

# **Privacy and Media – subtle compatibility – five categories of fame**

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## Introduction

It is too easy to set privacy and media against each other, to emphasise differences, even perhaps to antagonise. The result for all sides is usually a rather comfortable reinforcement of pre-existing attitudes. I think we can strive for more than that.

This paper presents a challenge both to media professionals and to privacy protectors. By 'privacy protectors', I mean not just privacy and data protection commissioners but also the privacy advocates and the lawyers who advise prospective litigants. I have worked in all these communities – journalism, advocacy, legal practice, statutory commission. I hope this paper encourages a fresh examination of fixed attitudes on all sides.

The paper has three main elements:

- I It asserts that privacy and media are compatible in principle and illustrates this by reference to commonly shared standards;
- II It shows how the protection of privacy and the practice of journalism in a healthy civil society share certain characteristics. In particular, they both use transparency as an important tool in their work.

If more attention is paid to this subtle compatibility, the tension that often develops between media and privacy protectors can be eased. Eased, yes; cured, no. We should face that fact, partly because it is from the open discussion of tensions between sometimes competing interests that democracies exercise perhaps their greatest attribute. That attribute is the capacity collectively to have second thoughts and to produce change with continuity.

- III In the third part of this paper, I suggest a taxonomy of fame comprised of five categories –
  - Fame by election or appointment
  - Fame by achievement
  - Fame by chance
  - Fame by association
  - Royal fame.

By applying this method categorisation in particular circumstances, tension between privacy and media can be eased.

People lose privacy via media when they become famous. But people become famous – or, in the language of journalism, become ‘newsworthy’ – for very different reasons. If more attention is given to the reasons fame attaches to a person in given circumstances, it is possible to make finer balances between disclosure and non-disclosure (or part disclosure) in particular cases.

If serious efforts were made to make finer balances, several benefits may flow. Journalists could refine their decision-making processes where privacy is in the balance against disclosure. Privacy protectors could acknowledge, with qualification as necessary, that some people trade privacy for media coverage, and some to a greater extent than others.

More precise treatment of different types of fame by the media and by privacy protectors, may have an impact beyond the effect on the lives of particular persons in particular cases. Over time, it may affect the “margin for manoeuvre” or “journalistic latitude” that the courts say they are prepared to grant to the media. These two phrases - “margin for manoeuvre”<sup>1</sup> and “journalistic latitude”<sup>2</sup> – are taken from recent decisions of the European Court of Human Rights and the UK House of Lords in which the courts dealt, in different ways, with issues raised by media, privacy and fame. Courts in others jurisdictions are addressing similar issues.<sup>3</sup> In such cases, just as in non-media cases involving privacy<sup>4</sup>, it is necessary to give some content to the unavoidably broad tests that the courts develop. Tests like ‘reasonable expectation’ or ‘legitimate expectation’ of privacy. How should we apply the broad tests in the context of particular types of information and particular categories of people? This is an everyday question for newspaper editors, television producers and for privacy and data protection commissioners. I suggest that a taxonomy of fame<sup>5</sup> would help.

## Compatibility in principle

The practice of journalism and respect for privacy are compatible in principle. This may seem counter-intuitive, so let me explain.

The media's own codes for self-regulation recognise that privacy is a value to be respected. This is so whether those codes are created by journalists and their unions, by publishers or broadcasters individually, or by media owners collectively in industry associations. One study of the media's own codes in 30 European countries found that 87 percent of the codes contained a requirement to respect privacy<sup>6</sup>. Media codes in North America and the Asia Pacific also include clauses requiring respect for privacy.<sup>7</sup> The point here is not whether media self-regulatory schemes work. My point is that their contents show that media professionals themselves see no contradiction, in principle, between requiring respect for privacy and the practice of good journalism.<sup>8</sup>

A right to privacy is found in the main international human rights instruments.<sup>9</sup> Like privacy protectors, journalists tend to rely on these fundamental documents. Naturally, journalists point most often to the rights to freedom of expression that the documents enshrine. But journalists tend to use these international instruments more generally as universally applicable measures against which to judge the actions of institutions that exercise power, whether it is public or private power. (Mass media are themselves one such institution.)

Human rights interact, mutually supporting each other. It is usually the case that the enjoyment of human rights in practice involves the interdependence of those rights. For instance, freedom of expression may be necessary in order to spread ideas, but it depends also on freedom of association and freedom of assembly if those ideas are to find a practical political existence or effect. Privacy is an instrumental freedom. Privacy facilitates the practical enjoyment of other fundamental rights, in particular –

- > freedom of expression (for the drafting processes, as authors create, consider and discard, before they are ready to publish);<sup>10</sup>
- > freedom of belief or conscience (for prayer, rites of worship, confession); and
- > freedom of association (to gather with the like-minded, to plan, and to join together to advance a shared cause).

Such rights are basic to the practice of journalism itself, and to the health of the civil society in which journalists operate. Let me illustrate. Journalists cultivate confidential sources, they report the work of dissenters, they seek out the unorthodox and, by reporting it, challenge society's orthodoxies and require it to re-examine those orthodoxies and either reaffirm them or recognise that they ought change. Journalists also chart the development of new political movements. In all of this work, privacy plays a background role. Here, on Polish soil, where history provides examples from living memory, it is not necessary to detail the ways in which invasion of privacy can be a method by which to deny other aspects of liberty and human rights.<sup>11</sup> When freedom begins to wane, journalists are among the first to lose their privacy.

It is important that journalists reflect on the background role played in their work by the interconnected rights to be found in the main international instruments, including the right to privacy.

## **Compatibility in practice**

Transparency is a tool for both setting rules and for holding to account those who should follow those rules. An open process tends to result in better rules, better drafted, and with the legitimacy necessary to their acceptance.

Transparency assists accountability because:

- > it can reveal problems before they become entrenched;
- > it shows that rules are enforced and that breaches carry a price, and this itself reinforces the legitimacy of the rules;
- > transparency can be an aspect of penalty, or what the philosophers call "shaming".

All this should be familiar both to privacy protectors and to journalists. If you dismantle the basic tasks of journalists and of privacy and data protection commissioners, some similarities emerge. Just as journalism uses disclosure to do its work, most information privacy and data protection laws rely in part on disclosure to do their work. Standard privacy and data protection principles require that notice be given to persons whose information is being collected. The principles often require openness about information handling practices and confer access rights on data subjects. This close connection

between an aspect of privacy protection – transparency – and of journalism itself, if noticed, tends to be unremarked and undervalued.<sup>12</sup>

Another similarity is the extent to which privacy and data protection commissioners also work to force information issues into the open, making transparent certain practices that deal in personal information but may be opaque, even hidden, from the subjects of the information. Commissioners conduct and publish privacy impact assessments and privacy audits. They urge the statutory exposition of the purposes and permitted uses of various data sets. They press not just for prerequisites such as judicial warrants to ensure that certain collections of information are lawful and supervised; they also press for the mandatory reporting of the number of warrants sought and the number granted. Privacy and data protection commissioners may at times be assisted by whistleblowers who have become troubled by the privacy invasiveness of a particular practice in an organisation. Commissioners may make submissions to committees of the Legislature, as specialists assisting generalists.

Journalists use similar methods, but on a larger canvas. Using transparency and disclosure, their task is to help ensure the health of democratic processes and of the accountability of power, whether public or private. Journalism, properly understood, is a necessary part of holding power to account. But it is not sufficient. Also necessary are independent courts, active legislatures and various statutory watchdogs including, in their modest speciality, privacy and data protection commissioners.

So long as privacy is recognised as a right of natural persons – not government or corporations – and so long as privacy is not treated as synonymous with institutional secrecy, then tension is eased. We can identify a subtle compatibility in principle and in practice between journalism and privacy protection.

(But what of journalism itself? It also wields power. Media often seem to be immune from the transparency, and therefore the accountability, that media can so effectively require of others. That is a topic for exploration some other day.)

In particular cases, choices must be made between privacy (if it is to be understood simply as non-disclosure) and media (if that is to be understood simply as disclosure).<sup>13</sup> This need to make choices in particular cases between privacy and disclosure is familiar enough.

Such choices are part of the daily work both of editors and of privacy and data protection commissioners, each in their particular field. Commissioners must often explain to disappointed complainants that privacy is not absolute and that the law requires privacy to give way in many circumstances to other public interests. Journalists often explain that disclosure is not absolute, for instance when it is necessary to serve other interests such as the protection of confidential sources.<sup>14</sup> In journalism the general rule is that information should be attributed to its source. This allows the audience to weigh the potential vested interests behind contentious claims. Where the journalists judge that, to protect a source, it is necessary to air a claim without attribution, the journalists are in effect asking the audience to trust the journalists on two key points. One, that there is a source. Two, that the journalists have sufficiently assessed the potential vested interests of the source and have discounted or qualified the claims accordingly. This is part of the day-to-day work of journalists worthy of the name. The fact that disclosure is not absolute does not invalidate their attempts to inform their audiences as best they can in particular circumstances. The fact that privacy is not absolute does not invalidate the attempts of privacy advocates or privacy and data protection commissioners to ensure that every person has some zone of privacy in which to develop individual identity, maintain relationships of trust and intimacy with others, and preserve dignity. Like the journalists, the commissioners exercise judgments. The public places a degree of trust in them, just as the media implicitly asks its audiences to place a degree of trust in journalists.

## **Taxonomy of fame**

What interests editors and commissioners alike are practical tools that may help them to make better choices, more precisely calibrated, in particular cases. Such tools are especially useful for journalists because deadlines shrink the time available to them to seek advice and to reflect before making judgements.

And this brings me to the third element of the paper. It is a suggestion for a practical tool for journalists in particular. I think the inevitable tensions between privacy and media would be eased by the development and systematic use of what might be called a taxonomy of fame.

I suggest there are five main categories of fame. Applying them to particular circumstances, you may get varying responses to the question: “Does the public interest in disclosure outweigh the reasonable expectation of privacy of the persons involved?”

Those five categories of fame are: fame by election or appointment; fame by achievement (or notoriety); fame by chance; fame by association; and Royal fame. Next, each category is explained, with some illustrations from case law involving privacy and media.

**Fame by election or appointment** is acquired by politicians, judges and others in public office. In a sense, they trade privacy for power. In a democratic system, accountability justifies some privacy loss.

One among many examples from this category is the recent European Court of Human Rights decision to overturn a longstanding ban on the book *Le Grand Secret*, by the doctor who treated the late French President, Francois Mitterrand.<sup>15</sup>

The book had been suppressed by court injunction in France when it was published 10 days after Mitterrand’s death in January 1996. The Court found the injunction had been justified until the French courts could rule on the compatibility of the book’s contents with medical confidentiality and the rights of others. Nine months after granting the injunction, the French courts had found breaches of criminal and disciplinary provisions and had ordered damages be paid to Mitterrand’s widow and children. By then, the passage of time, the fact that the book was on the internet and the absence of the imperative to maintain medical confidentiality in Mitterrand’s case, meant that the blanket ban on publication of the book was a disproportionate limitation on the publisher’s freedom of expression, the Court decided.

Excerpts from the ECHR Registrar’s summary of the decision illustrate how ‘fame by election’ may affect privacy:

[*The book*] mentioned the difficulties Dr Gubler had encountered in trying to conceal his patient’s illness, cancer having been diagnosed shortly after Mr Mitterrand’s election in 1981, although he had given an undertaking to publish a health bulletin every six months.

...[Factors supporting the initial injunction as a limitation on freedom of expression necessary in a democratic society were summarised as follows.] On a date so close in time to the President's death the distribution of a book which, in breach of rules of medical secrecy, presented him as having knowingly lied to the French people could only have deepened his family's grief. Moreover, Mr Mitterrand's death, coming after a long fight against his illness and a few months after he left office, had aroused strong emotions among politicians and the public, the book was particularly serious."

...[Assessing whether the injunction had met a pressing social need ] the Court noted that the publication...had taken place in the context of a general-interest debate which had already been going on for some time in France about the right of the public to be informed about serious illnesses of the Head of State, and the aptitude of a person who knew he was seriously ill to hold that office. In addition, the secrecy imposed by the President about his illness and its progress, as described in the book, raised the public-interest issue of the transparency of political life.

The Mitterrand case illustrates another and more specific aspect of privacy in the context of fame. Where death and grief are involved, the focus of privacy thinking is in part directed not at the subject of the disclosure, but rather at the deceased's family. It is their privacy, specifically the privacy of their initial grieving period, that may weigh against immediate disclosure of some kinds of information. In my experience, this process of judgment occurs regularly in newsrooms when journalists are considering what to report about the life of a prominent public figure who has just died. The death, like the life, is newsworthy. The details of any life are likely to include flaws as well as strengths, the discreditable and the laudable. Proper appraisal of a life requires consideration of all of it. But how soon? A nuanced approach takes timing into account.

Proximity is also a factor in journalism's handling of grief. When a natural disaster takes many lives, the local media in the affected region are likely to be more restrained than media in distant parts of the country, or in other countries far from the scene of the tragedy. This is partly because local journalists or their personal circle may themselves be affected, and partly because local journalists are attuned to the suffering and sensitivities of the local population (audiences and advertisers). As a general rule, both among journalists and their audiences, distance breeds indifference.

**Fame by achievement** comes to film stars<sup>16</sup>, television presenters<sup>17</sup>, fashion models<sup>18</sup>, sporting heroes and leaders in business.

Many invite publicity, at least initially. They exchange privacy for the fame that can bring wealth. Courts have been alert to this ‘trade’ of privacy for fame, in which media coverage is the currency.<sup>19</sup>

In the recent Naomi Campbell case, this factor was acknowledged in unusually blunt language in the judgment of Baroness Hale –

Put crudely, it is a prima donna celebrity against a celebrity-exploiting tabloid newspaper. Each in their time has profited from the other. Both are assumed to be grown-ups who know the score. On the one hand is the interest of a woman who wants to give up her dependence on illegal and harmful drugs and wants the peace and space in which to pursue the help which she finds useful. On the other hand is a newspaper which wants to keep its readers informed of the activities of celebrity figures, and to expose their weaknesses, lies, evasions and hypocrisies.<sup>20</sup>

A variant of this type of fame is the infamy acquired by wrongdoers because of the seriousness of their acts. They do not trade privacy, they forfeit it. Shaming is a longstanding element of punishment, and can be legitimate.<sup>21</sup> Shaming in part means loss of privacy. In contemporary society, media are a method of inflicting shame. Media are the modern pillory. When search engines are combined with digitised datasets of court records, police files and press archives, the media and especially the internet can be the modern branding iron. Discreditable personal information (whether or not accurate) can be assembled and disseminated so swiftly and so widely that it cannot be retrieved. Nor can it be comprehensively amended if necessary to clarify or correct it. The person to whom the information relates is marked indelibly.

**Fame by chance** happens to previously anonymous people randomly caught in tragedy, disaster, or less often, good fortune. At least at first, these people do not trade their privacy, nor forfeit it, but rather have it taken from them. A spectacular example happens to be Australian and to involve that iconic natural feature, Uluru, or Ayers Rock, in central Australia. In 1980, Lindy Chamberlain was on a camping holiday near Uluru with her husband and three children. Her weeks-old baby was taken from the family tent by a dingo and killed. No body was found. Lindy Chamberlain was wrongly convicted of the baby’s

murder, imprisoned, and then pardoned years later when the miscarriage of justice was made obvious by the discovery of further evidence that a dingo had taken the baby. A recent example of people who become famous by a ghastly chance event in their lives are the young female victims who survived abduction by the Belgian child killer Marc Dutroux.

Complexities are increasing over the effect on the privacy of innocent parties, especially victims, of media coverage of legal processes. The public interest in open justice makes media coverage legitimate in principle. The practical effect on privacy has been the result, in particular cases, of how well both the authorities and the media have applied a mixture of legal restrictions and self-regulation.<sup>22</sup>

It is essential that media distinguish this category of 'fame by chance', and the people in it, from those in other categories of fame. Unless the chance event is good fortune – for instance, winning the lottery - fame by chance is usually not a good time for the people going through it. It is not a powerful time, not an enriching time in their lives. Often it is the worst time. Their lack of preparedness for fame can make the pressures much worse than for those with a different type of fame, particularly those who are well versed in public relations and in the trading of privacy for media coverage.

A man named Sipple acquired fame by chance when, as a bystander in a crowd, he foiled an attempt to assassinate US President Gerald Ford. In the media coverage that followed, Sipple's homosexuality was disclosed.<sup>23</sup>

A chance combination of mathematical genius and parental consent to publicity made a child a celebrity. But in adulthood he achieved nothing and lived reclusively. Yet media coverage pursued him in later life, against his will and without legal redress.<sup>24</sup>

**Fame by association** is enjoyed or endured by those close to the famous, such as a politician's spouse, a sports champion's children or the parents of a criminal. It is reflected fame, but not always glory. Privacy may be traded or it may justifiably be breached because of the kind of fame with which the person is associated. For example, it may be justifiable to disclose the share dealings of the spouse of a political leader where a conflict of interest between the spouse's financial interest and the political leader's public duty is apparent.

**Royal fame** is unique. It is much more difficult to decide where to separate the public from the private in the lives of those who are born into, or marry into, a royal family. This is because royals exist to be in the media.<sup>25</sup> For those in the other categories of fame, what makes the person famous is but one aspect of their lives. For example, they act in heavily promoted movies, they present a nightly TV show, they play tennis or golf better than anyone else in the world, they run the government, their baby has disappeared, their brother has committed murder. For all these people we can fairly readily draw a zone, unconnected with what makes them famous, within which they have a reasonable expectation of privacy. By contrast, royal families may shrink the zone to almost nothing. Because they have not been elected or appointed, nor wield any remaining legislative, executive or adjudicative powers<sup>26</sup>, nor perhaps achieve anything except membership of a particular family, it is much harder to delineate the private zone. Many aspects of their lives are turned into media events, from birth, through education and public service in the military, to marriage, parenting, perhaps divorce and re-partnering, to funeral rites.

By delineating this category of Royal fame we can consider the limitations of a term such as 'public figure' if that term is not associated with a way to categorise fame. The Council of Europe's Parliamentary Assembly passed a resolution on the right to privacy in 1998, following the death of Princess Diana in a car accident that some attributed to pursuit of the princess by paparazzi. The resolution stated in part:

7. Public figures are persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain.

8. It is often in the name of a one-sided interpretation of the right to freedom of expression, which is guaranteed in Article 10 of the European Convention on Human Rights, that the media invade people's privacy, claiming that their readers are entitled to know everything about public figures.

9. Certain facts relating to the private lives of public figures, particularly politicians, may indeed be of interest to citizens, and it may therefore be legitimate for readers, who are also voters, to be informed of those facts.

10. It is therefore necessary to find a way of balancing the exercise of two fundamental rights, both of which are guaranteed by the European Convention on

Human Rights: the right to respect for one's private life and the right to freedom of expression.

What is the “way of balancing”? The courts in several jurisdictions have formulated tests such as ‘reasonable expectation’ or ‘legitimate expectation’ of privacy, where intrusion would be highly offensive to a reasonable person in the circumstances. I suggest that, in media contexts, such tests become useful in practice when fame is broken down into its various categories. Sorting out the type of fame is a starting point for assessing whether the disclosure would have been highly offensive to a reasonable person who is, for example, a movie star constantly in the media, or a person utterly unknown until chance intervenes tragically (or wonderfully) in their life. The objective ‘reasonable person’ test is a legal technique that needs plenty of context to work well, especially where fame, privacy and reputation are involved.

The description of ‘public figure’ in clause 7 of the resolution is so broad it seems to embrace almost all who are famous. Princess Caroline’s kind of fame seems to leave her, and others who are famous for being Royal, with a very small zone of privacy. Royals are of interest to the public precisely and perhaps only for the way they live, and this includes the way they shop, dine *tete-a-tete*, manage their children, and enjoy recreation such as horse-riding, canoeing, bicycling or a beach club. These were the activities by Princess Caroline that she wanted to be able to do privately, without being photographed and without the photos being published. And yet it is publicity about precisely these kinds of activities to which her type of fame dooms her.

The peculiar singularity of Royal fame is made clearer by comparison with Naomi Campbell’s ‘fame by achievement’ as a fashion model. The House of Lords decision in *Campbell* states in part:

If this had been, and had been presented as, a picture of Naomi Campbell going about her business in a public street, there could have been no complaint. She makes a substantial part of her living out of being photographed looking stunning in designer clothing. Readers will obviously be interested to see how she looks if and when she pops out to the shops for a bottle of milk. There is nothing essentially private about that information nor can it be expected to damage her private life. It may not be a high order of freedom of speech but there is nothing to justify interfering with it.<sup>27</sup>

In finding in Campbell's favour, the court included in her zone of privacy the details of where and how she was trying to deal with her drug problem. This is the zone the newspaper was penalised for invading. Her therapy was a matter that was not related to her work as a model. It was her work, her achievement, that was the reason for her fame (or newsworthiness), and for the public's legitimate interest in her. There 'could have been no complaint' about a media photo of how the famous model looked when she was out in public doing activities that most readers do, like buying some milk.

I think it is possible to discern in the judgments of several courts in several jurisdictions the implicit differentiation of types of fame in reaching decisions about privacy breach in particular circumstances. I suggest that the practical day-to-day balancing of the public interest in privacy and the public interest in disclosure would be more finely calibrated, with benefits for all, if more work were done to develop the taxonomy of fame.

## **Mass media without the mass**

We live in times when the word "mass" is being drained from the term mass media. Just as the internet and the World Wide Web make everyone a potential publisher, so the mobile phone with a camera is making everyone a potential broadcaster.<sup>28</sup> Now the fans can be paparazzi too. As the capacities and speed of digital technologies grow, and as they spread into more hands, some of the traditional power of mass media comes under challenge and may be diluted.

The capacity of governments to regulate media may also be diluted. When spectrum was scarce, the right to broadcast was licensed to a few organisations on terms fixed and enforced under law. Content standards were easier to justify and to enforce. The licences underpinned the considerable capital that a few large networked organisations had invested in infrastructure and expertise. A few large organisations were more likely than many small ones to agree, more or less, on self-regulatory standards. This is changing. In future, a comparative abundance of wired and wireless communications technologies can be expected to upset a model that has been in operation since the beginning of broadcasting regulation in the early 20<sup>th</sup> century. It seems that much will be affected by the changes. The ability of law to regulate the balance between privacy and disclosure will be tested in new ways. That is also a topic for another day.

Mass media face other challenges. The notion of the press as a kind of central archive of a society's daily life and times is being recast. If it was ever true that the press is 'the first rough draft of history', it is less true now. It is becoming increasingly viable to assemble and to disseminate new and more specialised datasets than newspapers.

Commercially, we can also chart change. The role of newspapers and free-to-air broadcast television as pre-eminent sites for advertising is under challenge. Direct mail and tailored SMS messages offer alternatives to the necessarily broad advertising that mass media carry.

Internet campaigning by some political candidates may undermine the mass media's role as the gatekeeper to the modern 'Agora' in democracies.<sup>29</sup>

In this changing environment for media, journalists may find it useful to reassess their traditional attitudes to privacy. They may find it useful to examine more closely the trends in information and communications technologies that it is part of the work of privacy and data protection commissioners to chart. The commissioners do this from a specialised and narrow perspective – they must consider the effects of these technologies on privacy. But the findings often have broader relevance. In some ways, the commissioners' statutory duties make them a barometer of the Information Age, a small but useful indicator of the weather ahead.

Thank you for the invitation to address the conference. Thank you for your attention.

*[Endnotes follow on next page]*

## Endnotes

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I acknowledge the contributions of Michelle Fisher, Manager of Policy, Office of the Victorian Privacy Commissioner, and of Jennifer Mullaly, a former colleague at the Communications Law Centre, to the research for aspects of this paper.

- <sup>1</sup> *Case of Von Hannover v Germany* (Application No. 59320/00) 24 June 2004, para 25 citing the German Constitutional Court decision in the same matter involving use by magazines of photos of Princess Caroline of Monaco. See also para 58, referring to ‘certain bounds’ and ‘possible recourse [by media] to a degree of exaggeration, or even provocation’.
- <sup>2</sup> *Campbell v MGN Limited* [2004] UKHL 22, 6 May 2004, paras 29, 62 and 143.
- <sup>3</sup> For instance, *Hosking v Runting* (2003) CA 101/03 New Zealand Court of Appeal.
- <sup>4</sup> Such as the type of case involving the individual’s privacy and state power: *Wainwright v. Home Office* [2003] UKHL 53 (body searches of prison visitors); *Leander v. Sweden* 10/1985/96/144 [1985] (whether right of access/correction to police data used adversely in employment context); *Silver v. UK* no. 5947/72 ors [1983] ECHR (prisoners’ correspondence); *Klass v Germany* [1978] ECHR and *Malone v UK* [1984] ECHR (state surveillance); *Lawrence v Texas* 539 US 558 (2003) US Supreme Court (whether consenting adult male sex in private a crime).
- <sup>5</sup> Initially proposed in *Privacy and the Media*, Chadwick and Mullaly, Communications Law Centre (October 1997, Melbourne and Sydney).
- <sup>6</sup> Laitila, Tiina, ‘Journalistic Codes of Ethics in Europe’ (1995) *European Journal of Communication* Volume 10 (4): 527-544 at 538.
- <sup>7</sup> Among this wide literature, useful references both to the codes and to cases applying them include: A. Besley and R. Chadwick, *Ethical Issues in Journalism and the Media* (1992, Routledge: London), see Chapter 6, p 80-84; J. Black, B. Steele, R. Barney, *Doing Ethics in Journalism* (1997, 3<sup>rd</sup> ed, Society of Professional Journalists) Chapter 9; *Media Ethics: Cases and Moral Reasoning* C. Christians, K. Rotzoll, M. Fackler (1991, 3<sup>rd</sup> ed.) Chapter Five; Ethics Review Committee, MEAA (Australian Journalists’ Association section) *Ethics in Journalism* (1997, Melbourne University Press).
- <sup>8</sup> The interrelationship of media self-regulatory codes with law in the privacy context is common: see, eg European Commission, Working Party on the Protection of Individuals with regard to the Processing of Personal Data, Recommendation 1/97 *Data Protection Law and the Media* 25 February 1997, Section 2. XV/5012/97.EN WP1; Australian *Privacy Act 1988* (Cth) section 7B(4).
- <sup>9</sup> Universal Declaration of Human Rights Article 12; International Covenant of Civil and Political Rights Article 17; European Convention Article 8.
- <sup>10</sup> For one scholarly analysis of this aspect of rights interdependence in the US, see Westin, *Privacy and Freedom* (1967) Chapter 13. For a contemporary analysis of the role of privacy in maintaining a properly functioning public sphere, see Thomas Nagel ‘Concealment and Exposure’, *Philosophy and Public Affairs* (1998) Vol 27 No1.
- <sup>11</sup> For one personal perspective in English see Timothy Garton-Ash, *The File* (1997, Flamingo: London).
- <sup>12</sup> Chadwick P., ‘Uses of Transparency – journalism and privacy’, *Privacy Law and Policy Reporter* (2003) Vol 10 No2 at 21.
- <sup>13</sup> Of course, both privacy and media are richer concepts. Privacy and data protection embrace far more than the issue of disclosure, for example the data quality principle which also has a companion in media ethics codes, where it is usually expressed as a required to strive for accuracy. Media also perform functions other than revelation or disclosure of that which was not previously known about the lives of persons. For example, media advertising lubricates commerce, and many aspects of the content of mass media are simple information services that assist the functioning of the societies they serve, eg weather information, birth and death notices, community sports results.
- <sup>14</sup> *Goodwin v United Kingdom* (1996) 22 ECHR 123.
- <sup>15</sup> *Plon (Societe) v France* Application No 58148/00 18 May 2004. Another example is *Krone Verlag and Co. KG v Austria* ECHR Application no 34315/96 26 February 1996: Austrian politician fails to restrain on privacy grounds publication of his photograph by newspaper reporting investigation into the politician’s receipt of three salaries at once.

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- <sup>16</sup> *Douglas v. Hello! Ltd* [2001] QB 967: Hollywood actors Michael Douglas and Catherine Zeta-Jones sought redress against a magazine that published unauthorised photos of their wedding celebrations, for which they had contracted to allow another magazine exclusive rights in order, they argued, to minimise media disruption to their private event. They succeeded, but on commercial rather than personal privacy grounds.
- <sup>17</sup> *Hosking v. Runting* [2004] NZCA 101/103: Media presenter and his wife unsuccessfully sought to restrain publication in a magazine of photos taken in a public place of Mrs Hosking and their twin girls. The couple had previously consented to publicity about their involvement in a fertility program prior to the twins' birth.
- <sup>18</sup> *Campbell v. MGN Limited* [2004] UKHL 22: Model Naomi Campbell successfully sought redress after a newspaper published the information that she had attended Narcotics Anonymous group therapy meetings, together with covertly taken photos of her in the street outside the meeting venue. The faces of others in attendance were pixellated to provide anonymity.
- <sup>19</sup> See, for example, *Lennon v News Group Newspaper Ltd* [1978] FSR 573 and *Woodward v Hutchins* [1977] 1 WLR 760.
- <sup>20</sup> [2004] UICHL 22, para 143.
- <sup>21</sup> Nussbaum, M., *Hiding from Humanity – Shame, Disgust and the Law* (2004, Princeton)
- <sup>22</sup> Many jurisdictions impose statutory prohibitions on identifying the victims of sexual crimes. For an example of disclosure in this context, see *Cox Broadcasting Corporation and Cohn* 420 US 469 (1975). In the US, media publication of information obtained lawfully from government (police) about matters of public interest has been held to prevail over the privacy rights of a rape victim: *Florida Star v BJF* 491 US 524 (1989).
- <sup>23</sup> *Sipple v. Chronicle Publishing Co* 201 Cal Rptr 665 (1984).
- <sup>24</sup> *Sidis .v FR Publishing Corp* 113 F 2<sup>nd</sup> 806 (2d Cir 1940). The case is a variant of a recurring issue in journalistic decision-making: Does fame have a use-by date? The increasing power of digital technologies will require that this question receive renewed attention, in particular in relation to disclosure of criminal records of minor offences. Here, memory and mercy are in the balance.
- <sup>25</sup> In 2004, royal weddings in Denmark and Spain vividly illustrated the point.
- <sup>26</sup> The ECHR majority decision in *Von Hannover* implicitly recognised this aspect of the issue when it stated that Princess Caroline, although active for charity organisations, did not 'perform any function within or on behalf of the State of Monaco or one of its institutions' [paras 8 and 62].
- <sup>27</sup> [2004] UKHL 22, para 154.
- <sup>28</sup> *Mobile phones with cameras*, Info Sheet 05.03, August 2003, Office of the Victorian Privacy Commissioner, [www.privacy.vic.gov.au](http://www.privacy.vic.gov.au)
- <sup>29</sup> For one of numerous analyses of the changing media environment, see Bowman and Willis, *We Media – how audiences are shaping the future of news and information* (2003, Media Center, American Press Institute).