public bodies. In *Commissioner of Police of the Metropolis v Times Newspapers Ltd*, [2011] EWHC 2705 (QB), [2014] EMLR 1, the claimants, both public bodies, brought an action for breach of confidence (alongside actions for breach of the Data Protection Act 1998 and conversion) in respect of leaked operational documents. The defendant newspaper intended to use the documents in its defence to a libel action brought by another individual. In making their case, the claimants made extensive reference to the potential for harm to come to unrepresented third parties should the documents be used and reported in open court. As Tugendhat J notes in that case, however, “[c]laims for breach of confidence [brought] by public authorities are different from claims by individuals” (at [15]). The reason for the difference was spelled out by Lord Goff in *Spycatcher*, n 60. There is a “continuing public interest that the workings of government should be open to scrutiny and criticism ... in such cases, there must be demonstrated some other public interest which requires that publication should be restrained” (at 283C-D, 285H). The claimants, moreover, considered that the interests of third parties, in particular their Article 8 rights including the control of personal data, triggered their s.6 HRA obligation to act compatibly with Convention rights and thus mandated their bringing the claim. *Commissioner v Times*, then, is an unusual breach of confidence case; it is brought by the claimants exclusively on the basis of third party interests. That is, however, an inevitable consequence of the claimants’ status as public bodies. The fact that they brought the claim under a cause of action traditionally considered part of private law does not alter the fact that this is a case with a primarily public focus.

focus, the interests of unrepresented third parties were considered relevant by the courts to the determination of the main claim.¹¹³

In traditional private law claims, third party interests would not be considered relevant to the resolution of the dispute.¹¹⁴ By contrast, the impact of court orders on third parties has long been relevant in areas of public and family law.¹¹⁵ The waters are muddied slightly by the influence of policy considerations upon findings of liability (and the extension of heads of liability) in English tort law, since this entails considering the impact of liability upon persons other than the parties. However, taking into account broad-brush policy considerations (often based on a rather speculative idea of what best serves the public interest) differs from the phenomenon we observe in the third party interests cases. For, in these cases, *specific* interests of *particular* individuals are taken into account (and, in effect, *specific* rights are granted to them). Moreover, even if this distinction were not as significant as I suggest, policy considerations that are openly acknowledged are far less objectionable than instances (such as in the third party cases) where such interests are taken into account in a manner that obscures the fact that a *development* is taking place in the law. Moreover, because the developmental dynamic present here is obscured, the normative rationale underpinning it is also hidden from view. We cannot immediately see *why* the courts may be justified in making this move. This, I argue, is highly unsatisfactory. For if the courts were not *obliged* as a matter of formal law to take these interests into account (which is what I argue), the decision to do so anyway must have a normative dimension. But this dimension is one which has never been made plain and which thus causes uncertainty and invites speculation.

¹¹³ *K (formerly "ETK") v News Group Newspapers Ltd* [2011] EWCA Civ 439, [2011] 1 WLR 1827 (K); *CDE v MGN Ltd* [2010] EWHC 3308 (QB) (CDE).

¹¹⁴ Rather, those who experience losses and might be classed as third parties can, in some instances, initiate their *own* claims, such as under the Contracts (Rights of Third Parties) Act 1999. Yet in common law torts, third parties are generally precluded from initiating claims of their own or from securing discrete remedies. For example, in *Dobson v Thames Water Utilities Ltd* [2009] EWCA Civ 28, [2009] All ER 319 (*Dobson*), the Court of Appeal denied a child damages for nuisance whilst his parents were permitted to recover. The reason was that the common law does not permit claims for private nuisance to be brought by children since they cannot have a legal interest in the affected land. The Court of Appeal found that this did not give rise to a breach of its obligations to secure protection for the child's Article 8 interests because the damages awarded to the parents would cover any loss of amenity suffered by the child as well.

¹¹⁵ For avoidance of doubt, in this section I treat family law cases as distinct from those which I refer to as traditional private law claims (by which I primarily mean cases in tort, equity and contract).

This third party interests issue is therefore significant because the courts' treatment of it alters the traditionally bilateral structure of a particular type of tort claim (MPI). It does so seemingly in the name of securing the ECHR rights of vulnerable parties. This may have profound implications. It suggests that, potentially, *any* tort may be developed in such a way as to accommodate third party interests. This sets the courts' approach – in the MPI cases upon which we will dwell – substantially apart from that in other torts.¹¹⁶ It also raises significant issues for defendants in privacy cases. In cases where the claimant has children, for example, the defendant is likely to face a substantially higher hurdle in terms of arguing that publication of the private information ought to be permitted in the public interest. This development, moreover, lacking as it does a clear doctrinal basis, could not have been foreseen by defendants prior to the courts' adoption of it.

The analysis which follows casts serious doubt on the efficacy of *Wainwright's* attempt to secure legal certainty in privacy law. Although it will point up problems with their reasoning at a formal level, this analysis is not intended as an attack on the third party interests line of cases. Rather it provides evidence of *Wainwright's* seemingly unintended but serious and detrimental effect; *Wainwright* created an environment so formally restrictive that the courts have been left with little option but to develop the law in ways that necessarily end up undermining legal certainty if they are inclined to secure justice for vulnerable parties. This is, to use a colloquialism, an instance of the proverbial chickens coming home to roost. For the courts are committed not only to endeavouring to maintain legal certainty. They are also committed to protecting the vulnerable – particularly children. Tort, after all, has a “protective purpose” strongly informed by a commitment to the pursuit of corrective justice (though not necessarily at any cost).¹¹⁷ Their efforts to do so, however, result in an unpredictable stretching of MPI that even goes so far as to rewrite the basic, bilateral structure of the claim.

¹¹⁶ *Dobson*, n 114.

¹¹⁷ See Lesley Dolding and Richard Mullender, ‘Tort Law, Incrementalism, and the House of Lords’ (1996) 47(1) NILQ 12 (Dolding and Mullender), 12-13 (on tort’s “protective purpose”); also Richard Mullender, ‘Negligence, Public Bodies and Ruthlessness’ (2009) 72(6) 961 MLR 970 and Richard Mullender ‘Tort, human rights, and common law culture’ (2003) 23(2) OJLS 301, 308 (on “qualified deontology” informing negligence law).

Having set out the aims of the section, I now turn to an analysis of the third party interests cases. Whilst the cases of *CDE* and *K* deal with essentially the same issue, they do so in quite different ways and so I will deal with each in turn, starting with *CDE*.

3.2 The Relevance and Importance of Third Party Interests: the Cases

3.2.1 *CDE v MGN*

The first claimant, *CDE*, was a man who regularly appeared on television, and the second claimant, *FGH*, was his wife. They sought an injunction restraining the defendants from publishing details of a “quasi-relationship” between *CDE* and another woman, *X*. The first defendant was the publisher of the tabloid newspaper *The Mirror*. *X* was the second defendant, who wished to sell her story. As is the case with so many of these privacy cases, the application was for interim injunctive relief. This requires the court to determine, often on the basis of limited evidence, whether it is “likely” that the claimant will succeed in obtaining a permanent injunction at trial.¹¹⁸ If the court is not convinced that is likely, no injunction will generally be granted.

In his judgment, Eady J asserts that third party interests have relevance to his decision-making in the following terms:

[P]ublication is likely to prove distressing to the Claimants, and almost certainly to their children ... Although there can be little doubt that the coverage contemplated would be intrusive upon the Claimants’ family life and bring bewilderment and distress to their children, it is correspondingly true also of the Second Defendant’s family. She too has a young daughter (and another who is now an adult). I have no doubt that these are all persons whose Article 8 rights are currently engaged...¹¹⁹

In this case, it is a question of balancing the rights of the Claimants (and/or their family) under Article 8 ... on the one side, with those of the Defendants under Article 10.¹²⁰

¹¹⁸ Human Rights Act 1998 section 12(3). See also *Cream Holdings v Banerjee* [2004] UKHL 44, [2005] 1 AC 253, [23].

¹¹⁹ *CDE*, n 113, [6].

¹²⁰ *Ibid*, [83].

The defendant's primary objection to the court considering the interests of third parties was that it disregarded the traditional bilateralism of private law claims:

As I understand the attitude of the newspaper, it is simply that a married man cannot be accorded greater rights or consideration by the court than a single man and, in so far as there may be any impact on his family, that is too bad.¹²¹

Eady J, however, was swift, emphatic and explicit in his rejection of that argument:

Yet it is now well established that the first question a court has to address on applications of this kind is whether Article 8 rights are engaged. As to that, the threatened publication would undoubtedly engage the Article 8 rights of all the persons I have identified. The fact that the First Claimant has a wife and children simply means that there are more persons whose rights have to be taken into account. They cannot simply be ignored on the basis of traditional arguments along the lines of who has a cause of action and who does not. Since they would at least potentially be affected by the exercise of the Defendants' Article 10 rights, their Article 8 rights have to be weighed in the balance.¹²²

Eady J's aim (to take seriously the interests of the children) is noble; it is certainly morally appealing. But that does not mean that it is grounded firmly in existing law. There is a subtle but important (and rather clutch-less) shift in this segment of his judgment. For he states that it is "well established" that the courts begin with an assessment of whether Article 8 rights are engaged.¹²³ From this he moves to determine whether *anyone's* Article 8 rights are engaged, not just those of the claimants. It is certainly well established that the court must begin with an assessment of whether the *claimants'* Article 8 rights are engaged. But it is far less clear whether the law requires that the search for engaged Article 8 rights be broadened beyond that. When the MPI tort was first recognised in *Campbell*, Lord Nicholls phrased the engagement test thus: "[e]ssentially the touchstone of private life is whether in respect

¹²¹ Ibid, [7].

¹²² Ibid, [7].

¹²³ Ibid, [7].

of the disclosed facts *the person in question* had a reasonable expectation of privacy.”¹²⁴ The reasonable expectation of privacy question, moreover,

is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.¹²⁵

Nothing in this well-established test even suggests the relevance of third party interests. Rather, it reflects the traditional, bilateral framework of tort litigation. Likewise, the refinement set out by Lord Steyn in *Re S* expressly limits the court to conducting “an intense focus on the comparative importance of the specific rights *being claimed*”.¹²⁶ It might be said that Lord Nicholls, when he stated in *Campbell* that “[t]he values embodied in articles 8 and 10 are as much applicable in disputes between individuals ... as they are in disputes between individuals and a public authority”,¹²⁷ was seeking to harmonise the approaches to adjudicating public and private privacy claims. Eady J in *Mosley* picked up on this when he said:

as Lord Nicholls at [17]–[18] and Lord Hoffmann at [50] observed in *Campbell* in 2004, ... private individuals and corporations (including the media) ... are obliged to respect personal privacy as much as public bodies. It is not merely state intrusion that should be actionable.¹²⁸

However, one must understand *Campbell* in context. At that time, as we noted earlier, the “horizontal effect” debate was in full swing. For instance, one influential commentator had denied the possibility of *any* horizontal application of human rights law.¹²⁹ A more conservative reading of Lord Nicholls’ statement might take it as simply making clear that the HRA does indeed have some, indirect horizontal effect.

¹²⁴ *Campbell*, n 4, [21] (emphasis added).

¹²⁵ *Murray*, n 4, [36].

¹²⁶ *Re S (A Child)* [2004] UKHL 47, [2005] 1 AC 593, [17] (emphasis added).

¹²⁷ *Campbell*, n 4, [17].

¹²⁸ *Mosley v News Group Newspaper Ltd* [2008] EWHC 1777 (QB), [2008] EMLR 20, [126].

¹²⁹ Richard Buxton, ‘The Human Rights Act and private law’ (2000) 116 LQR 48.

On that matter the whole House was in agreement. Moreover, it is inescapable that Lord Nicholls' statement – howsoever it is read – recognises the need for a violation to be “actionable”. It is well established that a person whose informational privacy is violated is entitled to seek redress as much against the media as against the state, but that person must *bring* the action. It does not directly follow from any of these authoritative statements of law that third party interests can be relied upon by claimants seeking to bolster their own claim.

The only authorities Eady J cites in support of his broad reading are *Secretary of State for the Home Department v AP (No.2)*¹³⁰ and *Donald v Ntuli*.¹³¹ The fact he points to just two cases must call into question the extent to which his reading is in fact “well established”.¹³² The passage that he quotes from *AP* was a repetition by Lord Rodger of what he himself had said six months earlier in *In re Guardian*.¹³³ He stated that, when balancing individual privacy against freedom of expression, the court had to ask the following question:

Is there a sufficient general, public interest in publishing a report of the proceedings which identifies the person concerned to justify any resulting curtailment of his right and his family's right to respect for their private and family life...?¹³⁴

In re Guardian was not a bilateral private law case, and did not concern the misuse of private information. It was a case concerning the media's right to name publicly the applicants in judicial review proceedings in which the applicants were challenging

¹³⁰ [2010] UKSC 26, [2010] 1 WLR 1652 at [7] (*AP*).

¹³¹ [2010] EWCA Civ 1276, [2011] 1 WLR 294 (*Donald*).

¹³² The notion that this is well established resurfaces in more recent cases, such as *AAA v Associated Newspapers* [2012] EWHC 2103 (QB), [2013] EMLR 2 (at first instance) and [2013] EWCA Civ 554, (on appeal). However, these more recent pronouncements are based upon the authorities cited in *K*, n 113, rather than those relied upon by Eady J. We will return to the *K* authorities below. But the fact that Eady J asserts that this is well established by authorities which have not been taken to provide evidence of its being well established in later cases weakens his position (in formalist terms) considerably.

¹³³ *In re Guardian News and Media Ltd* [2010] UKSC 1, [2010] 2 AC 697. *AP*, n 130, was a case concerning the identification in court of a suspected terrorist who had been made subject to a control order. The applicant wished to maintain his anonymity and the Home Secretary concurred. Moreover, the applicant did not at any point assert any third party interest that might bolster his case; the matters weighing in favour of maintaining anonymity related to him and him alone. The statement of law repeated in *AP* therefore did not apply in any way to third parties in that case and, insofar as it refers to third parties, it is clearly *obiter*.

¹³⁴ *In re Guardian*, *ibid*, [50]-[52], cited in *AP* (n 130) at [7] and *CDE* (n 113) at [85].

their designation as suspected terrorists. Section 6 HRA does not discriminate between the Convention rights of represented and unrepresented parties to such proceedings, because the decision whether or not to grant anonymity is a procedural, rather than a substantive, matter.

What muddies the water somewhat is the obligation on the courts themselves not to act incompatibly with ECHR rights, which is imposed by virtue of s.6(1) and s.6(3)(a) of the HRA. Alison Young (drawing on the work of Ian Leigh) makes a helpful distinction between “procedural” and “remedial” forms of horizontality, both of which are derived from the s.6 obligation.¹³⁵ She explains:

Procedural horizontality occurs when the court, as a public authority, exercises its inherent or statutory powers to regulate its own procedures by managing cases or granting court orders, which create obligations on private individuals bound by such court orders. ... *Remedial horizontality* occurs when courts exercise their discretionary powers to grant remedies, where ... they must ensure that the remedy in question is not contrary to Convention rights. A discretionary remedy may include an injunction to prevent a private individual from acting in a manner incompatible with Convention rights.¹³⁶

Young cites *Re S* as an example of procedural horizontality. In that case, the House of Lords granted an injunction prohibiting the publication of the name of a defendant in a criminal case who was charged with the murder of one of her sons, in order to protect the privacy interests of her surviving son (who might otherwise have been easily identified).¹³⁷ Because the litigation concerning the prohibitory injunction was separate from the criminal trial, the case is rightly classified by Young as procedural.¹³⁸ Most MPI cases, by contrast, exhibit remedial horizontality, since the application for an injunction is part and parcel of the primary litigation itself (albeit dealt with as a

¹³⁵ Alison Young, ‘Mapping Horizontal Effect’ in David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (CUP 2011) 22. Young draws on Ian Leigh, ‘Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth?’ (1999) 48 *International and Comparative Law Quarterly* 57.

¹³⁶ Young, *ibid*, 22 (emphasis is original).

¹³⁷ *Re S*, n 126.

¹³⁸ *F v G* (2012) UKEAT/0042/11/DA and *EF v AB* (2015) UKEAT/0525/13/DM are examples of third party interests being correctly considered in the context of procedurally-generated injunctions. Both involved anonymity orders relating to Employment Tribunal cases relating to allegations of sexual impropriety in the work place, publication of the details of which would have enabled the identification of third parties who were indirectly involved.

preliminary matter). This is because very few MPI cases ever go to trial; for the vast majority, the granting of an interim injunction is, in practice, sufficient to prevent publication of the private information ever occurring. There are two reasons for this. First, because the newsworthiness of the information often diminishes quickly so that media defendants are less interested in publishing it further down the line. Second, because the test applied by the court in determining whether to grant the injunction is whether “the applicant's prospects of success at the trial are sufficiently favourable”.¹³⁹ In other words, an interim injunction will (generally) be granted only where it is likely that a permanent injunction will be awarded following a trial of the issues. It is not controversial that, in either of these sorts of circumstances, the court must consider the impact of its decision upon the Convention rights of the *named* parties; that is the nature of the s.6 obligation.

The jurisdictional basis for the granting of injunctions in procedural and remedial circumstances is, however, not identical. In procedural cases, the court is the primary decision-maker and the parties have a statutory right (under s.6) to have their Convention rights taken into account. In remedial cases, the court is the arbiter of a dispute between the parties. Its power to grant an injunction is, like in procedural cases, discretionary. But it does not *solely* derive from its inherent or statutory powers. It requires *also* that the claimant have some right *at common law* to the injunction (i.e. because the defendant has breached a common law right of the claimant’s, such as the right to the non-misuse of private information). Unless that underlying common law right is present, the power to grant a remedial injunction has nothing upon which to bite. Moreover, the court’s obligation is, as Young states, to “ensure that the *remedy in question* is not contrary to Convention rights”.¹⁴⁰ The remedy is claimed by one party and awarded against the other. Thus where a third party has no common law right to claim a remedy, and therefore there is no possibility of granting them an injunction, there is no *formal compulsion* upon the court under the HRA to take that third party’s Convention rights into account.

¹³⁹ *Cream Holdings*, n 118.

¹⁴⁰ Young, n 135, 22 (emphasis added).

This is the same basic rationale that justifies the courts in not developing the common law in such a way as to give third parties their own claim *irrespective* of that which the parent might have.¹⁴¹ The rationale derives from the ethos of indirect horizontality: that the (bilaterally structured) common law is the mechanism through which Convention rights are addressed horizontally. So long as the courts apply the common law (and, if necessary, develop it incrementally) in a manner that is compatible with the Convention rights of the named parties, the s.6 obligation is satisfied. The s.6 obligation does not require the courts to amend further the common law in order to act compatibly with (or secure) the Convention rights of individuals *who are not parties to the litigation and to whom the common law grants no right to a remedy* in the instant case.

Thus whilst it may be necessary for the court to develop the common law in order to ensure the *named parties'* Convention rights are afforded a sufficient degree of protection, the court is not *formally required* by the HRA to consider the Convention rights of third parties.¹⁴² Moreover, if the court *does* decide to consider the Convention rights of third parties, it ought to recognise that it is *developing* the common law. Such a development may not necessarily be objectionable but it ought to be recognised for what it is. With great respect, Eady J does not seem to have appreciated this in his wholesale adoption of the *In re Guardian* statement.

Eady J also cites the Court of Appeal's judgment in *Donald v Ntuli* as supporting his decision to take into account third party interests. Yet this does not actually provide much in the way of clear, reasoned confirmation of his approach. *Donald* was an appeal from a decision of Eady J himself in the High Court in which he had granted a so-called "super injunction" to a claimant prohibiting the defendant from disclosing

¹⁴¹ In *O v A (previously OPO v MLA)* [2014] EWCA Civ 1277, [2015] EMLR 4, the Court of Appeal rejected a claim in MPI by the child of a well-known performing artist. The defendant was the child's father. The child sought to restrain the publication of his father's autobiography (which contained graphic accounts of sexual abuse the defendant had suffered when he himself was a child). The claim was brought on the basis that, if the claimant read the book (or encountered extracts from it), he might be caused severe psychological distress. However, the Court of Appeal held that only the subject of the information – in this case the father who authored the autobiography – would have standing to bring a claim in MPI. Although the case was appealed, the Supreme Court was not asked to revisit the decision on MPI (since the claim had gone forward as a primary claim under the tort in *Wilkinson v Downton* (n 3)).

¹⁴² This is the approach taken in *Dobson*, n 114.

various private details about a relationship they had previously had.¹⁴³ The Court of Appeal upheld Eady J's decision in part, although it discharged the anonymity and the restriction on publishing the details of the judgment itself. Apart from repeating the same phrase from *In re Guardian* (which the court likewise attributed to *AP*), the Court of Appeal's only reference to third party interests came when Maurice Kay LJ stated that Eady J "had proper regard to the possible impact of publicity on the parties' respective children".¹⁴⁴ There is nothing that suggests the issue of propriety in this regard was argued before the Court of Appeal, and no authority was cited by the court explaining its assertion that Eady J's regard for third party interests was "proper". Eady J's reference to *Donald* in *CDE* thus amounts to the mere citation of a bare affirmatory statement from the Court of Appeal upholding, in part, one of his own decisions.

It is also relevant that in *Ambrosiadou v Coward*,¹⁴⁵ which actually pre-dates *CDE* by five months, Eady J similarly held that the interests of the parties' 13 year-old son were of "particular significance" in an application for injunctive relief in respect of information, some of which directly concerned the son (a point of distinction from *CDE*). In that case, Eady J made his position on third parties plain when he stated that "[the son's] rights under Article 8 of the Convention certainly need to be borne in mind throughout – even though he is not a party to this litigation."¹⁴⁶ Indeed, the judge insisted that "it must be right ... to take into account the rights of the son."¹⁴⁷ However, unlike the more developed reasoning in *CDE*, Eady J cited no authority whatsoever for the relevance of third party interests on this occasion, suggesting that, prior to *CDE*, whilst he had come to the view that third party interests *were* relevant, he had yet to identify any supporting authority.

The decision by Eady J to take into account third party interests in *CDE* thus appears to be on less than entirely solid formal ground. In the light of this, we will now turn our attention to our second case, *K v NGN*.

¹⁴³ Eady J's original decision in *Donald* is unreported.

¹⁴⁴ *Donald*, n 131, [24].

¹⁴⁵ [2010] EWHC 1794, [2010] 2 FLR 1775 (*Ambrosiadou*).

¹⁴⁶ *Donald*, n 131, [29].

¹⁴⁷ *Ibid*, [33].

3.2.2 K v NGN

K concerned information pertaining to an adulterous affair conducted between a well-known male in the entertainment industry and a work colleague. In *K*, the Court of Appeal held that the Art.8 interests of the claimant’s children, who were not parties to the proceedings (and did not give evidence), could be taken into account when weighing and balancing the competing Convention rights of the claimant and defendant. The issue and conclusion are thus very similar to those in *CDE*, although in *K* we have the benefit of a somewhat more detailed judgment on these points.

The judgment indicates that, when conducting the balancing exercise, the court “should accord particular weight to the Article 8 rights of any children likely to be affected by the publication, if that would be likely to harm their interests”.¹⁴⁸ Ward LJ (with whom Laws and Moore-Bick LJ agreed) placed a high value on the interests of the claimant’s children in this particular instance:

the benefits to be achieved by publication in the interests of free speech are wholly outweighed by the harm that would be done through the interference with the rights to privacy of all those affected, *especially where the rights of the children are in play*.¹⁴⁹

The potentially detrimental effect that publicising their father’s extra-marital affair might have on his children, particularly in the context of their school lives, looms large in Ward LJ’s judgment. He is concerned by the “ordeal of playground ridicule ... that would inevitably follow publicity.”¹⁵⁰ He asserts that “the playground is a cruel place where the bullies feed on personal discomfort and embarrassment.”¹⁵¹ He accords this sort of harm “particular weight”. It is worth noting that there is no indication that Ward LJ heard any evidence on the level of cruelty the children could expect to encounter in their school playground – indeed the language he uses makes plain that he is assuming this apparently “inevitable” hardship.¹⁵²

¹⁴⁸ *K*, n 113, [19].

¹⁴⁹ *Ibid*, [22] (emphasis added).

¹⁵⁰ *Ibid*, [17].

¹⁵¹ *Ibid*.

¹⁵² Indeed, in *K*, the interests of the claimant’s children did not even form part of claimant counsel’s submissions. I am grateful to Hugh Tomlinson QC (who acted for the claimant) for this insight.

Ward LJ relies upon three cases, and two subtly different legal justifications, to support his assertion that the children's interests are relevant. The first, which he acknowledges takes place in "another context",¹⁵³ is *Beoku-Betts v Secretary of State for the Home Department*,¹⁵⁴ wherein Baroness Hale commented, in a short judgment, that

the central point about family life ... is that the whole is greater than the sum of its individual parts. The right to respect for family life of one necessarily encompasses the right to respect for the family life of others, normally a spouse or minor children, with whom that family life is enjoyed.¹⁵⁵

Beoku-Betts was a deportation case, and it ostensibly centres on the issue of third party interests. The appellant appealed against the decisions of the Court of Appeal and the Immigration Tribunal which had overturned the determination of the immigration adjudicator and upheld the Home Secretary's decision to deport him. The adjudicator had, in determining that he should not be deported, directed himself to "consider whether the interference with the appellant's family rights, which would obviously interfere with the family as a whole, is justified".¹⁵⁶ He therefore considered the adverse impact upon third party family members, concluded that the interference with the rights of the family was not proportionate to the legitimate aim of controlling immigration, and allowed the appeal. The Home Secretary appealed this decision and was successful in both the Immigration Appeal Tribunal and the Court of Appeal, both of which found that the adjudicator had misdirected himself in law and that he ought only to have considered the impact upon the appellant's Art.8 rights in isolation from other family members.

The House of Lords held that the third party interests were relevant and should have been taken into account by the Home Secretary when making the decision on deportation. The House accepted the appellant's arguments that, if the case were appealed to the ECtHR, that is the approach that would be taken there. Moreover, to

¹⁵³ *K*, n 113, [17].

¹⁵⁴ [2008] UKHL 39, [2009] AC 115 (*Beoku-Betts*).

¹⁵⁵ *Ibid*, [4].

¹⁵⁶ Quoted in *Beoku-Betts* (*ibid*) at [12].

do otherwise would leave the remaining family members with no option but to initiate their own proceedings under s.7 HRA.

The issue of the relevance of third party interests in deportation cases has an apparently complex judicial history since the coming into force of the HRA. We need not concern ourselves with the detail of it, save to note that there was no clear determination of the law's requirements either way until the House decided *Beoku-Betts*.¹⁵⁷ What must be remembered, however, is that – as with all deportation cases – this was a “vertical” human rights appeal against a decision of a public authority. The Home Secretary was bound by s.6 HRA not to act incompatibly with Convention rights – an obligation which does not discriminate between primary litigants and third parties. The Home Secretary need only ask herself whether her decision engages *any* Art.8 rights – *engagement* is the touchstone in that instance that ought to put her on alert.

This is significantly different from a case in misuse of private information. In MPI, the first question for the court is not a straightforward one of engagement of Art.8, but rather the question whether the claimant has a reasonable expectation of privacy. This covers much of the same ground as the engagement question – indeed if the answer is “yes” then clearly the claimant's Art.8 rights are engaged – but it is not the *same* question. For if the *claimant's* Art.8 rights are *not* engaged, the case falls at that point. No third party interests would ever be considered, since they have been brought into play (in cases like *CDE* and *K*) only at the second stage where the court conducts the “ultimate balancing test”.¹⁵⁸ *Beoku-Betts*, then, is even further removed from the circumstances of the MPI cases than *In re Guardian*, because it does not require the court to determine a procedural matter to which third parties' Art.8 rights are relevant. It simply involves judicially reviewing the Home Secretary's failure to abide by her own statutory obligations. In relying upon this authority, Ward LJ seemingly fails to appreciate the distinction between the vertical and the horizontal types of case in which human rights are in issue.

¹⁵⁷ Lord Brown sets out the history of this line of cases in *Beoku-Betts* (ibid) at [24]-[40].

¹⁵⁸ *Re S*, n 126, [17].

It might be objected at this point that I am conceptualising Art.8 rights too narrowly; that as an interest in “family life” the children of the claimant are part and parcel of his Art.8 interests (as Baroness Hale’s observation in *Beoku-Betts* suggests). I attend to this possibility in more detail elsewhere,¹⁵⁹ and so for my purposes here it is sufficient to summarise my response to such an objection as follows.

First, if this broader reading of Art.8 was the central right in play, the claimant’s claim would not simply be that his private information has been misused, but that the defendant has caused harm to the integrity of his family unit. What the courts would have in substance recognised is a broad tort of disrupting family integrity. It would “convert the tort of MPI into a tort which affects the private life of the claimant”.¹⁶⁰ The recognition of such a broad right as underpinning this sort of claim in tort would provoke criticism of the sort that there are “few grievances that cannot be accommodated to a claim of interference with this kind of interest.”¹⁶¹

Second, if the MPI tort has been converted into a tort of wrongful interference with the integrity of the family unit without anyone other than a handful of judges and practitioners who regularly deal with cases of this sort noticing, that alone is a testament to how unforeseeable such a development was. And in that sense, even if I am wrong about the nature of the Art.8 claim – if it is in fact broader than I have suggested – that would only provide further evidence for the argument I am making in this chapter.

In *K*, Ward LJ also presents a subtly different, secondary line of justification for his decision to consider the interests of third parties. This is the argument that the court must consider “the best interests of the child”, and as such it calls to mind that well established principle of family law.¹⁶² He cites *Neulinger v Switzerland*,¹⁶³ which is an ECtHR decision on deportation from the 1970s, from which he takes the broad observation that the ECHR cannot be interpreted as if in a legal vacuum; it warrants

¹⁵⁹ See Thomas DC Bennett, ‘Privacy, third parties and judicial method: *Wainwright*’s legacy of uncertainty’ (2015) 7(2) *Journal of Media Law* 251, 272-275.

¹⁶⁰ *O v A*, n 141, [43].

¹⁶¹ Richard S Kay, ‘The European Convention on Human Rights and the Control of Private Law’ [2005] 5 *EHRLR* 466, 477.

¹⁶² See n 170 and accompanying text, below.

¹⁶³ (2010) 28 *EHRC* 706 (*Neulinger*).

understanding as part of a wider set of supra-national human rights treaties including the International Convention on the Rights of the Child.¹⁶⁴ In particular, he quotes the court stating

there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount.¹⁶⁵

He further cites the House of Lords’ decision in *ZH (Tanzania) v Secretary of State for the Home Department*.¹⁶⁶ In that case, the Supreme Court held that the adverse effect upon the child of a non-citizen parent against whom deportation proceedings were being brought, when that child would inevitably have to leave with the parent if she were deported, must be taken into account. Ward LJ states that the “universal” principle that the court should act in the child’s best interests “cannot be ignored” in such a matter as the instant case.¹⁶⁷ He takes inspiration from Lord Kerr, who, in *ZH*, stated that

in reaching decisions that will affect a child, a primacy of importance must be accorded to his or her best interests. This is not ... a factor of limitless importance in the sense that it will prevail over all considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed, unless countervailing reasons of considerable force displace them.¹⁶⁸

However, Ward LJ is not prepared simply to adopt this guidance without qualifying it:

... the interests of children do not automatically take precedence over the Convention rights of others. ... The force of the public interest will

¹⁶⁴ Ward LJ (*K*, n 113, at [18]) refers to the second principle of the United Nations Declaration of the Rights of the Child 1959, Article 3(1) of the Convention of the Rights of the Child 1989 (UNCRC) and Article 24 of the European Union’s Charter of Fundamental Rights.

¹⁶⁵ *Neulinger*, n 163, [135].

¹⁶⁶ [2011] UKSC 4, [2011] 2 AC 166 (*ZH*).

¹⁶⁷ *K*, n 113, [19].

¹⁶⁸ *ZH*, (n 61) [46]

be highly material, and the interests of affected children cannot be treated as a trump card.¹⁶⁹

The principle that the courts must accord great weight to the best interests of the child, where it appears in English law, is generally a statutory duty.¹⁷⁰ In such instances, it is an absolute requirement. When family law cases involving children are dealt with under the common law, as the court exercises its wardship jurisdiction, the requirement is not absolute but clearly weighty. But what marks these family cases out from the scenario facing the court in *K* is the evidential basis upon which the court makes its decision. In applications for care orders, for instance, the court will act on what it considers to be the child's best interests after having received evidence on that very issue. In *K*, there is no sign that the Court of Appeal considered any *evidence* as to the potential bullying of the children. It seems clear enough (even though the decision is not reported) that the High Court which considered the application and gave an *ex tempore* judgment initially refusing the claimant injunctive relief did not consider any such evidence either, since Ward LJ finds it difficult to determine whether Collins J even took into account the children's interests.¹⁷¹

It is quite clear that Ward LJ perceives the risk of bullying to be a genuine one. However, it is surely arguable that making a finding of the risk of harm to the interests of children based on no evidence, and according that risk sufficient weight to override Art.10, itself constitutes a disproportionate interference with the defendant's Art.10 rights. It seems to run counter to the spirit of s.12(4) HRA, which requires the courts to pay particular attention to the importance of freedom of expression "where the proceedings relate to material which the respondent claims ... to be journalistic."¹⁷² Of course, requiring a solid evidential basis for taking these interests into account raises the expensive spectre of extended litigation on these issues, which may not be

¹⁶⁹ *K*, n 113, [19].

¹⁷⁰ For example, under s.1 Children Act 1989.

¹⁷¹ *K*, (n 9) [14]: "It is not at all clear to what extent if at all, Collins J. had regard to the Article 8 rights of anyone bar the appellant."

¹⁷² A caveat is needed here: in paying particular attention to the importance to freedom of expression under s.12(4) the courts will consider the entirety of Art.10 ECHR including the reasons for restricting that right under Art.10(2). This is an interpretive technique that effectively reads down s.12(4) to the extent that, as a matter of formal law, it does not significantly bolster a defendant's free speech interests. See *Douglas v Hello! Ltd (No.1)* [2001] QB 967, 1004 per Sedley LJ.

desirable.¹⁷³ Nevertheless, imposing injunctions partly on the basis of concerns that have no evidential grounding is not an adequate solution.

Notably, whilst the case of *CDE* was an authority on this point which was available to the Court of Appeal in *K*, the court did not refer to it. It was not cited in argument and we are left to presume that it did not come to the judges' attention. Thus the Court of Appeal's decision in *K* stands before a doctrinal backdrop which is somewhat oblique. The deportation jurisprudence first muddies the distinction (if indeed any distinction now remains, in the light of *K*) between the courts' obligations in vertical public law cases and horizontal private law claims. Its second effect is to provide (at best) support for a broad principle that the court ought to consider the best interests of children in cases where children are involved, but these are not to be regarded as automatically trumping competing interests. None of the cases cited provide analogies with more than a fleeting resemblance to the case at hand and indeed all of them, due to their vertical nature, are clearly distinguishable. A formalistic application of this doctrine, then, does not specify *as a matter of necessity* the approach taken in *K*.

3.3 The Future of Third Party Interests

In cases involving children, the courts have been willing to allow third party interests to influence the balance which they must strike between Arts 8 and 10. The stretching of the law is particularly remarkable in *CDE* and *K*, for it pulls away from the traditional bilateral structure of private law (which dealt only with the rights of those parties involved in the proceedings) and into the realm of the sort of all-encompassing assessment of impact upon Convention rights associated with vertical, public law cases. Particularly troubling is the lack of detailed consideration or explanation by the

¹⁷³ *AAA* [2012] EWHC 2103 (QB), [2013] EMLR 2 was a claim for misuse of private information brought by a young child (as the primary claimant, not a third party). The High Court noted that the authorities cited in *K* required weight to be attached to the best interests of the child. However, "the case was not conducted as a 'best interests of the child' hearing" (at [114]) and the court received no detailed evidence on the child's best interests. Nevertheless, the judge's explicit indication that "I attach considerable weight to the claimant's interests" was deemed sufficient by the Court of Appeal ([2013] EWCA Civ 554, [2013] WLR (D) 189, [18]) to discharge the "best interests" obligation (though neither court gave any more detail than the judgment in *K* had on the root of this obligation, which remains murky). This approach (perhaps controversially) avoids the need for extended evidence by treating the judge's assessment of the balance to be struck between Arts.8 and 10 as akin to an exercise of discretion.

judges of this effect of their rulings. Indeed, there is no indication in either case that the judges even appreciated the tension between their approach and the traditional bilateralism of private law to which the judgments give rise.

Notwithstanding the lack of a clear or deeply entrenched formal basis for the recognition of the relevance of third party interests in cases such as *CDE* and *K*, their appearance in both pleadings and judgments has quickly become accepted practice. In *Rocknroll v NGN Ltd*,¹⁷⁴ Briggs J was prepared to accord significant weight to the interests of the claimant's stepchildren, which gave support to the claimant's application to enjoin the intended publication of naked photographs depicting him. The judge made clear that the potentially "grave risk" of the children "being subjected to teasing or ridicule at school" which might be "seriously damaging" to their relationship with the claimant would, if all other matters had been equally balanced, have been "sufficient to tip it in the claimant's favour."¹⁷⁵

In 2016, Supreme Court handed down its decision in the case of *PJS v News Group Newspapers Ltd*.¹⁷⁶ The Court reinstated the High Court's decision to impose interim injunctive relief to prohibit the defendant from publishing details of a now infamous "three way" sexual liaison involving a well-known public figure. In a continuation of the third party interests doctrine, the Court gave particular prominence to the potential for harm to befall the claimant's children if further publication occurred (notwithstanding that which had already appeared on the internet). Unfortunately, the decision does nothing to clarify the formal basis of the third party interests doctrine. Whilst Lady Hale, who dwells on the doctrine more overtly than the other justices, makes clear her view that it is right and proper for the courts to consider the interests of the claimant's children,¹⁷⁷ she does not give any indication of which of the competing lines of authority (if either) she sees as supporting this conclusion. Neither does she give a clear elucidation of a principled basis for it. The other judgments rendered in the case are of no more assistance on this point. Thus whilst the Supreme Court has thrown its weight behind the third party interests doctrine – and, as a result,

¹⁷⁴ [2013] EWHC 24 (Ch) (*Rocknroll*).

¹⁷⁵ *Ibid*, [37]-[39].

¹⁷⁶ [2016] UKSC 26, [2016] AC 1081 (*PJS*).

¹⁷⁷ *Ibid*, [72]-[73].

we can be sure that it is here to stay – at a formal level the unsatisfactory state of affairs remains.

3.4 Uncertainty Prevails

The methodology adopted in both *CDE* and *K* calls into question anew the way in which horizontal rights-protection operates in England. Under any form of indirect horizontal effect (a notion around which there is broad consensus), human rights claims are dealt with through the common law, using (and if need be, incrementally developing) existing private law actions. This may even result on occasion, as with misuse of private information in *Campbell*, in the emergence of an apparently novel tort. But since the medium through which such claims are to be disposed of remains, resolutely, domestic *private* law, it seems extraordinary (at first glance) to see these very specific third party interests featuring at all in these cases. For private law claims (in, *inter alia*, tort, equity and contract) are normally by their very nature bilateral. A claimant is not traditionally able to bolster his claim by seeking to draw the court's attention to specific interests of other, unrepresented parties who might be adversely affected should he lose.

There is, of course, a sense in which the conclusions reached by Eady J in *CDE* and Ward LJ in *K* are commendable. Their willingness to take seriously the interests of children affected by the violation of their parents' privacy is morally appealing. But the methodologies leading to these conclusions raise considerable problems of coherence (not least with each other) which require much more work to sort out than appears to have been appreciated. Given that the decisions cannot reasonably be said to apply existing doctrine formalistically, they do not represent the kind of predictable, narrowly incremental elaborations of the law that Lord Hoffmann seemingly envisaged would follow *Wainwright*.

As such, larger questions must be raised about the legacy of *Wainwright*. For what we have uncovered in this chapter is evidence that, in one aspect of misuse of private information jurisprudence, the law has been significantly stretched in order to accommodate third party interests which ordinarily would play no role in private law methodology. There are other aspects of this body of case law which provide further

evidence of this judicial tinkering, such as the timid emergence of a doctrine of “false privacy”,¹⁷⁸ and what some commentators have suggested may be in substance (if not form) the recognition of a right in one’s own image.¹⁷⁹ It may well thus be the case that judges have in fact responded to the apparent limiting effect of *Wainwright* and *Campbell* by fashioning ways of broadening privacy protection (particularly for children) on a rather *ad hoc* basis whilst obscuring their moves by engaging in a process of ostensibly formal, *ex post facto* rationalisation of their decisions. And whilst the noble aim motivating this is no bad thing in itself, it demonstrably leaves the law in this field in a state of considerable uncertainty.

4. Overcoming the “Formal Barrier”

The three cases we looked at in the first section of this chapter – *Wainwright*, *Campbell* and *Malone* – are those which ostensibly erect a formal barrier to the recognition of an intrusion tort in English law. Whilst *Wainwright* was argued on the basis that a broad, general tort of “invasion of privacy” ought to be recognised, rather than a narrower (yet still novel) intrusion tort, the methodological incoherence in Lord Hoffmann’s judgment would preclude the recognition even of the narrower tort with which we are concerned. Moreover, Baroness Hale’s contribution in *Campbell* quite clearly rules out the recognition of even the more limited tort, since it would impose liability for “types of activities not previously covered” by existing law.¹⁸⁰

Yet in the previous chapter we unpacked the concept of incrementalism and found it to have several formulations that have, at various times, found expression in English law. The more restrictive of these formulations (gradualism/narrow incrementalism) are inspired by a formalistic understanding of the rule of law’s requirements that is problematic. For we have shown that the highly restrictive conception of the judicial role that prioritises the maintenance of legal certainty actually fails in practice to secure the certainty for which it strives.

¹⁷⁸ *McKennitt v Ash*, n 73, per Longmore LJ at [86]; *Terry v Persons Unknown* [2010] EWHC 119 (QB), [2010] EMLR 16 at [96].

¹⁷⁹ See Hugh Tomlinson QC, ‘Paul Weller, Article 8 and the recognition of “image rights”’, available at <http://inform.wordpress.com/2014/04/30/weller-article-8-and-the-recognition-of-image-rights-hugh-tomlinson-qc/> (accessed 18/7/17).

¹⁸⁰ See n 24.

In this section, I consider how the formal barrier might be overcome and sketch out a mode of adjudication that would enable the courts to do so. What is most important about the argument put forward in this section is not – though this may seem counter-intuitive – its methodological detail. What is important is, rather, that it relies on attentiveness to these broader, background concerns, seeing the privacy doctrine in its wider context and exhibiting the “broad vigilance” associated with right hemisphere thinking.¹⁸¹ For the mode of thinking that has dominated recent privacy jurisprudence – and which is clearly on display in the three cases analysed above – is insular, self-referential and highly technical in very much the way that McGilchrist associates with the left hemisphere. What has been missing from these cases is a counter-balancing attentiveness to the broader context within which these cases arise.

4.1 The Formal Barrier is an Illusion, but a Powerful One

The distinction that several commentators have endeavoured to draw between legitimate “judicial” and illegitimate “legislative” judicial law-making (encountered in the previous chapter) is more refined than blunt attacks on “judicial activism”. But we have seen that it remains problematic in that it is highly under-determinate. It rests predominantly on some intuitive understanding of what is meant by “narrow” as opposed to “radical” legal developments. For, as Dolding and Mullender demonstrate in their work, our highest court has adopted both wide and narrow approaches to incrementalism in tort law in the latter years of the 20th century.¹⁸² Indeed, as Lord Walker put it when discussing judicial pronouncements along the same lines:

it is not easy to discern, from the pronouncements of the House of Lords and the Supreme Court ... what is, and what is not, off-limits for the development of the common law by a court of last resort. A lot seems to depend on judicial intuition.¹⁸³

¹⁸¹ Iain McGilchrist, *The Master and his Emissary: The Divided Brain and the Making of the Western World* (Yale University Press 2010). I explain McGilchrist’s bi-hemispheric analysis of the brain in detail in ch.4, section 1.

¹⁸² Dolding and Mullender, n 117.

¹⁸³ Robert Walker, ‘Developing the Common Law: How far is too far?’ (2013) 37(1) *Melbourne University Law Review* 232, 250.

On the analysis of the three cases offered above, it is easy to sympathise with Lord Walker. He surveyed a broader spectrum of House of Lords and Supreme Court cases than the narrow field of privacy upon which we have dwelt. It is notable, given this, that he perceived a broad lack of consensus about the limits of the judicial role. The main concern, however, seems to fall into line with the legislative/judicial distinction, in that the courts express a reluctance (albeit not uniformly) to risk straying into the legislature's territory. A good example of the lack of consensus on this point is the disagreement between the five Law Lords in *Gregg v Scott*.¹⁸⁴ The House was split 3-2 on the issue of altering the approach to damages in tort. Lord Nicholls was in favour of a novel approach, seeing the claim as an obvious instance of injustice and arguing "if a claim is well-founded in law as a matter of principle ... the duty of the courts is to recognise and give effect to the claim."¹⁸⁵ The majority, however, viewed the proposed change to the law as being legislative in nature, and thus held it must be left to Parliament to effect it. It was Lord Hoffmann who put the case for leaving the matter for legislation thus: "a wholesale adoption of possible rather than probable causation as the criterion of liability would be so radical a change in our law as to amount to a legislative act."¹⁸⁶

What is perhaps most baffling about it is that those commentators and judges who proffer this distinction clearly evince a strong commitment to the maintenance of legal certainty. Yet given that the language in which the distinction is framed is so underdeterminate as to require resort to be had to some intuitive understanding of it, this pursuit of legal certainty is methodologically undermined. Stanton points us in the direction of a sceptical conclusion, remarking that the whole notion of incrementalism is "open to considerable manipulation by the courts".¹⁸⁷

When a concept relies upon intuition in order to be understood, it clearly does not – and cannot – have purely objective meaning. This may not be undesirable in itself, but since it is clearly something that is regarded by proponents of the legislative/judicial distinction and narrow forms of incrementalism as undesirable, their arguments appear

¹⁸⁴ *Gregg v Scott* [2005] UKHL 2, [2005] 2 AC 176.

¹⁸⁵ *Ibid*, [54].

¹⁸⁶ *Ibid*, [90].

¹⁸⁷ Keith M Stanton, 'Incremental Approaches to the Duty of Care' in Nicholas Mullan (ed), *Torts in the Nineties* (North Ryde 1997) 34, 54.

ultimately self-defeating. The intuition involved inherently in applying the legislative/judicial distinction is merely disguised under a cloak of under-determinate language, making it that much harder to spot, but no less present.

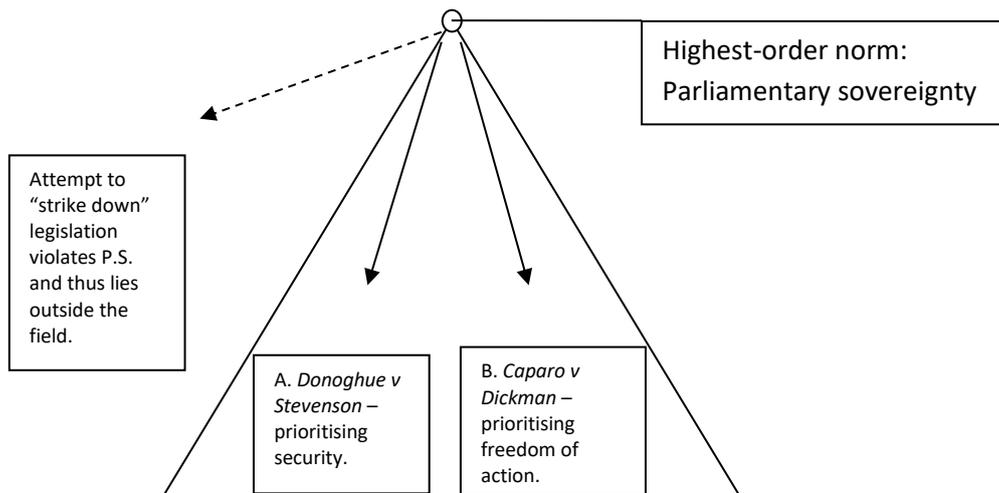
What is absolutely clear about the three judgments upon which we have dwelt is that all three judges clearly believe that the appropriateness of a judicial decision (in terms of its constitutionality) is determined primarily by the *substance* of the decision. More particularly, it is determined by an assessment of the radicalness of the substance of the decision (and its predicted effects). The problem here is the reliance upon necessarily subjective views as to what constitutes undue “radicalness”. Such subjectivism undermines any real hope of achieving the legal certainty ostensibly being sought.

Assuming Lord Walker is right to say that intuition plays a significant role when judges determine for themselves the limits of their law-making role, it is clear that the judicial law-making role is broader than the language used by the formalists would have us believe. This does not mean, however, that it is without limits. We might find a more helpful conceptualisation of the limits of the judicial law-making role by thinking of the judiciary as operating within a normative space: within this space, judicial law-making is legitimate; outside, it ceases to be.

Mullender’s conception of a “field of interpretative possibility” (encountered in the previous chapter) is one way of thinking about this normative space.¹⁸⁸ His version begins from a resolutely positivist basis – HLA Hart’s notion that the highest order norm in the English legal system is the sovereignty of Parliament.¹⁸⁹ There are, of course, other models by which we might conceptualise the normative space within which English judges go about their business. I use Mullender’s for illustrative purposes only, because its Hartian positivism (which I would not necessarily adopt myself) reflects the core stated concern of the *Wainwright*, *Campbell* and *Malone* judgments with respecting Parliamentary sovereignty.

¹⁸⁸ See ch.1, n 165 and accompanying text, p 65.

¹⁸⁹ See HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) ch.6.



In Mullender’s model, a (metaphorical) spatial field radiates down from the highest order norm in our legal system – Parliamentary sovereignty – within which judges may specify a range of (potentially politically controversial) norms as they elaborate the common law.¹⁹⁰ Judicial decisions must derive from compliance with Parliamentary sovereignty. There is scope within this field, for instance, for both “red light” and “green light” approaches to judicial review of executive action, or for the pursuit of either of the competing interests of security and individual freedom of action within tort law.¹⁹¹ The *content* of these judge-specified common law norms remains within the field (and must therefore be constitutionally acceptable since it conforms with the highest-order norm). A judge would stray outside of the field if she specifies a novel rule that violates the highest-order norm (Parliamentary sovereignty). For example, a judge who attempted to “strike down” or nullify an Act of Parliament – perhaps by appealing to a notion of more deeply entrenched constitutional values – would be

¹⁹⁰ This sort of arrangement is implicit in Mullender’s argument in ‘Parliamentary Sovereignty, the Constitution and the Judiciary’ (1998) 49 NILQ 138.

¹⁹¹ The diagram indicates the scope provided for the judiciary in this normative space to stake out defensibly a range of norms that may be politically controversial. In the diagram, the boxes A and B represent differing approaches to the same legal issue, neither of which the judiciary are precluded from elaborating since, in elaborating either, they remain within the Hartian structure (the constitutional constraints under which they operate). These boxes may contain various examples other than the negligence one that is given. For example, box A might represent a “red light” approach to judicial review (prioritising restraint of governmental action), whilst B might represent a “green light” approach (loosening judicial fetters on government). In the privacy context, box A might represent maintaining a narrow, confidence-based approach to dealing with individual privacy interests, whilst B might represent the recognition of a distinct tort of intrusion.

attempting to legislate *outside* the field.¹⁹² But in practice the range of judicial action that would take the judge outside of the field of interpretative possibility (by violating Parliamentary sovereignty) is going to be very small and highly unusual.

The field of interpretative possibility paints a picture within which the decisions in the three judgments upon which we have dwelt are, of course, constitutionally permissible. But it also demonstrates that a considerably more “activist” approach, possibly involving the recognition of a broader privacy tort, would have been equally permissible. It thus does not follow that, as a matter of positive, formal obligation, the courts were actually (as they insisted they were) precluded from taking that step.

This is based on precisely the kind of Hartian positivism that the *Wainwright*, *Campbell* and *Malone* judgments implicitly accept and upon the basis of which they proceed. And this analysis makes clear that the formal barrier is in fact – on these judgments’ own terms – illusory. Nothing appears to formally preclude the courts from adjudicating in the wide incremental or strong Burkean mode. Neither does anything preclude our highest court from reversing its earlier positions; it may abandon the restrictive *Wainwright* ruling and the restrictive aspects of *Campbell* whenever it chooses (assuming an appropriate case presents itself). Moreover, since Baroness Hale’s broad statements on the ability of the law to recognise novel heads of liability in *Campbell* were technically *obiter*, nothing in them formally precludes the lower courts from doing so either. But this reality – that the formal barrier is nothing more than an illusion – becomes apparent only when one pays attention to these broader background concerns (i.e. the nature of incrementalism, the requirements of the rule of law, and the application of *stare decisis* to the cases at hand). Conceptualising the judicial role as unfolding within a normative space is one way of opening one’s eyes to the background.

4.2 Towards Broad Attentiveness – Opening the Door for Wide Incrementalism

A system of common law is necessarily retrospective in its development, as judges are able to respond to society realising more about itself when appropriate disputes come

¹⁹² Mullender, n 190.

before the courts for resolution. Determining the *ratio decidendi* of a case, that part of its reasoning that binds lower courts in the hierarchy, is a tricky endeavour; the *ratio* is rarely obvious – indeed there is disagreement as to what is even meant by the term.¹⁹³

These deficiencies would seem to strike at the heart of Raz’s formalistic ideal for adjudication and the rule of law. Yet this need only be the case if we are not prepared to accommodate the necessary imperfections (in the sense of aspects that are imperfectly formal) inherent in the common law. For if we accept that a *degree* of retrospectivity is acceptable, and that a *degree* of indeterminacy as to *ratio* is acceptable, and that a *degree* of judicial law-making is inherent in a system that does not wholly rely upon its legislature as law-giver – all of which are propositions many at least purport to accept – then what dispute remains is, to speak metaphorically, mere haggling over the price. Concern over the metaphorical “price” of the degree of non-formalist imperfection that is acceptable has traditionally, and recently, been the mainstay of constitutional lawyers. Having acknowledged this, we can draw a brief link between schools of constitutional law thought that have recently come to prominence and the analysis of judicial method offered above.

Jeff King gives us a spectrum of constitutional conceptualisations of adjudication, with particular reference to the need for judicial restraint.¹⁹⁴ As King himself points out, it is not specifically oriented towards “much of private law”,¹⁹⁵ but is rather concerned with core matters of public law (primarily judicial and constitutional review). Nevertheless, it is a helpful spectrum for our purposes.

King identifies extreme ends of the spectrum as being occupied by strict formalism and non-doctrinalism. Strict formalists “believe that judges should apply abstract categories such as ‘law’, ‘politics’, ‘policy’ and ‘non-justiciable’ that they believe properly allocate decision-making functions between different branches of

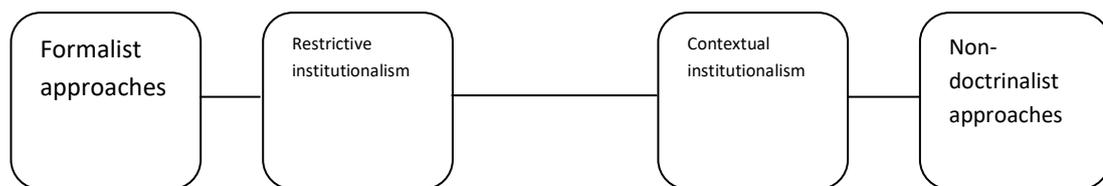
¹⁹³ For discussion of the difficulties in defining and locating *ratio decidendi* in the common law, see Neil Duxbury, *The Nature and Authority of Precedent* (CUP 2008) 58ff.

¹⁹⁴ Jeff A King, ‘Institutional Approaches to Judicial Restraint’ (2008) 28(3) OJLS 409.

¹⁹⁵ *Ibid.*, 440. This is, as we have seen in this chapter and the previous one, a common theme in public law scholars’ writing on the limits of the judicial role.

government.”¹⁹⁶ Non-doctrinalists, on the other hand, “suggest that we ought to trust judges to use their good sense of restraint on a case-by-case basis rather than employ any conceptual framework.”¹⁹⁷ In the middle ground between the two extremes, however, lie two institutionalist schools of thought: restrictive and contextual institutionalism. These have grown “out of a reaction to the problems” associated with the extreme positions.¹⁹⁸

Restrictive institutionalists, who are more formalist-leaning, “believe judges should act wherever possible with great restraint ... preferring adherence to bright-line rules and containing the expansion of precedent.”¹⁹⁹ By contrast, contextual institutionalists, who lean more towards non-doctrinalism, “believe more in the promise of the judicial process”, advocating “principles of restraint ... incorporated ... into adjudication” as a “tool to address the problems of broad judicial discretion.”²⁰⁰



This brief sketch of the institutionalists’ broad positions is helpful in that we can draw parallels with our modes of incrementalism. Narrow incrementalism is a mode of adjudication that would instinctively appeal to restrictive institutionalists. On the other hand, the faith placed by contextual institutionalists in the ability of the judicial process to work itself clean suggests that the kind of first-order treatment of the weight of precedent embraced by wide incrementalism and Stephen Perry’s strong Burkean conception might be acceptable to them.²⁰¹ If this is the case, then we can identify a body of mainstream constitutional law theory that may be less diametrically opposed to wide incrementalism – and the purposive development of tort law that it enables – than we might have suspected. Indeed, wide incrementalism is actually a good fit with

¹⁹⁶ Ibid, 410.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

²⁰¹ See ch.1, section 3.1.3. Recall that, operating under the strong Burkean conception of adjudication, courts would not depart from established precedent unless they had a substantial reason – in terms of first-order reasons for action – to do so.

the contextual institutionalist school of thought in constitutional law circles. For the contextual institutionalists share with Perry the belief that judges are well-equipped to weigh up principles of restraint alongside reasons for action in a grand balance of first-order reasons.

The adjudicative approach to conceptualising the judicial role which underpins Perry's Burkean conceptions does not suffer from the inherent conflicts within Razian formalism. It does not give credence to the legal fiction that law is a body of rules existing entirely separately from its application. Rather it recognises that judges occupy a central role in the enunciation of legal propositions; as they apply law, so they create it. In so doing, judges also reconfigure the normative space in which they adjudicate. Its contours are not fixed but, rather, constantly reconfigured by judicial decisions. Thus whilst some commentators might continue to baulk at a more activist conception of the judicial role on constitutional grounds (i.e. lack of accountability and democratic deficit), a retort can be found in the work of Laurence Tribe, who pointed out that judges do not adjudicate within a fixed, normative, constitutional space;²⁰² rather they alter, by virtue of their decisions, the shape of "the systemic whole of which [those decisions are] a new part."²⁰³

Moreover, the wide incremental mode may actually be thought to offer a better fit with the historical development of the common law. As Llewellyn noted, the common law is a body of "slow-growing wisdom".²⁰⁴ Whole swathes of our law is, of course, entirely built within the realms of judge-made common law. Tort law is a prime example; the vast majority of its rules and principles are rooted in judicial decision rather than legislative pronouncement.

The common law may sometimes grow slowly, but this does not in itself entail a requirement for judges to restrain themselves to piecemeal development. Indeed we have seen evidence that engaging in such piecemeal tinkering with doctrine can generate greater uncertainty than might result from the elaboration of a novel, broadly

²⁰² LH Tribe, 'The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics' (1989) 103 Harv L Rev 1, 7–8.

²⁰³ Richard Mullender, 'Judging and Jurisprudence in the USA' (2012) 75(5) MLR 914, 923.

²⁰⁴ Karl N Llewellyn, *The Bramble Bush: The Classic Lectures on the Law and Law School* (OUP 2008) 41.

applicable proposition (along the lines of Lord Atkin’s “neighbour principle”, or Warren and Brandeis’ “right to be let alone”). Every so often, a more “radical” development may be required, at which point the court may be called upon to do something for the first time. For it has been said that “never doing anything for the first time becomes a recipe for injustice in the individual case and stagnancy in the law generally.”²⁰⁵ The slowness of the common law’s growth happens to be a relatively accurate description. It is not, however, necessarily prescriptive of a method that artificially forces the law to stagnate in the face of legislative inertia.

Given that absolute certainty in the common law is achievable only by the use of an adjudicative method that tolerates stagnation (for there can be nothing more certain than that which does not change), the pursuit of certainty simply cannot be the *only* force driving the practice of adjudication if the law is to develop in any meaningful way. Wide incrementalism and the strong Burkean approach offer a promising compromise. Reasonable continuity is achieved by reference to underlying principle and by taking precedent seriously, in the sense of overriding it only where there are strong reasons to do so. At the same time, rejecting the notion that hostile precedent acts as an immovable exclusionary rule against developing the law enables the recognition of novel heads of liability appropriate to allow the law to keep pace with the times. It is owing to these benefits that wide incrementalism has found expression in tort cases in other fields.²⁰⁶

It might be objected that, in arguing that the wide incremental approach can provide a solution to the problems I have highlighted, I am falling foul of that criticism that I myself levelled at commentators such as Kavanagh in the previous chapter. I argued there that the legislative/judicial distinction failed to provide sufficient clarity or certainty about the limits on judicial law-making to function adequately as a prescription for adjudicative method. Such an objector might say that wide

²⁰⁵ EW Thomas, n 35, 140.

²⁰⁶ Dolding and Mullender point to *Anns v Merton Borough Council* [1977] AC 728 as an example of wide incrementalism in action (n 117). Later analysis by one of the authors provides evidence that the wide incremental mode has survived beyond the restrictive negligence ruling in *Caparo v Dickman* [1990] 2 AC 605 and has continued to inform developments in negligence. See Richard Mullender, ‘Negligence Law as a Human Practice’ (2009) 21(3) *Law & Literature* 321, 327-328 (discussing the wide incrementalism evident in *Watson v British Board of Boxing Control* [2000] EWCA Civ 2116, [2001] QB 1134).

incrementalism cannot provide an answer since it itself lacks precise definition. For instance, Dolding and Mullender say that it (wide incrementalism) involves looking to existing doctrine for “guidance” but, the objector might say, what amounts to “looking for guidance” is no clearer than Kavanagh’s attempt to distinguish “radical” from non-radical development of the law. Worse, it may be murkier.

Such criticism would arise out of two fundamental misunderstandings of my argument. First, I do not for a moment suggest that wide incrementalism is capable of providing the certainty that narrow incrementalism clearly fails to secure in practice. Nor do I suggest it can rival the legislative/judicial distinction in the certainty stakes. The failure of the legislative/judicial distinction and related formalist conceptions of the judicial role to provide or secure certainty is a failure *on their own terms*. I certainly do not endorse those terms. (I suggest that wide incrementalism might provide a basis for achieving “reasonable continuity”, which some less fanatical formalists might find acceptable, but I go no further than that.) As I said at the start of this section, absolute certainty is not an achievable goal – by any method of adjudication.

Second, I am not suggesting that wide incrementalism ought to form the basis of all judicial activity, nor that it ought to be regarded as the only legitimate method for developing the law. Whilst I doubt that much meaningful development can be achieved through the narrowest forms of incrementalism, I do accept that narrow incrementalism is every bit as acceptable a judicial method – constitutionally – as the wide variant (as indicated by Mullender’s Hartian model). It is for this reason that I prefer to think of incrementalism as a spectrum embracing a range of positions from narrow to wide, within which a range of defensible forms of the practice can find expression. Rather than promoting wide incrementalism as the one-and-only acceptable alternative to an undesirable narrow incremental method, I am arguing that a failure to *recognise* the potential to adjudicate in a wider mode has led the judiciary down an unduly exclusively narrow path. Both narrow and wide incrementalism – and the whole range in between – have their places in the English legal order. This is the case despite the obvious imperfections of narrow incrementalism on its own terms. And the judiciary have the unenviable task of determining which approach is appropriate in often complex circumstances where many competing interests and considerations are in play. I argue that this task is made all the more difficult when the

judiciary's eyes are (wilfully or otherwise) closed to the possibilities offered by the wide end of the incrementalism spectrum.

Given that neither method achieves absolute certainty (although only narrow incrementalism is primarily informed by the futile aim of doing so), closing one's eyes to the usefulness of wide incrementalism is unduly restrictive. Indeed, once wide incrementalism is considered, it might well be thought that it could provide greater stability than its narrow cousin. Developing a clearly distinct informational privacy tort in *Campbell*, for instance, would have prevented the years of confusion over the nature of MPI that have followed that ruling. And it is possible that, had the House of Lords recognised a broad privacy tort in *Wainwright*, it would have had the opportunity to consider in detail matters pertaining to its design, such as whose interests would be taken into account and whose would not. This might have prevented, or perhaps reduced, the appearance of a rather *ad hoc* approach to determining these issues that has resulted in the third party interests doctrine.

I argue that, if an intrusion tort is to be recognised, the courts would have to adopt a wide incremental approach to adjudication in an appropriate case (i.e. one in which the facts fit the basic pattern of an intrusion upon a person's seclusion, such as *Wainwright* or *Kaye*). I said at the outset of this thesis that it is not my purpose to advocate the adoption of such a tort. As such, I do not advocate the adoption of wide incrementalism. I merely argue that it is an acceptable method of adjudication and that the court that closes its eyes to, or is blind to, the possibility of its adoption is adjudicating in ignorance of a relevant consideration. And it is that blindness that is characteristic of (the problematic mode of) left hemisphere thinking, to which we will return and elaborate upon in Chapter 4.

My argument thus ought not to be judged by the standards set by the formalists, because I do not accept that their prioritising of legal certainty is either sensible or realistic. But I do say the formalists should be held to their own standards; where the method they espouse falls short it should be criticised.

Conclusion

This chapter first focused in detail upon three judicial pronouncements, engaging in a close reading of the text of those judgments. It has proceeded on the assumption that this kind of close reading is appropriate, and not merely an exercise in what has been pejoratively termed “academic hyperanalysis” – a phrase which invokes a sense of pointlessness.²⁰⁷ For judges, who are charged with elaborating the common law, must at the very least be taken to have thought carefully about what they have to say and to have chosen their words with some deliberation. It then considered in detail two issues that have arisen in English privacy law in recent years following the restrictive rulings in the three cases scrutinised in the first section.

The analysis in this chapter has flagged up an age-old tension between the pursuit of, on the one hand, stability in the law, and, on the other, the development of novel doctrine to respond to new circumstances in which significant interests have come to harm at the hands of wrongdoers. My purpose in doing this has been to highlight an imbalance between some of the more sophisticated comment on the judicial role, and the courts’ own perception of that role in privacy cases. For whilst much of the academic debate on the nature of the judicial role takes place within a sort-of centre ground (albeit a very broad centre ground) between the strict formalist and non-doctrinalist positions, the courts in privacy cases have tended strongly towards a formalistic cautiousness.

The evidence for this is that in the key privacy cases that have come before the courts – those in which there was an opportunity to consider broader non-doctrinal, societal factors weighing in favour of elaborating a general principle of privacy – the courts simply excluded the possibility of considering those factors. They did this for the simple reason that there was no existing doctrine confirming the recognition of a general privacy tort. In the absence of such doctrine, the courts held that recognising such a tort for the first time would be too great a step for the courts legitimately to undertake; it was a change only Parliament could properly effect. The principal

²⁰⁷ Stephen Sondheim, *Finishing the Hat* (Random House 2010) 333.

motivating factor behind such a narrow conception of the judicial role is a formalist-inspired pursuit of certainty in the law.

The courts' method in these cases essentially fits the description of being narrowly incremental, in the sense that it is tightly doctrine-bound and in that it eschews any inductive reasoning involving matters of broad principle or policy. It is upon the courts' closing of the door to broader, principle-based factors (that might have come into play had a wide incremental method been considered) that this chapter has focused.

An adequate understanding of the judicial role does not entail simply accepting formalism. A purely formalistic understanding is inadequate because it is insufficiently attentive to the wider (perhaps more "activist") aspects of established judicial practice. If it is accepted that wide incrementalism is a legitimate mode of common law development (based on the analysis conducted primarily in Chapter 1), then it becomes apparent that the formal barrier I have theorized in the course of these opening two chapters is nothing more than a powerful illusion. In simple terms, there is no objectively overriding reason not to adopt an intrusion tort. Formalism insists that there is, but formalism is itself simply one of several competing views on the proper nature of adjudication. Arguments to the contrary that have prevailed in these cases have overemphasised formalist and formalist-leaning conceptions of the judicial function, in ways that do not acknowledge even the existence of alternative views and which are, in any event, ultimately self-defeating on their own terms.

It is also worth saying something briefly about where this chapter fits in the overall argument presented in the thesis. In this chapter, I have identified the problems caused by rigid adherence to a restrictive conception of the judicial role and further identified a constitutionally acceptable methodology as a potential corrective (wide incrementalism). But the rigid fixation on the one school of thought over the other – on the restrictive over the permissive – indicates a lack of broad attentiveness. For it is hardly the case that wide incrementalism lies far outside mainstream judicial practice. It is theorized by mainstream tort commentators, including those like Mullender, who are ordinarily conservative in their view of permissible judicial

activism.²⁰⁸ Yet judges in privacy cases have not embraced it. They have not even overtly *considered* it. They may even not have thought about it at all, on any level whatsoever. This, then, shows the problems identified in this chapter and the previous one to be symptomatic of a deeper problem; the dominance of this insular, self-referential mode of thinking that excludes broad, contextual vigilance. I will address this deeper problem in Chapters 4 and 5, as I set out my account of “legal imagination”. Before that, however, I turn – in the next chapter – to the problems arising out of our second, “semantic” barrier.

²⁰⁸ Mullender, for instance, rejects strongly the notion – hinted at by some high profile judges in the late 1990s and early 2000s – that the judiciary could strike down an Act of Parliament on constitutional grounds. See Mullender, n 190, esp 150-151.

3

The Semantic Barrier: Mapping the Aspects of Privacy

World is crazier and more of it than we think,
Incorrigibly plural ...

*Snow, Louis MacNeice*¹

Introduction

In recent decades, a considerable amount of academic time, thought and energy has been spent by scholars attempting once-and-for-all to define the nebulous (and, to judicial eyes, often frightening) concept of “privacy”. And for all this effort, there is still no real agreement. All, it seems, have failed.²

Privacy has thus seemed a difficult – if not impossible – concept to define.³ Robert Post found it particularly troubling: “[p]rivacy is a value so complex, so entangled in competing and contradictory dimensions ... that I sometimes despair whether it can be usefully addressed at all.”⁴ Raymond Wacks lamented that “the currency of ‘privacy’ has been so devalued that it no longer warrants – if it ever did – serious consideration as a legal term of art.”⁵ Mainstream theorists insist either that privacy has a single “essence”⁶ (the singular stance) or that it has no unifying essence whatsoever (the reductionist stance). Both stances evoke the sort of formalism

¹ Louis MacNeice, *Selected Poems* (New edn, Faber & Faber 2007) 23.

² This chapter discusses contributions from some of the leading theorists in the privacy field. These theorists can, in large part, be considered to contribute to mainstream (western) privacy theory. However, it is not the aim of the chapter to exhaustively examine all contributions to privacy theory. The aim is, rather, to point up an area of methodological similarity between leading mainstream theorists, in order to set the scene for the critical examination (in Chapter 4) of evidence of left hemisphere dominance. The theorists whose work is discussed in this chapter will be cited individually in subsequent footnotes, but they include Daniel Solove, Robert Post, Ruth Gavison, Richard Parker, Stanley Benn, Edward Bloustein, Alan Westin, Sisela Bok, Nicole Moreham, Arnold Simmel, Kirsty Hughes, Amy Peikoff, Lillian BeVier, Judith Jarvis-Thomson and William Prosser.

³ Daniel J Solove, *Understanding Privacy* (Harvard University Press 2009).

⁴ Robert C Post, ‘Three Concepts of Privacy’ (2001) 89 *Georgetown Law Journal* 2087, 2087.

⁵ Raymond Wacks, ‘The Poverty of Privacy’ (1980) 96 *LQR* 73, 75.

⁶ Ruth Gavison, ‘Privacy and the Limits of Law’ (1980) 89(3) *Yale LJ* 421, 433.

associated with leading tort scholar Ernest Weinrib.⁷ As Emilia Mickiewicz puts it, Weinrib insists that “a phenomenon that does not disclose a single form is ‘an indeterminate something or other that is nothing in particular’.”⁸ This notion of “an indeterminate something ... that is nothing”, moreover, neatly encapsulates the view of privacy that Lord Hoffmann expressed in *Wainwright* when he “cast doubt upon the value of any high-level generalisation which can perform a useful function in enabling one to deduce the rule to be applied in a concrete case.”⁹

Lord Hoffmann’s judgment leaves us in no doubt that “privacy”, in his view, is not a term amenable to sufficiently tight definition to be useful as a legal term of art – let alone as the foundation of a head of tort liability in its own terms. This pithy rejection of “privacy’s” usefulness by our highest court suggests strongly that the difficulties encountered by academics in elaborating a working definition of the concept have seeped into the judicial mind set. The effect of this is to supplement the formal barrier we encountered in Chapters 1 and 2 with a “semantic barrier”. Put simply, English courts are not only stuck in a formalistic rut when it comes to their treatment of the lack of precedent on intrusion as an exclusionary reason not to develop such a tort. They are also constrained by an inability to perceive “privacy” as anything other than an amorphous, nebulous and thoroughly unhelpful concept. The problem is made all the more intense by the powerfulness of Lord Hoffmann’s judgment. It is one of the few occasions upon which our highest court has rendered a judgment in a privacy case, and one of only two such cases where the very nature – and future direction – of English law’s privacy protections was in issue.¹⁰ The rejection in *Wainwright* of the opportunity to develop a broad privacy tort – and, by necessary implication, to reject the development of further discrete heads of liability *other* than that which already existed (equitable confidentiality) – is a powerful indicator to other courts that, even if the decision could be shown to be formally defective, the semantic difficulties posed by the term “privacy” may be overwhelming.

⁷ Ernest J Weinrib, ‘Legal Formalism: On the Immanent Rationality of Law’ (1988) 97 Yale LJ 949.

⁸ Emilia Mickiewicz, ‘An Exploratory Theory of Legal Coherence in Canengus and Beyond’ (2010) 7 The Journal Jurispudence 465, 475, citing Weinrib, *ibid*, 957.

⁹ *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406 (*Wainwright*), [18].

¹⁰ The second being *Campbell v MGN Ltd*, cited at n 42, below.

In contrast to the formalistic approach to conceptualising privacy that prevails in academic and judicial circles, both the taxonomic approach adopted by Daniel Solove and an even broader mapping approach which I propose and defend herein attend to the richness of our human experience of privacy.¹¹ By mapping the privacy terrain, we are able to see that the formalist insistence upon defining privacy tightly and exhaustively is inevitably hampered by the richness of this experience.

In this chapter, I will show how we can nevertheless put the mainstream theories to good use, despite their having failed on their own terms to define privacy completely.¹² I will draw on the philosophy of Ludwig Wittgenstein in order to tease out “aspects” of privacy, which I argue can be used to construct a map of privacy’s field of interpretative possibility.¹³ Having done so, it will become apparent that – despite their differences – many theories overlap and agree on particular privacy matters. These may be termed areas of strong consensus. One such area is that of the wrongfulness of intrusive conduct (in the sense of intruding upon a person’s seclusion or private affairs). Having shown this, I will demonstrate that a form of selective “aspect blindness” exercised by our legal system renders only a limited range of aspects of any given phenomenon amenable to assimilation in the form of liability rules.

My proposed solution to the semantic barrier is, therefore, to conceptualise privacy in a way that recognises it as a pluralistic concept, by locating areas of “strong consensus” on aspects of its meaning (particularly on “intrusion”).¹⁴ This enables us to make sense of it in a manner amenable to the fashioning of doctrine in order to remedy the intrusion lacuna in English law.

¹¹ To a lesser extent, I argue, in Solove’s case. See Solove, n 3.

¹² Solove, *ibid*, 38.

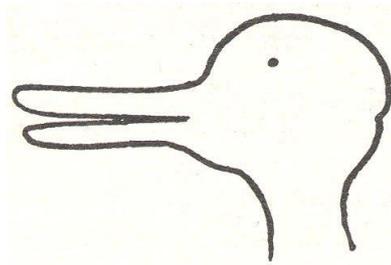
¹³ Solove uses another of Wittgenstein’s concepts – that of “family resemblances” – when defending his construction of a taxonomy of privacy’s meanings. See Solove, n 3, 42-44, discussed in more detail at section 2.4.1 below.

¹⁴ Solove, n 3, 9 and 187-189.

1. A Philosophical Backdrop: Wittgenstein on Aspect Perception and Aspect Blindness

The work of Ludwig Wittgenstein makes an important contribution to the philosophy of language. He explores the relationship between meaning and context, emphasising the importance of context to the task of establishing a concept's meaning. Wittgenstein's account of "aspect perception" highlights the necessity of prior experience for our ability to appreciate and comprehend complex concepts (of which privacy is an example). In this first section, then, we will explore the contributions his work can make to our efforts to understand "privacy".

In his later work, Wittgenstein explores the ways in which we come to understand words and images that we encounter. He was struck by the different ways in which we "see" objects. In a famous example, he referred to Joseph Jastrow's puzzle picture (which might be interpreted as depicting a duck or a rabbit).¹⁵



He noted that a person looking at the picture might initially see a duck, but then "see" a rabbit. Each of these possible perceptions Wittgenstein labelled an "aspect" of the picture. The form of the picture itself, lacking any objective meaning, is imbued with the meaning that the observer brings to it. The meaning we attribute to observable phenomena is not objective nor is it fixed to the form in which we observe them. Thus:

one and the same content can intelligibly exhibit many alternative forms, which are themselves contingent...¹⁶

¹⁵ Ludwig Wittgenstein, *Philosophical Investigations* (Revised 4th edn, GEM Anscombe, PMS Hacker and Joachim Shulte tr, PMS Hacker and Joachim Shulte eds, Wiley-Blackwell 2009) 204, para 118. The duck-rabbit grapheme first appears in Joseph Jastrow, *Fact and Fable in Psychology* (London 1900) 295.

¹⁶ Mickiewicz, n 8, 474.

Moreover,

What we conceive to be a form allowing us to see a phenomenon as a whole, distinct from all other things[,] ... is not inextricably bound to its content, but is a conceptual scheme that we create by identifying similarities and differences between the investigated phenomenon and phenomena that we are already familiar with.¹⁷

Wittgenstein realised that our ability to “see” multiple aspects in the phenomena we observe (and thus to understand those phenomena more fully) is contingent upon our experience. An individual who has never encountered a rabbit would “see” only a duck in the picture. We recognise that which we observe only because we are able to draw links between the observed and similar phenomena to which we have previously been exposed. Modern psychiatry concurs; as Arnold Modell (to whose work on imagination we shall return in Chapter 4) explains, memory involves a metaphoric process whereby the mind unconsciously draws parallels between its own experience and apparently novel phenomena.¹⁸ Most phenomena, thus, have multiple aspects.¹⁹

Privacy is just such a phenomenon. It is highly complex, with multiple aspects. When we consider it, we do so bringing our own “aspect” to bear upon it; “one [brings] a concept to what one sees”.²⁰ It is, as Daniel Solove says, a “pluralistic” concept.²¹ It has a field of interpretative possibility in which it is viewed as taking on different forms, rationales and purposes by different analysts. Of those scholars upon whose work we shall shortly dwell, Solove comes closest to appreciating the significance of this, but (as we will see) he could have pressed his analysis further on the point. Patrick O’Callaghan brings semantic pluralism of this sort into focus in the context of

¹⁷ Ibid.

¹⁸ Arnold H Modell, *Imagination and the Meaningful Brain* (MIT Press 2006).

¹⁹ It does not really matter, for our purposes, whether phenomena have any objective meaning or whether all meaning is contingent upon the experience of the observer. For with many commonly-encountered phenomena, the experiences of those encountering them will be sufficiently similar that observers will perceive sufficiently similar aspects that communication will not be overly obstructed. For example, when we encounter a bus, we recognise it as a bus because our individual experiences of buses, having grown up in the same culture, will be sufficiently similar that we can discuss and understand each other. In this way, commonly-encountered phenomena can, by virtue of the similar collective experience of those encountering them, be said to possess a sufficiently strong core of certain meaning to enable broad understanding.

²⁰ Ludwig Wittgenstein, *Remarks on the Philosophy of Psychology*, Volume 1 (GEM Anscombe and GH von Wright eds, GEM Anscombe tr, Basil Blackwell 1980) 169, para 961.

²¹ Solove, n 3, ch.3 (esp 40).

conceptualising privacy when at the outset of his book, *Refining Privacy in Tort Law*, he states:

[W]ords such as *dignity* and *liberty* have sufficient force so that we are in some measure cognisant of their content. But the words are sufficiently vague at the same time so that some degree of reasonable disagreement about what they represent can be accommodated. In this way, these words project *universality* but allow for *reasonable pluralism*.²²

Thus, for example, Commentator A thinks privacy is to do with informational control. Commentator B thinks it is about a right “to be let alone”.²³ Both conceive of privacy very differently – they perceive it as possessing different aspects. But they are likely also to share sufficient common ground to conduct a sensible discussion about privacy and indeed to recognise certain acts as violating privacy. In other words, the perceptual mode by which they identify privacy-violating acts is common to both of them. This common ground comes from their individual experiences of privacy, which are of course subjective and contingent. Assuming the commentators have grown up in the same or reasonably similar cultural circumstances, however, their experiences will share sufficient common ground to make discussion within this mode possible.

As Wittgenstein worked through his concept of aspect perception, he developed a notion of “aspect blindness”.²⁴ This, he argued, would afflict a person who, by virtue of not having the necessary experience to appreciate a particular aspect, would be unable to “see” it – as in our example of the person who had never encountered a rabbit. This notion proves illuminating when we use it to critique the various theories that claim fully to conceptualise privacy. For when we scrutinise them, it becomes apparent that, in claiming to secure the proverbial knock-out blow in terms of understanding privacy, they exhibit a degree of aspect blindness (i.e. an inattentiveness to the aspects of privacy identified by rival theories).

²² Patrick O’Callaghan, *Refining Privacy in Tort Law* (Springer-Verlag 2013) 1.

²³ Samuel D Warren and Louis D Brandeis, ‘The Right to Privacy’ (1890) 4 Harv L Rev 193, 195.

²⁴ Wittgenstein, n 15, 225, para 206ff.

Wittgenstein talks about the “field of a word” (*das Feld eines Wortes*).²⁵ By this he means a field of interpretative possibility; the normative space that the word creates and within which we may interpret it in different ways. Once one strays beyond a possible meaning one leaves the field. But within the field there is plenty of room for “reasonable pluralism”. Wittgenstein’s notion of aspect perception, then, shines light on the ways in which words may be interpreted in a variety of ways within their fields of interpretative possibility. Whether we are interpreting a simple noun, a duck-rabbit puzzle picture or a complex conceptual phenomenon such as privacy, we need to get the field of interpretative possibility into view if we are to understand – as well as we are able – what we are observing or considering. If there appear to be multiple aspects of privacy (perceived by those who observe it) we should not simply assume that all but one aspect are “wrong”, in the manner that “singular” theorists often end up doing. Such an assumption is blind not only to other aspects of privacy, but to the potential for other aspects to exist, and it dulls rather than enriches our understanding of privacy. It may not be philosophically (let alone legally) convenient, but the world we inhabit is “incorrigibly plural”.²⁶ Privacy is likewise plural. And we must try to understand it as fully as we can.

Wittgenstein, then, alerts us to the contingency of our experience – to its inherent subjectivity. Moreover, in his exploration of “aspect blindness”, he gives us an indication of the limiting effect that being unable to “see” a given phenomenon’s multiple aspects has on our understanding of the phenomenon. When we explore some of the major privacy theories from the last century through to the present, we will draw on Wittgenstein in order to highlight the fact that many mainstream theories fail to appreciate more than one of privacy’s aspects.

2. Privacy Theories as “Aspects”

In this section, I consider some of the best-known theories of privacy. I explore their key features and, from these, determine the “aspect” of privacy that each dwells upon and brings into focus. In so doing, I point up the methodological features of the various

²⁵ Ibid, para 297. (Original German text found on page 229, English translation on page 230.)

²⁶ Louis MacNeice, *Snow*, n 1.

scholars' approaches to understanding privacy that lead to the sorts of formalistic objections that have erected the semantic barrier to the recognition of broader privacy torts. The criticisms levelled at a number of these approaches are largely fair and accurate. But the deficiencies, once enumerated, can be overcome by adopting a method of conceptualising privacy that attends to its multiple aspects, rather than focusing narrowly on just one (or a few) of its aspects.²⁷

2.1 Singular Theories

Singular theories,²⁸ sometimes described as “top-down” theories,²⁹ argue that privacy can be conceptualised properly only by locating a common denominator between all matters private. Unlike reductionist theories, the singular theorists see privacy as a single distinct right or interest, often underpinned by a distinct value. Thus for some, privacy interests are linked by virtue of the type of thing being interfered-with, such as private information.³⁰ For others, this common denominator is a more abstract

²⁷ There is some broad similarity between the approach I adopt and that which Solove utilises in *Understanding Privacy* (n 3, above). However, there are two key differences between Solove's approach and mine. First, my approach is informed by an understanding of “aspect perception” and “aspect blindness”, derived from Wittgenstein's work. Whilst Solove draws on Wittgenstein in his book, he draws only on Wittgenstein's theory of “family resemblances”. As such, his work does not attribute the faults he finds in mainstream privacy scholarship with an inattentiveness to context in quite the same way that my approach does, though there is nothing in his critique that is incompatible *per se* with my approach. Second, when I engage in what I have termed a “mapping” exercise (see section 3, below), I look for areas of overlap between the theorists I have examined. Solove endeavours to “map” the privacy “terrain” (*Understanding Privacy*, 44), but does so primarily by reference to experiential rather than theoretical “privacy problems”. Whereas Solove seeks to cast aside scholarship that he finds methodologically limited, I seek to make use of it whilst acknowledging its deficiencies. It is my contention that use can helpfully be made of much of this scholarship by identifying areas in which these multiple theories about privacy's nature overlap.

²⁸ These might be described as “unitary” theories. Indeed, in initial drafts of this thesis, I preferred that terminology (which Solove also uses). However, Wittgenstein's contemporary, Martin Heidegger, expressly utilises the term “unitary” to describe concepts understood holistically (i.e., in Wittgensteinian terms, inclusive of their multiple aspects). Since I seek to describe these theories as those which fixate only upon one aspect of privacy each, the description “singular” seems more apt. See Martin Heidegger, *Being and Time* (John Macquarrie and Edward Robinson tr, Blackwell 1962) 78.

²⁹ Solove, n 311, 9.

³⁰ Theorists who conceptualise privacy as the interest in controlling information about oneself fall into this category. It is a point of commonality between the view of privacy as the ability to maintain secrecy, and that of privacy as a broader interest in controlling personal information (views which are otherwise in a number of ways divergent). The notion of privacy as an ability to maintain secrecy is espoused by scholars including Richard A Posner (*The Economics of Justice* (Harvard University Press 1981) 272-273; *Economic Analysis of Law* (5th edn, Aspen Publishers Inc 1998) 46), Sidney M Jourard (‘Some Psychological Aspects of Privacy’ (1966) 31 *Law and Contemporary Problems* 307) and Amitai Etzioni (*The Limits of Privacy* (Basic Books 1999)). The notion of privacy as control over a broader class of personal information is preferred by scholars such as Alan Westin (*Privacy and*

value, such as respect for individuals' "personhood".³¹ Whatever the common denominator proposed, however, the analytic method of the singular theorists is essentially the same. They seek the necessary and sufficient conditions of privacy, such that they can define the concept in a way that enables us to include and exclude matters that fit and do not fit (respectively) with the definition.

Samuel Warren and Louis Brandeis, who, writing in 1890, borrowed a phrase from Thomas Cooley that was to become synonymous with their work, argued for greater protection for "the right to be let alone", which they attributed to a principle of "inviolable personality".³² Edward Bloustein, making use of this principle, gives a deontological account of privacy, focusing on "the individual's independence, dignity and integrity; [which] defines man's essence as a unique and self-determining being."³³ Privacy thus protects personality, guarding against conduct that is "demeaning to individuality", "an affront to personal dignity"³⁴ or an "assault on human personality."³⁵ Stanley Benn, whose theory is grounded in similar deontological territory, sees privacy as safeguarding "respect for [a person] as one engaged on a kind of self-creative enterprise".³⁶ Building upon this, Paul Freund sees privacy as primarily concerned with the protection of "personhood".³⁷

Others see privacy as more instrumental. These theorists tend to focus on the centrality to privacy of control over private information. Thus for Alan Westin, "[p]rivacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."³⁸ And for Charles Fried, "[p]rivacy is ... the control we have over information about

Freedom (IG Publishing 1967)), Charles Fried ('Privacy' (1968) 77 Yale LJ 475) and Richard B Parker ('A Definition of Privacy' (1974) 27(2) Rutgers Law Review 275, 277).

³¹ Roscoe Pound, 'Interests of Personality' (1915) 28 Harv L Rev 343, 363; Paul Freund, Address to the American Law Institute, 23 May 1975.

³² Warren and Brandeis, n 23, at 195 and 205; Thomas McIntyre Cooley, *A Treatise on the Law of Torts: Or the Wrongs which Arise Independent of Contract* (2nd edn, Callaghan & Co. 1888) 29.

³³ Edward J Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 New York University LR 962, 971.

³⁴ *Ibid*, 973.

³⁵ *Ibid*, 974.

³⁶ Stanley I Benn, 'Privacy, Freedom and Respect for Persons' in *Nomos XIII: Privacy* (J Roland Pennock and John W Chapman eds, Atherton Press 1971) 26.

³⁷ Freund, n 31.

³⁸ Westin, n 30, 7.

ourselves.”³⁹ Richard Parker’s conceptualisation of privacy sits between this group (control over information) and the next (limited access to the self). For Parker, privacy is concerned with control but over more than just information. He describes privacy as “control over when and by whom the various parts of us can be sensed by others.”⁴⁰

He elaborates on these elements thus:

By “sensed,” is meant simply seen, heard, touched, smelled, or tasted. By “parts of us,” is meant the parts of our bodies, our voices, and the products of our bodies. “Parts of us” also includes objects very closely associated with us. By “closely associated” is meant primarily what is spatially associated. The objects which are “parts of us” are objects we usually keep with us or locked up in a place accessible only to us. In our culture, these objects might be the contents of our purse, pocket, or safe deposit box, or the pages of our diaries.⁴¹

It is worth noting that it is this aspect of privacy – control over information – that English courts have latched onto in deploying equitable confidentiality as a privacy-protecting device, and in developing the informational tort of MPI. In *Campbell*, Lord Hoffmann focused exclusively on this aspect of privacy, stating that the cause of action being developed

focuses upon the protection of human autonomy and dignity – the right to control the dissemination of information about one’s private life and the right to the esteem and respect of other people.⁴²

Baroness Hale likewise described equitable confidentiality as embracing “the protection of the individual’s informational autonomy”, in the course of distinguishing this aspect of privacy from “the sort of intrusion into what ought to be private which took place in *Wainwright*” (to which, it will be recalled, she says that English law is “powerless to respond”).⁴³

³⁹ Fried, n 30, 482-483.

⁴⁰ Parker, n 30, 281.

⁴¹ Ibid. Priscilla Regan, in her major 1995 book, *Legislating Privacy: Technology, Social Values, and Public Policy* (University of North Carolina Press 1995), adopts this sort of definition of privacy (at 4). Although her adoption of it does not amount to a ringing endorsement, her main concern in her book is with the manner in which privacy’s *value* is conceptualised, and not the way in which privacy itself is defined.

⁴² *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [2004] 2 AC 457, [51].

⁴³ Ibid, [133]-[134].

A third group of singular theorists focus on privacy as a limit upon accessibility. Sisela Bok finds that privacy is “the condition of being protected from unwanted access by others – either physical access, personal information, or attention.”⁴⁴ Of this group, Ruth Gavison’s “limited access” theory has probably been the most influential.⁴⁵ Gavison argues that it is necessary to separate the *concept* of privacy (which should be neutral and purely descriptive) from the *value* of privacy (which provides prescriptive guidance on how to balance it against competing interests).⁴⁶ Her argument is that privacy, properly conceptualised, is the condition of “limited access” of others to the self. This, she argues, comprises “three independent and irreducible elements: secrecy, anonymity and solitude,”⁴⁷ with “limited access” being the common denominator or the singular “essence” of privacy.⁴⁸ Both Solove and O’Callaghan are critical of Gavison’s conceptualisation, however. Solove finds it too narrow:

The way that Gavison defines access ... restricts privacy to matters of withdrawal (solitude) and concealment (secrecy, anonymity). Excluded from this definition are invasions into one’s private life by harassment and nuisance and the government’s involvement in decisions regarding one’s body, health, sexual conduct, and family life.⁴⁹

O’Callaghan, meanwhile, finds it too broad:

[A] great many instances of secrecy, anonymity and solitude have nothing to do with privacy... I may be in a state of solitude if I fall into a well while walking alone in the countryside; it may also be a secret to everyone else but is it a privacy-related concern? While Gavison’s formulation is more distinctive than the more general ‘being let alone’ test, it also has the potential to cover a great many conceivable complaints.⁵⁰

⁴⁴ Sisela Bok, *Secrets: On the Ethics of Concealment and Revelation* (Pantheon Books 1983) 10-11.

⁴⁵ Gavison, n 6.

⁴⁶ *Ibid*, 424.

⁴⁷ *Ibid*, 433.

⁴⁸ *Ibid*, 433.

⁴⁹ Solove, n 3, 21.

⁵⁰ O’Callaghan, n 22, 12.

Nicole Moreham argues for a modification to Gavison's conceptualisation, suggesting that the "inaccess" should be "desired".⁵¹ This is in order to avoid the incongruity of a person who is stranded down a well being described as experiencing perfect privacy. However, this modification does not satisfy O'Callaghan either:

[S]hould intention [to have secrecy, anonymity or solitude] always be a prerequisite? If, after several days in the well ... I am rescued and the event is covered on live television, can we confidently say that these pictures do not constitute an invasion of privacy? Certainly, my solitude in the well was unintentional and my euphoric reaction to being rescued may have left me unconcerned about the presence of television cameras. But what if I become distressed later that week when viewing recordings and reading accounts of the rescue?⁵²

Each of these singular theories, then, focuses on *one* aspect of privacy and treats all others as either wrong or unnecessary. But there is clear disagreement between the writers; the aspects they identify differ, and no one aspect manages to satisfy all contributors to the debate (indeed, it seems unlikely that any singular theory would manage to satisfy even a single other commentator in the debate).

2.2 Interdisciplinary Theories

A fourth group of theorists endeavour to conceptualise privacy in an interdisciplinary fashion. There is a strong undercurrent of realism about this sort of approach, since these theorists refute the notion that privacy can be conceptualised independently from its role in society. Writing in 1971, the sociologist Arnold Simmel observed that individual privacy interests exist within a "continual competition with society over the ownership of our selves."⁵³ Simmel invokes the language of behavioural science when he identifies "boundaries" and sees individual choice (the desire to maintain these boundaries) as the cornerstone of privacy's existence.

⁵¹ NA Moreham, 'Privacy in the Common Law: A Doctrinal and Theoretical Analysis' (2005) 121 LQR 628, 636ff.

⁵² O'Callaghan, n 22, 12-13.

⁵³ Arnold Simmel, 'Privacy is Not an Isolated Freedom' in *Nomos XIII: Privacy*, n 36, 72.

Within these boundaries our own interests are sovereign, all initiative is ours, we are free to do our thing, insulated against outside influence and observation. This condition of insulation is what we call privacy.

Every assertion of our right to personal privacy is an assertion that anyone crossing a particular privacy boundary is transgressing against some portion of our self.⁵⁴

Of the self, Simmel says that

our concern is ... with the social processes that delimit the space of free movement of the individual, and thus define in the course of social interaction a socially agreed-upon concept of the individual, which is reflected in the individual's own definition of the self.⁵⁵

For Simmel, then, the individual's own understanding of her self is contingent upon social interaction. However, this does not (necessarily) make the individual subordinate to society. Indeed, Simmel insists that "the individual occupies a central position in our value system."⁵⁶ Simmel points out that, in terms of our development as human beings (from birth), "we get to be what we are by progressively differentiating ourselves from others."⁵⁷ He cautions that, if perfect societal integration were an individual's sole aim, "he could not develop as an individual ... as a psychologically and socially distinct person."⁵⁸ Thus whilst "[w]e need to be part of others ... and we need to be so recognized by others ... we need also to confirm our distinctness from others, to assert our individuality..."⁵⁹ Individual development, therefore, in Simmel's view requires the effective maintenance of these "boundaries": "[i]n privacy we can develop, over time, a firmer, better constructed, and more integrated position in opposition to the dominant social pressures."⁶⁰

However, not all boundaries are physical. Simmel also realises that social norms play a boundary-determining role:

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid, 73.

⁵⁹ Ibid.

⁶⁰ Ibid, 73-74.

Most of these boundaries are not mere physical barriers; indeed, most physical barriers are boundaries only by virtue of socially shared prescriptions not to cross lines which are obstacles more by definition than because they offer any genuine physical resistance.⁶¹

Thus in determining how it is that individuals come to respect each other's boundaries, "[w]e have to look for the answer ... in the structure of society, the patterns of interaction, the web of norms and values."⁶² At this point, we can usefully turn to a scholar whose more contemporary analysis shares considerable common ground with Simmel's.

Kirsty Hughes has, in recent years, worked up an inter-disciplinary conceptualisation of privacy which shares a number of features with the work of Simmel. Drawing on social interaction theory from the behavioural sciences, her theory also overlaps in many instances with those of Gavison and Moreham. Indeed we might see it (just as we might see Simmel's) as an extension of the basic premise that privacy concerns the limitation of access to the self.

Hughes' analysis emphasises the centrality of experience to understanding privacy. The experience which is of utmost relevance to her theory is that of the interaction between the individual and others in society. Privacy cannot, in her view, be understood in isolation from society:

Legal and philosophical writings have tended to focus upon the benefits for the individual experiencing privacy. However, ... this approach is too narrow and ... the social and group benefits involved in privacy have been rendered invisible as a result.⁶³

Instead of regarding privacy as an individualistic right, we need to appreciate the fundamental role that privacy plays in facilitating social interaction.⁶⁴

⁶¹ Ibid, 83-84.

⁶² Ibid, 84.

⁶³ Kirsty Hughes, 'A Behavioural Understanding of Privacy and its Implications for Privacy Law' (2012) 75(5) MLR 806, 822.

⁶⁴ Ibid, 823.

However, for Hughes, one major drawback with earlier limited access theories has been the lack of analytical work undertaken to conceptualise the “self”; “[t]o define what constitutes ‘self’[,] a purely objective access-based theory has to fall back on the identification of universally accepted privacy-related interests.”⁶⁵ Whilst identifying Moreham’s more subjective notion of “desired inaccess”⁶⁶ as “preferable”,⁶⁷ Hughes still sees scope for considerably more analysis to be undertaken. It is this that motivates her to draw on the social interaction research of Irwin Altman, and, in language similar to that of Simmel, to present a theory based on the notion of “barriers”.

In his or her social interactions the individual relies upon ... barriers to obtain privacy, and privacy is experienced when those barriers are respected. Social interaction is, in turn, facilitated by respect for these barriers. Thus ... the right to privacy should be understood as a right to respect for these barriers, and that an invasion of privacy occurs when Y (the intruder) breaches a privacy barrier used by X (the privacy-seeker) to prevent Y from accessing X.⁶⁸

The three types of barriers identified by Hughes are: “(i) physical barriers; (ii) behavioural barriers; and (iii) normative rules (which also act as a form of barrier).”⁶⁹ Hughes’ treatment of the normative barrier, whilst ostensibly similar to Simmel’s, adds value to his contribution. Hughes explains that the normative barrier consists of “normative rules” that “may derive from a number of sources including social practices and codified rules, such as laws or codes of practice.”⁷⁰ Moreover,

the normative element is an essential part of the privacy experience, and we rely upon many normative rules about privacy on a daily basis. We are not permanently on guard against unforeseen intrusions and it is important that the law protects us from some of these intrusions.⁷¹

Hughes gives two examples to emphasise the importance of the normative barrier. The first concerns vulnerable persons, who may “lack the awareness of the need to employ

⁶⁵ Ibid, 809-810.

⁶⁶ Moreham, n 51.

⁶⁷ Hughes, n 63, 810.

⁶⁸ Ibid, 810.

⁶⁹ Ibid, 812.

⁷⁰ Ibid.

⁷¹ Ibid.

[physical or behavioural] barriers and/or the capacity to do so.”⁷² Here, Hughes primarily has children in mind.⁷³ Second, Hughes conjectures that, if normative barriers were not protected by law, individuals would become over-cautious, deploying increasingly drastic methods to protect their privacy. This would, she cautions, “[r]equir[e] individuals to be ‘on guard’ [and] is likely to break down trust and community, as neighbours and citizens are all characterised as potential intruders.”⁷⁴

Hughes and Simmel thus both identify a particular aspect of privacy left untouched by the group of scholars we examined previously: privacy as an aspect of the self.⁷⁵

2.3 Reductionist Theories

Reductionist theorists refute the idea that privacy can be usefully conceptualised as a distinct right or interest. Instead, they see it as encompassing a cluster (or set of clusters) of discrete interests. As such, they see talking of “privacy” as if it were distinct to be “pointless, a waste of time and mental capital.”⁷⁶ Thus Lilian BeVier asserts that “[p]rivacy is a chameleon-like word” embracing “a wide range of wildly

⁷² Ibid, 813.

⁷³ The case of *Murray v Express Newspapers Ltd* [2008] EWCA Civ 446, [2009] Ch 481 is a good example. The infant claimant, David Murray, was found by the Court of Appeal to be capable of establishing a reasonable expectation of privacy in a public place, despite being too young to be particularly aware of his surroundings and of the consequences of the taking and publication of his picture by paparazzi. In making this finding, the Court of Appeal lent force to the notion that a normative barrier is erected for a vulnerable claimant in circumstances where his parents have taken steps to shelter him from publicity.

⁷⁴ Hughes, n 63, 813. See also Elizabeth Paton-Simpson, ‘Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places’ (2000) 50(3) *The University of Toronto Law Journal* 305.

⁷⁵ Julie Cohen also argues that privacy must be understood as an aspect of the self. In her work, she calls for a recalibration of the way in which the “self” is conceptualised. Ultimately, this leads her to argue in favour of an understanding of privacy as an aspect of a self that exists in a symbiotic relationship with society. As such, Cohen’s theory aligns more closely with that which Solove ultimately proposes (see section 2.4.2, below) and with my own critique than with the views of the other mainstream theorists examined in this chapter. However, since the aim of this chapter is to examine the deficiencies within some of the leading, mainstream conceptual accounts of privacy that exhibit an inattentiveness to context, I do not propose to dwell on Cohen’s work further at this point. Her work is also briefly mentioned in Chapter 4, where I again flag up its points of alignment with Solove’s. See generally Julie Cohen, *Configuring the Networked Self: Law, Code, and the Play of Everyday Practice* (Yale University Press 2012).

⁷⁶ Amy L Peikoff, ‘The Right to Privacy: Contemporary Reductionists and their Critics’ (2006) 13(3) *Virginia Journal of Social Policy & the Law* 474, 509. See also Julie C Inness, *Privacy, Intimacy and Isolation* (OUP 1992) 36-37.

disparate interests”.⁷⁷ The philosopher Judith Jarvis Thomson, whilst not directly concerned with providing a *legal* definition of privacy, is a leading proponent of reductionism. For her, privacy is “not a distinct cluster of rights but itself intersects with the cluster of rights which the right over the person consists in and also with the cluster of rights which owning property consists in.”⁷⁸ A right to privacy, Thomson argues, derives from these higher-order interests.⁷⁹ Wacks’ dismissal of privacy as an impoverished concept also emanates from a concern that it has no distinct meaning other than as an umbrella term for other, discrete interests. It has, he argues, “become almost irretrievably confused with other issues”.⁸⁰

One scholar whom we might also see as a reductionist is William Prosser. Prosser remains probably the most famous privacy taxonomist of all time; his taxonomy of four privacy torts fed into the USA’s *Second Restatement of Torts* and continues to form the basis for American privacy in tort to this day.⁸¹ Prosser exhibits a strong reductionist tendency because he sees the four privacy torts as being “distinct” from one another; they have nothing in common, he insists, other than a loose notion that they protect the vague “right to be let alone”.⁸² Prosser analysed over 300 cases and from this body of jurisprudence determined the existence of the four torts: public disclosure of private facts, intrusion upon seclusion, misappropriation of image, and placing the plaintiff in a “false light”. Whilst Prosser was sceptical about the usefulness of conceiving of privacy as a unified concept, he did contribute significantly to American privacy jurisprudence by “creat[ing] clear and distinct categories where once only a whirling, undifferentiated chaos had been.”⁸³ The reductionists thus flag up yet another aspect of the concept: privacy as a cluster of interests.

⁷⁷ Lillian R BeVier, ‘Information About Individuals in the Hands of Government: Some Reflections on Mechanisms for Privacy Protection’ (1995) 4(2) William & Mary Bill of Rights Journal 455, 458.

⁷⁸ Judith Jarvis Thomson, ‘The Right to Privacy’ (1975) 4(4) Philosophy & Public Affairs 295, 306.

⁷⁹ *Ibid.*

⁸⁰ Wacks, n 5, 78.

⁸¹ *Restatement of the Law (Second): Torts* (2d), vol 3 (American Law Institute 1977) 376; see also William Prosser, ‘Privacy’ (1960) 48(3) Cal LR 383.

⁸² Prosser, *ibid.*, 389.

⁸³ Peikoff, n 76, 479.

2.4 The Pragmatic Taxonomy of Daniel Solove

2.4.1 Solove's Conception of Privacy

In *Understanding Privacy*, the American scholar, Daniel J Solove, provides us with both a pertinent critique of rival privacy theories and a (new) proposal to understand privacy in a “pragmatic” fashion.⁸⁴ Given his claim to recognise and reflect privacy’s “pluralistic” nature (suggesting that, unlike most other scholars, he is alive to privacy’s multiple aspects), his work is worthy of detailed scrutiny, and I devote much of the remainder of this section to the task.⁸⁵

Solove’s starting point is a clear dissatisfaction with the state of contemporary privacy theory. He finds the efforts of most earlier scholars to define the concept of privacy (such as the singular theorists identified above) baleful.⁸⁶ The reason for this is that he finds the method of analysis that they adopt limiting. For most scholars operating in the traditional mode of singular theorizing engage in what Solove terms “top-down” analysis. That is, as we have noted, they endeavour to identify the common denominator between all things private. According to Solove, this leads such scholars invariably into error. Either their theories end up over-inclusive (in the sense of identifying, as private, matters which ought not ordinarily to attract that label) or under-inclusive (that is, certain matters which ought to be considered private are excluded). Indeed, Solove charges two prominent theories with falling into error on both counts.⁸⁷

For Solove, it is the very search for these common denominators that is the root of the error. One will necessarily end up including or excluding too much and that inclusion or exclusion smacks of arbitrariness. Rather than proceeding in such a top-down fashion, Solove conceptualises privacy from the “bottom-up”. By this he means that we “should act as cartographers, mapping the terrain of privacy by examining specific

⁸⁴ Solove, n 3.

⁸⁵ Ibid, 40.

⁸⁶ Ibid, ch.2.

⁸⁷ Ibid, at 29 (on privacy as “control over personal information”), and 37 (on privacy as “intimacy”).

problematic situations rather than trying to fit each situation into a rigid predefined category.”⁸⁸

Solove argues that any effort properly to understand privacy must be rooted in our experience of privacy. Thus his work proceeds from a pragmatic methodology. (He is particularly inspired by the work of John Dewey, one of the fathers of American pragmatic philosophy, amongst others.⁸⁹) In his search for an adequate understanding of privacy, Solove presents us with two key tools. First, he exhorts us to view privacy through the experiential lenses of actual “privacy problems”. This is because “philosophical inquiry begins with problems in experience, not with abstract universal principles.”⁹⁰ Thus he argues that “[p]rivacy concerns and protections do not exist for their own sake; they exist because they have been provoked by particular problems. Privacy protections are responses to problems caused by friction in society.”⁹¹ For Solove, then, “[c]onceptualizing privacy is about understanding and attempting to solve certain problems.”⁹²

Second, Solove employs one of Wittgenstein’s concepts – that of “family resemblances”⁹³ – as an alternative to locating common denominators between these “privacy problems”. According to Wittgenstein, not all related phenomena necessarily possess a common feature. But this is not prejudicial to the idea that such phenomena *are* in fact related. Like children, cousins, parents and grandparents, related phenomena can be expected to share certain features. Yet, whilst each will share one or more characteristics with another, they will not all share *the same* characteristics. Solove’s point is that we need not expect all privacy-related matters to share the same common features, and in searching for them we can easily overlook others in the privacy family. This is not, of course, a prescriptive argument, merely a descriptive

⁸⁸ Ibid, 44.

⁸⁹ Solove cites (n 3, at 46-47) John Dewey, *Logic: The Theory of Inquiry* (1938) in vol. 12 *The Later Works of John Dewey* (Jo Ann Boydston ed, SIU Press 1988); *Experience and Nature*, in vol. 1 *The Later Works of John Dewey* (Jo Ann Boydston ed 1988). Solove later cites (at 91) *Ethics* (1908) in vol. 5 *The Middle Works of John Dewey* (Jo Ann Boydston ed, SIU Press 1978); *Liberalism and Civil Liberties* (1936) in vol. 11 *The Later Works of John Dewey* (Jo Ann Boydston ed, SIU Press 1991).

⁹⁰ Solove (ibid, 75) citing John Dewey, *Experience and Nature*, in vol. 1 *The Later Works of John Dewey*, ibid, 9; and Michael Eldridge, *Transforming Experience: John Dewey’s Cultural Instrumentalism* (Vanderbilt University Press 1998) 4.

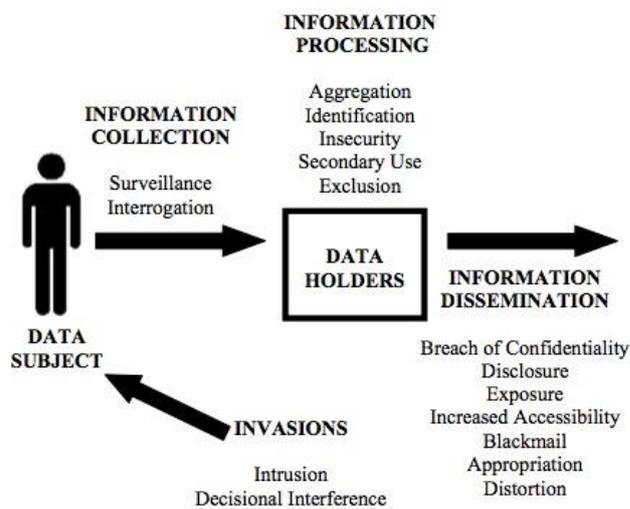
⁹¹ Solove, ibid, 76.

⁹² Ibid, 75.

⁹³ Wittgenstein, *Philosophical Investigations*, n 15, 36, para 67.

tool that justifies broadening the search for an understanding of privacy that transcends common denominators.

Ultimately, Solove uses this methodology to produce a taxonomy of privacy problems, which he readily concedes must be open to amendment as new problems arise.⁹⁴ This taxonomy contains four broad categories: information collection, information processing, information dissemination and intrusion. Each of these contains a number of discrete problems which identify correlative interests that a “data subject” has in privacy. Solove sets these out in a diagram reproduced below:⁹⁵



Because Solove rejects the notion that privacy is capable of properly being conceptualised in a singular fashion, he does not prescribe any particular conditions for the recognition of a privacy problem. Rather, he conducts a survey of legal, political and cultural matters that, in his view, point up relevant problems. He openly admits his survey will be coloured, to some extent, by agent relativity, but suggests this will not be problematic as he is able to remain objective about that which he is observing:

I have attempted to identify problems on the basis of a detached interpretation of law, policy and culture... [M]y intent is to locate problems based not on my own normative perspective but on broader

⁹⁴ Solove tells us that the categories in his taxonomy are “not final and immutable” (n 3, 105).

⁹⁵ Ibid, 104.

cultural recognition. The taxonomy is an exercise in cultural interpretation, which occurs through observation and generalization.⁹⁶

The concern this flags up is whether this agent-relative identification of legal, political and cultural evidence of privacy problems can plausibly claim to be sufficiently comprehensive to provide an accurate picture of the background against which privacy issues come to light. We will return to this below, where, having given an overview of Solove's taxonomy that he hopes "will aid the creation of law",⁹⁷ we turn to his treatment of the issue of privacy's value.

2.4.2 Solove and the Value of Privacy

A privacy interest exists whenever there is a problem from the related cluster of problems we view under the rubric of privacy. A privacy problem disrupts particular activities, and the value of protecting against the problem stems from the importance of safeguarding the activities that are disrupted.⁹⁸

When turning to the question of how privacy derives its value, Solove seeks to distinguish himself from both liberal and communitarian positions. Liberal theories of privacy traditionally focus on the individual's privacy as a right in tension with the interests of the community; that is, they see the relationship between the individual and society as an atomistic one. As a pragmatist, Solove finds these liberal theories deficient on the basis that, when privacy is conceived as an individual's right against the community, it tends to be undervalued:

The interests aligned against privacy – for example, efficient consumer transactions, free speech, or security – are often defined in terms of their larger social value. In this way, protecting the privacy of the individual seems extravagant when weighed against the interests of society as a whole.⁹⁹

⁹⁶ Ibid, 106.

⁹⁷ Ibid, 11.

⁹⁸ Ibid, 75-76.

⁹⁹ Ibid, 89.

Solove also rejects communitarian approaches to valuing privacy, since these “view the private sphere as antagonistic to the public sphere.”¹⁰⁰ Thus:

The problem with communitarianism is that it pits the individual against the common good. Individualism becomes not an element valued for its contributions to the common good, but a countervalue that stands in opposition to the common good.¹⁰¹

According to Solove, both the liberal and communitarian views of privacy provide us with a particular aspect of privacy: privacy as an individualistic interest, in conflict with that of the community. It is important to note here that Solove does not try to embrace but instead rejects this aspect, since – as we shall shortly see – his doing so is at odds with his stated aim to “reconstruct” a comprehensive understanding of privacy.

His own preferred approach to valuing privacy is to recognise the role of the individual *within* society and to ascribe a value to her rights insofar as they promote the collective common good.¹⁰²

Individualism should be incorporated into the conception of the common good, not viewed as outside it. ... When individualism is severed from the common good, the weighing of values is often skewed toward those equated with the common good, since the interests of society often outweigh the interests of particular individuals.¹⁰³

Solove argues that seeing individual privacy as a social good can serve to enhance protection for individuals’ privacy interests. In this way, he identifies an aspect of privacy that runs counter to the antagonistic, individualistic aspect that he associates with liberalism and communitarianism.

Privacy is valuable not only for our personal lives, but for our lives as citizens – our participation in public and community life. ... Thus privacy is more than a psychological need or desire; it is a profound

¹⁰⁰ Ibid, 90.

¹⁰¹ Ibid.

¹⁰² Some might think that this is, *prima facie*, difficult to distinguish from a communitarian position. I comment on this sort of objection immediately below.

¹⁰³ Solove, n 3, 91.

dimension of social structure. In addition to protecting individuals, privacy safeguards relationships between individuals, which are essential for family life, social engagement, and political activities.¹⁰⁴

He gives the example of a person whose home is subject to an unwarranted search by the police. During the course of the search, they happen to discover evidence that this person has committed a heinous crime. Solove explains that it is not because the individual concerned has a particularly strong claim to privacy (in the sense of one that will outweigh society's interest in detecting crime) that we protect people from unreasonable searches. Rather it is because through protecting each and every individual, society's collective interest in the security of our homes can be maintained.¹⁰⁵

A potential problem for Solove here is that it is not immediately apparent how far these protections of individuals' privacy interests will extend under his pragmatic approach to valuing privacy. This is because he states that "[p]rivacy protects aspects of individuality that have a *high social value*".¹⁰⁶ Moreover, "[p]rivacy should be weighed against contrasting values, and it should win when it produces *the best outcome for society*."¹⁰⁷ Solove thus seems explicitly to endorse a utilitarian calculus as the basis for determining privacy claims.

[T]he value of privacy should be understood in terms of its contribution to society. ... Commentators have argued that privacy should be protected as an individual right that trumps competing interests even when these interests have *greater social utility* than privacy. In contrast, I have argued that when privacy protects the individual, it does so because it is in society's interest. Individual liberties should be *justified in terms of their social contribution*.¹⁰⁸

This is clearly an attempt to avoid the oft-cited problem of incommensurability, whereby competing interests (such as privacy and free speech) lack a common metric

¹⁰⁴ Ibid, 93.

¹⁰⁵ Ibid, 99. This example of Solove's is, of course, set in the USA where Fourth Amendment to the Constitution protects against unreasonable search and seizure.

¹⁰⁶ Ibid, 92 (emphasis added).

¹⁰⁷ Ibid, 87 (emphasis added).

¹⁰⁸ Ibid, 173-174 (emphasis added).

by which they can be weighed against one another.¹⁰⁹ This avoidance is to be achieved by determining which of the competing interests will promote the best consequences for society.¹¹⁰ Ultimately, for Solove, privacy and other competing interests need not be incommensurable. Rather, privacy can be weighed against other societal goods commensurably on the basis of their consequences.¹¹¹ Moreover, privacy can be attributed a fair weight in this balance by recognising the societal goods that derive from individuals' privacy interests.

To this, it might be objected that whilst individuals' privacy interests may be accorded protection under his taxonomy, this is merely incidental. As he roots his analysis of privacy problems around the individual-in-society, so the objection would go, he loses focus on the individual-in-her-own-right. Indeed, when he says that "[p]rivacy is valuable *not only* for our personal lives, but for our lives as citizens",¹¹² he may be charged with understating his position. What he is saying is that privacy is valuable *only* for our lives as citizens, at least insofar as it has any relevance to a balancing exercise conducted by the law. Any non-societal interest in privacy is effectively excluded from consideration, for it does not give rise to a societal privacy problem.¹¹³ In other words, rather than constructing a balanced alternative to the liberal and communitarian approaches, he has produced a notion of privacy that answers to the communitarian position's need for privacy to be compatible with the interests of the community at large, but which seriously underplays liberal, individualistic interests.¹¹⁴

¹⁰⁹ Joseph Raz, *The Morality of Freedom* (Oxford University Press 1986) 329 and 404 (on "competitive pluralism" between incommensurable values). Incommensurability is a state whereby multiple significant interests (for instance, personal security and freedom of action) each provide compelling but "incompatible grounds on which to respond to the same practical problem" (Richard Mullender, 'English Negligence Law as a Human Practice' (2009) 21(3) *Law & Literature* 321, 328). See also Isaiah Berlin, 'The Pursuit of the Ideal' in *The Crooked Timber of Humanity: Chapters in the History of Ideas* (Pimlico 2003) 19.

¹¹⁰ Solove, n 3, 88.

¹¹¹ This is an approach that is mirrored in the recent proposal of the Australian Law Reform Commission (*Serious Invasions of Privacy in the Digital Era* (ALRC Report 123)) to establish a new statutory tort of privacy, wherein the "public interest" in publication of private information would be weighed against the "public interest" in maintaining the individual's privacy. I have offered a detailed critique of this aspect of the report elsewhere; see Thomas DC Bennett, 'Privacy, Free Speech and Ruthlessness: The Australian Law Reform Commission's Report, *Serious Invasions of Privacy in the Digital Era*' (2014) 6(2) *Journal of Media Law* 193, 202-203.

¹¹² Solove, n 311, 93 (emphasis added).

¹¹³ And, even if it did, it would carry little or no weight when it came to assessing its "value" for the purposes of weighing it against competing interests, because the problem of incommensurability would immediately return.

¹¹⁴ See Kirsty Hughes, 'The Social Value of Privacy', in Beate Roessler and Dorota Mokrosinska (eds), *Social Dimensions of Privacy: Interdisciplinary Perspectives* (CUP 2015) 241.

This sort of criticism of Solove’s approach to valuing privacy might then charge him with legitimising (or even encouraging) “ruthlessness” – in the sense proffered by the philosopher Thomas Nagel – on the part of those conducting the value-assessment.¹¹⁵ According to Nagel, those charged with assessing the competing interests’ relative values will exhibit “ruthlessness” if they are inattentive (or less attentive) to the interests of minorities (or individuals) in pursuit of publicly beneficial goals.¹¹⁶

However, notwithstanding the explicit reference to the “common good” that lends itself to understanding Solove as committing himself to utilitarianism and to pursuing a critique of the sort outlined above, such a reading of his work would be simplistic and unfair. Solove is actually, in my view, endeavouring (albeit with some ambiguity) to bring a subtler conception of privacy to the fore. In order to draw out this subtler conception, it is necessary to briefly outline a distinction between “functional” and “conceptual” meanings that features in the work of Martin Heidegger.¹¹⁷

A better reading, I suggest, is to see Solove as bringing into focus the individual-in-society in a functional, rather than conceptual, sense. The functional meaning of a phenomenon is that instinctive, intuitive meaning concerned with its purpose or the use to which it is put; it is a something-in-order-to-X. Thus the functional meaning of a screwdriver is a something-to-screw-things-in-with; a mug a something-to-drink-

¹¹⁵ Thomas Nagel, *Mortal Questions* (CUP1979) ch 6.

¹¹⁶ The same sort of criticism might also be levelled at Helen Nissenbaum’s notion of privacy as a matter of “contextual integrity” (*Privacy in Context: Technology, Policy and the Integrity of Social Life* (Stanford University Press 2010)). According to this approach to assessing the value of a claim to privacy, decision-makers must consider the potential privacy problem in its context with reference to “appropriate flow”. By this, Nissenbaum means the “norm-governed flow of information that has been calibrated with features of the surrounding social landscape, including important moral, political and context-based ends, purposes, and values” (at 187). She gives the example of heightened airport security measures, which might be objected-to as violating privacy. In deciding whether the claim is valid (whether there is a violation of “contextual integrity”), decision-makers should consider the efficiency of the new information flow “at achieving values, such as safety, security, and efficient movement through the system, that might credibly be high among the aims of a transportation system” (at 188). Unlike Solove’s work, however, it is not immediately apparent how such an objection to Nissenbaum’s argument could be dispelled.

¹¹⁷ There is no particular need to dwell on Heidegger’s philosophy at any great length in order to make this observation about Solove’s understanding of privacy, and so I simplify the key points in the text. Heidegger contrasts what I term “functional” with “conceptual” understandings of phenomena, although he uses different terminology to do so. The terms used in Heidegger’s work are: “ready-to-hand” (“functional”) and “present-at-hand” (“conceptual”). I have chosen not to use Heidegger’s original terminology (which is, in any event, translated from the original German), since it is not particularly intuitive and risks unnecessary confusion. See Martin Heidegger, *Being and Time*, n 28, 98.

coffee-from. Identifying this functional type of meaning raises two further important points. First, the functional meaning comes into view against the phenomenon's "background of intelligibility";¹¹⁸ a screwdriver is only a something-to-screw-things-in-with because there is a thing that needs to be screwed in.¹¹⁹ Second, the functional meaning is the most *basic* meaning that we attach to phenomena. It is the meaning we intuitively attach to an object – often without even thinking about it. Conceptual meanings are secondary and occur temporally later.

For Heidegger, the conceptual meaning – the label which we attach to the phenomenon – always arrives later; it becomes a short-hand term for a particular class of object that fulfils a particular function. Thus whilst, at a functional level, we would not distinguish between a mug, a tea-cup and a small bowl (each being potentially useful as a something-to-drink-coffee-from), we attach different conceptual meanings to each in order to narrow the class to which each belongs. The conceptual meaning is therefore *parasitic* upon the functional one. So, according to Heidegger, a background of intelligibility (a contextual situation) yields a basic, functional meaning that we ascribe, intuitively, to a given phenomenon. Later, we ascribe one or more conceptual meanings to that phenomenon, which assist us in labelling and categorising it. This conceptual, labelling exercise is possible *only* because of an awareness of the more basic, functional meaning. This functional meaning is itself possible *only* because of an awareness of the object's background of intelligibility. An intuitive understanding of an object *in its context* thus precedes any conceptual understandings of that object.

Those who espouse liberal and communitarian conceptions of privacy view the individual and the community as conceptual, rather than functional, objects. "Top-down" privacy theorists do this. In conceptualising the individual and the community, however, it becomes easy to be inattentive their more basic, functional meanings. Solove's work alerts us to this. When, instead, we view the individual as a functional phenomenon, we necessarily see the individual against her background of

¹¹⁸ This notion of a "background of intelligibility" is implicit in Heidegger's work. The phrase, although not directly taken from Heidegger, is widely used in scholarly analyses of his work in order to encapsulate the context within which the phenomenon under scrutiny sits. As an example of its use in the jurisprudential field, see Brian Leiter, 'Heidegger and the Theory of Adjudication' (1996) 106 Yale LJ 253, 264 and 274-276.

¹¹⁹ Likewise, a mug is only a something-to-drink-coffee-from because there is some freshly-brewed coffee waiting to be drunk.

intelligibility.¹²⁰ That is, we appreciate the role of the individual *within* society as well as without. Moreover, because the individual is born into society, and cannot help but be a constituent part of that society, the individual *also* provides a background of intelligibility against which to view the community as a functional phenomenon. Each provides a background of intelligibility against which to view – in the most *basic* way possible – the individual and society, and thus to understand their interrelationship at its most basic. This reading of Solove’s theory, then, paints a picture of the individual and her society as inextricably linked and mutually dependent.

Assuming this analysis is accurate, through Solove we have uncovered an aspect of privacy that – far from being more conceptually sophisticated than the singular theories – is actually more *basic*. This is its strength. Seen in this light, the individual-in-society *is* the base, experiential phenomenon, upon which the conceptual individualistic and communitarian views of privacy have parasitically developed. Unless their proponents (the singular theorists) at some intuitive (possibly pre-conscious) level were aware of this background, their singular theories would have no basis. In other words, the conceptual theories of the singular theorists necessarily imply (and are contingent upon) *some degree* of awareness of the basic phenomenon that is the individual-in-society.

Uncovering this about Solove’s work is noteworthy because it may be contrasted with his express aims. In writing his book, Solove expressly aims to examine privacy as it exists, right now, as a matter of empirical observation – hence his use of the cartographic metaphor. Yet in dealing with privacy as an interest of the individual-in-society, he actually advances a view of the *origin* of rights that – quite deliberately – excludes both the individualistic picture currently prevalent in Anglo-American private law, and the contrasting communitarian position.

This is the reason why the “ruthlessness” objection to Solove’s work outlined above would be unfair. In arguing in favour of conceptualising privacy in this basic,

¹²⁰ Some might feel uncomfortable thinking of individuals as possessing a “functional” meaning. The term is not possessed of great political meaning, however. It might assist instead to think of an individual’s “functional” meaning as being concerned with what a human being *does* (rather than what they are *for*). To exist as a social being is the basic “function” of an individual, in the view of pragmatists (like Solove).

functional way, Solove is actually making (by implication) a broader argument for a recalibration of the way in which we conceptualise individual rights. He suggests that we should view them as deriving neither from atomistic nor communitarian relationships between the individual and society, but rather from the background painted by their interrelationship.¹²¹ He admits as much when he acknowledges that his pragmatic approach to balancing privacy and other interests “requires us to consider our deeply held commitments, the ends furthered by privacy and countervailing interests, and our larger social vision and view of the good.”¹²²

2.4.3 Solove and “Aspect Blindness”

Each of the singular theorists, as we have noted, locates a preferred common denominator between all things private, and uses this as a measuring rod to determine whether a particular matter is or is not private. When Solove criticises them (as he does strongly) for this method, his criticism is couched in terms that recall Wittgenstein’s concept of “aspect blindness”. This is another facet of Wittgensteinian philosophy that Solove could have fruitfully deployed to add further depth to his analysis. For each singular theorist believes their interpretation of the phenomenon they are observing (privacy) to be the One True Interpretation. But this, Wittgenstein tells us, simply cannot be the case. Privacy – like all observed phenomena – has multiple aspects. Thus, when Solove criticises theories for being “under-inclusive”, he might be taken as charging the theorists concerned with exhibiting aspect blindness, in that they are either unable or unwilling to recognise other aspects with which privacy may legitimately be imbued.

There is considerable value to be gleaned from his work and there are several points in particular that we should note and add to our map. Whilst it is left to other theorists to bring the individual *per se* into focus, Solove alerts us to the potential, that singular, conceptual definitions of privacy have, to exclude an un-ignorable, basic aspect of privacy and also to the correlative dangers (primarily under-determinacy) of over-

¹²¹ Regan (n 41) proposes a similar recalibration of the way in which privacy is understood. She too argues that the relationship between the individual and society are intertwined: “a dynamic relationship exists between the two” (at 217).

¹²² Solove, n 3, 88.

inclusivity. His methodological approach is helpful because it alerts us to the *importance* of our individual and collective experience of privacy – the background – as a means to understanding and, later, conceptualising it. Moreover, he goes some way to pointing up the *richness* of that experience. (As we shall see in Chapter 4, attentiveness to the richness of experience is a crucial element in the imaginative processes necessary for developing the common law.)

2.5 Assessing Contributions to the Map

By this point, it has been quite comprehensively demonstrated that there is wide disagreement about the true nature of privacy. The theorists upon whom we have dwelt “see” privacy differently. But the fact of their disagreement does not necessarily equate to mutual exclusivity.

Both Simmel and Hughes make particularly valuable contributions to our map of the privacy terrain. Their approaches are highly complementary. Both emphasise the importance of conceptualising privacy by reference to experience, and (like Solove) both reiterate the fact that the social aspect of individuals’ privacy experiences cannot be ignored. Yet neither can be accused of losing sight of the individual *per se*. Indeed, Simmel makes quite plain that he views (in a classically liberal fashion) the individual as central to society’s values.¹²³ And whilst Hughes stresses the social value of privacy, she makes clear that she sees this as existing “in addition” to the benefits it brings individuals in their own right.¹²⁴ Moreover, the social value of privacy that Hughes highlights illuminates a point of comparison between her and Simmel. For Solove’s view of the individual as inexorably bound-up with society is a point of agreement with Hughes, who likewise finds their relationship *intertwined*. But it is a point of contrast with Simmel, for whom (as we noted) the individual both forms a part of *and remains separate from* her society.

Hughes’ contribution improves upon Simmel’s in two obvious respects. First, she provides a more detailed exposition of the role played by norms in the construction of

¹²³ Simmel, n 53, 72.

¹²⁴ Hughes, n 63, 822.

privacy barriers. Second, Hughes is concerned to demonstrate the applicability of her theory to *law* and demonstrates how, had the courts in some recent privacy cases adopted her approach, they would have reasoned in those cases differently.¹²⁵

However, if there is a weakness in the contribution that both theories can make to our map, it is that neither shines much light on the legal status quo. Simmel's focus is more abstract, whilst Hughes is openly prescriptive: "The law plays a role in the construction of social norms. ... The role of normative barriers *must reach beyond* merely a consolidation of the status quo."¹²⁶ They both thus add aspects of privacy to the map, but not ones that accord closely with contemporary *legal* norms relating to privacy. They assist in the mapping of the concept in the abstract, but may be less readily amenable to immediate adoption by the legal system.

The reductionists contribute a rather different aspect of privacy to our map. They alert us to the (apparent) fact that privacy's usefulness as a *legal* tool is highly form-dependent. By reducing privacy to other interests (invariably to interests which are less controversially recognised as valuable and which often already attract legal protection, such as property rights) they point up areas of congruence between privacy violations and existing non-privacy norms. Seeing privacy in this way (as a collection of discrete, unrelated interests) enables the reductionists to keep the legal processes involved in protecting privacy (and developing those protections) in focus. For in pointing to existing mechanisms for resolving common privacy problems, they alert us to pieces of doctrine that we might otherwise overlook in our search for analogies to draw as we build an argument for the incremental development of the law. Thus we need not accept the sceptical overtones of the reductionists' theories, but we can make good use of some of their key observations.

The reductionists also highlight the fact that privacy is not an isolated concept. There are considerable overlaps between particular privacy interests and certain other

¹²⁵ Hughes (ibid) cites *Von Hannover v Germany (No.1)* (2005) 40 EHRR 1 as a case which would have benefited from a clearer judgment had her approach been adopted. She also cites *Author of a Blog v Times Newspapers Ltd* [2009] EWHC 1358 (QB), [2009] EMLR 22 as a case which would have reached the opposite conclusion (in respect of whether the claimant had a reasonable expectation of privacy) had her approach to conceptualising privacy underpinned that test.

¹²⁶ Hughes, *ibid*, 814 (emphasis added).

interests (for instance, between Prosser's "false light" tort and defamation law's protection of reputation). For the reductionists, this means that "privacy", as a term, is unhelpful; it attempts to group together interests that are insufficiently similar. However, we might see their aspect in a different light if we draw on Tribe's theory that norms exist in a normative ("constitutional") space. If we see legal artefacts (comprising legal rules, judgments and so forth) not as objects on a two-dimensional plain but rather as situated within a three-dimensional normative space, we can entertain the possibility that law – by its very presence – alters the shape of that space. (We noted a similar impact upon the shape of normative space in Chapter 2.¹²⁷) There are problems with overreliance on this metaphoric analogy; we should exercise caution when relying on spatial metaphor when dealing with non-physical phenomena, lest the metaphor usurp observation as the driving force behind our understanding of the space's characteristics. But if we allow the metaphor to hold for a moment for purely analytical purposes, we might expect to see norms within the space affecting one another by their very presence; the presence of one norm affects the trajectory of others. Thus, the existence of liability rules for defamation, which, due to our experience of them, shape our perception of reputation and its associated harms, affects our understanding of "false light" privacy. Some will fixate upon defamation's overlap with false light; others will highlight what they perceive to be conceptual differences (for instance, that false light does not require reputational "harm" in the traditional sense, merely some misrepresentation of the individual). Either way, the existence of the legal norms surrounding defamation impacts upon our perception of other norms that share some similarities.

The reductionists focus on the similarities between privacy interests and other interests, and come to view privacy as superfluous. But if we hypothesise that privacy interests *are* distinct, we might detect their presence in a Tribe-esque fashion by examining their effect on these other interests. A good example here would be the English experience of the changes in equitable confidentiality made in order to accommodate privacy. A reductionist might argue that there is no distinct interest in informational privacy; there is merely a recognised interest in the maintenance of

¹²⁷ See my earlier comments on the work of Laurence Tribe and the notion of normative space in ch.2, n 202, p 130.

confidences. If this were correct, we would expect to observe confidence law operating consistently along traditional lines; we would not expect to see significant alterations to that doctrine aimed at protecting this supposedly indistinct privacy interest. But this is not what is observed in English law. Confidence law – as far back as the mid-19th century case of *Albert v Strange* – was mobilised and, in the course of subsequent judgments elucidating its elements, altered in order to accommodate privacy interests. As it was put in *Strange*, an “altogether distinct” notion of “privacy” was the interest violated by the defendant.¹²⁸ And we have seen countless more examples of confidentiality being altered in order to accommodate an increasingly diverse range of privacy interests. The fact that the courts have not always been clear about what they have been doing does not alter the apparent fact that notions of privacy have had an impact upon the shape of ostensibly unrelated legal doctrines.¹²⁹

Having mapped the various aspects of privacy we have discovered, we might now be thought to have at our disposal a large, somewhat unwieldy and incomplete map. In the next section, I sketch out my proposal for making use of it.

3. Areas of Strong Consensus

Taking each of these theories’ aspects and endeavouring to map them enriches our understanding of privacy’s nature; for it is a pluralistic, experiential concept with, presumably, an infinite number of potential aspects. An advantage of this cartographic approach is that, in being attentive to this plurality of aspects, the approach makes room for “reasonable pluralism” within the privacy debate.¹³⁰ We can comprehend this debate as a human practice, and the contributors to it upon whose work we have dwelt as participants in that practice. As Gerald Postema observes, it is not necessary “that all participants must agree about how to understand their practice, but ... one’s own understanding must be addressed to other participants and [be] sensitive to their understanding of it.”¹³¹ We noted earlier that “reasonable pluralism” is allowed for

¹²⁸ *Prince Albert v Strange* (1849) 2 De Gex & Smale 652, 680-681.

¹²⁹ We noted a number of these in Chapter 2. See both ch.1, section 1.1, and ch.2, sections 2 and 3 (and related subsections).

¹³⁰ O’Callaghan, n 22, 1.

¹³¹ Gerald J Postema, ‘Protestant Interpretation and Social Practices’ (1987) 6 Law and Philosophy, 283, 312.

when terms have both sufficient certainty that “we are in some measure cognisant of their content” and sufficient vagueness “that some degree of reasonable disagreement about what they represent can be accommodated.”¹³² This is a familiar notion; it accords with HLA Hart’s famous observation that legal rules (like any other norm) have a core of certain meaning, and a penumbra where meaning is less certain.¹³³ However, under the aspect-mapping approach, the core of sufficiently certain meaning is not objective. Rather it is derived from observers of privacy who bring sufficiently similar past experiences to bear on the concept and thus “see” the “same” (i.e. sufficiently similar) aspect.

Postema captures the essence of this:

[T]o understand a practice as a participant involves first of all mastery of a discipline. ... [T]his discipline is social, a trained social sense. Not only is it socially acquired, learned through interaction and participation, but what is handed down and learned is itself a shared capacity. A social capacity is the capacity to move around with familiarity in the world of the practice common to its participants. To learn a social practice is to become acquainted through participation with a new common world; it is to enter and take up a place in a world already constituted. ... [T]hrough participation one comes to grasp ... the common meaning of the practice. This common world, then, is not constructed out of individual participants’ beliefs or attitudes or intentions or purposes. Instead, we participants have the beliefs and attitudes about it that we have – we understand it as we do – by virtue of our common participation in it.¹³⁴

An example may assist. Consider the “limited access” theorists. Gavison, Moreham and Hughes all see a “limited access” aspect of privacy. The experiences that inform their perceptions (of all concepts, not just privacy) are, of course, contingent; they are different people who have led different lives. But they clearly also have had broadly similar exposure to a normative, cultural, legal and political background and are thus able to see broadly the same aspect. Some of these similarities will be educational; all three are lawyers and legal scholars, and they will have been trained in broadly similar

¹³² O’Callaghan, n 22, 1,

¹³³ HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) ch.7.

¹³⁴ Postema, n 131, 313.

(common law) legal method. Moreover, we can see from their work that all three have familiarity with much of the same literature on privacy theory. Obviously, the aspect each sees differs slightly, but because those three scholars share a level of consensus on a number of elements common to “limited access” accounts of privacy, we can gain a broad appreciation of their understanding by grouping them together. Doing so is, admittedly, an exercise in generalisation (albeit a fairly localised one) but it is necessary to draw together groupings that extend beyond merely personally-perceived aspects if our map is to be of much practical use. This is what I take other scholars to mean when they group theorists together in this sort of way; there is sufficient similarity between their theories that we can treat them as sharing broadly the same aspect perception in relation to the concept theorized.¹³⁵

Beyond grouping theorists together, however, there is another – more helpful – way in which we can make use of points of consensus. This is to locate points of consensus that lie *across* different approaches to conceptualising privacy. In other words, we can search for areas of overlap. Imagine that, rather than constructing a single map of “privacy”, we map each identified aspect separately and then lay the maps atop one another to see where they overlap. This is actually what cartographers do in the real world.¹³⁶ As Stephen Hawking tells us:

[Y]ou can’t use a single map to describe the surface of the earth ... you need at least two maps ... to cover every point. Each map is valid only in a limited region, but different maps will have a region of overlap. The collection of maps provides a complete description of the surface.¹³⁷

If we can locate particular acts (or “problems”, to use Solove’s term) that scholars agree violate privacy – notwithstanding their different conceptualisations of the overarching concept – then we might term these areas of “strong consensus”. Such areas would provide us with pockets of sufficient certainty for us to take cognisance of them (whilst still allowing for reasonable pluralism in respect of underlying

¹³⁵ For example, O’Callaghan engages in an exercise of this sort. See O’Callaghan, n 22, 8-18.

¹³⁶ As mentioned earlier, Solove utilises the cartographic metaphor in his book (n 3, 44) but his efforts to “map” the privacy “terrain” involve experiential “privacy problems”, rather than seeking points of agreement between scholarly theories of privacy (n 3, 75).

¹³⁷ Stephen Hawking, *The Illustrated A Brief History of Time, Updated and Expanded Edition* (Bantam Books 2014) 223.

rationales). Put simply, if numerous scholars agree that act X constitutes a *prima facie* privacy violation, we can be pretty sure that, whatever “privacy” means (and its meaning is of course contingent on the perception of its observer), it is broadly accepted as covering act X. So what we need to do is look for areas of overlap between the different aspects we examined above. This will enable us to put together a composite map encompassing these various aspects, thereby covering more of the terrain than any single map has managed to do previously.

That the act of intruding upon a person’s seclusion or private affairs violates that person’s privacy (and thus is, in tortious language, wrongful) is, I argue, such an area of “strong consensus”. Let us examine the evidence for this. In order to bring the consensus into focus, let us start with some putative privacy violations. I propose to examine the level of consensus by postulating the facts of three cases as putative, privacy-invading intrusions. These cases are *Kaye*,¹³⁸ *Jones*¹³⁹ and *Holland*.¹⁴⁰ All three cases represent variants on the classic intrusion scenario. *Kaye*, it will be recalled, involves intruding into the room of a vulnerable person receiving medical treatment. Meanwhile, *Jones* involves the accessing of confidential bank records, and *Holland* centres on an act of voyeurism (video-recording a person in the shower).

Gavison’s theory clearly embraces *Holland*-type intrusions as privacy violations, for they cause the plaintiff’s “spatial aloneness [to be] diminished”.¹⁴¹ Parker’s definition also picks out intrusions of this sort as offences against privacy. He himself gives the example of a woman who is spied upon while naked by a former lover.¹⁴² He regards this intrusive act as a privacy violation, but insists that it is so because more than

¹³⁸ *Kaye v Robertson* [1991] FSR 62. In *Kaye*, discussed in Chapter 1, a well-known television actor was photographed and “interviewed” by journalists from the Sunday Sport who, without permission, gained access to the hospital room in which he was receiving intensive care following a serious road accident. See ch.1, n 34 and accompanying text, p 36.

¹³⁹ *Jones v Tsige* 2012 ONCA 32, 108 OR (3d) 241. *Jones* is a case from Ontario, Canada, in which the defendant accessed (without permission) the plaintiff’s confidential bank records at least 174 times over a four year period. The defendant made no use of the information gleaned thereby, nor did she disseminate the information further.

¹⁴⁰ *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672. *Holland* is a New Zealand case in which the defendant was discovered to have surreptitiously video-recorded the plaintiff in a state of undress having installed a hidden camera in their shared bathroom for that purpose. Both *Jones* and *Holland* are examined in detail in Chapter 5.

¹⁴¹ Gavison, n 6, 433.

¹⁴² Parker, n 30, 280. Moreham also uses this example: see NA Moreham, ‘Liability for listening: why phone hacking is an actionable breach of privacy’ (2015) 7(2) *Journal of Media Law* 155, 166.

control over *information* has been lost. She has lost control over who *senses* her. Parker's treatment of this sort of Peeping Tom scenario is essentially very similar to Gavison's, who likewise finds the act a privacy violation going beyond the mere acquisition of information.¹⁴³ Whilst these writers dwell on the sexual Peeping Tom scenario (rather than the non-sexual *Kaye*-type scenario) the fact that neither sees the violation as concerned with the acquisition of information (of any type) but rather as an intrusion into physical proximity (Gavison) or loss of sensory control (Parker) demonstrates that both would also see *Kaye* as a privacy violation. Moreover, Parker's definition of privacy, which includes control over others' ability to sense "objects very closely associated with us",¹⁴⁴ expressly includes safety deposit boxes within a list of typical such objects. As such, it is reasonable to postulate he would see the *Jones*-type intrusion into banking records as violating privacy. For Gavison, the *Jones* scenario would come under the element of secrecy and thus also constitute a privacy violation.¹⁴⁵

Likewise, Moreham sees these sorts of intrusion as very much concerning privacy:

Privacy can ... be breached by unwanted watching, listening or recording even if little information is obtained and none is disseminated. Peering through a person's bedroom window, following him or her around, bugging his or her home or telephone calls, or surreptitiously taking for one's own purposes an intimate photograph or video recording are all examples of this kind of intrusion.¹⁴⁶

These three scenarios would also breach privacy as conceptualised by Hughes. In the *Kaye*-type scenario, the defendants have breached both a physical barrier (by entering his room without permission) and a normative barrier (in that there is a social norm dictating that those recovering from serious injury ought not to be photographed and pressed for comment). In the *Holland*-type scenario, there is a clear breach of all three of Hughes' barriers: physical (installing the camera in a place the plaintiff believes she is unobserved), behavioural (the plaintiff has intentionally secluded herself in order to use the bathroom) and normative (as evidenced by the fact the defendant realised he

¹⁴³ Gavison, n 6, 433.

¹⁴⁴ Parker, n 30, 281.

¹⁴⁵ Gavison, n 6, 433.

¹⁴⁶ NA Moreham, 'Beyond Intrusion: Physical Privacy in English Law' (2014) 73(2) CLJ 350, 351.

could succeed in his voyeuristic endeavours only by secreting the camera in a location where it could not easily be seen). As for the *Jones*-type scenario, this may constitute the breach of a physical barrier (if the definition of physical covers the kinds of electronic walls present in secure computer systems – and there seems no reason why it should not) and also the normative barrier (in that the defendant has abused her position of trust as an employee of the bank in order to pry into the plaintiff’s affairs).¹⁴⁷

Benn, whose non-consequentialist theory is based on the value of human dignity and respect for the individual “as a person, as a chooser, ... as one engaged on a kind of self-creative enterprise”,¹⁴⁸ also agrees. The right to privacy extends, he tells us, to (and, indeed, beyond) “the claims not to be watched, listened to, or reported upon without leave.”¹⁴⁹ Bloustein would concur, based on his similarly dignity-based aspect whereby violations of privacy are found in conduct that amounts to “an affront to personal dignity”.¹⁵⁰ Both the *Kaye* and *Holland* scenarios fall squarely under their conceptions. As for *Jones*, it is not hard to square with Benn. For when the defendant accessed the plaintiff’s bank records, she failed to respect her victim as a “chooser” – as a person who has the capacity to decide for herself with whom she shares her financial information.

Solove places intrusion openly within his taxonomy and so we have no doubt he views it as a privacy problem.¹⁵¹ He would see the *Holland* scenario as a problem not only of intrusion (of “disturb[ing] the victim’s daily activities, alter[ing] her routines, destroy[ing] her solitude and ... mak[ing] her feel uncomfortable and uneasy”¹⁵²) but also one of surveillance: “[i]ntrusion into one’s private sphere can be caused not only by physical incursion and proximity but also by gazes (surveillance)”.¹⁵³ Solove openly characterises Peeping Toms as engaged in surveillance,¹⁵⁴ and cites a case¹⁵⁵

¹⁴⁷ Bok, n 44. Bok’s conception of privacy embraces freedom from “unwanted access” – including “physical access” – and thus also covers these sorts of intrusive acts.

¹⁴⁸ Benn, n 36, 26.

¹⁴⁹ *Ibid.*, 3.

¹⁵⁰ Bloustein, n 33.

¹⁵¹ Solove, n 3, 161-165.

¹⁵² *Ibid.*, 162.

¹⁵³ *Ibid.*, 163.

¹⁵⁴ *Ibid.*, 107.

¹⁵⁵ *Hamberger v Eastman* 206 A 2d 239, 241-42 (NH 1964).

in which a couple successfully sued their landlord for installing a recording device in their bedroom as one of surveillance.¹⁵⁶ As for the *Kaye* scenario, this would fall squarely under both Solove's "intrusion" and "interrogation" problems. The defendants both destroyed Kaye's solitude and interrogated him (in conducting their "interview").¹⁵⁷

It is slightly harder to pinpoint where in his taxonomy Solove would place the *Jones* scenario. Because it involved accessing data records, one might expect him to place it within the "information processing" group of problems. However, Solove makes plain that he sees this group as "not involv[ing] the disclosure of the information ... to another person."¹⁵⁸ Rather, this group deals with privacy problems involving data "transferred between various record systems and consolidated with other data."¹⁵⁹ Nevertheless, given his thesis that privacy should be conceptualised from the bottom-up, we can expect him to find (or create) a place for the *Jones* scenario. It might well fit under his intrusion category, given his observation that "[i]ntrusion need not involve spatial incursions".¹⁶⁰ It might also be characterised as a form of (non-consensual) interrogation.¹⁶¹

Even the reductionists tend to agree that intrusive acts are wrongful, though they do not see it as a *privacy* issue *per se*. So it is worth examining what they might make of our three cases. Prosser was in no doubt when constructing his taxonomy that intrusion was wrongful (albeit as an empirical, rather than normative, exercise in observing the courts' treatment of intrusion cases).¹⁶² All three cases would fit within that category. Indeed, in both *Jones* and *Holland*, the courts expressly made use of Prosser's intrusion tort in devising novel intrusion torts in Ontario and New Zealand, respectively.¹⁶³ The *Kaye* scenario would constitute a classic Prosser-type intrusion: Kaye had a reasonable expectation of privacy whilst in his room, and the intrusion

¹⁵⁶ Solove, n 3, 111.

¹⁵⁷ *Kaye*, n 138, 64-65.

¹⁵⁸ Solove, n 3, 117.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*, 163.

¹⁶¹ *Ibid.*, 112-117.

¹⁶² Prosser, n 81, 389.

¹⁶³ We will examine this aspect of the two decisions, amongst others, in detail in Chapter 5.

would be highly offensive to a reasonable person (this “highly offensive” element is perhaps just another way of “seeing” Hughes’ notion of a normative barrier).¹⁶⁴

Judith Jarvis Thomson similarly finds intrusive acts to be objectionable, since, notwithstanding her misgivings about using the term “privacy” to encapsulate them, she finds that individuals have rights “to not be looked at and ... not be listened to”.¹⁶⁵ This clearly covers the *Kaye* and *Holland* scenarios. However, her treatment of *Jones*-type scenarios would be slightly different. For in instances of acquiring private information, Thomson considers the rights breached to be of the property genus: a person has a right to conceal property – including information – from others. Any unauthorised accessing of this concealed information constitutes a breach of that right.¹⁶⁶ Her reasoning thus gives yet another rationale for the *Jones* scenario constituting a privacy violation – but her theory would agree with the others that it does in fact constitute a wrongful act.

The above analysis demonstrates that, despite the differences between the aspects of privacy that each scholar identifies, there is strong consensus surrounding the issue of intrusive acts. This issue is one where multiple aspects overlap. There are more such issues; the dissemination of private facts is one upon which we could have dwelt, but since it no longer poses a great problem in English law we focused upon the intrusion issue with which this thesis is principally concerned.

At this point, one might object to my argument by pointing out that I have not given any precise indication of just how much “consensus” there needs to be around a concept before it amounts to “strong consensus” and becomes useful. This would be a charge of vagueness. My response to such a charge would be that there can be no definite, bright-line definition of “strong consensus”. It is a matter of degree. The more consensus there is, the stronger it is.¹⁶⁷ The test of this collection of overlapping maps’ usefulness in pointing up areas of consensus is whether it proves useful for elaboration of the common law. All I am claiming is that areas with the strongest consensus

¹⁶⁴ *Ibid.*, 390-392.

¹⁶⁵ Jarvis Thomson, n 78, 304. Thomson does not see these as privacy rights as such, but rather as rights over the self akin to those people have in property.

¹⁶⁶ *Ibid.*, 302-303.

¹⁶⁷ See Postema, n 131, 298.

provide pockets of reasonable certainty as to privacy's scope and that these may prove useful to courts as they consider recognising novel heads of liability to deal with putative privacy violations.

Conceptualising privacy by mapping its aspects enables us to be confident that, when we try to determine whether a particular matter does or does not raise privacy issues, we have not blinded ourselves to a relevant way of understanding privacy. It might be objected that the lack of a consistent message from these scholars in respect of an underlying rationale explaining the wrongfulness of intrusion weakens its force. But in Hartian terms, demonstrating that an issue attracts such a strong degree of consensus from otherwise divergent theories indicates that the issue lies within privacy's core of (relatively) certain meaning.¹⁶⁸ There are plenty of issues that do not sit within this core, but are instead penumbral. For instance, whether coercing a person into revealing private information about themselves (or others) amounts to a privacy violation is an issue upon which there is very little written, let alone agreed, in privacy scholarship circles. As an example, imagine a child (aged 15 or 16) who is sitting her GCSE English examination. One task instructs her as follows:

Childhood memories can be very important. Choose one childhood memory. **Describe** the memory and **explain** its importance to you.¹⁶⁹

Ostensibly, the child has a choice. She might choose to answer another question (if there is a choice of question¹⁷⁰), or simply not to answer at all. Alternatively, she might choose to give a fictional response. However, this may in reality amount to a false choice. The examination question does not, on its face, permit a fictional response, and it certainly does not encourage it. An act of considerable creativity (not to mention courage) would be required if the child is to attempt to produce one. Moreover, the child may legitimately believe that failure to answer the question appropriately will result in her getting a lower grade; the pressures on children to achieve even at GCSE

¹⁶⁸ Hart, n 133.

¹⁶⁹ Assessments and Qualifications Alliance (AQA) English Language GCSE Examination Paper, June 2007, originally obtained from http://web.aqa.org.uk/admin/qp-ms_library.php. This weblink is no longer active, but a copy of the paper can be supplied by the author on request. Emphasis is original.

¹⁷⁰ In that particular paper, one of the alternative choices was the potentially equally problematic instruction to "**Describe** your home" (emphasis is original).

level in today's society are immense.¹⁷¹ Thus this question might be thought of as coercing, on pain of underachieving, the child into revealing private information pertaining to her past – her memories of her childhood. If the child does reveal this information, does it constitute a privacy problem? Moreover, is the mere *asking* of the question, which may for some children trigger particularly painful memories, a privacy problem?

This is an issue which raises fascinating conceptual questions, but it is difficult to imagine that – even if it featured in our mapping exercise – it would attract much consensus. Solove might concede that his definition of interrogation is broad enough to encompass it, and his analogy with nuisance telephone calls when describing intrusion might also embrace it.¹⁷² But this does not appear to be the sort of scenario he had in mind when devising either of those categories in his taxonomy. It would fit into Hughes' definition only if the child's behaviour erected a barrier – presumably the child would have to object to the question before it became problematic for privacy. There is certainly no physical barrier in play, and – as evidenced by the regularity with which these sorts of questions are set not only in examinations but by schools as classwork or homework (we doubtless all recall the “write about what you did last summer” task from some point in our schooldays) – there is clearly no normative barrier prohibiting this sort of questioning. This privacy problem, if indeed it is one, is an example of one that would sit at the penumbra of our composite map.

The exam question scenario, then, is one which does not at all easily lend itself to the development of novel liability rules with which to respond to it. As a penumbral problem, the arguments as to whether it does or does not interfere with privacy might rage indefinitely. However, the intrusion scenarios we have examined – *Kaye*, *Jones* and *Holland* – do not suffer from this. The consensus surrounding them is strong. Whatever else might be disagreed about, it seems intrusion of these sorts is widely regarded as wrongful and privacy-invading.

¹⁷¹ According to a recent *Guardian* article, the children's charity Childline reported providing 3,135 counselling sessions in the year up to May 2017 specifically dealing with exam pressure issues. (See <https://www.theguardian.com/education/2017/may/12/gcses-and-a-levels-how-are-young-people-coping-with-exam-stress>, accessed 04/08/2017.) Moreover, the NHS now provides online advice about exam-related stress in children. (See <https://www.nhs.uk/Conditions/stress-anxiety-depression/Pages/Coping-with-exam-stress.aspx>, accessed 04/08/2017.)

¹⁷² Solove, n 3, 163.

Before concluding this chapter, it is worth offering one clarification on the nature of the consensus that I suggest is present between the various scholars upon whose work I have dwelt as to the wrongfulness of intrusions of the sort featuring in *Kaye*, *Jones* and *Holland*. The consensus necessarily exists only at a level of generality. Commentators may (and, no doubt, will) continue to disagree on a number of issues – for instance, the point at which the “intrusion” takes place, what makes it an “intrusion” in the first place and the reason why it is wrongful. There continues also to be disagreement as to how we are to define the areas of life that are thought to be worth protecting from intrusion. I do not deny the existence of these disagreements when I say there is strong consensus on the issue of intrusion.

In order to understand why I suggest there is consensus on the wrongfulness of intrusion in the cases outlined above, notwithstanding these disagreements, it is necessary to recall that a key feature of the common law is that it is reactive. Courts deal with cases after the fact. And they deal with those cases by examining fact-patterns holistically. Each of the scholars I have mentioned above (in this section) would agree that the totality of the circumstances that came to bear on the claimants in the cases outlined above represented intrusions into those claimants’ privacy and that the intrusions were wrongful. They may agree on this for different reasons. They may, individually, believe that the “intrusions” take place at different points (when the camera is placed in the shower,¹⁷³ when the camera begins to record,¹⁷⁴ when the video file is accessed,¹⁷⁵ and so forth) but none of these distinctions matter much to the courts when they are dealing, reactively, with a complete set of circumstances that has been laid before them. What matters is whether the totality of the circumstances amounts to an intrusion and whether that intrusion is wrongful (in the sense that it ought to attract civil liability).

¹⁷³ At the point at which the perpetrator installs a camera with the aim of recording the victim in a state of undress (at some point in the future), the perpetrator has acted with wilful disregard for the dignity of the victim. For those theorists, such as Bloustein, who see privacy as an aspect of personal dignity, the activity is at this point objectionable. See Bloustein, n 33.

¹⁷⁴ Solove would say that, at this point, a process of surveillance is in operation, which raises a privacy problem. He would also see the recording of a person who is in a secluded space as an invasion of that space. See Solove, n 3, 107 and 164.

¹⁷⁵ At the point at which the video file is accessed, the perpetrator is, in essence, observing the victim. For Moreham, an intrusion has at this point occurred (see n 146).

From a Razian perspective, this might sound rather troubling.¹⁷⁶ For if one starts from the basis that it is a fundamental requirement of law that it provide clear and prospective guidance to its addressees, in order that they may regulate their conduct, a lack of clarity as to the point at which an intrusion took place (for example) within a given set of circumstances might seem insufficient. However, as I argued in Chapters 1 and 2, the Razian perspective is not universally accepted. If one were to accept, alternatively, Stephen Perry's notion that law is a by-product of an often messy adjudicative process, then one would not seek such precise, forward-looking formal guidance.¹⁷⁷ Instead, one might be open to the notion that, over time, a precedent set in rather broad terms could form the basis for incremental elaboration and refinement. And if such a perspective were to be adopted (which would require courts to be attentive and open to that perspective), we would find that there is a *sufficient* degree of consensus on the matter of intrusion (as set out above) to provide a basis for that initial, and perhaps broad, precedent. Such a precedent is, of course, something that English privacy law is currently lacking.

Conclusion

The analysis in this chapter demonstrates that it is possible to conceptualise privacy in a workable fashion more tightly than seems to have been widely appreciated – particularly by theorists engaged in top-down analyses. By seeking to map the various aspects of privacy we have encountered, we can locate pockets of certainty in areas where there is strong consensus on the privacy-violating nature of the activity under scrutiny. Intrusive conduct, on this analysis, falls within such a pocket; notwithstanding widespread disagreement about the nature of privacy – and indeed about the nature of intrusion – there is widespread agreement that intrusive conduct of the sort identified in our three example cases is (a) a violation of privacy and, (b), wrongful.

¹⁷⁶ Joseph Raz, *The Authority of Law* (OUP 1979) (Raz, *AL*); *Practical Reason and Norms* (Princeton University Press 1990) (Raz, *PRN*).

¹⁷⁷ Stephen R Perry, 'Judicial Obligation, Precedent and the Common Law' (1987) 7(2) *OJLS* 215, 240-241.

This demonstrates that the apparent semantic barrier to the recognition of broader or novel privacy torts at common law is just as illusory as the formal barrier. Yet the illusion, just like that of the formal barrier, is a powerful one. Its power mainly comes from the obvious lack of consensus on the nature of privacy and the widespread academic disagreement on this point, itself largely driven by a narrowly-focused, insular insistence on trying to locate the One True Meaning of privacy.

The solution required to overcome the semantic barrier is, then, relatively simple: the adoption of this aspect-mapping approach to conceptualising privacy on a problem-by-problem basis. However, the analysis in this and the preceding two chapters has brought into focus the second and deeper problem with which this thesis is concerned. For both the formal and semantic barriers arise out of essentially the same rigid, narrow, insular mode of thinking. This dominance of “left hemisphere” thinking is engendering the aspect-blindness blighting the privacy scholarship examined in this chapter, and also the aspect-blindness to alternative conceptions of the judicial role and incrementalism that were the subject of the analyses in Chapters 1 and 2. In order to develop a cure for the dominance of this mode of thinking, I turn in the next chapter to the relationship between imagination and common law development.

4

Legal Imagination

Perhaps we think up our own destinies, and so in a sense deserve whatever happens to us, for not having had the wit to imagine something better.

Iain Banks, *A Song of Stone*¹

Introduction

In recent decades, discussion of a loosely-defined concept known as “legal imagination” has appeared in jurisprudential circles. Perhaps most prominently brought into legal theoretical discourse by James Boyd White, this concept has been deployed by several (although by no means many) writers, often in the context of arguments promoting greater judicial creativity or “activism”.² The problem with using “legal imagination” in this way is that it lacks specificity. Indeed, this sort of use suffers from two distinct kinds of impoverishment. In some instances, it operates as a synonym for “creativity”. This sort of usage fails to move us beyond existing normative (and often constitutional) arguments regarding the appropriate extent of creativity in the judicial role. A second kind of impoverishment is that “legal imagination” can, if it is not clarified, end up offering what Stanley Fish calls “counsel without content”.³ That is, it can purport to instruct legal decision-makers – judges – to go ahead and exercise greater “legal imagination” without explaining what it is, how to do it or why it is necessary.

The idea that judicial creativity – such as that involved in elaborating novel heads of common law liability – is a fundamentally *imaginative* exercise is an intuitive one. It is also academically exciting; the link between the imagination and the creative

¹ Iain Banks, *A Song of Stone* (Abacus 1998) 165.

² See n 80, below.

³ Stanley Fish, ‘Dennis Martinez and the Uses of Theory’ (1987) 96 Yale LJ 1773, 1774.

judicial enterprise promises to enrich our study of the way the common law develops. But this raises the question of just how we ought to go about making use of the concept.

In this chapter, I aim to do two things. In the first section, I elaborate my argument that the kind of thinking resulting in the presence of the (illusory) formal and semantic barriers fits well with the psychiatrist Iain McGilchrist's account of left hemisphere thinking.⁴ According to McGilchrist, this is a narrow, insular and self-referential mode of thought that, whilst capable of detailed and highly technical analysis, is inattentive to broader contextual matters.⁵ I explore McGilchrist's account in more detail and explain why this mode of thinking impoverishes the common law when it starts to dominate the judicial mindset.

In the second and third sections of the chapter, I build an account of legal imagination – a mode of thinking that has the *potential* to assist in doctrinal development of the sort with which this thesis is concerned. I construct an account of the concept that does not suffer from being dominated by the thought-types of one or other of the brain's hemispheres (as so-labelled by McGilchrist). That is, my account of legal imagination is neither dominated by narrow, insular, self-referential analysis nor by broad vigilance to context. Instead, both of these valuable modes of thinking have their place, each providing key parts of the background against which legal development takes place.

In order to build this account, I draw on two schools of thought that are mutually compatible. In section two, I turn to the work of a second contemporary psychiatrist, Arnold Modell, and add his observations to McGilchrist's, before drawing on accounts of "imagination" from empiricist philosophy. I dwell on these schools of thought, rather than on existing jurisprudential literature on "legal imagination", for one major reason: jurisprudential accounts of legal imagination are relatively few in number and disparate in their understandings of the concept. In order to understand what the "legal imagination" consists in, I argue that it is necessary to understand the broader, more

⁴ See n 6, below.

⁵ See, in particular, section 1.1, below.

generalised concept of imagination. Only when we understand what the imagination involves can we make a useful attempt to conceptualise its relevance to legal practice.

1. Iain McGilchrist and the Bi-hemispheric Brain

Iain McGilchrist is a clinical psychiatrist and academic whose work on the nature of the human brain is regarded as leading in the field. In *The Master and his Emissary*, McGilchrist offers a novel form of bi-hemispheric analysis of the brain.⁶ His purpose in doing so is twofold. First, he aims to make a contribution to neurology and psychiatry's understanding of the functions of the brain. Second, he makes a more ambitious argument. Using his bi-hemispheric analysis as an analogy, he argues that recent meta-trends in western societies (for instance, in the design and operations of political and civic institutions) have tended towards a mode of thinking he associates with the left hemisphere of the brain, to the exclusion of right hemisphere-like concerns. In essence, he contends that, as a result of this dominance of "left hemisphere thinking", these western societies have become more insular and self-referential; they have become less attentive to context. This has resulted in the western world becoming mechanistic, fragmented and decontextualized. McGilchrist finds this deeply troubling. For a brain that is dominated by one hemisphere is significantly impaired. A loss of function in the right hemisphere (leading to left hemisphere dominance) is found in patients with conditions including (*inter alia*) autism and schizophrenia. Moreover, society, when dominated by left hemisphere thinking, actually exhibits, according to McGilchrist, some classic symptoms of schizophrenia.

In this section, I take inspiration from McGilchrist's analogical insight into the effects of left hemisphere dominance on western society and consider the implications of left hemisphere dominance for the functions of the common law. When I do so, it becomes apparent that the problems we encountered when discussing the formal and semantic barriers (in Chapters 1-3) align closely with classic symptoms associated with left hemisphere dominance. English privacy jurisprudence, it seems, bears certain hallmarks of what would, in humans, be regarded as mental illness. Before I can make

⁶ Iain McGilchrist, *The Master and his Emissary: The Divided Brain and the Making of the Western World* (Yale University Press 2010).

this claim, however, it is necessary to explain McGilchrist's bi-hemispheric thesis in more detail.

1.1 The Nature of the Left and Right Hemispheres

The human brain is made up of two hemispheres: the left and the right. The hemispheres are linked by a biological bridge called the *corpus callosum*. Anatomists have for many centuries endeavoured to make sense of this structure. A number of well-known theories abound. The right hemisphere, for instance, has long been associated with creativity,⁷ whilst the left hemisphere has been associated with logic and language learning.⁸ McGilchrist argues – relying on a wealth of neurological, psychological and psychiatric evidence – that these analyses are rather crude.

The picture he paints is one in which particular modes of thinking are associated with each hemisphere. He prefers this to ascribing particular *functions* to each hemisphere, since mental functions tend to involve input from both hemispheres. It will be recalled that, in the Introduction to the thesis, I made clear that it does not matter, for our purposes, whether McGilchrist is correct – in neurological terms – in stating that the two modes of thinking he identifies are *located* in the right and left hemispheres.⁹ I reiterate that here. All that matters for our purposes is that he identifies these two modes of thinking and explains that the brain functions normally only when they collaborate. (I thus use the terms “right hemisphere thinking” and “left hemisphere thinking” as short-hand for the types of thinking they represent in McGilchrist's work.)

In his understanding of the bi-hemispheric brain, each hemisphere is said to have a particular “take” on the world; these are reflected in the hemispheres' characteristic

⁷ Glen R Hendren, 'Using sign language to access right brain communication: A tool for teachers' (1989) 23 *Journal of Creative Behavior* 116; Betty Edwards, *Drawing on the right side of the brain* (HarperCollins 2001). C.f. Terence Hines, 'The Myth of Right Hemisphere Creativity' (1991) 25 *Journal of Creative Behavior* 223.

⁸ See David Caplan, *Neurolinguistics and linguistic aphasiology* (CUP 1987) 43-48.

⁹ There remains a live debate in neurological scholarship about the veracity of bi-hemispheric models, including McGilchrist's, that it is unnecessary to get into in this thesis. It suffices to note that there is a broad consensus around the central idea for which I am using McGilchrist's analysis; that the imaginative process requires collaboration between narrowly analytical (a-contextual) and broadly vigilant (contextual) modes of thinking. See Hines, *ibid*.

modes of thinking.¹⁰ A key part of this theory is McGilchrist's determination that certain forms of "attention" are associated uniquely with one hemisphere or the other.¹¹ In conventional neuropsychology, "attention" is thought to consist of five distinct types: vigilance, sustained attention, alertness, focused attention and divided attention.¹² Alertness, vigilance and sustained attention are closely related to one another and form what is known as the "intensity" axis of attention. "Without alertness, we are as if asleep, unresponsive to the world around us; without sustained attention, the world fragments; without vigilance, we cannot become aware of anything we do not already know."¹³

Although the precise brain functions dealing with attention are highly complex (and thus difficult to measure), neurological evidence associates the intensity axis with the right hemisphere.

Looking at the evidence from brain research, it becomes clear that vigilance and sustained attention are grossly impaired in subjects with right-hemisphere lesions [who are then reliant on their left hemisphere]... [B]y contrast, in patients with left-hemisphere lesions (therefore relying on their intact right hemisphere) vigilance is preserved.¹⁴

¹⁰ McGilchrist, n 6, 98.

¹¹ Attention is a good example of a mental function to which both hemispheres make distinct contributions. Attention is located neither in one hemisphere nor the other. But particular forms of attention – particular "takes" on what attention consists in – are attributable, at a neurological level, to one or other hemisphere (except "divided attention", which, McGilchrist explains, involves input from both hemispheres).

¹² McGilchrist, n 6, 38.

¹³ Ibid, 39.

¹⁴ Ibid, 39, citing RJ Korda and JM Douglas, 'Attention deficits in stroke patients with aphasia' (1997) 19(4) *Journal of Clinical and Experimental Neuropsychology* 525. It will be neither necessary nor particularly helpful to detail the nature of the clinical experiments that enable neurology to locate mental functions in one hemisphere or the other. In short, experiments can be (and have been) performed on subjects with "split brains". In split-brain patients, the *corpus callosum*, which links the two hemispheres, is severed (to a greater or lesser extent). This can result from some natural phenomena, trauma or, in some circumstances that are no longer very common, surgical procedure. (Surgery to split the *corpus callosum* was used quite commonly in the mid-20th century to treat epilepsy, though advances in pharmacology have now eclipsed this form of treatment.) It is also possible to artificially subdue the functions of one or other hemisphere temporarily using certain drugs. It has therefore been possible for experiments to be performed on subjects whose right and left hemispheres necessarily function independently. It is this sort of research that underpins McGilchrist's neurological claims.

Focused attention and divided attention, meanwhile, form a second, “selectivity” axis. Focused attention – the capacity for granular, detailed analysis, focused tightly on a particular subject – is the province of the left hemisphere. (Divided attention is possible only with input from both hemispheres. We need not, for my purposes, dwell on divided attention further.)

Deficits in focused attention are “more severe” in patients with left hemisphere damage.¹⁵ Thus, “there is evidence of left-hemisphere dominance for local, narrowly focussed attention and right-hemisphere dominance for broad, global and flexible attention.”¹⁶ Owing to this, McGilchrist tells us that “it is the right hemisphere that is attuned to the apprehension of anything new.”¹⁷ It is “on the look out.”¹⁸ The left hemisphere, by contrast, is not. It constructs its own virtual, internal world which is self-referential; the left hemisphere is attentive only to that which it already knows. It “therefore prioritises the expected”, making it “more efficient [than the right hemisphere] in situations where things are predictable, but less efficient ... wherever the initial assumptions have to be revised.”¹⁹ “It is thus the right hemisphere that has dominance for *exploratory* attentional movements, while the left hemisphere assists focussed *grasping* of what has already been prioritised.”²⁰

The consequence of these different approaches to attention being primarily located in one hemisphere or the other is that the right hemisphere “sees each thing in its context, as standing in a qualifying relationship with all that surrounds it, rather than taking it as a single isolated entity.”²¹ By contrast, “the left hemisphere sees things abstracted from context, and broken into parts, from which it then reconstructs a ‘whole’:

¹⁵ Ibid, 39, citing AL Benton and RJ Joynt, ‘Reaction time in unilateral cerebral disease’ (1959) 19(3) *Confinia Neurologica* 247; Henry L Dee and Maurice W Van Allen, ‘Speed of Decision-Making Processes in Patients With Unilateral Cerebral Disease’ (1973) 28(3) *Archives of Neurology* 163; W Sturm and A Büssing, ‘Effect of task complexity on cerebral organic reaction impairments – brain damage or patient effect?’ (1986) *European Archives of Psychiatry and Clinical Neuroscience* 235.

¹⁶ McGilchrist, *ibid*, 39-40. McGilchrist, the reader will notice, is inconsistent in his hyphenation of “right-hemisphere” and “left-hemisphere” throughout his book. There is no apparent meaning behind his decision sometimes to hyphenate and sometimes not to do so. Where I use the terms myself, I have elected not to hyphenate them. However, where the terms appear in direct quotations, I have faithfully reproduced them as they appear in the original text.

¹⁷ Ibid, 40.

¹⁸ Ibid, 38.

¹⁹ Ibid, 40.

²⁰ Ibid, 44.

²¹ Ibid, 49.

something very different.”²² Whilst I hesitate to give any prominence to McGilchrist’s simplest summation of the differences between them (since it lacks nuance), the reader might find it helpful as confirmation of the basics of this complex relationship: “the left hemisphere takes a local short-term view, whereas the right hemisphere sees the bigger picture.”²³

We noted (above) McGilchrist’s view that it is preferable (owing to the complex nature of the brain’s functions) to think of the hemispheres as having a particular outlook – a particular “take” – on the world.²⁴ The right hemisphere’s “take” on the world is informed by its capacity for broad vigilance, whereas the left hemisphere’s “take” on the world is ultimately virtual, self-referential and disconnected from the world “out there”.

[T]he right hemisphere pays attention to the Other, whatever it is that exists apart from ourselves, with which it sees itself in profound relation. ... By contrast, the left hemisphere pays attention to the virtual world that it has created, which is self-consistent, but self-contained, ultimately disconnected from the Other, making it powerful, but ultimately only able to operate on, and to know, itself.²⁵

Others in the field concur that the brain creates an internal world. Modell cautions against the “naive assumption that [a] representation (in the mind) correspondingly mirrors what exists in the world.”²⁶ He explains that “[t]he mind/brain does not represent or mirror reality; it *constructs* a virtual reality of its own.”²⁷ Rodolfo Llinás likewise observes that the mind is a “reality emulator ... that construct[s] virtual models of the real world.”²⁸ The mind thus, whilst “activated by sensory inputs, ... is also a self-contained system” where “[m]eaning may be constructed entirely from within.”²⁹ Although neither Modell nor Llinás locates this virtual world specifically in

²² Ibid, 27-28.

²³ Ibid, 43.

²⁴ Ibid, 98.

²⁵ Ibid, 93.

²⁶ Arnold H Modell, *Imagination and the Meaningful Brain* (MIT Press 2006) 13.

²⁷ Ibid, 13.

²⁸ Rodolfo R Llinás, *I of the Vortex* (MIT Press 2001) 13, quoted in Modell (ibid), 13.

²⁹ Modell, ibid, 21. See also Sigmund Freud, ‘The unconscious’ in *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, (Vol 14, Vintage 2001) 171.

the left hemisphere of the brain (they are not concerned with establishing its location), they concur that it is very much part of the mind's functionality.

In a normally-functioning brain, both the right and left hemispheres co-operate in order to make sense of the world.³⁰ Each brings different perspectives to bear, giving the brain a coherent and rounded understanding of encountered phenomena. McGilchrist paints a picture of proper mental function as involving information first entering the right hemisphere (which is vigilant and on the look-out for novel phenomena), before being packaged up and sent to the left hemisphere for detailed analysis.³¹ In the properly-functioning brain, the analysis performed by the left hemisphere is then served back up to the right, wherein decisions can be made with the benefit of the broad, contextual understanding for which the left hemisphere is not equipped. This | right → left → right | movement of information forms the basis, in McGilchrist's view, of cross-hemispheric collaboration.

Where, rather than properly collaborating, one hemisphere dominates, the brain functions abnormally. The capacity of patients with right hemisphere damage to undertake certain functions – those which hinge upon the capacity for vigilance and broad attentiveness to context – will be reduced. For our purposes, it is particularly important to focus on the consequences of left hemisphere dominance (that is, the effects of reduced right hemisphere function).

The left hemisphere prioritises a particular kind of knowledge:

a knowledge that comes from putting things together from bits. ... Its virtue is its certainty – it's fixed. It doesn't change from person to person or from moment to moment. Context is therefore irrelevant. But it doesn't give a good idea of the whole, just of a partial reconstruction of aspects of the whole.³²

Where a patient exhibits a lack of sensitivity to context, this can indicate left hemisphere dominance (i.e. reduced right hemisphere function).

³⁰ McGilchrist, n 6, 135.

³¹ Ibid, 206.

³² Ibid, 95.

Failure to take into account context, inability to understand *Gestalt* forms, an inappropriate demand for precision where none can be found, an ignorance of process, which becomes a never-ending series of static moments: these are signs of left-hemisphere predominance.³³

One consequence of the left hemisphere's inability to appreciate context, for those whose left hemisphere comes to dominate, is a tendency to confabulate; to build constructive truths rather than relate to reality. It does this because it cannot comprehend anything that it cannot fit within its existing, virtual-reality framework. In the absence of the right hemisphere's contextual counter-balance, the left hemisphere-dominated brain can comprehend the unknown only by treating it as if it were something known. In its constructive reality, the unknown thing *becomes* something known.

Thus, for example, in the presence of a right-sided lesion, the brain loses the contextual information that would help it make sense of experience; the left hemisphere, nothing loath, makes up a story, and, lacking insight, appears completely convinced by it.³⁴

Studies on patients with right hemisphere lesions prove that “not only does ... the left hemisphere tend to insist on its theory at the expense of getting things wrong, but it will later cheerfully insist that it got it right.”³⁵ It will insist on its correctness even when much of – or even all of – the evidence points to the contrary. When it dominates, therefore, the left hemisphere causes a tendency towards hubris.³⁶ It has a need for internal coherence – a form of internal certainty – that trumps engagement with reality; “the left hemisphere needs certainty and needs to be right.”³⁷ Worse still, the left hemisphere will never recognise its own hubris, for only the right hemisphere's input

³³ Ibid, 139.

³⁴ Ibid, 81. For example, McGilchrist recounts (at 67-68) the story of a patient with right hemisphere damage who believed wholeheartedly that her paralysed arm was not really hers but her mother's, a condition known as asomatognosia (often found in patients who have suffered a right hemisphere stroke). The story is taken from Edoardo Bisiach, Maria Luisa Rusconi and Guiseppe Vallar, 'Remission of Somatoparaphrenic Delusion Through Vestibular Stimulation' (1991) 29(10) *Neuropsychologia* 1029, 1030.

³⁵ Ibid, 82.

³⁶ The Oxford English Dictionary defines hubris as “presumption, orig. towards the gods; pride, excessive self-confidence” (<http://www.oed.com.libproxy.ncl.ac.uk/view/Entry/89081>, accessed 13/4/17). Although it is today a term often used synonymously with “arrogance”, the excessive self-confidence that features in hubris may be the consequence of either arrogance or ignorance.

³⁷ McGilchrist, n 6, 82.

can bring contextual reality back into the picture. It will insist that it has gotten the thing right, even in the face of overwhelming evidence to the contrary – for it cannot access that evidence. A memorable illustration of this need for internal, virtual-world coherence trumping reality has recently been provided by the 45th President of the United States’ insistence that the crowd attending his inauguration was larger than that which turned out for his predecessor.

A related feature of left hemisphere dominance is self-entrapment within this self-referential, “virtual world”. McGilchrist characterises this as the left hemisphere’s “stickiness”.³⁸

[The left hemisphere’s] tendency to recur to what it is familiar with, tends to reinforce whatever it is already doing. There is a reflexivity to the process, as if trapped in a hall of mirrors: it only discovers more of what it already knows, and it only does more of what it already is doing.³⁹

It is clear that, on McGilchrist’s analysis, left hemisphere dominance results in some fairly clear-cut symptoms. In the remainder of this section, I consider evidence of those symptoms appearing both in our privacy case law and in more conceptual privacy scholarship.

1.2 Applying McGilchrist’s Analysis Beyond the Confines of the Brain

McGilchrist uses his bi-hemispheric analysis to ground a far broader critique of western societies. It is my assertion that, in a similar fashion, the bi-hemispheric analysis may be used to ground a critique of common law methodology as seen within the privacy jurisprudence this thesis has examined. This assertion, however, must be both explained and defended before I can proceed.

McGilchrist defends his use of the bi-hemispheric analysis as the basis for a critique of the present-day western world in this way. “[T]he way we experience the world”, he tells us, “and even what there is of the world to experience, is dependent on how

³⁸ Ibid, 86.

³⁹ Ibid, 86.

the brain functions...”⁴⁰ Since we only experience the world “out there” through the functions of our brains, the ways in which the brain enables that experience shape, for us, our experience of the world. In essence, they shape our world (the world we experience).

The same may be said of law (which is, of course, part of the world we experience). Law is experienced, developed and applied through those people who are tasked with discharging it (or aiding in its discharge): lawyers and judges. The fact of deep human involvement in the shaping of our legal system is inescapable. The legal system does not have a life beyond that which is shaped by those intimately involved with it. Because of this, mental functions are inescapably involved in shaping the law and it behoves us to make some effort to understand the shaping effect that they have.

McGilchrist is deeply concerned by the shape of the modern western world which, he says, evidence indicates has become dominated by left hemisphere thinking. And indeed some of the symptoms he describes of a left hemisphere-dominated world seem all too familiar. In a world dominated by left hemisphere thinking:

[I]ts organisation, and therefore meaning, would come only through what we added to it, through systems designed to maximise utility. ... Morality would come to be judged at best on the basis of utilitarian calculation... [Ours would become] a technologically driven and bureaucratically administered society. ... There would be a depersonalisation of the relationships between members of society, and in society’s relationship with its members. Exploitation rather than co-operation would be, explicitly or not, the default relationship between human individuals, and between humanity and the rest of the world. ... [A government in this sort of world] would seek total control... Talk of liberty ... would increase ... but individual liberty would be curtailed. Panoptical control would become an end in itself, and constant CCTV monitoring, interception of private information and communication, the norm.⁴¹

In such a society, people of all kinds would attach an unusual importance to being in control. Accidents and illnesses, since they are beyond our control, would therefore be particularly threatening and

⁴⁰ Ibid, 7.

⁴¹ Ibid, 431.

would, where possible, be blamed on others. ... There would be a preoccupation, which might even reach to be an obsession, with certainty and security, since the left hemisphere is highly intolerant of uncertainty...⁴²

Many people living in this country would recognise a number of these indicators as having already come to pass: we might consider the mass CCTV surveillance that is now a fact of life in the UK, the ever-increasing powers to intercept and collect bulk communications data⁴³ or the well-documented rise of “blame culture” (particularly evident in negligence law⁴⁴). Utilitarian morality is used to justify further destruction of our environment whilst bureaucratic and technocratic governance now pervades much of our day-to-day interaction with the state.

Assuming McGilchrist is correct to identify these as being connected to left hemisphere dominance, evidence clearly exists that such dominance is already widespread in our society today. Given this, it is appropriate to consider whether there is evidence of the same sort of dominance in the narrower field that is our legal order and, in particular (due to the focus of this thesis), whether such evidence exists in our privacy jurisprudence. In the next two sub-sections, then, I consider evidence of left hemisphere dominance in both the privacy doctrine I examined in Chapters 1 and 2, and the broader privacy scholarship examined in Chapter 3.

1.3 Dominance of the Left Hemisphere: the Formal Barrier

The formal barrier is, as we established in Chapters 1 and 2, an illusory obstacle perceived by judges that has the effect of deterring them from engaging in wider forms of incremental development of the common law. It works by excluding the existence of wider, legitimate⁴⁵ forms of incrementalism from the judiciary’s field of vision. It is quite clear from the leading judgment of Lord Hoffmann in *Wainwright* and a number of the judgments in *Campbell* (of which Baroness Hale’s is the clearest

⁴² Ibid, 432.

⁴³ For example, under the Investigatory Powers Act 2016 (infamously nicknamed the “Snoopers’ Charter”).

⁴⁴ See PS Atiyah, *The Damages Lottery* (Hart 1997); Frank Furedi, *Courting Mistrust: The Hidden Growth of a Culture of Litigation in Britain* (Centre for Policy Studies 1999).

⁴⁵ Legitimate in the sense of being acceptable according to established common law practice in other fields and also to some mainstream constitutional theories.

example) that wider forms of incrementalism are not even being overtly considered in any of the leading privacy cases in the appellate courts. The result of this is that the judges in these cases believe themselves to be “unable” (though some might say they are merely “unwilling”⁴⁶) to develop broader privacy protections in English tort law (whether those take the form of a general privacy tort or an additional, more limited head of liability such as a tort of intrusion).

When we uncovered the (illusory) formal barrier, we found it to be strongly informed by a commitment to formalism and a highly restrictive conception of the judicial law-making role. If there is an underlying core concern, it appears to be one of maintaining certainty in the law. Certainty, it seems, is both prized and craved by the English courts in privacy cases. Immediately we can associate this craving for certainty with the attitude of the left hemisphere; the left hemisphere, as McGilchrist tells us, “needs certainty”.

The left hemisphere, moreover, creates sharp boundaries between concepts. It is an incorrigible divider of things. Owing to its predisposition to confabulate, however, these boundaries may have little or no basis in reality.

If one had to characterise the left hemisphere by reference to one governing principle it would be that of division. ... It is the hemisphere of ‘either/or’: clarity yields sharp boundaries. And so it makes divisions that may not exist according to the right hemisphere.⁴⁷

In Chapter 2, we observed Lord Hoffmann distinguishing “principles” from “rules”; he drew a sharp distinction (or “boundary”) between the two.⁴⁸ Yet when we subjected this distinction (and, indeed, his whole use of the term “principle”) to intense (but straightforwardly logical) scrutiny, it became clear that it lacked coherence. It had no basis in reality. In left hemisphere terms, it is a confabulation. Likewise the sharp distinction drawn by numerous commentators between “legislative” and “judicial” forms of judicial law-making has an ostensibly attractive simplicity.⁴⁹ But when we

⁴⁶ *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406, [18] (Wainwright).

⁴⁷ McGilchrist, n 6, 137.

⁴⁸ See ch.2, pp 76-78.

⁴⁹ See ch.1, section 2.1.

subject it to detailed scrutiny and contextualise it by placing it alongside accounts of recognised forms of “incrementalism” (which can be demonstrated to have actually informed real decision-making in real cases), we see that this distinction too is unhelpfully detached from reality. These sharp distinctions – which bear little if any resemblance to observed phenomena in the real world – are precisely the sorts of things McGilchrist would expect to find in a system dominated by left hemisphere thinking. They are fundamentally characteristic of an inattentiveness to context and a fixation on internalised, self-referential knowledge. They represent a-contextual, constructive truths. They reflect what their authors *expected* to see (and perhaps all that their authors were *able* to see). But they do not reflect the totality of what is really “out there” in the world.

We can see more such distinctions that are similarly evocative of left hemisphere thinking throughout the material we examined in Chapter 1. Aileen Kavanagh’s distinction between “radical” and non-radical judicial development of the law, for instance, suggests that it ought to be possible to draw a bright line between the two.⁵⁰ But the inability to draw this line with any precision, and the inability to relate consistently the distinction to observed practices of judicial law-making, confirm this distinction to be one born out of inattentiveness to context. It is a constructive truth based on an insistence that the evidence must fit an already established framework that is presumed to be accurate; it fundamentally fails to paint a rounded, realistic picture of judicial activity.

We further observed that, despite pursuing legal certainty with considerable vigour – by espousing such a limited role for judicial law-making – the courts have clearly failed, in reality, to achieve any significant degree of certainty. This would not surprise McGilchrist in the least. As he remarks, “all apparently ‘complete’ systems, such as the left hemisphere creates, show themselves ultimately, not just by the standards or values of the right hemisphere, but *even in their own terms*, to be incomplete.”⁵¹ The virtual world that the left hemisphere creates for itself, and to which it exclusively attends, is necessarily incomplete since it exists outside of – and is blind to – context.

⁵⁰ See ch. 1, p 52.

⁵¹ McGilchrist, n 6, 207 (emphasis added).

A system of rules generated by thinking in that mode must also be incomplete; the quest for certainty necessarily fails because the quest itself is predicated on the erroneous, a-contextual, formalistic belief that rules alone can provide comprehensive and coherent answers in complex cases.

Consider the “third party interests” cases analysed in Chapter 2. They exhibit at least two left hemisphere characteristics that deserve to be flagged up. First, they manifest the failure of the quest for certainty that was instantiated by the *Wainwright* ruling; development of this doctrine could not realistically have been foreseen. Second, and perhaps more importantly, they exhibit the classic, characteristic hubris of the left hemisphere. For notwithstanding the lack of a clear formal basis for developing this doctrine, the courts have nonetheless insisted – on several occasions – that it is entirely “proper” (and other similar endorsements) to have regard to these third party interests.⁵² The Supreme Court in the recent, high-profile *PJS* case exemplifies this perfectly; it both expressly affirms the existence of the third party interests doctrine and impliedly confirms the lack of a formal basis for the doctrine (by failing to identify any such basis).⁵³ The Supreme Court does not even mention – let alone choose between or offer an alternative to – the competing *CDE* and *K* lines of authority. The courts have simply, to use McGilchrist’s phrase, “cheerfully insisted” that they have gotten the law “right”, notwithstanding the abject lack of evidence supporting that conclusion.

When we turn to the uncertainty surrounding the very nature – the doctrinal root – of the action for misuse of private information, these left hemisphere characteristics are, if anything, even more plainly on display. In *Vidal-Hall*, Tugendhat J’s approach to determining that the nature of the action for misuse of private information (MPI) is tortious is revealing. His insistence (endorsed by the Court of Appeal) that the frequent judicial labelling of MPI as a tort is an important indicator of its nature is a classic piece of left hemisphere reasoning. For the left hemisphere is, McGilchrist tells us, an adept categoriser. It attaches labels to observed phenomena by reference to its own experience, not the context in which the phenomena arise; “the left hemisphere will

⁵² *Donald v Ntuli* [2010] EWCA Civ 1276, [2011] 1 WLR 294, n 123, [24].

⁵³ *PJS v News Group Newspapers Ltd* [2016] UKSC 26, [2016] AC 1081.

identify by labels rather than context (e.g. identifies that it must be winter because it is ‘January’, not by looking at the trees).”⁵⁴

It is also revealing that Tugendhat J identified only two possible bases for MPI: tort and equity. This is the classic “either/or” approach characteristic of the left hemisphere. He did not, for instance, give any consideration as to whether MPI might be better thought of as something else entirely. (An argument could be made that, given the influence of human rights norms on its development, the action is of a novel type, ill-suited to the traditional classifications of “pure” private law.⁵⁵) Nor did he attend to one major contextual matter – the long-running academic debate over the extent to which equity and the common law have been fused.⁵⁶ Whichever view might be taken within that debate (i.e. whether one believes that equity and the common law are wholly or partially fused, or remain separate) is of quite obvious relevance to the classification of a doctrine that, most have assumed, must lie in one or the other. McGilchrist tells us that the left hemisphere’s mechanistic view of the world renders it incapable of seeing anything other than that which it expects to see – that which its internal, virtual world allows for.⁵⁷ “To a man with a hammer,” he explains, “everything begins to look like a nail.”⁵⁸ Equally, it seems that to a judge used to dealing with tort claims, every privacy claim begins to look like a tort.⁵⁹

It might be objected, at this point, that the nature of our adversarial system of litigation means that judges can only attend to arguments put before them by counsel. A judge might object to my argument here by saying that, if counsel do not put forward arguments on – for example – the fusion of the common law and equity, she is limited

⁵⁴ McGilchrist, n 6, 49.

⁵⁵ Mullis and Oliphant, for instance, suggest that the *Campbell* doctrine is a “hybrid ‘equitable tort’”. See Alastair Mullis and Ken Oliphant, *Torts* (4th edn, Palgrave MacMillan 2011) 3.

⁵⁶ For an introductory discussion of key contributions in this debate, see Jill E Martin, *Modern Equity* (17th edn, Sweet & Maxwell 2005) 20-27.

⁵⁷ We saw, in Chapter 2, that, in *K v News Group Newspapers Ltd* [2011] EWCA Civ 439, [2011] 1 WLR 1827 (K), Ward LJ treats the third party interests in the privacy claim in a manner that suggests he sees a direct parallel between the privacy tort and family law. It will be recalled that he does this by applying the “best interests of the child” test, which is located in s.1 Children Act 1989 (even though the statute does not technically apply to the situation at hand). Much of Ward LJ’s earlier judicial and practical experience was in the field of family law, in which he was first a noted practitioner and, later, a noted High Court judge. This might be seen as an example of a judge seeing (in the case) that which his experience leads him to expect in cases involving children.

⁵⁸ McGilchrist, n 6, 98.

⁵⁹ Tugendhat J’s pre-judicial career at the Bar was dominated by a noted practice in the tort of defamation, as well as some relatively early (by English standards) privacy litigation.

in the range of material she is able to consider, which necessarily limits her conclusions. However, such an objection neglects the fact that courts do sometimes reach conclusions that were not mentioned in argument by counsel. As an example, recall the case of *K* (encountered in Chapter 2).⁶⁰ In *K*, the Court of Appeal attended to the interests of the claimant's children, despite the relevance of these interests not having been pleaded, no argument having been made upon it and no evidence in respect of those interests having been introduced. Consider also the case of *Terry v Persons Unknown*.⁶¹ The claim was pleaded in MPI. No argument was made by the respondent, who did not appear at the hearing and was not represented. Despite this, the claim was treated by Tugendhat J in the High Court as being, in substance, one in defamation rather than MPI. This resulted in the application of a more restrictive rule and the consequent refusal of injunctive relief. As such, this objection cannot stand as an absolute – least of all in the privacy field (and, one might think, particularly not in cases heard by Tugendhat J).

There is further evidence of left hemisphere dominance in the decision of the Court of Appeal in *Vidal-Hall*. We noted in Chapter 2 that it concluded by making a bare assertion, unsupported by any clear or detailed doctrinal evidence, that “there are now two separate and distinct causes of action” (MPI and equitable confidentiality).⁶² This is another instance of a court cheerfully insisting that it has gotten its conclusion right, without any hint that it recognises the contextual shortcomings in its (or the earlier High Court's) reasoning.

We can press this analysis further by introducing McGilchrist's observation that the left hemisphere is incapable of engaging properly with narrative. The left hemisphere cannot make sense of a story; to it the language in which the story is expressed is just words on a page; the concepts mentioned merely abstract. “[T]he disconnected left hemisphere [cannot] engage with narrative... In place of a narrative, it produce[s] a highly abstract and disjointed meta-narrative.”⁶³ When we look, at a meta-level, at the way in which successive courts have attempted to explain the doctrinal roots of MPI,

⁶⁰ *K* (formerly “*ETK*”) v *News Group Newspapers Ltd* [2011] EWCA Civ 439, [2011] 1 WLR 1827.

⁶¹ *Terry v Persons Unknown* [2010] EWHC 119 (QB), [2010] EMLR 16.

⁶² See ch.2, pp 97-100.

⁶³ McGilchrist, n 6, 191.

just such a disjointed meta-narrative emerges. Consider Lord Nicholls' bare statement in *OBG v Allen* that the law had, four years after *Campbell*, developed "two distinct causes of action" for confidence and privacy.⁶⁴ The Court of Appeal in *Vidal-Hall*, it will be recalled, cited (in meagre support of its cheerful conclusion) this part of Lord Nicholls' judgment with an appropriately dramatic, if unsurprisingly unhelpful, "four years later". This marked the period between *Campbell* and *OBG* during which, logically, this supposed development of two distinct causes of action must have occurred, but during which no court dealing with a privacy case thought to mention it.⁶⁵ There are numerous further examples of courts using the terms "privacy" and "confidentiality" interchangeably in the post-*Campbell*, pre-*Vidal-Hall* period, each of which serves to highlight further the disjointed, incoherent nature of the story being told.⁶⁶ The narrative which underpins the very root of MPI is disjointed and disconnected from any serious engagement with the broader context within which MPI exists in *precisely* the way we would expect if left hemisphere thinking is dominating.

There is considerable evidence, then, that left hemisphere thinking is dominating English privacy jurisprudence in terms of doctrine. Having uncovered this, I now turn to its possible role in the theoretical accounts of privacy examined in Chapter 3.

1.4 Dominance of the Left Hemisphere: the Semantic Barrier

When we consider the difficulties scholars (and judges) have faced in grappling with the semantics of "privacy", we see similar, left hemisphere characteristics to those we observed in the doctrine. Left hemisphere thinking, it seems, is dominating and obstructing attempts to understand privacy at the theoretical, as well as the doctrinal level. This can be exposed relatively swiftly, since we have already outlined the major features of left hemisphere thinking above, and since we have examined privacy scholarship in detail in the previous chapter. It also assists us that the mainstream privacy theories take, in general, essentially the same, top-down approach (and can thus be grouped together for the purpose of this part of my analysis).

⁶⁴ *OBG Ltd v Allen* [2007] UKHL 21, [2008] 1 AC 1, [255]; *Vidal-Hall v Google Inc* [2015] EWCA Civ 311, [2016] QB 1003, [24].

⁶⁵ See ch.2, p 99-100.

⁶⁶ See ch.2, section 2.1.2.

The top-down conceptualisations of privacy (those which endeavour to locate the One True Meaning of privacy) are characteristic of left hemisphere thinking. The desire to classify concepts by reference to pre-established categories is exactly the sort of process McGilchrist associates with the left hemisphere. We ought not to be surprised at the lack of consensus amongst these scholars, for the top-down, a-contextual approach to classification is – just as it is in respect of legal doctrine – doomed to fail on its own terms. Each definition offered ends up being over- or under-inclusive because each is inattentive to the richness of the background – the context – against which our attempts to define the concept arise.

We can probe further the assertion that left hemisphere thinking is prevalent in top-down privacy scholarship by examining the link between the philosophy of Ludwig Wittgenstein (introduced in Chapter 3) and McGilchrist's work.

From Wittgenstein, we gained an understanding of both “aspect perception” and the related condition of “aspect blindness”.⁶⁷ This alerted us to the plurality of meanings in everyday phenomena (including objects, pictures, words and so forth) and, crucially, to the realisation that only those aspects of which we already have experience are visible to us. Where we lack sufficient experience, we will be blind to those aspects of an object, picture, word (and so forth) that are dependent upon that (missing) experience. The ability to link newly encountered phenomena to existing experience is associated with the left hemisphere; perceptions from the right hemisphere are passed to the left for analysis. But the ability to seek out new experiences (vigilance) belongs to the right hemisphere. Aspect blindness, then, occurs when the left hemisphere has insufficient internalised experience to attribute a possible meaning – a possible aspect – to the observed phenomena. Aspect blindness is caused by – and is an inevitable consequence of – a failure to be sufficiently broadly vigilant; it represents a failure to grasp enough of what is “out there” to make fuller sense of what is later encountered.

McGilchrist's account of the relationship between the right and left hemispheres reinforces Wittgenstein's account of aspect blindness:

⁶⁷ See ch.3, p 142.

The left hemisphere knows things the right hemisphere does not know, just as the right knows things of which the left hemisphere is ignorant. But it is only ... the right hemisphere that is in direct contact with the embodied lived world: the left hemisphere world is, by comparison, a virtual, bloodless affair. In this sense, *the left hemisphere is 'parasitic' on the right.*⁶⁸

The world (the virtual, self-referential, internally coherent world) that the left hemisphere inhabits is parasitic on the world that the right hemisphere experiences: the world “out there”. Its virtual world can expand only by exposure to novelty, and only the right hemisphere can provide that exposure. Unless the right hemisphere is functioning properly – unless the world “out there” is being experienced, packaged-up and sent to the left hemisphere where it can build it into its internal world – the left hemisphere’s world will be impoverished.

This is what has happened in the vast majority of privacy scholarship. Daniel Solove’s criticism of mainstream privacy scholarship (on the basis of its consistent over- and under-inclusivity) thus aligns perfectly with McGilchrist’s concerns about the effects of left hemisphere dominance.⁶⁹ What is going on in the brains of each scholar individually is not what is important here; it is the meta-level evidence which ought to cause concern. As a body of scholarship, mainstream privacy theory is suffering from a deficiency in right hemisphere functionality; the left hemisphere’s mode of thinking is dominating and inhibiting a fuller understanding of privacy.

1.5 Diagnosis: the Schizophrenic Nature of Privacy Jurisprudence?

English privacy jurisprudence, both in terms of its formal, doctrinal treatment and its conceptual scholarship, exhibits characteristics that are indicators of left hemisphere dominance. In a human, we would find these characteristics to be a cause for concern, for they are symptomatic of mental abnormality and even mental illness. Of course, it

⁶⁸ McGilchrist, n 6, 199-200 (emphasis added).

⁶⁹ See Daniel J Solove, *Understanding Privacy* (Harvard University Press 2009). See ch.3, p 153. This sort of criticism also features in the work of Priscilla Regan and Julie Cohen, each of whom argue that mainstream privacy theory (largely limited, particularly in Cohen’s case, to US theorists) is narrowly focused on an individualistic conception of the right and is inattentive to broader social and cultural reality. See Regan’s *Legislating Privacy: Technology, Social Values, and Public Policy* (University of North Carolina Press 1995) and Cohen’s *Configuring the Networked Self: Law, Code, and the Play of Everyday Practice* (Yale University Press 2012).

would be simplistic (not to mention dramatic) to leap to the conclusion that English privacy jurisprudence is mentally ill, however tempting it might be to assert something so strikingly attention-grabbing. But a more cautious diagnosis is no less significant. Even with the strong caveat that English privacy law is (obviously) not a human being and is not wholly analogous to the functions of the human brain, the fact that it currently exhibits a number of symptoms that would, in a human, be indicative of mental illness, is as troubling in law as McGilchrist finds it in society at large. For the reasons identified earlier, the analysis is pertinent: law, like all else in the world, is experienced through our brains. Widespread dysfunction amongst those who are intimately involved with the development and application of the law – evident at a systemic, if not individual, level – ought to be of considerable concern.

McGilchrist's bi-hemispheric analysis thus gives us a means of framing the formal and semantic barriers so that the pervasiveness of the problems that they pose can be flagged up. The dominance that left hemisphere thinking appears to have in both doctrinal and conceptual matters relating to our privacy jurisprudence explains the particular problems that both barriers cause. This sets the scene for our examination of legal imagination. For it seems intuitively likely that a more imaginative approach to judging might provide the opportunity for a corrective to these problems, by providing greater scope for judicial creativity. However, if we are to make the argument convincingly, we need to work up an understanding of what legal imagination involves, and to explain *how* it can provide a corrective to left hemisphere dominance. McGilchrist helps us to diagnose the nature of the problem. We now need to determine whether imagination might provide, as we might intuit, a cure. It is to this challenge that we now turn.

2. Legal Imagination

A human being cannot originate new things out of nothing. He must be exposed to an environment that gives him cultural opportunities and stimulates him in various ways... And in itself imagination, of course, is only a prerequisite for or a precursor of creativity.⁷⁰

⁷⁰ Silvano Arieti, *Creativity: The Magic Synthesis* (Basic Books 1976) 37-38.

A move towards the development of a novel head of tort liability is a creative one. It may be intuited that such a creative move entails an exercise of imagination. But understanding what that means in the legal context is not necessarily straightforward.

When some scholars write of the “legal imagination”, it seems that they have in mind a subclass of a broader concept. Just as when people, talking of a steak knife or a cheese knife, do so in order to identify particular subclasses of knives, so “legal imagination” is presented as a subclass of a broader concept of “imagination”. Some writers explicitly talk of “legal imagination” as a distinct form or aspect of a more general imaginative capacity. In so doing they evoke similar language from other fields of philosophical and critical inquiry. Talk of distinct modes of imagination is common in these other fields. Thus we see C Wright Mills writing of the “sociological imagination”,⁷¹ Martha Nussbaum of the “literary imagination”,⁷² and Sean Silver of the “curatorial imagination”.⁷³ In specifically legal circles, Martin Loughlin writes of the “constitutional imagination”,⁷⁴ and Richard Mullender of the “moral imagination”.⁷⁵ Other writers, whilst not deploying the specific term “legal imagination”, write of the relevance of “imagination” to law.⁷⁶ Some of this group do so explicitly, whilst others use language that makes plain that creativity or risk-taking within argument is relevant to legal practice (thus impliedly asserting that imagination is relevant).⁷⁷ Roberto Unger deploys a notion of “institutional imagination” as part of his critique of mainstream jurisprudence.⁷⁸ (As such, his understanding of the role imagination plays in law sets him apart from other jurisprudence scholars. For his

⁷¹ C Wright Mills, *The Sociological Imagination* (2nd ed, Penguin Books 1970).

⁷² Martha Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (Beacon Press 1995).

⁷³ Sean R Silver, *The Curatorial Imagination in England, 1660-1752*, University of California, Los Angeles, 2008.

⁷⁴ Martin Loughlin, ‘The Constitutional Imagination’ (2015) 78(1) MLR 1.

⁷⁵ Richard Mullender, ‘Judging and Jurisprudence in the USA’ (2012) 75(5) MLR 914, 930.

⁷⁶ See, for example, Alan Watson, *Failures of the Legal Imagination* (University of Pennsylvania Press 1988). The American Supreme Court Justice, Felix Frankfurter, once wrote (in a letter replying to a child who had sought his advice upon the best educational route to take with a view to becoming a lawyer) that “cultivation of the imaginative faculties” is integral to a lawyer’s job; “[n]o one can be a truly competent lawyer [without developing such faculties]”. See Felix Frankfurter, letter to Paul Claussen, Jr, in Ephraim London ed, *The Law as Literature* (Simon and Schuster 1960) 725.

⁷⁷ See for example Allan C Hutchinson, *Laughing at the Gods: Great Judges and How They Made the Common Law* (CUP 2012). I make the intuitive assumption here that where writers talk of creativity they have in mind the fruits of an imaginative process. “Creativity” is a more limited concept than imagination, however, since it is product-focused – the creative mind aims to “create” something. As we shall see, later, the imagination, whilst encompassing the capacity for creativity, is an altogether broader concept.

⁷⁸ Roberto Mangabeira Unger, ‘Legal Analysis as Institutional Imagination’ (1996) 59(1) MLR 1.

“institutional imagination” is intended as a systemic corollary, rather than a sub-class, of imagination.)

Despite all this work, however, there seems to be no consensus on the meaning of the broad, overarching concept to which each of the subclasses is related. Indeed, none of these writers provides any *detailed* analysis or explanation of what “imagination” is. The problem may be exemplified by scrutinising two attempts to define “legal imagination”, from James Boyd White and Richard Mullender, respectively. Boyd White’s book, *The Legal Imagination*, is essentially a self-contained course in Law and Literature.⁷⁹ It is not – as one might (erroneously) suppose from the title – a detailed analysis of the relevance of imagination to law and legal practice. Rather it is a book that endeavours to imbue the reader with a sufficiently keen appreciation of the relevance and importance of literature to legal study in order that the reader may go on to exercise greater “legal imagination” – whatever that means – in the future. Nevertheless, since it necessarily implies the relevance of imagination to the legal process (especially in a common law jurisdiction), the author’s conception of imagination is highly relevant to our concerns, providing we can get fully to grips with it. Boyd White defines imagination – without significant explanation – as “a power that organises what is seen and claims a meaning for it”.⁸⁰ This definition makes two distinct claims: (1) that imagination “organises what is seen” and, (2) that imagination then “claims a meaning” for what is seen. Imagination thus exhibits dual functionality. It has an “organising ideas” function that involves the identification of objects, ideas, events, experiences and so forth and their subsequent organisation into particular structures, categories and schema. It is this function that starts the creative process we intuitively think of when confronted with the term “imagination”. And it also has a “meaning attribution” function that requires inputs – data – upon which to act; only what is “seen” (or sensed, known) can be organised by the imagination.

As we have already begun to see (through McGilchrist’s description of the left hemisphere’s world) and will continue to see in this section, there is much merit in

⁷⁹ In the text I will continue to identify this author as Boyd White, in order to distinguish him from another – Alan R White – to whose work I also make reference.

⁸⁰ James Boyd White, *The Legal Imagination* (Abridged ed, University of Chicago Press 1985) 209 (Boyd White).

both aspects of Boyd White's definition (notwithstanding the lack of a detailed explanation of it). Imagination *does* involve both organisational and meaning-attribution functions. Unlike the analysis offered in this chapter, however, Boyd White does not offer an explanation of just *why* these are imaginative functions or how they relate to creativity. Indeed creativity, perhaps because he cannot explain the link between it and his understanding of imagination, takes very much a back-seat in his work.

Mullender, who frequently references different subclasses of imagination in his work on tort law and legal philosophy, offers a definition of "legal imagination" by way of example:

Those who possess this capacity [for legal imagination] are able to detect defects in the law (eg, doctrinal inconsistencies) and to identify means by which to correct them.

For Mullender, then, legal imagination similarly has a dual functionality. But it is not quite the same dual functionality as Boyd White's. First, Mullender identifies a "detection of defects" function, enabling the lawyer to spot lacunae, inconsistencies, absurdities and so forth within legal doctrine. Second, Mullender identifies a creative function – the identification of "means by which to correct" these defects. It is immediately apparent that Mullender's vision of the legal imagination is instrumentalist; it is focused on bringing about a particular end-state: the remedying of "defects" in the law and the consequent improvement in protection for the rights upon which he focuses.

The juxtaposition of Boyd White and Mullender's definitions of "legal imagination" exemplifies perfectly the lack of a clear consensus on the concept's meaning. There are undoubtedly similarities and overlaps in their conceptions, but there are also significant differences. We might say – metaphorically – that whilst Boyd White and Mullender are reading from the same page, they are focusing on different paragraphs.

Amy Kind and Peter Kung offer an analytical device which can be used to shed light on the differences between Boyd White and Mullender. Kind and Kung call this "the

puzzle of imaginative use”.⁸¹ The puzzle involves trying to account for two aspects of imagination which they see as quite distinct. First, there is what they identify as the “transcendent” use of imagination. This is the aspect of imagination we use “to enable us to ... look beyond the world as it is”.⁸² This is what enables us, in Alan White’s language, to think of something “as possibly being so.”⁸³ Second, there is the “instructive” use of imagination. This is the aspect we use “to enable us to learn about the world as it is, as when we plan or make decisions or make predictions about the future”.⁸⁴ Boyd White’s definition of imagination seems to involve only the “instructive” aspect; it is limited, ostensibly, to organising what is already present and attributing meaning to it. Whilst the clear implication behind Boyd White’s book – taken in its entirety – is that there *is* a creative aspect to legal imagination, his one, clear elucidation of the concept sorely lacks any reference to it. This serves only to highlight the depth of the “puzzle of imaginative use”.

Mullender’s definition, by contrast, appears to contain both the “instructive” and “transcendent” uses of the concept of imagination. The ability to identify defects present in the law *as-it-is* is “instructive” – it tells us something about the world around us. But the ability to identify means by which to correct those defects involves using imagination in a “transcendent” fashion; it requires us to look beyond the way things are and make decisions and predictions about how they *could* be and how a different (hypothetical) state of affairs might be arrived at.

Of course, it is this end-state – the ability of a lawyer (or a judge) to envisage a plausible pathway towards the recognition of a novel legal norm – in which we are most interested. If we are to understand what is needed in order to enable *lawyers* to envisage novelty in the legal context, we need a broader understanding of just how the imagination works. For unless we understand the broader concept of “imagination” – unless we know what “imagination” is – we can hardly expect to work up a useful concept of its jurisprudentially-minded offspring, the “legal imagination”.

⁸¹ Amy Kind and Peter Kung (eds), *Knowledge Through Imagination* (OUP 2016) 3.

⁸² *Ibid.*, 1.

⁸³ Alan R White, *The Language of Imagination* (Basil Blackwell 1990) 184.

⁸⁴ Kind and Kung, n 81, 1.

Here again, however, we do not find ourselves in particularly welcoming territory. For “imagination” is also a concept about which there is only limited consensus in respect of its meaning. The ailment afflicting study of the legal imagination appears, perhaps fittingly, to be itself a sub-class of the same difficulty hindering the study of imagination more broadly. As Kind and Kung put it:

Anyone coming to the imagination literature for the first time would undoubtedly be frustrated by the lack of a clear explanation of the mental activity being talked about. The problem is not simply that philosophers give different theoretical treatments of imagination but rather that there doesn't even seem to be consensus about what the phenomenon under discussion is.⁸⁵

Understanding imagination, then, will not be an easy endeavour. However, it is possible to establish a working understanding of the concept by drawing on two distinct, but nonetheless mutually supportive, schools of thought: contemporary psychiatry and empiricist philosophy. Each of these schools of thought offers ideas that can be seen to be mutually supportive. Thus whilst I do not claim to be an expert in either, a case can be made for their plausibility in the light of the mutual support they provide one another.

2.1 Imagination in Psychiatry

2.1.1 The Work of Arnold Modell

In *Imagination and the Meaningful Brain*, Modell (a Harvard clinical psychiatrist) explores the neurological processes that underpin the human imagination.⁸⁶ Imagination is, he argues, an ongoing, unconscious metaphoric process. This is revelatory in a number of respects. First, contrary to what one might intuitively think, the imagination is not a faculty of the mind that switches on and off; it is a constant function. Second, exercises of imagination are generally unconscious. By this, Modell means that the mind unconsciously constructs an internal world which is self-referential. In this respect, his work aligns closely with McGilchrist's account – the

⁸⁵ Ibid, 3.

⁸⁶ Modell, n 26.

difference being that McGilchrist locates this internal world specifically in the left hemisphere. By relating newly observed phenomena to concepts already integrated into the mind's internal world, the mind attributes meaning to those newly observed phenomena. This is achieved by the forging of mental links between new sensory inputs and prior experience, and leads to the third revelatory matter in Modell's work: all exercises of imagination are metaphoric. Imagination is thus presented by Modell as the mind's tool for meaning-attribution. It is an interpretative – and often unconscious – process.

Metaphor is more than a “trope or figure of speech”.⁸⁷ Metaphor is a cognitive tool – “primarily a form of thought” – that enables us to make sense of the world.⁸⁸ It does this by functioning as “an interpreter of unconscious memory.”⁸⁹ Consider: a person observes a novel phenomenon – a car that is driving past. The mind processes this visual input (sense-data) by referring, unconsciously, to its internalised world of experience. (In McGilchrist's terms, the data moves from the right hemisphere to the left.) It forms a link between the new input and other phenomena previously observed, enabling the person to identify the newly observed phenomenon as a car. Even though the person has never seen *this particular car* before, she is able to identify it by relating it – metaphorically – to other cars she has previously encountered. (The left hemisphere categorises the data passed to it from the right.) It is this process that enables us to attribute meaning to and make sense of, and prevents us from being terrified of, everything we encounter “out there” in the world. Each time we encounter a new type of car and recognise it *as* a car, the mind adapts or “recontextualises” its internal world to include the new model. (The left hemisphere's world expands.) The

⁸⁷ Ibid, xii. See also George Lakoff and Mark Johnson, *Philosophy in the Flesh: The Embodied Mind and Its Challenge to Western Thought* (Basic Books 1999).

⁸⁸ Modell, 26. That metaphor is a cognitive tool is a well-established and accepted truth in the fields of psychiatry and cognitive linguistics. See, for instance, Mark Johnson, *The Body in the Mind* (University of Chicago Press 1987); George Lakoff, *Women, Fire and Dangerous Things: What Categories Reveal About the Mind* (University of Chicago Press 1987); Mark Turner, *Reading Minds: The Study of English in the Age of Cognitive Science* (Princeton University Press 1991); Raymond W Gibbs Jr, *The Poetics of Mind: Figurative Thought, Language, and Understanding* (Cambridge University Press 1994); Lakoff and Johnson *ibid*.

⁸⁹ Modell, n 26, 26.

mind thereby “turns around upon its own schemata.”⁹⁰ Thus “every act of memory is to some degree an act of imagination.”⁹¹ Or, as Frederic Bartlett puts it,

Remembering is not the re-excitation of innumerable fixed, lifeless and fragmentary traces. It is an imaginative construction, or a construction built out of the relation of our attitude towards a whole active mass of organized past reactions or experience.⁹²

Modell takes us further than McGilchrist into the imaginative process itself that is dependent on this initial | right → left | movement. “The source of the imagination”, Modell tells us, “is [this] unconscious metaphoric process.”⁹³ By this process, the “[u]nconscious autobiographical memory, the memory of the self and its intentions, is constantly recontextualized, and the link between conscious experience and unconscious memory is provided by metaphor.”⁹⁴ A metaphor, Modell elaborates, involves the “transfer of meaning between dissimilar domains”.⁹⁵ One mental function which is thus inherently metaphoric is meaning-attribution (attaching meaning to newly-observed phenomena). Meaning-attribution is, Modell’s work tells us, imaginative *in itself*.

It is apparent that Modell prefers a broad understanding of the term “imagination”. It is not limited, on his account, to infrequent bouts of creative thinking. Rather it is a term properly applied to an ongoing and often unconscious neurological process. This does not mean, however, that “imagination” does not also embrace particular, creative instances. It just means that even the most basic mental function that is a necessity if we are to make sense of the world around us – meaning-attribution – is itself imaginative (since it involves the construction of metaphor). Modell simply does not dwell on the operation of what Scott Brewer terms the “imaginative moment”.⁹⁶ This is the moment during the exercise of the imagination when something suddenly occurs to us. It is the moment of inspiration – the instant when the murky becomes clear,

⁹⁰ Ibid, 9.

⁹¹ Gerald M Edelman, ‘Building a picture of the brain’ in Gerald M Edelman and Jean-Pierre Changeux eds, *The Brain* (Transaction Publishers 2001) 56.

⁹² FC Bartlett, *Remembering: A Study in Experimental and Social Psychology* (CUP 1932) 213.

⁹³ Modell, n 26, 25.

⁹⁴ Ibid, 25.

⁹⁵ Ibid, 27.

⁹⁶ Scott Brewer, ‘Exemplary Reasoning: Semantics, Pragmatics and the Rational Force of Legal Argument by Analogy’ (1996) 109 Harv L Rev 923, 954.

unrealised possibilities are realised, (metaphorical) doors are (metaphorically) opened. This moment is inexorably bound-up with notions of creativity; the moment results in the emergence of an apparently “new” idea. “Eureka!” spluttered Archimedes, when he realised why his bathtub was overflowing. “Ouch!” exclaimed Newton (presumably), when gravity caused that fateful apple to hit him on the head and forever alter our understanding of physics.

Modell’s concern is not primarily with particular instances of remarkable creativity but with the ongoing, unconscious process he describes. However, McGilchrist is very much concerned with the “eureka!” or, as he calls it, the “aha!” moment.⁹⁷ Like Modell, McGilchrist presses home the point that attentiveness is key to the properly-functioning brain’s operations. His bi-hemispheric analysis has flagged up the fundamental importance of collaboration between two distinct forms of attention: wide vigilance and narrow, focused attention. When properly functioning, the brain’s two hemispheres collaborate with one another in order to attribute meaning and to make decisions. The brain’s ability to pay attention – simultaneously but discretely – to both the internalised world that forms its immediate frame of reference *and* to the broader context of what is “out there” in the world is what enables humans properly to comprehend the world around them. This is, as Modell tells us, the basic, imaginative, metaphoric process. And it enables people to react appropriately to the things they encounter.

2.1.2 Summarising Modell’s and McGilchrist’s Contributions

Both Modell and McGilchrist demonstrate that broad attentiveness to context and to the world “out there” is a prerequisite for the exercise of imagination that results in meaning-attribution. Without the data that the brain gathers from being attentive to the phenomena we encounter, there would be nothing from which the mind could derive meaning, nor make decisions. The unconscious metaphoric process by which the mind makes sense of that which it encounters would have nothing upon which to bite. Imagination, then, is fundamentally dependent on collaborative input from both the

⁹⁷ McGilchrist, n 6, 47.

left hemisphere and the right. (And so are, incidentally, virtually all other mental functions.⁹⁸)

Modell's account of the mind's internal, "virtual" world, and the unconscious metaphoric process, enriches McGilchrist's account of the brain's self-referential, processing function (located in the left hemisphere). At the same time, McGilchrist's argument that – in a properly functioning brain – the ultimate seat of judgment is the (widely vigilant) right hemisphere (rather than the narrowly-focused, self-referential, left hemisphere) enriches the picture Modell paints because it highlights the combined contribution made to meaning-attribution by both the internal world and attentiveness to broader context. When we attempt to make sense of phenomena and to react appropriately to them (by exercising judgment), the internal world only takes us part of the way. For a purely self-referential understanding enables us only to make sense of newly-observed phenomena by relating them to *that which we already know*. It is the brain's ability to reappraise the phenomenon in the light of its self-referential analysis *and* the phenomenon's situation *in context* which truly enables the brain to be meaningfully receptive to novelty.

We are now able to understand *why* cross-hemispheric collaboration (in McGilchrist's terms) is vital for the properly-functioning brain: it is essential for meaning-attribution. And meaning-attribution is, in turn, essential for the metaphoric process that underpins the imagination. Thus we now have a working understanding of what the properly-functioning brain requires in order to engage in a basic imaginative process – meaning-attribution. Having established such an understanding, we now turn to empiricist philosophy as we search for a greater understanding of the more obviously creative function – the emergence of the "eureka!" moment – with which the imagination is often associated.

2.2 Imagination in Empiricist Philosophy

The treatment of imagination by empiricist philosophers makes one thing clear; they are committed proponents of the notion that the presence of background data in the

⁹⁸ Ibid, 1.

mind is a prerequisite for any exercise of imagination. In this sense, they are in complete agreement with the psychiatrists Modell and McGilchrist whose work post-dates most of these philosophers. However, the empiricists were concerned with more than just meaning-attribution. They endeavoured to explain the relevance of this background data to more obviously creative enterprises.

***2.2.1 Nihil est in intellectu quod non prius fuerit in sensu*⁹⁹**

The basic empiricist proposition is simple enough. All ostensibly “new” ideas are re-workings, re-arrangements or re-combinations of existing ideas and experiences. The empirical message is that the mind can know nothing that has not been produced by the senses; all knowledge is experiential or empirical. According to the empiricist position, then, the *form* of novel ideas is new but the *substance* is pre-existing.¹⁰⁰ Thus, “newly discovered” ideas (such as mathematical formulae, for example) are not novel in substance; they are simply newly discovered ways of ordering concepts (numbers, in this example) that already exist. They would say the same of “novel” legal norms; all are but re-workings of existing ideas. In the 20th century, the interpretative legal philosophy of Ronald Dworkin essentially embodies this position. The enlightenment philosopher David Hume puts the point this way:

But though our thought seems to possess this unbounded liberty, we shall find, upon a nearer examination, that it is really confined within very narrow limits, and that all this creative power of the mind amounts to no more than the faculty of compounding, transposing, augmenting, or diminishing the materials afforded us by the senses and experience. ... In short, all the materials of thinking are derived either from our

⁹⁹ In English: “Nothing is in the mind that was not first in in the senses.”

¹⁰⁰ The Oxford English Dictionary offers the following definition of “form” as it appears in Scholastic philosophy: “The essential determinant principle of a thing; that which makes anything (*matter*) a determinate species or kind of being; the essential creative quality.”

The OED’s entry elaborates:

This use of *form* (Aristotle’s *μορφή* or *εἶδος*) and *matter* (*ὑλη*) is a metaphorical extension of their popular use. In ordinary speech, a portion of matter, stuff, or material, becomes a ‘thing’ by virtue of having a particular ‘form’ or shape; by altering the form, the matter remaining unchanged, we make a new ‘thing’. This language, primarily applied only to objects of sense, was in philosophical use extended to objects of thought: every ‘thing’ or entity was viewed as consisting of two elements, its form by virtue of which it was different from, and its matter which it had in common with, others.

For my purposes, this definition suffices. See <http://www.oed.com/view/Entry/73421> (accessed 01/09/2017). Emphasis is original.

outward or inward sentiment: The mixture and composition of these belongs alone to the mind and will.¹⁰¹

An important clarification is required at this point. I do not argue that the entirety of this empiricist position is necessarily correct. (I am not arguing that there is “nothing new under the sun”.) For proving that all knowledge is empirical is beyond the scope of this thesis, and far beyond that which is necessary for my argument. I am concerned only with legal reasoning and legal norms, which are, I will argue, grounded in existing norms (whether legal, social, political or otherwise), principles and ideals of justice. I use the empiricists’ position to argue that all *ideas* – conceptual understandings – produced by humans are rooted in some form of sense data; that, theoretically, they could be traced back to their constituent parts. In so doing, I am not seeking to establish the correctness of the empiricist position as a general proposition of epistemology. I merely suggest that, once understood, it can provide a valuable insight into the role that imagination plays in legal reasoning.

Nihil est in intellectu quod non prius fuerit in sensu is a recurring theme of John Locke’s *An Essay Concerning Human Understanding*. According to this theme, ideas first appear in the mind only *after* sensation.¹⁰² “[A]ll the materials of reason”, he tells us, come from “experience”.¹⁰³

Our observation employed either about *external sensible objects, or about the internal operations of our minds, perceived and reflected on by ourselves, is that, which supplies our understandings with all the materials of thinking.*¹⁰⁴

For Locke, the mind thus produces nothing from scratch; it re-orders, re-arranges and re-combines sense data it has already encountered (whether recently or in the distant past). Human *ideas* are thus ultimately, when one drills deep enough, found to be novel

¹⁰¹ David Hume, ‘An Enquiry Concerning Human Understanding’, section II in *Philosophical Essays Concerning Human Understanding* (London 1777). Available at <http://davidhume.org/texts/ehu>, para E2.5 on page SBN19, accessed 24/7/2017.

¹⁰² John Locke, *An Essay Concerning Human Understanding*, in *The Works of John Locke in Nine Volumes* (G Knaller and TA Dean eds, 12th Edition, C and J Rivington and Partners, London 1823) Book II, ch.1, para 2, page 77-78.

¹⁰³ John Locke, *Of the Abuse of Words* (Penguin 2009) 2.

¹⁰⁴ *Ibid* (emphasis is original).

only in form, not in substance.¹⁰⁵ Thus, as Abrams puts it, the imagination “consists of the division and recombination of discretives to form a whole which may be novel in its order, but never in its part.”¹⁰⁶

Let us consider the implications of this for a fairly simple exercise of imagination. According to the empiricists, a “new” story, song or game is not actually created anew *out of nothing*; these things represent new orderings of existing sense data and existing ideas. Thus I can imagine climbing Kilimanjaro even though I have never climbed it. But my imagining of this does not truly involve the creation of new ideas *in substance*. For, whilst I may never have climbed a mountain and thus cannot draw directly on that experience, I have encountered mountains before and I have an idea of what it is like to climb up things. These experiences comprise underlying sense data. I am able to imagine the cold, the wind, and the elation of reaching the summit since I have some experience of all these constituent parts. They exist in my left hemisphere’s virtual world because my right hemisphere has served those individual experiences up to it in the past. The fact that my imagined ascent up Kilimanjaro may bear little resemblance to any other person’s *actual* experience of ascending it might, admittedly, affect the factual *accuracy* of my vision of the journey. For I lack exposure to the full, rounded experience of climbing *that particular mountain*. In the absence of that, the best that my left hemisphere can do is to construct a vision of what it *might* be like to climb Kilimanjaro based on these fractured experiences. It is building a new “whole” out of what it believes to be relevant parts. But, notwithstanding the factual inaccuracy of my vision of the journey, it remains one that I have brought into its imaginary existence

¹⁰⁵ There is a wealth of literature on the nature of imagination, but – as Alan White argues forcefully in his book (n 83) – until relatively recently, many of these writers made a serious error. This was the error of assuming that the imagination dealt only in images. (See section 2.2.3, below.) For most of these writers (including Aristotle, Descartes, Hume and Hobbes), for something to be “imaginable” it had first to be “imageable”. Moreover, as becomes apparent in the work of Hooke, the organisational function of the imagination, whilst recognised, was considered only to involve the organisation of images.

For now, it remains acceptable for our purposes to make use of some of these earlier writers’ analogies (which involve images) in order to conceptualise the organisational function of the imagination. Indeed, when James Boyd White writes of the imagination organising what is seen, he implicitly aligns himself with the image thesis. It must be borne in mind throughout, however, that where these writers talk only of images, we must be open to a broader range of sense-data as forming the subject of the organisational effort.

¹⁰⁶ MH Abrams, *The Mirror and the Lamp: Romantic Theory and the Critical Tradition* (OUP 1953) 160 and 162, quoting Hume, *Treatise of Human Nature*, (LA Selby-Bigge ed, OUP 1986) 366.

through the re-combination of a range of ideas and experiences to which I have already been exposed.

This, then, is the task at which the left hemisphere is adept. It is limited, however, by the availability of contextual experience served up by the right hemisphere. The only thing that is new, therefore, in any novel concept is the order in which existing ideas or information is placed. Novelty (in ideas, at least) is a quality of *form*. Novelty is also a *relative* concept; things appear new only because we have not encountered their constituent elements *in that particular order* before. In this way, we begin to see how empiricist philosophy aligns with the evidence of the brain's functions provided by the psychiatrists upon whose work we have dwelt.

Richard Hurd puts the notion a little differently. For him, “[a]ll is derived ... all is unoriginal. And the office of genius is but to select the fairest forms of things, and to present them in due place and circumstance.”¹⁰⁷ Hurd's insistence that “all is unoriginal”, however, lacks a necessary nuance. For the empiricist position is that originality is *relative*; originality in ideas is a quality of form, not of substance. Thus we may – and frequently do – have “original” ideas because our ideas re-combine aspects of our prior experience in novel ways; the *form* of the “new” idea is original. Yet its basic *substance* is not new. Hurd is right, however, to claim that “genius” – that is, highly imaginative thinking – involves this kind of re-arranging and re-combining, rather than the pure creation of substantive ideas. For if originality – if creativity, imagination – is relative, then the person with the higher-operating capacity for re-combination is the more imaginative. Creativity may be measured in terms of the radicalness of the re-arrangement of existing ideas that the mind is capable of producing. The radicalness of this re-combination is originality's dimension.

The notion that *nihil est in intellectu quod non prius fuerit in sensu*, upon which Locke and others dwelt,¹⁰⁸ gives us a starting point in our examination of the necessary

¹⁰⁷ Richard Hurd, ‘A Discourse Concerning Poetical Imitation’ in *Epistola ad Augustum with an English Commentary and Notes* (London, 1751) 110.

¹⁰⁸ But which was not – fittingly enough – originally his. The notion *nihil est in intellectu quod non prius fuerit in sensu* can be traced back to Aristotle, via Ibn Sina (known in Latin as Avicenna) and Thomas Aquinas. See Paul F Cranefield, ‘On the Origin of the Phrase *Nihil est in intellectu quod non prius fuerit in sensu*’ (1970) 25 *Journal of the History of Medicine* 77.

precursors to the “eureka!” moment. We can immediately see that it is a cornerstone of empiricist philosophy upon which there is broad consensus. Moreover, we can see clear links between its appearance in philosophy and the neurological evidence on the functioning of the human brain.

2.2.2 The Curatorial Imagination

Sean Silver, who examines the empiricist philosophers’ treatment of imagination at length, finds that they share a common understanding of the concept.¹⁰⁹ He calls this the “curatorial” model of imagination. The commonality comes from the fact that many empiricist philosophers use very similar analogies when describing the mind and the imagination; a significant number of them liken the mind to a collection of something (though the “something” differs). Moreover, it becomes apparent that the use of these metaphors is by no means coincidental. For each writer who deploys them (and Silver catalogues numerous such examples) relates the mind to a collection of a sort with which that writer was intimately familiar. Locke, for instance, characterises the mind as a “cabinet”, into which “ideas” produced by the senses are placed (they “furnish” it). In seeking to understand why Locke uses the cabinet metaphor, Silver points out that Locke was himself a bibliophile; he spent many years of his life compiling a substantial personal library.¹¹⁰ The collection of these books – containing ideas – and the placing of them in a previously empty space designed for their storage was a practice in which Locke was steeped.

Further examples include Francis Bacon – an architect who designed libraries – who sees the mind as a repository. Joseph Addison – an avid coin collector – goes on to liken it to a drawer of medals. Robert Hooke – a laboratory technician – describes the mind as a workshop.¹¹¹ Each of these writers – and others – thus bases their mind-describing metaphor on a kind of “collection” with which he is intimately familiar. The metaphor used is drawn from the writer’s unique background of experience. This experience, focused through the lens of the metaphor, impacts upon the writer’s understanding of the concept being related: the mind.

¹⁰⁹ Sean Silver, *The Mind is a Collection* (University of Pennsylvania Press 2015).

¹¹⁰ *Ibid*, 5.

¹¹¹ *Ibid*, viii and 5.

This curatorial model of imagination neatly summarises the empiricists' position. Imagination is the function of the mind that enables it to "curate" the experiences it has logged, by relating them to one another.¹¹² It may re-arrange and recombine these experiences in order to give them (formally) novel meaning, but it does not *create* new experiences any more than a curator creates the collections in a museum. As will be immediately apparent, the empiricists go further than I do in making this argument. For the empiricists, this notion accounts for *all* human thinking and, ultimately, all human knowledge. As I have said, I do not seek to prove that this is correct. But I will argue that it holds for the narrower category of *legal* thinking in the common law. Empiricist philosophy thus tells us that there is a key information-collecting faculty within the operations of the imagination. However, it also tells us that this is not the entirety of what the imagination does.

2.2.3 Imagination: "thinking of something as possibly being so"

Alan White's work on imagination is particularly helpful since he provides a definition of the concept that is amenable to use in the legal field. He defines imagination as the ability "to think of something as possibly being so".¹¹³ His aim is to define imagination more broadly than some traditional understandings of the concept, particularly those that have insisted that the imagination is solely concerned with the production of mental images (the "imagistic" thesis). White's dismissal of the imagistic thesis is swift and entirely sensible. He points out that there are a number of things we can think of as possibly being so that are not reliant on the production of unique mental images. He gives the example that we could not, if asked to, imagine a myriagon (a 10,000-sided shape) that is distinct from a chiliagon (a 1,000-sided shape).¹¹⁴ Instead we would simply visualise a many-sided shape of an indeterminate number. This particular example is vulnerable to a counter-argument from contemporary proponents of the imagistic thesis who argue that the fact that the mental image produced is not

¹¹² The reader will notice the shift in terminology in this part of the Chapter, in that we are now discussing the *mind* rather than the *brain*. There are distinctions between the two that have relevance in some fields, but I do not propose to draw those distinctions here; they would not assist and would only complicate the argument. For our purposes, it will suffice to note that neurology focuses on measurable matters pertaining to the workings of the brain, whilst philosophy concentrates more holistically on the abstract notion of the mind. Such is the traditional difference in focus between utilitarian science and more abstract philosophy.

¹¹³ AR White, n 83.

¹¹⁴ Ibid, 21.

accurate does not prove that imagination does not always involve the production of *some* image. This is a fair criticism. But we could come up with different examples that insulate White's basic point from this sort of critique. Consider: I can imagine the strain in Anglo-American political relations that might result from the election of a communist President in the USA or a far-right Prime Minister in the UK, but I cannot *image* it; I cannot *visualise* the strain. I can imagine that I am a better pianist than I really am, but I cannot *picture* this enhanced talent.

Imagination fails, in White's account, when we are unable to think of any possibilities in a given situation. It is only "when we cannot imagine what to do or how to solve a problem" that imagination fails us: our ideas run out and "we are unable to think of any possible answer."¹¹⁵ And it is quite clear in White's thesis that the cause of a failure of imagination is a lack of background experience – sense data – upon which the mind can draw when imagining: "If we cannot imagine what it would be like to be a bat it is that we cannot think of the possible sorts of experiences, sensations or feelings that a bat has."¹¹⁶ In this way, White's work is entirely in line with the position staked out in both the neurological and philosophical literature upon which we have dwelt.

White's broader definition of imagining as "thinking of something as possibly being so" thus appears eminently defensible. And it leads him to make a second, important observation. For if imagination involves thinking of something as possibly being so, then "[a]n imaginative person is one with the ability to think of lots of possibilities, usually with some richness of detail."¹¹⁷ But White does not mean that, the more possibilities one is able to think of, the more imaginative the person necessarily is. For he insists that the ability to imagine possibilities is not in itself enough to guarantee that the person is particularly imaginative. It is the ability to imagine possibilities that are *appropriate in the circumstances* that distinguishes the imaginative person from the pure fantasist: "[w]hen such [imagined] possibilities stretch toward the incredible, we regard [the person's] imaginings as fantasies and what he imagines as fanciful or

¹¹⁵ Ibid, 184.

¹¹⁶ Ibid. This is a question posed earlier by Thomas Nagel in 'What is it like to be a bat?' in *Mortal Questions* (CUP 1979).

¹¹⁷ AR White, *ibid*, 185.

even fantastic.”¹¹⁸ This point – about the limits of imagination (which are set by, amongst other things, social norms and social context) – is highly relevant to our attempts to pin down an understanding of “legal imagination”. For, when making legal argument, the lawyer and the judge operate within a field of interpretative possibility that, whilst malleable, is nonetheless constrained. This is especially apparent in a common law system such as the UK’s which aims to restrict the development of the common law to merely “incremental” steps. Constitutional and institutional constraints remain in place (albeit they are not necessarily as constraining as some formalist commentators and judges believe).

Imagination, then, is a process that involves the collection and collation of data every bit as much (indeed, perhaps more so) as it does the re-working, re-ordering and re-combining of that material. It is a process that places us in a position to be capable of “thinking of something as possibly being so”, including giving us an awareness of limitations that may be placed on the idea we are producing. An attentiveness to the shape of the normative space within which our ideas, once produced, will need to sit – in the case of common law norms, the space shaped by constitutional and institutional constraints – is crucial. But it is no more crucial than attentiveness to other background contextual matters (including, *inter alia*, principles and ideals of justice, and the semantics associated with the concept with which we are grappling).

3. Sketching out an Understanding of Legal Imagination

Having gleaned insights into the understandings of imagination (as a broad concept) offered by empiricist philosophy, as well as the work of some leading contemporary psychiatrists, we are now in a position to sketch out an understanding of what imagination means in the legal context, something we will call “legal imagination”.

3.1 Legal Imagination as “Curatorial”

From Modell’s work, we have learned that the imagination involves an unconscious metaphoric process that enables the brain to attribute meaning to observed phenomena.

¹¹⁸ Ibid.

Background data – sense data – is required in order for meaning to be properly attributed. From McGilchrist, we learned that the focused analytical functions of the brain are located in the left hemisphere, whilst attentiveness to context is the task of the right hemisphere. In order to function properly – and to engage in the imaginative exercise Modell talks about – both narrow, analytical focus *and* broad attentiveness are required; each brings distinct but vital ingredients to the mix.

The empiricist philosophers enable us to link these neurological analyses of mental functions to the creative enterprise and the production of creative ideas. We learned of the nature of creativity; human beings are capable of creatively imagining novelty in form, but not in substance. Novelty is, in the empiricists' view, a quality of form rather than substance. In this way, the vision of imagination established by the empiricists is a curatorial one. Imagination may be defined as the ability to think of something as possibly being so. But there are limits on what may be imagined, or may be imagined usefully, in any given situation.

First, we can imagine only that which our left hemisphere can construct out of the pieces of data to which we have already been exposed (and which thus make up its internal world).¹¹⁹ This is an absolute limit on imagination, according to the empiricists and to the neurological evidence we have gleaned from the likes of McGilchrist and Modell. In this sense, imagination takes on a “curatorial” appearance. In order to imagine something beyond that to which we have already been exposed, we must be exposed to more data. The right hemisphere enables such exposure, but where the left hemisphere dominates, attentiveness to the world “out there” (necessary to acquire more data) is diminished.

Second, imagination is limited by a need to conceive of possibilities that are appropriate to the circumstances. This is a normative limit on the extent to which imagined possibilities are useful in particular circumstances. As White tells us, to think beyond the confines of that which is appropriate in the circumstances leads us into the realms of fantasy or fancifulness. Sometimes, this may be desirable (in certain of the

¹¹⁹ I am, for example, only able to imagine the structure of a Ph.D thesis that invokes a bi-hemispheric analysis of the brain because I have read such an analysis (McGilchrist's).

arts, perhaps). But in law, the constraints (constitutional and institutional) on judicial activity constitute the parameters of that which is appropriate. Where the left hemisphere dominates, the fruits of its narrow, focused analysis may not be served back up to the right hemisphere. McGilchrist's | right → left → right | movement breaks down. This results in decisions about how to act on the analysis being made *a-contextually* (i.e. by the left hemisphere alone) rather than with the benefit of contextual awareness. In such circumstances, an awareness of what is appropriate in the circumstances is missing. Two contrasting positions may result from this in the legal context. In some circumstances, it may lead courts to exclude possibilities from their thinking because they assume that the circumstances in which those possibilities are appropriate are narrower than they really are. In others, courts may go the other way and overstep the boundaries of their role (straying beyond the field of interpretative possibility within which they operate¹²⁰). The evidence from English privacy jurisprudence, however, indicates that it is the former that is currently resulting from the dominance of the left hemisphere's mode of thinking.¹²¹

Two further insights can be gained from combining the work of McGilchrist and Modell with our exploration of the empiricist philosophers' position. First, by combining McGilchrist's work with that of the empiricists, we realise that creativity cannot come from a purely self-referential mind. Undiluted self-referentiality – of the sort found in the left hemisphere's internal world – traps the mind in a “hall of mirrors”: no new ideas – not even ideas that are new in form rather than substance – can issue from it. Instead, creativity is seen to require *both* self-referential analysis *and* broad attentiveness to context. This is because meaning-attribution can only take place where the mind is able properly to locate meaning for an observed phenomenon by seeing it in its context. It is also because, as White points out, one limit on imagination is the need to think up ideas that are appropriate *in their context*; attentiveness to

¹²⁰ Richard Mullender, 'Judging and Jurisprudence in the USA' (2012) 75(5) MLR 914, 921. See ch.1, p 65.

¹²¹ It is noteworthy that the British tabloid press in particular have frequently accused judges in privacy cases of going beyond the confines of their role. (See, e.g., Paul Dacre, *Speech by Daily Mail editor-in-chief Paul Dacre at the Society of Editors conference*, 9 November 2008, available at <http://image.guardian.co.uk/sys-files/Media/documents/2008/11/07/DacreSpeech.pdf> (accessed 14/4/17).) The evidence examined in this thesis (particularly in Chapters 1 and 2) suggests such criticism is wholly without foundation.

context is a necessary pre-requisite for ensuring the mind's creativity does not stray into fancifulness or absurdity.

The first insight is related to the second. This is that, as Modell tells us, meaning-attribution is the most basic imaginative function upon which all other exercises of imagination are themselves parasitic. Moreover, although we might not intuit it, meaning-attribution *is* itself imaginative. The metaphoric process underpinning it, which transfers meaning across dissimilar domains – from memory to observed object and *vice versa* – is imaginative in nature; it results in the creation of a novel meaning which is attributed to the observed phenomenon (a new mental connection being formed). The relationship between these two insights is that both the process of meaning-attribution and the use to which attributed meanings can be put are fundamentally dependent upon attentiveness to context. Without the necessary sense data entering the mind's virtual world, meaning cannot be attributed. And without being able to re-perceive the observed object in its context, any meaning attributed to it serves no useful purpose.

The notion of imagination as curatorial in nature fits well with accounts of what lawyers do. For lawyers take existing materials and use them to ground arguments as to how the law should respond to novel fact-patterns. Here there is, of course, normative disagreement as to which existing materials ought to be made use of. Formalists insist that only existing legal doctrine – a body of existing legal rules – is relevant. This is, as we have seen, predicated on the assumption that rigid adherence to existing doctrine will maintain certainty in the law (and also on the normative position that the maintenance of legal certainty is desirable). For the reasons we have discussed at length, the formalist position is problematic.

3.2 Imagination and Legal Pragmatism

What is needed is a mode of adjudication in which attention is paid *both* to traditional left hemisphere concerns (coherence with existing doctrine, and so forth) and also to those of the right hemisphere (broader attentiveness to context), and in which *neither dominates*. The sort of approach that I have in mind here shares much in common with

the version of legal pragmatism promoted by Michael Sullivan.¹²² It is worth saying something about this pragmatic perspective on the practice of judging.

Legal pragmatism originated, as a loosely-aligned body of thought, in the USA during the 20th century and was inspired by the work of pragmatic philosophers – most notably John Dewey, Charles Peirce and William James.¹²³ It has inspired scholars from a range of fields – including Solove’s work on privacy that we encountered in the previous chapter. And it has also come under hostile fire from some heavy-hitting scholars. Ronald Dworkin is particularly critical of legal pragmatism, accusing it of amounting to nothing more than an *ad hoc* approach to adjudication, concerned simply with locating efficient means to reach contingent ends. Pragmatism, Dworkin tells us, “holds that people are never entitled to anything but the judicial decision that is, all things considered, best for the community as a whole, without regard to any past political decision.”¹²⁴

The pragmatist thinks judges should always do the best they can for the future, in the circumstances, unchecked by any need to respect or secure consistency in principle with what other officials have done or will do.¹²⁵

[The pragmatist] rejects ... the very idea of consistency in principle as important for its own sake.¹²⁶

Dworkin thus paints a picture of a purely forward-looking mode of adjudication; a consequentialist mode of thinking that pays no attention to existing doctrine or principle. As Sullivan puts it, “Dworkin’s account makes it sound as if the pragmatist is liable to make radical breaks with past judicial and legislative valuations at any

¹²² Michael Sullivan, *Legal Pragmatism: Community, Rights, and Democracy* (Indiana University Press 2007).

¹²³ The works of John Dewey relevant to Sullivan’s work are too numerous to usefully cite in their entirety here. Much of his response to the Dworkinian attack is taken from three sources: John Dewey, *The Public and its Problems* (H Holt and Co. 1927), John Dewey, *Experience and Education* (MacMillan 1938), John Dewey, *The Sources of a Science Education* (Horace Liveright 1929). See generally Sullivan, n 122, ch.2. See also Charles Peirce, *The Essential Peirce: Selected Philosophical Writings Vol. 1 1867-1893* (Nathan Houser and Christian Kloesel eds, Indiana University Press 1992); and William James, *Pragmatism: The Works of William James* (Harvard University Press 1975).

¹²⁴ Ronald Dworkin, *Law’s Empire* (Hart 1998) 147.

¹²⁵ *Ibid.*, 161.

¹²⁶ *Ibid.*, 162.

moment.”¹²⁷ Existing frameworks are thus absent in the mind of Dworkin’s pragmatist; context alone drives the decision-making process. This makes pragmatism sound like the polar opposite of legal formalism, particularly on a McGilchrist-style analysis. For if formalism is the embodiment of left hemisphere dominance, Dworkin’s pragmatism looks very much like a mode of thinking in which the right hemisphere’s exclusive concern with context dominates.

Dworkin’s highly sceptical view of pragmatism has become regrettably influential. And it does not help pragmatism’s cause that perhaps its most famous self-declared proponent – Richard Posner – reinforces the Dworkinian line of attack. For he not only declares that judges need not respect precedent for its own sake, he goes significantly further, stating that “the past is a repository of useful information, but it has no claim on us.”¹²⁸

However, this Dworkinian vision of pragmatism is, Sullivan argues, deeply misleading. According to Sullivan, Dworkin not only fails to give an accurate representation of legal pragmatism, he has actively created a “straw man” to attack in the name of promoting his own, interpretive theory of adjudication.¹²⁹ Sullivan’s picture of pragmatism is far subtler than Dworkin’s. In Sullivan’s view, pragmatism counsels attention to both a case’s immediate context – its circumstances and the likely future impact of a ruling one way or another – *and* the circumstances that gave rise to the problem facing the court in the first place. These earlier circumstances necessarily include the relevant doctrinal background.

Although pragmatists are interested in developing precedent to help people plan, their primary interest is to see that legal decisions function as effective solutions to the host of problems that gave rise to them (including, of course, the need for predictability).¹³⁰

Pragmatism is anything but hostile, in principle, to studying the relations between present and previous decisions. After all, only through such comparisons can present decisions be improved.¹³¹

¹²⁷ Sullivan, n 122, 39.

¹²⁸ Richard A Posner, *Law, Pragmatism and Democracy* (Harvard University Press 2003) 6.

¹²⁹ Sullivan, n 122, 33.

¹³⁰ *Ibid.*, 40.

¹³¹ *Ibid.*, 41.

For Sullivan, then, “[t]o justify judicial restraint, the pragmatist would examine why it is best *at this particular point in our history*.”¹³² The pragmatic judge’s method involves, Sullivan tells us, three stages. And in the third of these, he invokes the power of imagination.

First, one has to ask: Out of what nexus and power relationships did the guiding [legal] principles arise, and toward what ends are they directed? Second, one must explore how existing institutions and practices purport to, and fail to, embody and apply these principles. Third, as one studies one’s principles in action, both successes and failures, one works hard *to imagine* more satisfying alternatives.¹³³

Sullivan does not elaborate on the imaginative process underpinning this method but there is nothing in his outline that is inherently incompatible with the imaginative method that I have outlined in this chapter. Indeed, given the centrality of the imaginative process to both Sullivan’s pragmatism and the method I have sketched out, the two have much in common.

It is clear that a significant number of scholars and judges are highly critical of the notion that a mode of adjudication might eschew adherence to existing frameworks (i.e. doctrine, principle and so forth) in favour of deciding cases in a purely forward-looking fashion. “Pragmatism” has, in no small part because of Dworkin’s well-known critique of it, attracted the brunt of this criticism. But when we look at the issue through the analytical lens of McGilchrist’s bi-hemispheric analysis, we can see that this whole line of attack is deeply flawed.

The line of attack proceeds from a presumption that – to hijack Newton’s third law of motion – to every mode of adjudication there is an equal and opposite mode of adjudication. Thus rigid formalism, it is thought, must have an equivalent and opposite: pragmatism. But this deduction rests on a faulty premise. Consider the relationship between McGilchrist’s model and the case law we have analysed. It is clear that formalistic thinking exhibits symptoms of left hemisphere dominance. If the “equal and opposite” critique is valid, we would expect pragmatism to exhibit

¹³² Ibid, 64 (emphasis is original).

¹³³ Ibid, 97.

symptoms of right hemisphere dominance. But it does not. For the symptoms of left and right hemisphere dominance *are neither equal nor opposite*. The hemispheres do not have the same takes on the world because they are attuned to doing very different things. Together, collaboratively, they contribute to a capacity to comprehend the world around us. But they do not do so in precisely equal ways.

McGilchrist tells us that “in almost every case what is new must first be present in the right hemisphere, before it can come into focus for the left... [the right hemisphere] alone can bring us something other than what we already know.”¹³⁴ Moreover, only the left hemisphere is capable of the abstraction necessary to build an internalised world of experience. McGilchrist tells us of a patient with left hemisphere damage (who therefore relied on his right hemisphere) who was asked to use pieces of wood to copy a model in front of him. The patient approached the task by placing the pieces of wood on top of the model, indicating an inability to visualise the shape of the model in the abstract.¹³⁵

Without the right hemisphere’s broad vigilance, as we have noted, the brain is robbed of contextual information and can comprehend phenomena only by reference to its existing internal world. This can lead to hubris as the left hemisphere-dominated brain cannot cope with an inability to label phenomena; it labels encountered phenomena the best way that it can, assumes it is right, and cheerfully goes on its way. But imagine a brain in which the capacity to build and draw upon an internalised world of experience is missing. A brain that can attend *only* to context and to the world “out there”, but which cannot relate what is observed to any existing analogue, is *fundamentally* incapable of engaging in the most basic imaginative function: meaning-attribution. And, Modell tells us, without the capacity for meaning-attribution, the unconscious metaphoric process that enables us to comprehend the world around us simply cannot get started. In other words, a left hemisphere-dominated brain can make limited, and sometimes inaccurate, sense of the world around it. A wholly right hemisphere-dominated brain would not be able to make any sense at all of the world

¹³⁴ McGilchrist, n 6, 40.

¹³⁵ Ibid, 50, citing Henry Hécœen and Julián de Ajuriaguerra, *Méconnaissances et hallucinations corporelles: intégration et désintégration de la somatognosie* (Masson & Cie 1952).

around it. It would be a mere conduit through which information passed but did not stay. It would live life like a goldfish.

There is no popularly-counselled mode of adjudication that suggests deciding cases with the moment-to-moment wisdom of a goldfish. Even Dworkin's straw-man take-down of pragmatism does not go that far. For Dworkin's pragmatist has a keen eye on the future and she could not comprehend the consequences of one outcome or another for that future without an existing frame of reference. She must draw on the internalised bank of experience if she is to consider a possible future – if she is to “think of something as possibly being so”.

Sullivan is right, then, when he argues that pragmatism has been sorely misrepresented in a number of high-profile works, whether as a result of hostile (in Dworkin's case) or benevolent (in Posner's case) intentions. Legal pragmatism does not counsel wilfully ignoring precedent and adjudicating solely on the basis of contextual matters and some prediction about the best outcome for the community's future. Rather it counsels judges not to follow existing frameworks of thought – including precedent and principle – *simply for the sake of consistency*. Consistency, Sullivan points out, may well have instrumental value. Pragmatists “value consistency as a means to further ends”; it is one factor to be considered alongside others.

Two points arise from this. First, the mode of adjudication that the more imaginative jurisprudence that I have outlined in this chapter involves, shares much in common with the pragmatic approach outlined by Sullivan (albeit our focuses are different and I offer an account, not present in Sullivan's book, of the imaginative process itself). He justifies his formulation of pragmatism by drawing in detail on the philosophy of American pragmatism; he relies heavily on the primary source material of thinkers like Dewey, James and Peirce. I have formulated this more imaginative jurisprudence by drawing on two entirely different schools of thought (empiricist philosophy and contemporary psychiatry). The fact that several discrete foundations support an essentially similar mode of adjudication strengthens the case for defending that mode.

Second, the revelation that formalism does not necessarily have a workable “equal and opposite” mode of adjudication is made possible by utilising McGilchrist's model of

the bi-hemispheric brain. This further justifies the use of this model, since it can lead us away from a common and mistaken way of thinking. Consider how many of the judges and legal scholars upon whose work this thesis has dwelt have cautioned, in one way or another, against the risk that purely contextual thinking might supplant the role that doctrinal consistency has in legal reasoning. Lord Hoffmann was clearly concerned by this in *Wainwright*.¹³⁶ In their own distinctive ways, Ewing, Heydon and Kavanagh share this concern.¹³⁷ But context simply *cannot* supplant formal reasoning entirely. This is not a normative assertion but a logical one; a mode of thinking that involved consideration of nothing but context – which is always a passing, momentary entity – would be a nonsense. No sense could be made of it, nor could any sense result from it.

When Posner says that the past “has no claim on us”, he fails to recognise this. For the basis of our ability to comprehend *anything* we observe relies on past experience that enables us to understand observed phenomena by reference to a previously-encountered analogue. We never see anything as it *is*; we see things only as they *were*. (It takes time – albeit an almost immeasurably small amount of time – for sense data, e.g. visual data, to enter the brain. It then takes a further amount of time for the brain to process this information.) Indeed, the past constantly – and most of the time unconsciously – influences our very perception of the world. This is partly due to the time lag in information reaching first the right hemisphere, and then in passing to the left. And it is also in part due to the fact that the analogues that the left hemisphere uses to make sense of the incoming data are, of course, rooted in older experience; they are rooted in the past.

The most that right hemisphere-like attentiveness to immediate context can do is to be added into the mix alongside existing frameworks. Here, it can enhance them, re-contextualise them and enable their expansion. That is the limit Sullivan’s pragmatism places on the usefulness of contextual information. And it aligns with the limit to which McGilchrist and Modell’s work alludes. So even though Sullivan’s doctrinal focus is very different to mine (he focuses on constitutional review of legislation in

¹³⁶ See ch.2, section 1.1.

¹³⁷ See ch.1, pp 47 (Heydon), 48-49 (Ewing) and 51-53 (Kavanagh).

the USA), the core feature of his pragmatism – its use of contextual information – has much in common with my idea of a more imaginative jurisprudence.

3.3 A More Imaginative Jurisprudence as a Counterweight to Left Hemisphere Dominance

This more imaginative jurisprudence would treat the symptoms currently afflicting our common law in respect of privacy. And although this sort of approach has not been adopted in English privacy jurisprudence, there are – happily enough – examples of it in comparable jurisdictions. We will consider two such examples in the next chapter.

Before we do so, however, one further thing must be said. To exercise legal imagination is, I have argued, to adopt a mode of adjudication that involves collaboration between the left and right hemispheres' modes of thinking, within which each has a role to play and neither dominates over the other. But none of what I have argued necessarily translates into an argument for more “creative” judging. It is perhaps a recipe for judicial activism, but it is no guarantee of it. For a judge who is attentive to context as well as the demands of precedent may still – entirely legitimately – conclude that she ought not to recognise a novel head of liability, or to develop the common law in a particular direction. She might conclude, all things considered, that it is preferable to maintain the status quo. It is the “all things considered” bit that is important. It is entirely possible to judge imaginatively and yet adopt an anti-activist position. This is something Dolding and Mullender articulate, in different terms, when they talk of judges “engaging in activism of an anti-activist stripe”.¹³⁸ All that this more imaginative approach to judging can do is to make it possible for a significant development of the common law – such as the recognition of an intrusion tort – to take place. It does not guarantee that it will, nor does it in itself provide a persuasive normative argument that such a development *should* take place. It is simply a corrective to the prevailing situation in England, where a dominant left hemisphere mode of thinking *precludes* such a development.

¹³⁸ Lesley Dolding and Richard Mullender, ‘Tort Law, Incrementalism, and the House of Lords’ (1996) 47(1) NILQ 12, 31.

Having sketched out our definition, and come to the realisation that creative legal imagination is – just as we might have intuited – a necessary pre-requisite for the establishment of a novel head of tort liability at common law, we are in a position to think about what a more imaginative privacy jurisprudence might look like in practice. This we shall consider in our next and final chapter.

5

Judging the Whole Mosaic: Towards a More Imaginative Jurisprudence

History is selective. Give us instead
the whole mosaic, the tesserae,
that we may judge if a period indeed
has a pattern and is not merely
a handful of coloured stones in the dust.

Mosaic, John Hewitt¹

Introduction

In the previous chapter we explored the nature of imagination and considered what it might mean in a legal context. Drawing on contemporary psychiatry and empiricist philosophy, I argued that imagination amounts to more than just the “eureka!” moment when new ideas occur. It is, more fully, a process that involves the identification and collation of background contextual information (data) that may ultimately lead to an imaginative moment in which an individual re-works, re-arranges or re-combines that information into a novel form. This is the curatorial nature of the imagination. Having considered in the abstract what this might mean for the practice of judging, we will in this chapter look to see it in operation.

We will examine in detail two cases from other common law jurisdictions – New Zealand and Ontario, Canada – that exemplify imagination (of the sort outlined in the previous chapter) at work in a legal context. Both cases involve the recognition, for the first times in their respective jurisdictions, of privacy torts of intrusion upon seclusion and thus both represent significant advances on the current status quo in English law. Both cases give us an opportunity to observe the legal imagination at work and to identify hallmarks of its operation.

¹ John Hewitt, *The Collected Poems of John Hewitt* (Frank Ormsby ed, paperback edn, Blackstaff Press 1992) 313-314.

1. The Implications for Judging of a More Imaginative Jurisprudence

A more imaginative jurisprudence would involve an approach to judging that corrects at least some of the problems identified with our privacy jurisprudence in Chapters 1-3. In those chapters, we uncovered a common theme running through the courts' apparent inability to escape the trappings of doctrinal formalism and semantic underdeterminacy; a lack of attentiveness to broader, contextual matters that, if brought into focus, would augment the narrow, insular focus placed on doctrinal and semantic issues (respectively). In short, contextual awareness has been squeezed out of our jurisprudence. A more imaginative jurisprudence would see it (re)take its place.

Let us consider the implications of this more imaginative approach for the practice of judging. It will be recalled that, at the outset of this thesis, I brought up Ronald Dworkin's well-known prescription that judges should endeavour to see law in its best light, and suggested that, without attentiveness to context, judges would – to extend the metaphor – be judging in, at best, semi-darkness.² To put the point another way, the more imaginative approach I am outlining might be correlated with the poet John Hewitt's plea for us to understand the past more fully by seeing “the whole mosaic”. History, as it is written, is, he tells us, selective. It ignores “marginalia” – matters that are lost to time, having been deemed trivial or unworthy of attention or record. Ignoring such marginalia, however, prevents us from seeing the whole mosaic and thus also from coming to fully-informed judgments about what has transpired. It is noteworthy that the activity of judging is central to the point he makes (“that we may judge”).³ Without attentiveness to marginalia, he implies, we cannot truly judge whether recorded history accurately reflects what has happened.

I am not concerned, in this thesis, with proving that Hewitt's observation is true of our accounts of history. However, I am concerned with the common law and his point is most certainly true of rigidly formalistic jurisprudence. We have seen how context

² Ronald Dworkin, *Law's Empire* (Hart 1998). See Introduction, p 20.

³ It is unlikely to be a coincidence that, in the final stanza of *Mosaic* (quoted at the head of this chapter) the verb “judge” occupies not only a central place in terms of its meaning, but also in terms of its layout (the word is literally central, both in its line and in the stanza as a whole).

quickly becomes, at best, the stuff of marginalia.⁴ Recall Baroness Hale’s brief discussion of the *Wainwright* case in *Campbell*. Our law, she told us, is powerless to help people like the Wainwrights because “it cannot, even if it wanted to” develop sufficiently powerful and focused privacy protections to respond to their situation. The impact of the House of Lords’ earlier decision in *Wainwright* itself is quickly marginalised. The decision has very rarely been brought up again in our domestic case law since. And on those occasions on which it has been, the claimants themselves have rarely been mentioned.⁵ This is despite the fact that, having failed to obtain redress in the domestic courts, the Wainwrights succeeded in a case brought before the European Court of Human Rights.⁶

Inattentiveness to context does not significantly inhibit a rigidly formalistic approach to adjudication, at least in cases where a reasonably clear rule of general application can be gleaned from precedent (for example, the oft-cited notion that English law recognises no general tort of invasion of privacy that is attributed to *Wainwright*). However, if the courts are to move away from such an approach towards a more imaginative jurisprudence (assuming, just for the moment, that such a move is desirable), a lack of attention to context becomes deeply problematic. Without context, as we have seen, meaning-attribution is frustrated. For instance, the very question that Perry’s “strong Burkean” approach to adjudication would require courts to ask of precedent – whether there is a sufficiently good reason why it ought not to be followed – would be undermined by a lack of contextual awareness. A court will struggle to consider whether a precedent such as *Wainwright* ought to be followed today if it is

⁴ Hewitt particularly highlights the tendency of historical accounts to omit – as marginalia – the effects of actions upon individuals.

⁵ Out of the 63 domestic (including Scotland) cases in which the *Wainwright* ruling has been mentioned, of which only a handful were concerned with the privacy and/or *Wilkinson* aspects of the decision, just five have referred to the facts of that original ruling (i.e. to the impact upon the claimants of the actions of the prison staff). Four of those five judgments were handed down between 2004-2006 (*Hipgrave v Jones* [2004] EWHC 2901 (QB), [2005] 2 FLR 174; *KD v Chief Constable of Hampshire* [2005] EWHC 2550 (QB); *C v D* [2006] EWHC 166 (QB); and *Mbasogo v Logo Ltd (No.1)* [2006] EWCA Civ 1370, [2007] QB 846). The combined judgment of Lady Hale and Lord Toulson in the Supreme Court case of *O v A* [2015] UKSC 32, [2016] AC 219 is the only recent decision to refer explicitly to the facts of *Wainwright*, and itself relates only the suffering of the male claimant, Mr Wainwright (at [58]). It is noteworthy, moreover, that in none of the cases which have related the facts of *Wainwright* has the court utilised the case as authority for the proposition that English law recognises no general tort of privacy (the formal barrier). Conversely, in each of the decisions which has utilised *Wainwright* in order to support the proposition that English law recognises no general tort of privacy, the facts of *Wainwright* and the plight of its claimants have been entirely overlooked.

⁶ *Wainwright v UK* (2007) 44 EHRR 40.

blind to the consequences that *Wainwright* actually had for the claimants in that case, and – by extension – to the consequences that following it would have for the parties in a novel case.

As I made clear at the outset of this thesis, I do not in this work take the further step of arguing that judges *ought* to develop a tort of intrusion (although it might initially seem implicit in the arguments that I am making). Others have made that argument and I can add no value by repeating what they have said. Instead, I argue that, *if it is* desirable to develop an intrusion tort (as others have argued), it can *only* be achieved through the common law if a more imaginative jurisprudence is embraced. Moreover, this more imaginative jurisprudence would bring with it the benefit of correcting the left hemisphere dominance that, we noted in the previous chapter, is symptomatic of what would, in humans, be regarded as mental illness.

A more imaginative jurisprudence is, as we saw in the previous chapter, one that is more attentive to context. It is a jurisprudence that is prepared to pay more attention to the world “out there”, not in order to replace its attentiveness to the internal world it already knows (the world of established doctrine) but in order to *supplement* it and provide a means by which that internal world can be re-appraised and, if needed, revised. It provides a means by which the implications of strict adherence to the internalised world of doctrine can be appreciated and more fully understood. This more imaginative jurisprudence would see the two *collaborate* in the manner that McGilchrist insists must take place in the properly functioning brain. It would exclude neither the marginalia nor the more prominent events from the picture; it would seek to judge with the benefit of being able to see “the whole mosaic”, without excluding either the more colourful or the more mundane tiles.⁷

There are likely to be some hallmarks of this more imaginative jurisprudence. It would entirely defeat my purpose if I was to offer an exhaustive list and thus what follows is

⁷ It may be objected that such an approach would, even if it were possible, drown courts in an ocean of background data. Such an argument would suggest that, if one is searching for the needle comprising the sensible disposition of a case in a haystack of relevant doctrine, adding yet more hay to the stack (in the form of background data) can only hinder the task. To such an objection I would repeat what I have said before; that I am not arguing normatively in favour of this approach at this stage. I am simply arguing that such an approach is a necessary prerequisite to escaping the left hemisphere-centric approach to adjudication currently dominating the English common law.

fairly tentative and merely indicative. I have already suggested that one hallmark might be an attentiveness to the factual circumstances underpinning particular precedents. Such hallmarks might also include: consideration of broader forms of incrementalism (as opposed to excluding from consideration all but narrow incrementalism), explicit consideration of constitutional justifications for adopting broader incremental modes, reference to the underlying principles and/or ideals of justice informing a particular branch of the law or law more generally, and efforts to make sense of under-determinate terms by reference to “bottom-up” (or, at least, non-“top-down” methods of conceptualisation). Broadly speaking, evidence of attentiveness to context is evidence of the imaginative process at work. And if we can locate some of these hallmarks in judgments, we will have grounds to regard those judgments as imaginative.

Having given an overview of what a more imaginative jurisprudence might entail in practice, we now turn to look in detail at two cases from outside the English common law that exhibit precisely the sort of imaginative jurisprudence with which we are concerned. Both, moreover, engage directly with the question of whether to recognise novel intrusion torts for the first time in their jurisdictions.

2. Case Studies

The two cases upon which we will focus in this chapter are ones that we have, briefly, encountered earlier in the thesis. The first is *Jones v Tsige*, from the Ontario Court of Appeal, Canada. The second, *C v Holland*, was heard just a few months later in the New Zealand High Court. Both cases have clear relevance to this thesis’ concerns. In both, the plaintiffs argued – successfully – for the recognition in their respective jurisdictions of torts of intrusion upon seclusion for the first time. Both jurisdictions (Canada⁸ and New Zealand) are common law jurisdictions that inherited much of their legal tradition from English law. Prior to the recognition of these novel intrusion torts, both jurisdictions’ legal protections for privacy were remarkably similar to English law’s – protections were limited at common law and focused on informational privacy

⁸ The exception to this in Canada is the province of Québec, which operates a civil law system, owing to its French heritage.

violations rather than intrusive conduct. Both cases thus provide a basis for an almost (though obviously not exactly) direct comparison with English law and give us a good idea of the sort of judicial methodology required to take the less-travelled path towards recognising intrusion as a tortious wrong.

2.1 *Jones v Tsige*⁹

2.1.1 *An Overview of Relevant Ontarian Law*

Before we can scrutinise in detail the approach to developing the common law that is exemplified by the judgment in *Jones*, it is necessary to give an overview of the relevant doctrinal background in Ontarian law, the better to formulate the comparison with English law. The pre-*Jones* doctrinal background in Ontario on privacy bore much similarity to post-*Campbell* English law. Breach of confidence operated along *Coco* lines to provide some protection for informational privacy violations.¹⁰ Whilst several lower court decisions had suggested an action in tort could lie for intrusion,¹¹ others had rejected the idea – one in particularly strong terms.¹² Further decisions left the matter open.¹³

Ontario, as a Canadian province, is also subject to the Canadian *Charter of Rights and Freedoms*.¹⁴ This operates in a manner similar to the UK's Human Rights Act (HRA), in that it impacts upon domestic private law through a process that, in UK terms, we would identify as a form of “weak indirect horizontal effect”.¹⁵ In *Dolphin Delivery*,

⁹ *Jones v Tsige* 2012 ONCA 32, 108 OR (3d) 241.

¹⁰ *Coco v AN Clark (Engineers) Ltd* [1968] FSR 415. In Canada, see *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574; *Cadbury Schweppes Inc v FBI Foods Ltd* [1999] 1 SCR 142. Both are cited as authority for the proposition that breach of confidence provides some protection for individuals' informational privacy rights in Ontario in the recent superior court decision in *Jane Doe 464533 v ND* 2016 ONSC 541.

¹¹ See *Motherwell v Motherwell* (1976) 73 DLR (3d) 62 (Alta SC App Div); *Dyne Holdings Ltd v Royal Insurance Co of Canada* (1996) 135 DLR (4th) 142, leave to appeal to SCC refused, [1996] SCCA No 344.

¹² *Euteneier v Lee* (2005) 77 OR (3d) 621 (CA), [2005] SCCA No 516.

¹³ See *Saccone v Orr* (1981) 34 OR (2d) 317 (Co Ct); *Roth v Roth* (1991) 4 OR (3d) 740 (Gen Div).

¹⁴ *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act 1982, Schedule B to the Canada Act 1982 (UK), c11 (the *Charter*).

¹⁵ See Gavin Phillipson, ‘The Human Rights Act, “Horizontal Effect” and the Common Law: a Bang or a Whimper?’ (1999) 62 MLR 824. See also Alison Young, ‘Mapping Horizontal Effect’ in David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (CUP 2011) 39-42. Under a “weak” model of indirect horizontal effect, courts are not bound rigidly to apply higher-order rights within lower-order private law, but rather may draw on the values underpinning those higher-order

the Supreme Court clarified the manner in which the *Charter* would impact upon the shape of private law doctrine:

Where ... private party “A” sues private party “B” relying on the common law ... the *Charter* will not apply ... [H]owever, this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to that question must be in the affirmative.¹⁶

The *Charter* differs from the UK’s HRA, however, in not expressly providing for a wide-ranging right to privacy (unlike Art.8 ECHR), but instead providing a protection, in s.8, against unreasonable search and seizure. The Canadian courts have, however, read into s.8 a broader underlying value of privacy, and have based upon that underlying value further privacy protections at common law.¹⁷ (Sharpe JA engages in precisely this sort of exercise in *Jones*, as we will shortly see.)

2.1.2 An Overview of the Jones Case

The appellant (plaintiff) and respondent (defendant) both worked for the Bank of Montreal (BMO), at different branches. They did not know each other and had only one, indirect connection; the respondent was in a relationship with the appellant’s former husband. Over a period of around four years, the respondent accessed the appellant’s BMO bank accounts at least 174 times using her workplace computer. This gave the respondent access to personal information including the appellant’s date of

rights in order that they can then be reflected in the development of lower-order law. A disadvantage of such a model is that it may give rise to uncertainty as to the manner in which these higher-order values might impact upon any given case. Moreover, it provides judges with wide scope for differing opinions as to the application of these values. Thus it is potentially less effective as a rights-ensuring model than a “strong” form of indirect horizontality. However, just as it is less definitive, so it provides greater scope for the judge who is concerned with “paying due regard to morally significant rights” to draw on an indeterminate concept – “values” – to justify significant common law development (Richard Mullender ‘Tort, human rights, and common law culture’ (2003) 23(2) OJLS 301, 308). It places greater control of the direction in which the common law will develop into the hands of the lower-level judiciary (ie judges below the level of the court which adjudicates definitively on higher-order rights and values – the Canadian Supreme Court and the European Court of Human Rights, in our examples).

¹⁶ *RWDSU v Dolphin Delivery Ltd* [1986] 2 SCR 573, 603 per McIntyre J.

¹⁷ Recently such an exercise resulted in the recognition of a private facts tort in Ontario in *Jane Doe 464533 v ND*, n 10. However, that decision has been quashed on appeal for procedural reasons (2017 ONSC 127) and now awaits a full trial of the issues (the defendant having not been present and having not presented a defence at the original hearing).

birth, marital status and residential address, as well as transaction details. Notably, the respondent did not disseminate any of this information. The respondent admitted accessing the appellant's records and apologised.

The appellant brought claims for invasion of privacy and breach of fiduciary duty and moved for summary judgment. The respondent brought a cross-motion to dismiss the claims summarily. Whitaker J, the motions (first instance) judge, granted the respondent's motion and dismissed both claims, awarding costs against the appellant in the amount of C\$35,000. The motions judge considered himself bound by the decision in *Euteneier v Lee*, where it had been held that there was no "free-standing" right to privacy under either Canadian *Charter* law or at common law.¹⁸ Whitaker J found himself hampered by a formal barrier; he could conceive of no other answer to *Jones*' claim than that Ontario law recognises no tort of intrusion. The reasoning for this is heavily dependent upon a rigid adherence to that bare proposition in *Euteneier*.

The appellant, Jones, appealed against Whitaker J's dismissal of the invasion of privacy claim, averring that the motions judge had erred when holding that Ontario law did not recognise a cause of action for invasion of privacy.

In the Court of Appeal, Sharpe JA, with whom Winkler CJO and Cunningham ACJ (*ad hoc*) agreed, held that Ontario law does indeed recognise an "intrusion upon seclusion" tort protecting privacy interests and reversed Whitaker J's finding. Sharpe JA formulated the novel tort in terms closely reminiscent of the USA's intrusion tort, before awarding the plaintiff C\$10,000 in (compensatory) damages.

2.1.3 Imagination in the Jones Judgment

In *Jones*, Sharpe JA clearly faced the problem posed by the formal barrier (as Whitaker J had at first instance). In this section, we will see how his judgment evidences the legal imagination at work as he overcomes this barrier. However, it also becomes clear, upon close scrutiny of the case, that he did not face the obstacle of the semantic barrier. It is worth briefly commenting on this before we proceed further.

¹⁸ (2005) 77 OR (3d) 621 (CA), [2005] SCCA No 516 (*Euteneier*) per Cronk JA at [63].

We will see later, when we scrutinise the case of *Holland*, evidence of the imaginative process at work in a judgment that overcomes the semantic – as well as the formal – barrier. The semantic barrier, however, does not feature in *Jones*. There are two factors to which this may be attributed. First, Canada’s proximity to the USA has had a clear influence on the direction in which its common law privacy protections have developed. As Allen Linden and Bruce Feldthusen observe, Canadian privacy law “seem[s] to be drifting closer to the American model”.¹⁹ The formulations of Prosser’s four privacy torts have provided guidance when Canadian courts have developed causes of action protecting different aspects of privacy. For example, Ontario – pre-*Jones* – already recognised a tort of misappropriation of image.²⁰ This feature of Canadian privacy law leads to the second reason for the absence of the semantic barrier. The presence of multiple forms of privacy protection means that Canadian law – and Canadian lawyers and judges – are already keenly aware of privacy’s pluralistic nature.²¹ They have become adept at recognising a variety of (in Daniel Solove’s terms) privacy problems in different forms, and developing distinct protections to respond to them.²² This clearly differs from the situation in the UK and other Commonwealth jurisdictions where privacy protection in the common law originates in an equitable doctrine of confidentiality that has been (in some murky fashion) adapted, re-worked or developed, or which has served as the clear inspiration for an informational tort couched in similar terms.

A. Attentiveness to the Doctrinal Background

With the formal barrier presenting the only significant obstacle to the recognition of an intrusion tort in *Jones*, let us examine Sharpe JA’s judgment for evidence of the imaginative process at work. We will see that he exhibits a broad attentiveness to a range of doctrinal sources that go far beyond the bare assertion (in the *Euteneier* case) that Ontario knew no tort of intrusion (the assertion that led Whitaker J to dismiss the

¹⁹ Allen M Linden and Bruce Feldthusen, *Canadian Tort Law*, 9th ed (Toronto: LexisNexis, 2011) at 59, cited in *Jones*, *ibid*, at para 23. This observation appears all the more accurate today, given the recent recognition (also in Ontario) of a US-style private facts tort in *Jane Doe 464533 v ND*, n 10.

²⁰ *Krouse v Chrysler* (1973) 1 OR (2d) 225 (Ont CA), followed in *Athans v Canadian Adventure Camps Ltd* (1977) 17 OR (2d) 425 (HCJ).

²¹ See ch.3, p 141.

²² See ch.3, pp 154-155.

claim at first instance). He considers authorities from Ontario, from other Canadian provinces, from federal statute and from foreign jurisdictions.

Sharpe JA starts by surveying the common law landscape in respect of protection for privacy interests in Ontario and the rest of Canada. He points out that “[t]he question of whether the common law should recognize a cause of action in tort for invasion of privacy has been debated for the past one hundred and twenty years”.²³ Protection for privacy interests has been found in Canada through various legal mechanisms including breach of confidence, defamation, copyright, nuisance and “various property rights”.²⁴ However, Sharpe JA adopts the observation of Adams J from *Ontario (Attorney General) v Dieleman* that “invasion of privacy in Canadian common law continues to be an inceptive, if not ephemeral, legal concept”.²⁵

It was stated in *Euteneier* that “there is no ‘free standing’ right to dignity or privacy under the *Charter* or at common law”.²⁶ Sharpe JA, however, distinguishes the facts of *Euteneier* with relative ease, remarking that the (above) statement “could not have been intended to express any dispositive or definitive opinion as to the existence of a tort claim for [the] breach of a privacy interest”.²⁷ Sharpe JA eschews authorities that are inconclusive or even (in one case) hostile to the notion that an intrusion-type tort of privacy could be recognised. He asserts that in other Ontario cases, “where the courts did not accept the existence of a privacy tort, they rarely went so far as to rule out the *potential* of such a tort”.²⁸ Rather, “[t]he clear trend in the case law is, at the very least, to leave open the possibility that such a cause of action [for intrusion upon seclusion] does exist.” Acknowledging that, “[i]n Canada, there has been no definitive statement from an appellate court on the issue of whether there is a common law right of action corresponding to the intrusion on seclusion category,” Sharpe JA points out that, in several cases, courts have refused to strike out such claims.²⁹ Indeed, he goes

²³ *Jones*, n 9, [15].

²⁴ *Ibid.*

²⁵ (1994) 117 DLR (4th) 449, cited in *Jones*, *ibid.*, [15].

²⁶ *Euteneier*, n 18.

²⁷ *Jones*, n 9, [38].

²⁸ *Ibid.*, [31].

²⁹ *Ibid.*, [25]. Sharpe JA goes on to cite *Somwar v McDonald's Restaurants of Canada Ltd* (2006) 79 OR (3d) 172 (SC); *Nitsopoulos v Wong* (2008) 298 DLR (4th) 265 (Ont SC); *Capan v Capan* (1980) 14 CCLT 191 (Ont HC); *Lipiec v Borsa* (1996) 31 CCLT (2d) 294 (Ont Gen Div); *Shred-Tech Corp v Viveen* 2006 CarswellOnt 7762 (Ont SC).

on to argue that “dicta in at least two cases [from other provinces] support the idea” that a common law right of action for intrusion-type privacy violations can lie.³⁰ He thus states that “Ontario ... at the very least, remains open to the proposition that a tort action will lie for an intrusion upon seclusion.”³¹

Sharpe JA then looks to several legislative provisions from both Ontario and federal law that relate to aspects of personal privacy.³² The respondent argued that the presence of legislation in the field of privacy “reflects carefully considered economic and policy choices” that are beyond the capacity of the courts,³³ and that, therefore, the “complex legislative framework” put in place to deal with some aspects of privacy by the federal and Ontario governments precludes the adaptation of the common law to provide redress in these circumstances.³⁴ Tsige thus submitted that

expanding the reach of the common law in this area would interfere with these carefully crafted regimes and that any expansion of the law relating to the protection of privacy should be left to Parliament and the legislature.³⁵

Sharpe JA rejects Tsige’s argument on this point. In support of his decision to do so, he cites statutory privacy regimes that have been enacted by other Canadian provinces. He notes that four common law provinces (British Columbia, Manitoba, Saskatchewan and Newfoundland) have enacted statutory torts of invasion of privacy, and further that the civil law province of Québec explicitly protects a right to privacy in its civil code.³⁶ Having located these statutory regimes, Sharpe JA points out that none of them

³⁰ *Jones*, *ibid.*, [33]. See *Motherwell and Dyne Holdings*, both n 11.

³¹ *Jones*, *ibid.*, [24]. The case establishing liability for ‘appropriation of likeness’ to which Sharpe JA is referring is *Athans v Canadian Adventure Camps Ltd* (1977) 17 OR (2d) 425 (HCJ).

³² He specifically notes (at [47]) the Personal Information Protection and Electronic Documents Act 2000; the Personal Health Information Protection Act 2004, Sch. A; the Freedom of Information and Protection of Privacy Act 1990, the Municipal Freedom of Information and Protection of Privacy Act 1990; and the Consumer Reporting Act 1990.

³³ *Ibid.*, [48].

³⁴ *Ibid.*, [47]-[54]. Tsige had argued that the existence of various statutes precluded the common law development of a privacy tort. These statutes included: the Personal Information Protection and Electronic Documents Act, 2000, SC 2000, c5; the Personal Health Information Protection Act, 2004, SO 2004, c3; the Freedom of Information and Protection of Privacy Act, RSO 1990, cF31; the Municipal Freedom of Information and Protection of Privacy Act, RSO 1990, cM56; and the Consumer Reporting Act, RSO 1990, c C33. Sharpe JA states that ‘it would take a strained interpretation to infer from these statutes a legislative intent to supplant or halt the development of the common law in this area’ (at [49]).

³⁵ *Ibid.*, [48].

³⁶ *Ibid.*, [52]-[53].

offer a conclusive definition of what constitutes an invasion of privacy, and observes that

The courts in provinces with a statutory tort are left with more or less the same task as courts in provinces without such statutes. The nature of these acts does not indicate that we are faced with a situation where sensitive policy choices and decisions are best left to the legislature. To the contrary, existing provincial legislation indicates that when the legislatures have acted, they have simply proclaimed a sweeping right to privacy and left it to the courts to define the contours of that right.³⁷

He concludes, therefore, that “it would take a strained interpretation to infer from these statutes a legislative intent to supplant or halt the development of the common law in this area”.³⁸ There is evidence of right hemisphere thinking here. Tsige’s submission is insular and formalistic; her argument that the mere presence of statutes in this field is sufficient to indicate a parliamentary intention to abrogate the common law is superficial and relies on the automatic treatment of statute’s presence as a Razian exclusionary rule. Sharpe JA has a significantly broader field of vision and is far more attentive to context. For he delves into the *content* of those statutes and further provisions not brought up by Tsige (those from other provinces). With the benefit of having that content at his fingertips, he relates it far more closely to the issue at hand. It is this that enables him to determine that the best interpretation of the legislative intent behind the Ontarian statutes is the polar opposite of that for which Tsige argues; that the under-determinate language pervading these various statutory provisions implicitly discloses a commitment to leaving the courts to determine the scope of privacy protections.

Sharpe JA’s survey of relevant doctrinal matters does not, however, end there. Having considered law directly on the point of intrusion, he then considers the manner in which the common law ought to develop by reference to higher-order public law principles in the form of the *Charter*. He points to “the principle that the common law should be developed in a manner consistent with *Charter* values”.³⁹ He explains that “*Charter* jurisprudence identifies privacy as being worthy of constitutional protection

³⁷ Ibid, [54].

³⁸ Ibid, [49].

³⁹ Ibid, [46]. See the *Charter*, n 14.

and integral to an individual's relationship with the rest of society and the state".⁴⁰ This is particularly important since the Canadian *Charter* (unlike the UK Human Rights Act) does not contain a provision explicitly protecting privacy.⁴¹ He draws on the treatment of s.8 of the Charter in *Hunter v Southam Inc.*,⁴² where Dickson J "observed that the interests engaged by [section] 8 are not simply an extension of the concept of trespass, but rather are grounded in an independent right to privacy held by all citizens".⁴³ Sharpe JA then points to "three distinct privacy interests" that have been recognised in the *Charter* jurisprudence: personal, territorial and informational privacy.⁴⁴ Sharpe JA then further flags up Supreme Court authority for the proposition that, whilst the *Charter* "does not apply to common law disputes between private individuals", the common law ought to be developed in a manner consistent with *Charter* values.⁴⁵

A useful comparison might be drawn here between Sharpe JA's reliance upon "*Charter* values" as a basis for common law development and the effect which the HRA has had upon the English common law in respect of privacy. Both the *Charter* and the European Convention (given domestic effect in England by the HRA) are higher-order forms of law. The principles which they contain can be seen to impact upon the manner in which lower-order (municipal/domestic) law is shaped as it is developed. Sharpe JA draws upon the *values* which underpin the *Charter* and locates, in the absence of any express provision protecting a general privacy right, a general principle that privacy is worthy of protection. He then utilises this "*Charter* value" to drive his development of the common law. This method bears much similarity to the notion of "weak indirect horizontal effect" which has been mooted, alongside other

⁴⁰ *Jones*, *ibid*, [39].

⁴¹ Privacy has, however, been held by the Canadian Supreme Court to be encompassed within s.8 of the *Charter*'s protection against unreasonable searches. Section 8 simply provides: "Everyone has the right to be secure against unreasonable search or seizure." See *Hunter v Southam Inc.* [1984] 2 SCR 145 (SCC) and *R v Dymont* [1988] 2 SCR 417 (SCC).

⁴² *Hunter*, *ibid*, 158-159.

⁴³ *Jones*, n 9, [39].

⁴⁴ *Ibid*, [41].

⁴⁵ *Ibid*, [45]. Sharpe JA cites: *RWDSU v Dolphin Delivery Ltd*, n 16; *R v Salituro* [1991] 3 SCR 654; *Hill v Scientology* [1995] 2 SCR 1130; *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd* 2002 SCC 8, [2002] 1 SCR 156; and *Grant v Torstar* 2009 SCC 61 [2009] 3 SCR 640 as examples of instances where the Supreme Court has developed the common law "in a manner consistent with *Charter* values".

theories of horizontal effect, as one possible way in which the HRA might affect English private law.⁴⁶

Here, we have seen that Sharpe JA displays a broad attentiveness to relevant doctrine, crucially including doctrine from outside the immediate field (i.e. beyond tort doctrine on privacy in Ontario) and that of a higher-order nature (in the form of the *Charter*). Whitaker J's method (at first instance) appears to have been one that was narrowly-focused on a small body of doctrine exclusively concerned with privacy in Ontario (in regarding *Euteneier* as dispositive of the matter) and thereby resembling a left hemisphere-centric approach. By contrast, Sharpe JA's approach discloses evidence of right hemisphere activity in the thought process. His broader attentiveness to a wider range of doctrine is characteristic of the right hemisphere's wide vigilance at work. This is the first piece of evidence that the more imaginative jurisprudence with which we are concerned is present in his judgment.

B. Design Inspiration

Having surveyed and considered a range of domestic law in the field, Sharpe JA then turns his attention to privacy protections in comparable, foreign jurisdictions. He looks to the USA, the UK, New Zealand and Australia, noting the presence of the four-tort framework in the former, the prevalence of breach of confidence/misuse of private information in the UK and the private facts tort in New Zealand.⁴⁷ Australia, he notes, had "left the door open" to a privacy tort in *Lenah Game Meats*,⁴⁸ and a privacy tort was subsequently recognised in the lower court decision in *Grosse*.⁴⁹ He highlights

⁴⁶ For a summary of what is meant by "weak indirect horizontal effect", see n 15.

⁴⁷ *Jones*, n 9, [55]-[64].

⁴⁸ *Lenah Game Meats Pty Ltd v Australian Broadcasting Corp.* [2001] HCA 63, 185 ALR 1 (HC Aust).

⁴⁹ *Grosse v Purvis* [2003] QDC 151, Aust Torts Reports 81-706. In *Grosse*, an intrusion tort was recognised by the Queensland District Court. However, this decision has not been given the support of the higher courts, and the ALRC saw no likelihood that it would be followed in the near future. In *Kalaba v Commonwealth of Australia* [2004] FCA 763, the Federal Court declined to follow *Grosse*, although regrettably no detailed reasoning was provided for this decision and the court appeared to rely simply on the absence of earlier authority. Likewise, although the question of whether an intrusion tort ought to be recognised was raised by the Victoria Court of Appeal in *Giller v Procopets* [2008] VSCA 236, (2008) 79 IPR 489, the Court declined to comment on it, since the claim was amenable to disposition on other grounds. Moreover, Australia's traditionally conservative approach to elaborating novel tort doctrine weighs in against the likelihood of the judicial development of such a cause of action in the near future. Sharpe JA's analysis in *Jones* does not refer to the cases that come after *Grosse*, and so it is possible that he overestimates the level of protection likely to be given to

New Zealand and Australian authorities (on informational privacy violations) which, like the American formulation of the intrusion tort, require the defendant's conduct to be "highly offensive to a reasonable person" before liability will be imposed.⁵⁰ From an early stage (paragraph 18) of the judgment, however, Sharpe JA expresses a preference for the USA's *Second Restatement of Torts* as a guide to how an intrusion tort might be formulated for Ontario. (This is in preference to, for example, the English and New Zealand models of protecting privacy through informational causes of action – MPI and the *Hosking* private facts tort, respectively.) He notes that, in the comment section within the *Restatement*, it is explained that "the [intrusion] tort includes ... listening or looking, with or without mechanical aids, into the plaintiff's private affairs ... even though there is no publication or other use of any kind"⁵¹ of any information obtained.

Having conducted a broad survey of domestic and foreign law relating to privacy, Sharpe JA concludes:

[The r]ecognition of such a cause of action [for intrusion upon seclusion] would amount to an incremental step that is consistent with the role of this court to develop the common law in a manner consistent with the changing needs of society.⁵²

Sharpe JA states that the newly recognised intrusion tort will "essentially adopt[] as the elements of the action ... the [USA's] *Restatement (Second) of Torts* (2010) formulation".⁵³ He then outlines the "key features" of the new intrusion tort, which he models closely on William Prosser's from the USA's *Restatement*. This contains a three-part structure:

[F]irst ... the defendant's conduct must be intentional, within which I would include reckless; second, ... the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and

victims of intrusion-type privacy violations in Australia, though this does not actually impact noticeably on his conclusions.

⁵⁰ *Jones*, n 9, [63]-[64].

⁵¹ *Restatement of the Law (Second): Torts* (2d), vol 3 (American Law Institute 1977) 376, cited in *Jones*, *ibid*, [20].

⁵² *Jones*, n 9, [65].

⁵³ *Ibid*, [70].

third, ... a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish.⁵⁴

Here, Sharpe JA displays further evidence of right hemisphere thinking. First, in casting a wide net in his search for inspiration for the design of a novel intrusion tort he considers a range of possible approaches, including the possibility of taking inspiration from individual elements of foreign torts (for instance, the possibility of adopting the “highly offensive to a reasonable person” standard from the New Zealand private facts tort). Second, in ultimately preferring the American model, he exhibits a classically right hemisphere attentiveness to context. For Ontario (and Canada more generally) is a jurisdiction that is influenced by US law – particularly in privacy. Ontario has already, as he has noted, recognised a US-style tort of misappropriation of image. In preferring Prosser’s formulation for an intrusion tort, Sharpe JA evidences an awareness of the shaping force already exerted by US privacy law on Ontario, and a keenness to maintain a degree of consistency in the provincial law’s direction of travel.

C. Corrective Justice

We have seen that one of the central strands in Sharpe JA’s reasoning is his appeal to the notion that the “*Charter* values” (in conformity with which Canadian common law ought to be developed) include respect for a right to privacy. This is one of the features of the judgment that indicates the presence of imagination (along the lines I have sketched out). Each of these features indicates a mode of thinking that eschews strict formalism and – crucially – seeks out additional background, contextual data before adding that data into the mix.

However, notwithstanding his express reference to them, there remains a weakness in the case that Sharpe JA makes for “*Charter* values” justifying common law development of such a significant type (the recognition of a novel head of tort liability). His reference to “*Charter* values” is – perhaps necessarily – both brief and

⁵⁴ Ibid, [71]. For comparison, Prosser’s original intrusion tort under US law is formulated in the following terms: “One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person.” (See the *Restatement*, n 51.)

a little vague. A “value” is an ephemeral concept and so there is a limit to the precision with which it may ever be used. Even so, Sharpe JA devotes just eight paragraphs (out of 93) in his judgment to an explanation of his use of privacy as an underlying “*Charter* value”.⁵⁵ Moreover, the authority he cites in relation to privacy being an underlying “*Charter* value” cannot be said to be entirely dispositive of the question forming the basis of Jones’ appeal.⁵⁶ Rather, he establishes that: (a) privacy (including informational privacy) is an underlying “value”,⁵⁷ and (b) a line of Supreme Court authority directs that the common law ought to be developed in accordance with “*Charter* values”. But manoeuvring from that position to the conclusion that (a) and (b) support “the recognition of a civil action for damages for intrusion upon the plaintiff’s seclusion” (i.e. in *this* particular case), logically requires a third step: “(c)”. That third step is the point at which it must be convincingly argued that the plaintiff’s privacy interest would not be adequately protected unless the court takes the particular step of recognising an “intrusion” tort. This step is missing from the “*Charter* values” argument.

The “*Charter* values” argument, then, indicates an awareness of broader concerns to do with the shaping influence that higher-order public law (in the form of the *Charter*) has on Canadian common law. However, this does not in itself provide full justification for the step that Sharpe JA takes. There are grounds to believe that he recognised the limitations of the “*Charter* values” argument, that may be drawn out by the ways in which he circumvents its weakness. As we have seen, he considers common law authority on the point; if this disclosed positive authority for the recognition of an intrusion tort then, arguably, he would have successfully avoided the need to rely on “*Charter* values”. But the authority on point was inconclusive. So a further appeal to common law authority cannot form the basis of the missing step “(c)”. Instead, to supplement the “*Charter* values” argument, Sharpe JA makes a further appeal to underlying principle: the tortious ideal of “corrective justice”. Seeing the link between the gap in the “*Charter* values” argument and the ideal of corrective justice is suggestive of the sort of “aha!” moment McGilchrist associates with a properly-functioning brain exhibiting cross-hemispheric collaboration.

⁵⁵ *Jones*, *ibid*, [39]-[46].

⁵⁶ *Ibid*, [14].

⁵⁷ *Ibid*, [43].

The theory that “corrective justice” is the ideal which underpins tort law has become one of the two major theories attempting to explain the purpose of tort law generally (the other being one of “distributive justice”).⁵⁸ Corrective justice is a form of justice that imposes upon wrongdoers the duty to repair their wrongs and the wrongful losses their wrongdoing occasions.⁵⁹ It requires that where an individual has suffered harm as the result of a wrongful act by the defendant, the defendant ought to compensate the plaintiff for that harm.⁶⁰ In so doing, the defendant is made to “correct” the harm she has caused.

For leading scholars in the field, the pursuit of corrective justice within tort law necessitates a strong focus on harm and the cause of harm.⁶¹ This requires a focus on the type and severity of harm caused to the plaintiff. There are significant indications that a commitment to the pursuit of corrective justice underpins the judgment of the Ontario Court of Appeal in *Jones*.⁶² There is a strong focus on the harm that the plaintiff suffered and the cause of that harm (i.e. the defendant’s wrongful conduct).

⁵⁸ I do not, in this work, express a view on whether corrective justice (or, indeed, distributive justice) really is, as some argue, the core principle underpinning tort law. For my purposes it suffices to note that it is one possible principle that may underpin tort law that has been the focus of considerable work and attention from others.

⁵⁹ See, for example, Jules Coleman, ‘A Mixed Conception of Corrective Justice’ (1991-2) 77 *Iowa Law Review* 47 at 441 [Coleman]; Stephen Perry, ‘The Moral Foundations of Tort Law’ (1991-2) 77 *Iowa Law Review* 441 [Perry]; Ernest Weinrib, ‘Legal Formalism: On the Immanent Rationality of Law’ (1988) 97 *Yale LJ* 949, ‘Right and Advantage in Private Law’ (1989) 10 *Cardozo L Rev* 1283 and ‘The Special Morality of Tort Law’ (1989) 34 *McGill LJ* 403 [Weinrib]; Richard W Wright, ‘Substantive Corrective Justice’ (1991-2) 77 *Iowa Law Review* 625 [Wright]; Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (Harvard University Press, 1989); also Richard Epstein, ‘A Theory of Strict Liability’ (1973) 2 *Journal of Legal Studies* 151; and ‘Causation and Corrective Justice: A Reply to Two Critics’ (1979) 8 *Journal of Legal Studies* 477. A helpful analysis of the core similarities and differences between the arguments of Coleman and Weinrib (who are arguably the leading lights in the corrective justice debate) is offered by William Lucy in *The Philosophy of Private Law* (OUP 2006) ch.8: ‘Corrective Justice’.

⁶⁰ One of the most useful considerations of the various corrective justice theories espoused by a range of tort theorists is to be found in Perry’s article (ibid). Perry considers the suitability of corrective justice as a moral foundation for the protection of privacy interests at 457.

⁶¹ John Gardner appraises the theories of Weinrib and Coleman in particular and, defending their theories against the criticism of functionalists, argues that corrective justice “cannot be reduced out”, that “that any complete explanation of tort law - whatever other considerations it may invoke - cannot but invoke considerations of corrective justice”. See John Gardner, ‘What is tort law for? Part 1: the place of corrective justice’ (2011) 30(1) *Law and Philosophy* 1, 1 (Gardner).

⁶² Corrective justice is not explicitly mentioned in *Jones*. However, it is very much implicit in the judgment. Moreover, Justice Sharpe was kind enough to confirm to me personally (and entirely informally), when I had the opportunity to speak with him at the Institute of Advanced Legal Studies, London, following a lecture he gave there on 21 May 2012, that a desire to do corrective justice had informed his thinking in *Jones*. I am indebted to him for this insight.

Sharpe JA is particularly concerned by the potential threats to privacy posed by “technological change” (i.e. “the internet and digital technology”).⁶³

[R]outinely kept electronic data bases render our most personal financial information vulnerable. Sensitive information as to our health is similarly available, as are records of the book we have borrowed or bought, the movies we have rented or downloaded, where we have shopped, where we have travelled, and the nature of our communications by cell phone, e-mail or text message.⁶⁴

Sharpe JA held that Tsige had caused Jones “distress, humiliation or anguish” by her actions.⁶⁵ He is scathing in his summary of Tsige’s behaviour: “[H]er [Tsige’s] actions were *deliberate, prolonged and shocking*. Any person in Jones’ position would be *profoundly disturbed* by the *significant intrusion* into her *highly personal information*”.⁶⁶

The intrusion tort formulated by Sharpe JA in *Jones* thus follows a methodology designed precisely to focus on, and attribute significant weight to, the type and severity of harm suffered by the plaintiff and the *cause* of that harm. The intrusiveness of the defendant’s behaviour was a key, determining factor in the *Jones* case.

We can press further the analysis of the corrective justice impulse present in the judgment by reference to Lord Atkin’s well-known opinion in the landmark tort case of *Donoghue v Stevenson*.⁶⁷ In *Donoghue*, the House of Lords recognised, by a 3-2 majority, a general duty of care in English (and Scottish) negligence law: “the neighbour principle”.⁶⁸ Lord Atkin’s leading judgment for the majority is replete with references that impliedly bespeak a commitment to corrective justice. He dwells on an

⁶³ *Jones*, n 9, [67].

⁶⁴ *Ibid*. See also Samuel D Warren and Louis D Brandeis, ‘The Right to Privacy’ (1890) 4 Harv L Rev 193, in which the writers argued for the recognition of an actionable right to privacy under US tort law in response to perceived threats to privacy interests posed by the advent of photographic technology.

⁶⁵ *Jones*, n 9, [89].

⁶⁶ *Ibid*, [69] (emphasis added).

⁶⁷ [1932] AC 562, 1932 SC (HL) 31 (*Donoghue*).

⁶⁸ The House of Lords in *Donoghue* was split on the issue of whether or not a general duty of care could be rooted in existing precedents. Lord Buckmaster argued that earlier cases such as *Heaven v Pender* (1883) 11 QBD 503 could not support the recognition of a generally applicable duty. Lord Atkin, in the majority, argued that existing cases could be read in such a way as to support a general duty.

underlying “fundamental principle” that, he argues, lends authority to his proposition that English law recognises a general duty of care owed by defendant to claimant in circumstances where the elements of foreseeability of harm and proximity between the parties can be established.⁶⁹ The inference we may draw from his judgment in *Donoghue* is that, although he does not explicitly give it a name, Lord Atkin has in mind a principle that tort law ought to require a defendant who wrongfully causes harm to a claimant to compensate for that wrong. In other words, Lord Atkin’s key concern is that the law ought to do corrective justice. For Lord Atkin, this is sufficient to justify engaging in quite radical development of the common law:

I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilized society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong.⁷⁰

The clearest indication of Sharpe JA’s commitment to corrective justice is found when he states openly:

[M]ost importantly, we are presented in this case with facts that cry out for a remedy. ... The discipline administered by Tsige’s employer ... did not respond directly to the wrong that had been done to Jones. In my view, the law of this province would be sadly deficient if we were required to send Jones away without a legal remedy.⁷¹

Clearly of great concern to Sharpe JA is the need to provide Jones with a legal remedy for the wrong inflicted upon her by Tsige. This is the motivating factor – the “reason for action”⁷² – behind the recognition of the intrusion tort. Similarly, Sharpe JA’s judgment is concerned to impose liability “based upon a general public sentiment of moral wrongdoing for which the offender must pay”.⁷³

⁶⁹ *Donoghue*, *ibid*, 598.

⁷⁰ *Ibid*, 583.

⁷¹ *Ibid*.

⁷² On reasons for action in deontological moral theory, see Richard Mullender, ‘Privacy, paedophilia and the European Convention on Human Rights: a deontological approach’ (1998) *Public Law* 384, 386.

⁷³ *Donoghue*, n 67, 580. I acknowledge here that I am assuming that Sharpe JA equates (at least roughly) a “general public sentiment of moral wrongdoing” to Lord Atkin’s notion of a “social wrong”. This seems to accord with the general tone of his (Sharpe JA’s) judgment, but it does not matter for my purposes if these two, similar expressions do not mean exactly the same thing. My point is that both invoke the ideal of corrective justice.

Sharpe JA's view that Ontario law would be "sadly deficient" if it did not provide Jones with a remedy mirrors Lord Atkin's concern that failing to recognise a general duty of care would be a "grave defect in the law ... so contrary to principle".⁷⁴ This statement of Lord Atkin's would not look out of place in Sharpe JA's judgment. The latter's appeal to *Charter* and common law jurisprudence, to the case law of foreign jurisdictions and to a range of academic comment on the subject of privacy, all point towards a strong concern to fashion a cause of action aimed at providing redress for an "obvious social wrong". Indeed, given the concern originally expressed by Warren and Brandeis with the potential for technology-assisted intrusions into the private sphere, as well as the wealth of legislation across many jurisdictions designed to prevent abuses of electronic data-storage and communications technology, the obviousness of this "social wrong" is readily apparent.

D. Wide Incrementalism

A further – and related – feature of Sharpe JA's judgment that suggests that it is an imaginative one is his adoption of a wide incremental mode of common law development. Looking at the judgment, we can locate substantial evidence that the approach he takes closely matches Dolding and Mullender's "wide incrementalism",⁷⁵ or Craig's "principled approach",⁷⁶ model. (Craig's approach is actually cited approvingly in the judgment.⁷⁷) The evidence is not separate from those aspects of the judgment upon which we have already focused, but when we reconsider them we can see how they fit into a wide incremental approach. First, Sharpe JA recognises a new category of tort: "intrusion upon seclusion", rejecting Tsige's argument that it is not open to the court to do so. This immediately establishes that some significant *development* of the law is taking place. Second, we have already noted the extent to which Sharpe JA is untroubled by the case of *Euteneier v Lee*, and by the lack of precedent indicating an affirmative answer to the question of whether Ontario tort law previously recognised an action for intrusion. Third, his strong focus on the

⁷⁴ Ibid, 582.

⁷⁵ Lesley Dolding and Richard Mullender, 'Tort Law, Incrementalism, and the House of Lords' (1996) 47(1) NILQ 12.

⁷⁶ John DR Craig, 'Invasion of Privacy and Charter Values: The Common Law Tort Awakens' (1997) 42 McGill LJ 355.

⁷⁷ Ibid. Cited in *Jones*, n 9, [46].

(perceived) need to provide redress for a deserving claimant who suffered harm to a significant interest (i.e. privacy) as a result of a wrongful act by the defendant (i.e. intrusive conduct) evidences a desire to give effect to the ideal of corrective justice – tort law’s “protective purpose”. This indicates that an underlying legal principle is providing him with guidance on the direction in which the law ought to develop. Fourth, Sharpe JA’s appeal to the higher-order “*Charter* value” of privacy as a justification for the recognition of a new category of tort, rather than dwelling on the limited existing doctrine, indicates that he perceives “incrementalism” as embracing, and allowing for, a wide approach. Here we have seen in Sharpe JA’s judgment an incremental mode that features an appeal to two distinct underlying principles: privacy as a “*Charter* value” and the need to do corrective justice in this particular instance.

We have seen, then, that Sharpe JA locates an underlying ideal of justice – corrective justice – that he attributes to tort law generally and which he uses to inform his understanding of the direction in which that body of law ought to develop as it responds to a novel form of harm-occasioning behaviour (intrusion into privacy). Moreover, as he ties this underlying principle to his development of the law, we see evidence of the wide mode of incrementalism being deployed. The right hemisphere is clearly at work here; in identifying an underlying principle of justice informing the law in this field, and in identifying a constitutionally permissible mode of incrementalism that goes beyond the narrowness shown by the first instance judge (and some earlier cases), and also in tying the two together, Sharpe JA exhibits the broad vigilance associated with that mode of thought.

2.1.4 Summarising the Evidence of Imagination in Jones

In *Jones*, there is clear evidence that a right hemisphere mode of thinking plays a role in the judgment of Sharpe JA. It is present in his broad attentiveness to doctrine (beyond the narrow confines of Ontarian privacy cases), to higher-order *Charter* values, to the underlying principle of corrective justice and to the availability of a wide mode of incrementalism. It is equally clear, however, that this mode does not dominate. For he remains attentive to the notion that his law-making power is limited (by the need to act merely incrementally) and to the need to take cognisance of relevant doctrine in the field (and to distinguish, rather than ignore, any that does not assist).

The formal barrier Sharpe JA faces is thus overcome – and without great difficulty. Of course, *Jones* does not present Sharpe JA with the second – semantic – barrier. English courts can have little chance of recognising an intrusion tort in this jurisdiction unless both the formal and semantic barriers can be overcome. At this point, we will turn our attention to the second of the two cases upon which this chapter focuses. As we shall see, in our second case, both barriers come into play – and an imaginative approach to adjudication is key to overcoming them.

2.2 *C v Holland*⁷⁸

The case of *Holland* concerned a plaintiff who had been the victim of covert video-taping by the defendant whilst she had been showering. The defendant had recorded the plaintiff in states of partial and complete undress on two occasions and had transferred the recordings to his personal computer's hard disk. Upon discovering the existence of the videos, the plaintiff brought an action for invasion of privacy. In the New Zealand High Court, the defendant agreed that he had, as a matter of fact, invaded the plaintiff's privacy, but averred that no cause of action existed in tort which provided relief.

In *Holland*, Whata J was faced with a situation where “[t]here [was] no existing authority in New Zealand for the proposition that an intrusion upon an individual's seclusion ... [gave] rise to an actionable tort”.⁷⁹ In fact, New Zealand case law had, in terms reminiscent of the House of Lords in *Wainwright v Home Office*,⁸⁰ expressly rejected the possibility of a *general* tort of privacy in *Hosking v Runting*, when constructing a tort aimed solely at guarding against the publication of private facts.⁸¹ (Albeit the court in *Hosking* had not expressly ruled out the possibility of recognising, at some point in the future, further discrete privacy torts.⁸²) As such, in both cases, the judges involved could not provide a tortious remedy to the plaintiffs without making significant developments in the common law.

⁷⁸ *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672 (*Holland*).

⁷⁹ *Ibid*, [8].

⁸⁰ [2003] UKHL 53, [2004] 2 AC 406.

⁸¹ [2004] NZCA 34; [2005] 1 NZLR 1 (*Hosking*).

⁸² *Ibid*, [118].

Whata J also considers privacy protections in tort (and equity) in other common law jurisdictions (much as Sharpe JA does in *Jones*). He finds no support for an intrusion tort in English or Australian law, but finds clear support for it in the USA's *Second Restatement* and in the recent (at the time) development in Ontario. Aware of the developments in Ontario heralded by the *Jones* decision just seven months earlier, Whata J explains that "the most appropriate course is to maintain as much consistency as possible with the North American tort". He thus formulates a novel New Zealand intrusion tort in very similar terms:

[I]n order to establish a claim based on the tort of intrusion upon seclusion a plaintiff must show:

- (a) An intentional and unauthorised intrusion;
- (b) Into seclusion (namely intimate personal activity, space or affairs);
- (c) Involving infringement of a reasonable expectation of privacy;
- (d) That is highly offensive to a reasonable person.⁸³

Whata J cites *Jones* several times in his judgment. He is clearly of the view that Ontario's new intrusion tort has been formulated virtually identically to the United States' one (hence his assertion that there is, in essence, a single "North American" model for such torts).⁸⁴ He is concerned (much as Sharpe JA was in *Jones*) by threats to privacy which are "increasing with technological advances".⁸⁵ He also expresses a concern – doubtless familiar to those judges who take cognisance of relevant overseas authority whilst engaging in significant common law development – that citizens of his jurisdiction (New Zealand) ought not to "be afforded [lesser protection than Ontarians] from unwanted intrusions".⁸⁶

The New Zealand High Court thus recognised, for the first time in the jurisdiction, a tort of intrusion into seclusion. When we scrutinise this judgment, we can uncover evidence – as with the *Jones* decision – of imaginative judging taking place.

⁸³ *Holland*, n 78, [94].

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*, [86].

⁸⁶ *Ibid.*, [87].

2.2.1 *Imagination in the Holland Judgment*

Like Sharpe JA in *Jones*, Whata J traces the notion of an intrusion tort back to Prosser and the USA's *Second Restatement*.⁸⁷ He locates a remarkably similar case from the USA that highlights the harm caused by this sort of privacy invasion. In *Lake v Wal-mart Stores, Inc.*,⁸⁸ a consensually-taken photograph of two young women naked together in the shower was circulated (without the plaintiffs' consent) amongst members of the local community by employees of Wal-mart (the store responsible for developing the photographic negatives). The *Lake* case was an appeal against a decision to strike out the plaintiffs' claim for invasion of privacy. (The District Court (at first instance) and Court of Appeals had previously determined that no such tort was recognised in Minnesota.) In reversing both these courts, the Supreme Court of Minnesota recognised, for the first time in the state, a tort of intrusion.⁸⁹ The case is thus both factually and doctrinally similar to *Holland* (in that, prior to *Lake*, there was no precedent establishing such a tort in Minnesota).

Whata J cites the Minnesota Supreme Court's treatment of the nature of the privacy right, and in so doing draws attention to the harm suffered by the plaintiffs:

The right to privacy is an integral part of our humanity; one has a public persona, exposed and active, and a private persona, guarded and preserved. The heart of our liberty is choosing which parts of our lives shall become public and which parts we shall hold close.

Here [the plaintiffs] Lake and Weber allege in their complaint that a photograph of their nude bodies has been publicized. One's naked body is a very private part of one's person and generally known to others only by choice. This is a type of privacy interest worthy of protection.⁹⁰

A related theme in Whata J's judgment is the "value" of privacy. He describes privacy as having "value" (or being a "value" recognised within domestic or foreign law) no

⁸⁷ *Ibid*, [12]-[14].

⁸⁸ 582 NW 2d 231 (Minn 1998).

⁸⁹ The federal nature of the United States prevents the *Second Restatement* having automatic effect; each state determines for itself whether to adopt individual common law torts. *Lake* was the first intrusion case to succeed in Minnesota, in 1998.

⁹⁰ *Lake*, n 88, 235, cited in *Holland* at [19].

fewer than 27 times in his judgment. He links the “value” of privacy to “the protection of personal autonomy”.⁹¹ In so doing, he enjoys a wide range of judicial and academic support (not least from Sharpe JA in *Jones*).⁹²

His reference to *Lake* and his repeated further references to the “value” of privacy suggest a conscious engagement with the semantic barrier to privacy torts. For it points up a recognition, on Whata J’s part, of the existence of the under-determinacy problem surrounding the term “privacy”, and, moreover, a keenness to resolve that difficulty. Further, we can glean a significant insight into his method for resolving this difficulty in his judgment.

When we scrutinise his approach to locating a sufficiently tight definition of the privacy right with which he is concerned to enable him to drive forward legal development, we see something that bears similarity to the “mapping” approach (locating pockets of certainty) that I suggested (in Chapter 3) might prove useful. I argued that although a generally agreed definition of “privacy” might prove forever elusive, it is possible to locate pockets of certainty in which there is strong consensus in respect of an aspect of its meaning. Whata J’s approach, like my suggested approach, fastens on the wrongful act of intrusion as a potential pocket of certainty. Over the course of 64 paragraphs in his judgment,⁹³ he searches for evidence of consensus on the wrongfulness of intrusive conduct – and locates plenty.

Whata J surveys legal responses to various forms of intrusive conduct in New Zealand⁹⁴ and in other common law jurisdictions.⁹⁵ He dwells at length on various legislative provisions dealing with intrusive conduct as an actionable legal wrong in New Zealand. For whilst New Zealand law had not previously recognised a tort of intrusion upon seclusion, and had only in relatively recent times recognised a publication of private facts tort,⁹⁶ the legal landscape was “not devoid of consideration

⁹¹ *Holland*, n 78, [86].

⁹² See *Jones*, n 9, [66]-[67]. See also *Griswold v Connecticut* 381 US 479 (1965); Edward J Bloustein, ‘Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser’ (1964) 39 *New York University Law Review* 962, 971 and Stanley I Benn, ‘Privacy, Freedom and Respect for Persons’ in *Nomos XIII: Privacy* (J Roland Pennock and John W Chapman eds, Atherton Press 1971).

⁹³ *Holland*, n 78, [11]-[75].

⁹⁴ *Ibid*, [21]-[32].

⁹⁵ *Ibid*. Whata J looks to the UK at [49]-[55], Australia at [56]-[61], and Canada at [62]-[64].

⁹⁶ *Hosking*, n 81.

of protection of privacy from intrusion.”⁹⁷ Relevant provisions include the Broadcasting Standards Authority’s Privacy Principles,⁹⁸ Principle 4 of the Information Privacy principles under the Privacy Act 1993,⁹⁹ the protection from unreasonable search or seizure under s.21 New Zealand Bill of Rights Act 1990, the offence of making an intimate personal recording under s.216H Crimes Act 1961, and the right to quiet enjoyment of a rented property under s.38 Residential Tenancies Act 1986. Each of these suggests strongly by a process of inductive reasoning (either explicitly or by clear implication) that acts which intrude significantly into personal space, property or affairs are regarded as wrongful under New Zealand law. Moreover, Whata J locates further legislative evidence that “freedom from intrusion” is a core privacy concept in New Zealand when he cites the Search and Surveillance Act 2012. Under s.46 of the Act, surveillance by an officer of the state which involves observing “private activity in private premises, and any recording of that observation, by means of a visual surveillance device” requires a warrant before it may lawfully be conducted.

The method he adopts here is significant. Whata J is not simply searching the limited privacy doctrine in tort law (which, in New Zealand, was – before *Holland* – confined to the publication of private facts tort) for indications that it might also cover (or be amenable to development in order to cover) intrusion. Instead he casts his net more broadly, searching for indications across a spectrum of legislative *indicia* that intrusive conduct of one sort or another – generally linked by the target of that conduct (be it personal space, property or affairs) – is regarded as both wrongful and legally actionable. In short, he does not confine his search for indications that intrusive behaviour is subject to legal sanction to the narrow tort field with which he is ultimately concerned. This is clear evidence of right hemisphere thinking playing a prominent role in his method. A judge thinking in a left hemisphere-dominated mode

⁹⁷ *Holland*, n 78, [22].

⁹⁸ Principle 3 stated (when *Holland* was decided): “It is inconsistent with an individual’s privacy to allow the public disclosure of material obtained by intentionally interfering, in the nature of prying, with that individual’s interest in solitude or seclusion. The intrusion must be highly offensive to an objective reasonable person.” (Cited in *Holland*, *ibid*, at [23].) This can be found in the Broadcasting Standards Authority’s *Free-to-Air Television Code of Broadcasting Practice* (May 2011 edn, 2011), Appendix 2, p 12 (available at https://bsa.govt.nz/images/codebook/Free_to_Air_TV_Code_2008.pdf, accessed 26/7/2017). The guidance has since been revised.

⁹⁹ Under s.6 of the Act, Principle 4 prohibits the collection of personal information by means that “[i]ntrude to an unreasonable extent upon the personal affairs of the individual concerned”.

would have stuck rigidly (as English courts have done) to consideration of existing tort doctrine in the privacy field.¹⁰⁰

Further evidence of Whata J's imaginative approach can be found in the latter stages of his judgment, where he responds (proactively) to objections to the recognition of a novel privacy tort. He identifies three such possible objections:

- (a) Privacy per se is not justiciable.
- (b) It is for Parliament, not the Judiciary, to resolve the weight to be accorded to privacy as a value within a complex matrix of competing values, interests and rights.
- (c) A privacy tort is not necessary.¹⁰¹

Whata J then engages with each and responds to them, finding none of these objections to be insurmountable obstacles to the recognition of an intrusion tort. Before exploring his particular response to each, however, it is important to note that his very identification and clear elucidation of these three discrete objections evinces a keen awareness of potential obstacles to the recognition of an intrusion tort. Moreover, the first two of these objections, as we shall see, essentially exemplify the semantic and formal barriers with which this thesis has been concerned.

The justiciability point essentially focuses on the problems caused by the semantic barrier. It is the argument that "privacy" is too unwieldy a concept to be amenable to useful judicial elaboration. Whata J's response to this is encapsulated in the detailed analysis that we have already scrutinised (and upon which we need not dwell further), whereby he engages in a mapping exercise in search of those pockets of certainty in respect of the narrower issue of intrusion. In concluding that the justiciability objection does not prevent the recognition of an intrusion tort, he is unequivocal that he sees

¹⁰⁰ The English courts have, of course, included consideration of equitable doctrine as well as tortious doctrine, by considering the action for breach of confidence. My use of "tort" in this sentence is a shorthand for the particularly idiosyncratic tort + equity combination that underpins privacy in the English common law.

¹⁰¹ *Holland*, n 78, at [65].

sufficient consensus on the legally wrongful nature of conduct that intrudes into the private sphere to be able to make use of the (more limited) concept of intrusion:

I accept ... that a *general* claim to privacy may not be amenable to rules of law, or in fact be transformed into a rule of law giving rise to an actionable claim. But in New Zealand the transformation of aspects of privacy into rights and *unwanted intrusion* into a wrong is already well underway and in my view it is now too late to cogently argue that judges in New Zealand are unable to adjudicate on the content and boundaries of a privacy right *to be free from intrusion upon seclusion*.¹⁰²

The second objection – that the creation of a novel privacy tort ought to be left to Parliament, rather than be the subject of judicial action – is a New Zealand iteration of the formal barrier. In responding to this objection, Whata J returns to the seminal New Zealand case of *Hosking v Runting*, in which the Court of Appeal confirmed the existence of a tort of publication of private facts. (There had been several High Court cases recognising such a tort, but there had been no conclusive affirmation of its existence.¹⁰³) He noted three competing visions of the judicial role that were elaborated by the Court in that case. Owing to its seminal status, and its prominence within Whata J's judgment, it is worth dwelling on *Hosking* a little further.

A. *Hosking v Runting*

Hosking is an unusual case because, despite the seminal confirmation of a private facts tort by the Court, the plaintiffs were unable to avail of it. The major judicial disagreement within the case thus goes not to the disposal of the case, but to the decision to recognise the private facts tort at all. The majority of the judges in the case are in favour of recognising the private facts tort (Keith and Anderson JJ disagreeing on that point). Yet within the majority there are clear methodological differences. Gault P and Blanchard J take the view that recognising a private facts tort amounts to an incremental step, given that New Zealand already (like England) recognises a

¹⁰² *Ibid*, [74] (emphasis added).

¹⁰³ *P v D* [2000] 2 NZLR 591 (HC); *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716; *Morgan v Television New Zealand Ltd* HC Christchurch CP67/90, 1 March 1990; *C v Wilson and Horton Ltd* HC Auckland CP765/92, 27 May 1992; *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415.

doctrine of confidentiality.¹⁰⁴ They consider a range of authorities from a number of jurisdictions (including the USA, the UK, Canada and Australia, as well as parts of international law), which provide some assistance in formulating the new tort, though less assistance in persuasively defending the form of incrementalism adopted.

Tipping J takes what Whata J describes as a “more direct route” to the recognition of the private facts tort.¹⁰⁵ In Tipping J’s view, there is no legislative *indicia* of an intention by Parliament to abrogate the law-making function of the judicial branch in respect of privacy protections at common law. The presence of the Privacy Act 1993 cannot, he states, be seen as an effort to “stifle” judicial development of the common law.¹⁰⁶

In a judgment that rejects the recognition of the private facts tort favoured by the majority, Keith J (with whom Anderson J agreed) takes the view that the fact that Parliament has legislated on some privacy issues indicates its belief that further privacy issues ought to be left to “specialist bodies”, and that it ought not to be for “the regular judiciary ... to make the judgments about the release of certain sensitive information.”¹⁰⁷ For Keith J, the presence of a multitude of legislative provisions relating to various aspects of privacy means that the legal landscape

with its varieties of planting, some of it very dense and deliberate, and its contrasting bare plains, is sharply distinct from that in *Donoghue v Stevenson* ... where, for the majority and minority alike, common law authorities and principle completely occupied the field.¹⁰⁸

He later clarifies that he is “not saying that the array of legislation *absolutely* excludes the proposed tort. Rather, the statutory context *tells strongly* against the existence of such a tort.”¹⁰⁹

¹⁰⁴ In New Zealand, breach of confidence is frequently described as a tort, rather than an equitable doctrine, but its contours essentially mirror the English doctrine (rooted, as it is, in the same line of case law).

¹⁰⁵ *Holland*, n 78, [81].

¹⁰⁶ *Ibid*.

¹⁰⁷ *Hosking*, n 81, [194].

¹⁰⁸ *Ibid*, [185].

¹⁰⁹ *Ibid*, [207] (emphasis added).

B. Adjudicative Modes in *Hosking*

Let us consider the modes of adjudication evident in these judgments. Although his reasoning differs considerably, Keith J's position in *Hosking* has all the practical effect of Lord Hoffmann's in *Wainwright*. His is the position of the quintessential Razian formalist; his preference is for legislative intervention in all but the most straightforward of developmental cases. Moreover, just like Lord Hoffmann's judgment, Keith J's offers no explanation of just when – that is, in what circumstances – this non-absolute but “strongly telling” statutory dissuasion from the recognition of such a tort might permit such recognition. This leaves unanswered an obvious question: whether sufficient scope to do so actually remains within the method he espouses.

Gault P and Blanchard J, meanwhile, stake out a position bearing some hallmarks of a fairly narrow mode of incrementalism. Whilst sensitive to the separation of powers and the risk of usurping the legislature, they see clear scope for the courts to expand the common law in cases where justice demands a remedy. They expressly reject Keith J's notion that the presence of legislation in this field indicates a parliamentary intention to preclude the courts from developing common law privacy protections.

We do not draw from the absence from the Bill of Rights Act [1993] of a broad right of privacy any inference against incremental development of the law to protect particular aspects of privacy (or confidence) as may evolve case by case.¹¹⁰

However, it may also be noted that some of the phraseology in their judgment suggests a wider form of incrementalism. For instance, they state that the courts “are at pains to ensure that any decision extending the law to address a particular case is *consistent with general legal principle* and with public policy”.¹¹¹ It will be recalled that, according to Dolding and Mullender, rigid adherence to precedent accommodating limited expansion where a tight analogy with an existing case can be found is a characteristic of narrow incrementalism, whilst looking to underlying principle as a

¹¹⁰ Ibid, [96].

¹¹¹ Ibid, [5] (emphasis added).

guide to the direction in which development ought to occur is associated with wider modes of incrementalism. Yet Gault P and Blanchard J are quite clearly not espousing a wide mode of incrementalism (albeit their preferred mode may not sit right at the narrowest end of the scale). This is evident for three reasons. First, their reference to “general legal principle”, like Lord Hoffmann’s in *Wainwright*, lacks specificity. Moreover, they do not elaborate upon its meaning expressly in the remainder of their judgment, leaving us to conclude that it has provided minimal, if any, guidance in this particular case.

Second (and more importantly), the lip-service paid to the relevance of underlying principle is clearly counteracted by repeated and express reference to the limits of legitimate judicial law-making. “From time to time,” they tell us, “[when] the current law does not point clearly to an answer[,] ... the law may be developed to a degree.”¹¹² (They offer no explanation of what “to a degree” means.) Yet “matters that involve significant policy issues ... are considered best left for the legislature.”¹¹³

Third, Gault P and Blanchard J are at pains to emphasise that they are, in their judgment, recognising a limited tort apt to respond only to the publication of private facts; they are not to be taken as establishing a general or “blockbuster” privacy tort:

We say immediately, and emphasise, that we are not to be taken as establishing a general cause of action encompassing all conduct that may be described as invasion of privacy. *There can be no such broad ground of liability.*¹¹⁴

Tipping J’s approach adopts the widest mode of incrementalism of any of the judges in the case. He agrees with Gault P and Blanchard J that the presence of legislation in the field does not preclude common law development, but he puts his response to that suggestion in significantly stronger terms:

I do not regard the ground as having been entirely captured by that enactment [of the Privacy Act 1993] so as to preclude common law developments. Indeed it might well seem very strange to those who see

¹¹² Ibid, [4].

¹¹³ Ibid, [5].

¹¹⁴ Ibid, [45].

the Privacy Act as preventing the supply of information about whether a friend is in hospital or on a particular flight, for the common law to be powerless to remedy much more serious invasions of privacy than these would be. In the absence of *any express statement* that the Privacy Act was designed to cover the *whole* field, Parliament *can hardly have meant to stifle the ordinary function of the common law*, which is to respond to issues presented to the Court in what is considered to be the most appropriate way and by developing or modifying the law if and *to the extent necessary*.¹¹⁵

There are two striking things about this paragraph. First, Tipping J suggests that, for Parliament effectively to abrogate the law-making function of the courts, a statute purporting to do so must say so expressly. This results in a presumption that the courts are not precluded from developing the common law. It is wholly at odds with Keith J's Razian approach, which would presume the common law to have been effectively stifled whenever legislation "tells strongly" in that direction.¹¹⁶ Legislation "telling strongly" against common law development would operate, in Keith J's approach, as a Razian exclusionary reason.

Second, Tipping J frames the "ordinary function of the common law" in a particular way; this function is to deal with cases appropriately by developing the law "to the extent necessary". He does not firmly clarify how the necessity of the extent might be measured, but it is fairly obvious from its context that he means that the courts should identify an "appropriate" disposal of a case and develop the law however far is "necessary" to make that disposal possible. This is a far cry from Razian formalism and hints strongly at *ex post facto* rationalisation. In this sense, Tipping J's approach aligns with Perry's "strong Burkean conception" of adjudication; law is seen as a by-product of a normative determination of what justice requires in the instant case.¹¹⁷

¹¹⁵ Ibid, [226] (emphasis added).

¹¹⁶ Legislation appears to "tell strongly" against common law development where it is prevalent in a particular field, such as privacy. There is no indication in Keith J's judgment that he thinks Parliament must expressly provide against common law development.

¹¹⁷ It will be recalled that Perry's "strong Burkean" approach still gives presumptive priority to following existing precedent where it exists (see ch.1, section 3.1.3). In *Hosking*, however, there was no clear binding precedent for the Court to follow.

C. Whata J's Imaginative Approach Revealed

The above scrutiny of the *Hosking* judgment is important because it evidences Whata J's attentiveness in *Holland* not only to relevant doctrine (*Hosking* being the leading New Zealand privacy case) but also to a spectrum of forms of incrementalism each of which has received – in that leading case, no less – judicial support within his jurisdiction. Whata J's reaction to encountering the formal barrier is to do precisely what I have argued is necessary in order to overcome that barrier; he seeks, locates and pays detailed attention to a range of incremental modes from which he then formulates his own position as to the mode of incrementalism appropriate in this case (ultimately staking out a position similar to that of Tipping J). Had Whata J not paid such detailed attention to *Hosking*, he might only have felt able to adopt the narrower incremental mode favoured by the leading judgment in that case (that of Gault P and Blanchard J). This is despite the fact that there is actually no majority support for the narrower incremental mode in *Hosking*: Gault P and Blanchard J support it, but Keith and Anderson JJ reject it as going too far and Tipping J prefers a wider mode.

Given that there was no majority support in *Hosking* for any of the incremental modes staked out, Whata J effectively had a free hand (even in formalistic terms) to choose one of them (since, absent a majority, none of the judgments in *Hosking* is binding on this point). The formal barrier is thus revealed once again to be illusory, but it is also clear that only a keen attentiveness to the potential for incrementalism to come in a variety of forms is able to illuminate the illusion. This attentiveness being characteristic of a cross-hemispheric, collaborative mode of thinking (i.e. one in which neither the left nor the right hemisphere modes dominates over the other), and thereby being characteristic of an approach to adjudication that seeks out a broader range of contextual source data, we have cause to consider Whata J's approach to be an imaginative one.

3. *Jones and Holland* – a More Imaginative Jurisprudence

In some ways, *Jones and Holland* are quite different cases. One concerns an abuse of position leading to, in effect, the hacking of banking records. The other is a classic

instance of technology-enabled voyeurism. Yet in legal methodological terms, the cases are remarkably similar.

There are three key points of commonality between the judgments. First, both judgments expressly endeavour to locate some underlying principle of law upon which to base the recognition of the novel intrusion tort. In both cases, the courts look beyond existing doctrine and seek guidance from some deeper principle embedded in the tort field. And in both cases it quickly becomes apparent that a commitment to the pursuit of corrective justice is the principle upon which the judges fasten. For the notion that there are cases in which the defendant's actions are so reprehensible and causative of such significant harm that they "cry out for a remedy" is one that is strongly associated with corrective justice.

The search for underlying principle bespeaks an attentiveness to a broader legal context than that which is provided by doctrine alone. It evidences an awareness that there is more that links cases than simply their facts and the tightness of the analogy that may be drawn between them. It points up a commitment to an inductive, rather than deductive, mode of reasoning; the courts seek to draw a general principle from a range of authorities, rather than to apply doctrine to facts in a formalistic, deductive manner. These features suggest a prominent (though not dominant) role being played by the right hemisphere's mode of thinking.

Second, both cases dwell on the notion that privacy has value and that the courts ought to be able to establish a working theory of that value in order to rationalise their commitment to protecting privacy interests. The ways in which the cases consider this point differ, but the fact that they both do consider it is a notable area of confluence. Sharpe JA, in *Jones*, seeks to understand privacy as a legal value of a particular type: a value under the Canadian *Charter*. Whata J seeks to understand privacy's value not in terms of a higher-order body of public law (for privacy is not specifically protected under the New Zealand Bill of Rights Act) but as a legal value protected by a range of other legal mechanisms. In both cases, the judges conduct a survey of existing law (primarily case law in *Jones*, primarily statute in *Holland*) and seek to locate evidence in it that privacy has been accorded value by their legal systems. In *Holland*, this leads more obviously than in *Jones* to an exercise of the sort for which I argued in Chapter

3, as Whata J endeavours to map the legal terrain of privacy in New Zealand and locate pockets of strong consensus in respect of the wrongfulness of intrusive conduct. But the commitment to locating evidence of privacy's value – and, in particular, the wrongfulness of intrusive conduct – from a range of legal sources (and not just from within the narrow field in which the claims have been framed – tort law) evidences broad vigilance and attentiveness to context in both judgments.

Third, both cases pay clear attention to the constitutional limits on the courts' law-making powers and, thereby, to different forms of incrementalism that have been accorded judicial support in their jurisdictions. The attentiveness to broader constitutional concerns exhibits both right and left hemisphere characteristics. In so far as it demonstrates an awareness of broader matters of higher-order public law in what are primarily private law cases, it points up the right hemisphere's broad vigilance at work. However, there is also a clear commitment to the notion that courts do not have an absolutely free hand to decide cases in any way they please. Both courts are anxious to identify *and remain within* the relevant constitutional constraints under which they operate. Put another way, whilst the courts look to identify a variety of conceptualisations of those constraints, they do not seek to ignore them. This evidences the collaborative (cross-hemispheric) nature of the work being done. The left hemisphere's more formalistic concerns are not being supplanted by the broad contextual vigilance of the right hemisphere; they are working together to enhance the range of legal protections available for privacy within the existing framework.

Each of these three points of commonality are hallmarks of the more imaginative jurisprudence that I have sketched out in this and the previous chapter. As I said above, there can be no exhaustive list of such hallmarks. But it is clear that the three have a single root commonality: a broad attentiveness to context that reaches beyond the rigidly formalistic fixation with established doctrine. It is this broad attentiveness – this wide vigilance – that enables the courts in *Jones* and *Holland* to envisage a reworking of tort law that includes a distinct tort of intrusion upon seclusion. And this thesis has argued that it is this broad attentiveness that has been lacking in English privacy law and which has led to the current position where the intrusion lacuna remains unresolved.

Conclusion

Looking for Privacy in the Common Law

In Robert Pirsig's *Zen and the Art of Motorcycle Maintenance*, the protagonist recounts an incident from his earlier career as a teacher of rhetoric at a university.¹ In it, a student struggles to write a 500-word essay about the United States. Indeed, she tells him, she cannot even get started on it. She can think of nothing to write. The teacher tells her to narrow her focus; to write instead only about their town: Bozeman, Montana. The student tries but again is unable to write even a single word. She is again told to narrow her focus, this time just to the main street in town. And again she fails to write a thing.

He [the teacher] was furious. 'You're not *looking!*' he said. ... 'Narrow it down to the *front* of one building on the main street of Bozeman. The Opera House. Start with the upper left-hand brick.'²

This time the student goes away, looks properly at the building she has been told to write about, and produces a 5,000 word essay. So what changed?

She was blocked because she was trying to repeat, in her writing, things she had already heard... She couldn't think of anything to write about Bozeman because she couldn't recall anything she had heard worth repeating. She was strangely unaware that she could look and see freshly for herself, as she wrote, without primary regard for what had been said before. The narrowing down to one brick destroyed the blockage because it was so obvious she *had* to do some original and direct seeing.³

The student had been suffering from an obliviousness to the world "out there". Instead of seeking out new sense data – instead of *looking* – she was trying to write something novel from the closed-off bank of knowledge in her mind's internal (left hemisphere) world. And whilst she undoubtedly had a great deal of knowledge in that internal

¹ Robert M Pirsig, *Zen and the Art of Motorcycle Maintenance: An Inquiry into Values* (Vintage 1989).

² *Ibid*, 195.

³ *Ibid*, 195-196.

world, none of it was useful to her for this task; none of it provided an answer with which she was satisfied. But the left hemisphere is hubristic. It does not acknowledge its own failings. It does not recognise that it does not understand something; that it lacks sufficient data to comprehend it. Thus, stuck in the hall of mirrors of her left hemisphere, the student is unable even to see that, in order to escape it, she must engage her right hemisphere and pay attention to the world “out there”.

This is, at base, the same problem that afflicts the English judiciary when they grapple with privacy in the common law. Judging without attentiveness to context takes place in a hall of mirrors. And this inhibits creativity, precluding the development of significant, novel legal rules. We have seen, in Chapter 4, that the entire imaginative process is frustrated when we fail to attend to context – to the background against which that which we are observing takes place. For only in the light of context can meaning properly be attributed to that which we observe. And we can only make use of ideas to which we have attributed meaning.

Pirsig’s protagonist later tells us that

[w]e constantly seek to find ... analogues to our previous experiences. If we didn’t we’d be unable to act. We build up our language in terms of these analogues. We build up our whole culture in terms of these analogues.

In so doing, he reminds us that (what McGilchrist calls) left hemisphere thinking, whilst problematic if it comes to dominate, nevertheless plays an indispensable role in the functions of the human mind. Without retaining a bank of experience – the internal world – by which to analyse phenomena that we encounter, we would drift without understanding through Tennyson’s “wilderness of single instances”.⁴ Thus it is imperative that we attend to McGilchrist’s key insight: that the modes of thought associated with each hemisphere must collaborate if pathological functioning is to be avoided.

⁴ Alfred Tennyson, *Aylmer’s Field* (1793).

Legal formalism, in its more radical forms (amongst which I count the approach advocated by Joseph Raz), eschews contextual material as irrelevant to the process of legal reasoning, and in its less radical forms downplays the relevance of context considerably. It thus exhibits the classic symptoms of left hemisphere dominance. Adjudication must exhibit collaboration between the left and right hemisphere modes of thinking if it is to provide a plausible alternative to formalism. Legal pragmatism is an alternative approach which has, until relatively recent times, suffered from a series of misrepresentations that have characterised it as a form of adjudication in which the right hemisphere's mode of thinking dominates. As we saw in Chapter 4, this is a gross distortion of pragmatic philosophy. For, rather than mirroring formalism's deficiencies, a broadly pragmatic form of adjudication, along the lines that Sullivan sketches out, actually gives us a way forward.

In Chapter 5, I began to sketch out a way of engaging in the practice of judging that I have called a "more imaginative jurisprudence". This has the potential to be a recipe for creativity in common law reasoning but it would certainly not make judicial activism inevitable. For, as I indicated earlier, a judge adopting this more imaginative jurisprudence might still decide that, all things considered, the recognition of a novel head of liability is neither required nor desirable in any given case.⁵ It is the "all things considered-ness" of the method that is important, far more than what might or might not result from it.

As I have hoped to demonstrate in the way in which I have written this thesis – adopting the very methodology I espouse – it is possible to work in a way that attends to a broad contextual background and attempts to locate a common language among widely divergent theories and concepts. This is, of course, not a fully-fledged model of cross-hemispheric collaborative adjudication (which it was not the aim of the thesis to develop). (Not even Sullivan's book, which focuses tightly on pragmatic adjudication, produces a fully-fledged model.⁶) But the analysis I have offered in this thesis, and the outline of a more imaginative jurisprudence contained in Chapters 4

⁵ See ch.4, p 227.

⁶ Michael Sullivan, *Legal Pragmatism: Community, Rights, and Democracy* (Indiana University Press 2007). He expressly indicates that "imagination" is integral to his pragmatic method, but does not elaborate on the imaginative process.

and 5, opens the door to the development of a more sophisticated model, one that would have application beyond the narrow confines of English privacy law (with which the thesis has primarily, at a doctrinal level, been concerned). And so the work I have started in thesis will live on. It is the beginning of the work that needs to be done – that I need to do – on the relevance of imagination for common law practice.

Coda: Possible Objections

Before I conclude this thesis, it is worth briefly saying something about possible overarching objections to the imaginative jurisprudence outlined in the preceding chapters.

One objection that might be levelled at me is that the more imaginative jurisprudence I have outlined calls for judges to try to take on board too much background data; that they would have more at their fingertips than they would know what to do with; that they would find themselves drowning in a sea of information, unable to produce anything of much use to anyone. I will call this the “unworkability” objection; it is the idea that this more imaginative jurisprudence would simply be unworkable in practice.

The second obvious objection at this point is a normative one: the assertion that the more imaginative method is undesirable. Once the unworkability aspects of the argument are filtered out (since they might otherwise seep back in under the guise of normativity), it reverts to the basic political constitutionalist objection that the courts should not involve themselves in matters that ultimately concern social policy; determining the appropriate balance between competing social goods (i.e. privacy and freedom of expression/freedom of action) is said to be a matter for the elected legislature rather than the unelected judiciary.⁷ We encountered Keith Ewing’s view in Chapter 1, but it is worth repeating his attack on judicial law-making since it highlights the likelihood that political constitutionalists will object to this thesis:

⁷ See generally JAG Griffith, ‘The Political Constitution’ (1979) 42(1) MLR 1, and ‘The common law and the political constitution’ (2001) 117 LQR 42; also Thomas Poole, ‘Tilting at Windmills? Truth and Illusion in “The Political Constitution”’ (2007) 70(2) MLR 250.

[T]he judicial role ought to be a limited one: it is not the job of the judicial branch to make the law, in the sense of laying down rules of general application which will apply to people other than the parties in a dispute before the courts. That is a legislative function for which the judicial process is wholly unsuited.⁸

It is perhaps inappropriate that law should be made in this way, and it is perhaps obvious that there should be no role for the common law proper in a properly functioning democracy.⁹

To this second objection, I would say two things. First, if the courts in fact do start to engage in this more imaginative jurisprudence and develop the common law in a manner to which Parliament objects, Parliament is ultimately empowered to legislate and reverse the direction in which the common law is heading. Statute could either simply abolish any judicially created tort or modify it in any way of Parliament's choosing.¹⁰ Ultimately nothing the courts do can, under the British constitution, override the will of a sovereign Parliament.

Second, the particularly radical form of political constitutionalism represented by Ewing is simply incompatible with a system of common law reasoning, as he himself acknowledges; he argues for the replacement of the common law with a continental-style civil code. Whatever the merits of this sort of argument, it does not engage with the limits of legitimate judicial law-making from an internal perspective. Since this thesis takes the existence of the common law as its starting point and has made an argument about the approach to judicial reasoning *within* that system, the radical political constitutionalist objection simply lies beyond the scope of the analysis I have offered. Moreover, since there is no indication that England and Wales are, at any time in the foreseeable future, likely to abandon the common law in favour of a civil code, this radical objection seems rather detached from our present political and legal context.

⁸ Ibid, 710.

⁹ Ibid.

¹⁰ Subject to the obligation in s.3 Human Rights Act 1998 that requires courts to interpret legislation compatibly with the European Convention on Human Rights, which will remain so long as the HRA is on the statute books.

As for the first, “unworkability” objection, I would respond to such objectors by urging them to look closely at the cases of *Jones* and *Holland* – as we have done. They will then be able see how adeptly the judges in both cases have not only engaged in this more imaginative form of adjudication but also how they have formulated workable, working heads of tort liability as a result. The very existence of these two cases – and the use to which the torts each recognises has subsequently been put¹¹ – shows this objection to be baseless. The fact that English courts have not engaged in this sort of adjudication in privacy is due to the prevalence of the formal and semantic barriers, which *Jones* and *Holland* have managed to overcome, not to the unworkability of the method. The prevalence of the barriers results from a mode of thinking dominated by rigid formalism and a fixation with granular, technical analyses based on established analytical frameworks; a mode of thinking dominated by the left hemisphere.

English courts have been unable (or unwilling) to work in this more imaginative way because they cannot (or will not) be sufficiently attentive to background concerns to be able to *see* this way of doing things as a genuine possibility. They are “aspect blind” to it. Unable to see the method, English judges can have no hope of seeing the potential doctrinal developments the method might yield and are thus stymied from developing an intrusion tort of the sort recognised in Ontario and New Zealand. The more imaginative method is demonstrably not unworkable. It simply has not worked in English privacy jurisprudence because it has not been considered.

¹¹ The *Jones* tort formed the basis for an award of damages in *McIntosh v Legal Aid Ontario* 2014 ONSC 6136, in a case involving the accessing of a confidential file by the plaintiff’s ex-boyfriend. The *Jones* tort has been adopted beyond Ontario. In Nova Scotia, it was approved, *obiter*, in *Trout Point Lodge Ltd v Handshoe* 2012 NSSC 245, and affirmed again recently in *Doucette v Nova Scotia* 2016 NSSC 25. (A number of other Canadian provinces have statutory privacy protections more extensive than those in Ontario and, whilst the *Jones* tort has been considered in a number of cases in those provinces, there has been no need to rely on it as such.)

In New Zealand, the *Holland* tort formed one basis for the claim in *Faesenkloet v Jenkin* [2014] NZHC 1637, a case concerning the recording a dispute between two neighbours about one’s installation of a CCTV camera overlooking a shared driveway. The court found no liability on the facts but recognised the *Holland* development and considered its elements in some detail. *Obiter*, the judge expressed the view that he was uncertain whether there was sufficient distinction between the *Hosking* and *Holland* formulations to properly regard them as separate torts. (Given the New Zealand Court of Appeal’s aversion to a blockbuster privacy tort as expressed in *Hosking* (see ch.5, pp 258-262), the judge may be overly sceptical on this issue. For a sketching-out of a distinct conceptual basis for the *Holland* tort, see NA Moreham, ‘A Conceptual Framework for the New Zealand Tort of Intrusion’ (2016) 47 Victoria University of Wellington Law Review 283).

Just as the student could not write adequately about the town of Bozeman until she had gone into the world “out there” and observed it properly – in its context – so the English judiciary will not be able to resolve the intrusion lacuna in the common law until they really *look* at the issues with which they must grapple. They must look not just at their existing framework of understanding, at the mirrored halls of the bank of knowledge they have built up. For if they only look inside it, they will see only what they expect to see; not what is really “out there”. They must give the right hemisphere mode of thinking a meaningful role in their adjudicative practice. They must attend to context. They must be vigilant; they must see the world “out there”. They must recognise privacy’s pluralistic, multi-aspect nature. They must see the background against which the issues with which they are grappling are situated and from which they derive meaning.

And in order to *see* all these things they must first learn to do one thing: to *look*.

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