

**THE RIGHT TO PRIVACY IS COMING TO THE
UNITED KINGDOM: BALANCING THE
INDIVIDUAL'S RIGHT TO PRIVACY FROM
THE PRESS AND THE MEDIA'S RIGHT TO
FREEDOM OF EXPRESSION**

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I. INTRODUCTION

On January 25, 1990, Gorden Kaye, a well-known English actor, was in an automobile accident in which he sustained substantial head injuries.¹ While recovering from brain surgery in the hospital, journalists gained unauthorized access to his private room and interviewed and photographed him in his debilitated state.² Kaye asked for “an interlocutory injunction to prevent publication [of the article and pictures,] alleging malicious falsehood, libel, passing off and trespass to the person.”³ He was granted the injunction,⁴ but on appeal, Judge Glidewell replaced the lower court’s injunction with one less restrictive. He said:

1. See *Kaye v. Robertson*, [1991] F.S.R. 62, 63 (Eng. C.A., 1990).

2. See *id.* at 64. Hospital officials, worried that too many visitors might jeopardize Kaye’s recovery, had posted notices outside the ward and Kaye’s private room asking any visitors to see the staff before visiting Kaye. See *id.* at 64. A list of persons with visitation rights was also posted in both places. See *id.*

3. *Id.* at 65.

4. See *id.* The original injunction prevented the defendants from publishing any of the photographs or statements pertaining to the incident. See *id.* They were also prevented from passing off the photographs or statements by alleging that Kaye consented. See *id.* Even though Kaye apparently agreed to talk with the journalists and did not object to the photographs, medical evidence showed Kaye was not fit to give informed consent to be interviewed, and in fact had no recollection of the incident shortly after it occurred. See *id.* at 64. The injunction also prohibited defendants from making any statement

It is well-known that in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy. The facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals.⁵

Currently there is no domestic legal recourse in the United Kingdom for a person in Kaye's circumstances,⁶ but this state of affairs is soon to change. On November 9, 1998, Parliament passed The Human Rights Act of 1998,⁷ which incorporated the European Convention on Human Rights (ECHR)⁸ into domestic law.⁹ The ECHR guarantees individuals a general right to privacy,¹⁰ as well as the right to

that Kaye posed for photographs or gave an interview "until trial or further order." *Id.* at 65. Finally, the defendants were ordered to deliver up any notes or photographs related to the incident. *See id.* The order on appeal replaced this injunction with one that only restrained defendants from publishing anything that could reasonably cause a person to believe Kaye voluntarily permitted the photographs or interview to be taken. *See id.* at 66.

5. *Id.*

6. *See Right to Privacy as a Human Right*, GUARDIAN (London), Nov. 12, 1998, at 12 (noting there is no common law or statutory right to privacy in English law).

7. Human Rights Act, 1998, ch. 42 (Eng.). Implementation of the Act was not planned to take place until the year 2000. *See* Clare Dyer, *Human Rights Law; Bringing Home the Basics*, GUARDIAN (London), Nov. 12, 1998, at 21. However, when this article went to press the Prime Minister was considering postponing implementation past this date, depending on how long it takes to train judges, magistrates, and court legal advisers; and to complete a study of the act's impact on public authorities. *See* Robert Shrimley, *European Human Rights Law for Britain Is Facing Long Delay*, DAILY TELEGRAPH (London), April 5, 1999, at 12.

8. Convention for the Protection of Human Rights and Fundamental Freedoms, signed Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter Human Rights Convention]. Britain incorporated Articles 2 through 12, and 14 of the Convention, Articles 1 through 3 of the First Protocol, and Articles 1 through 2 of the Sixth Protocol. *See* Human Rights Act, 1998, ch. 42, § 1 (Eng.).

9. Human Rights Act, 1998, ch. 42, preamble (Eng.); *see also* Shrimley, *supra* note 7, at 12.

10. *See* Human Rights Convention, *supra* note 8, art. 8, at 230. Article 8 reads as follows:

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of

freedom of expression.¹¹ Although originally meant to protect an individual's human rights from violations by the State, the ECHR could be interpreted to protect the individual's rights from violations by nongovernmental entities such as the press.¹² This interpretation would give a person in Kaye's situation a legal remedy.¹³

The untimely death of Princess Diana led to the public condemnation of the press for their alleged role in the accident.¹⁴ This tragedy cemented the public's view that the

disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Id.

11. See Human Rights Convention, *supra* note 8, art. 10, at 230. Article 10 reads as follows:

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

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Id.

12. See ANDREW Z. DRZEMCZEWSKI, EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC LAW 199–205 (1983). Drzemczewski examines ECHR rights in relation to obligations between individuals at both a domestic and international level. See *id.* at 203–05. He argues that even though the ECHR drafters did not intend for it to have a third party effect, this interpretation is not prohibited by the ECHR. See *id.* at 205. Drzemczewski contends that terminology in certain articles could imply that rights are also guaranteed against violations by individuals. See *id.* This proposal is better supported at a domestic level rather than at an international level, since by making the state internationally responsible for an individual's action, such an interpretation could be an unforeseen extension of state obligation under the ECHR to which the state did not consent. See *id.* at 205.

13. See *id.* at 201–02 (noting that domestic courts of Member States of the Council of Europe “may be prepared to assume that certain rights and freedoms guaranteed by the Convention can be invoked by individuals against other private persons”); see also *Kaye v. Robertson*, [1991] F.S.R. 62, 66 (Eng. C.A., 1990) (holding that Kaye had no legal remedy).

14. See John Penman, *Tragic Death Brings New Clamour for Privacy Law*, SCOTSMAN, Sept. 1, 1997, at 5, available in LEXIS, News Library, Scotsm File. “Earl Spencer, angrily accused the press of hounding [Diana] to her death.” *Id.* Roger Gale says, “Some of us have been saying for a long time that a law to

press had grossly overstepped its bounds for invading a person's privacy for no other reason than its own financial profit.¹⁵ Diana's death and the incorporation of the ECHR into UK domestic law mean that the right to privacy will most likely result in the development of laws governing invasive intrusions on individuals by nongovernmental entities such as the press.¹⁶ It is far from settled, however, what shape this law will take.¹⁷

The first part of this Comment discusses whether the ECHR rights embodied in the Human Rights Act should have a higher, more protected status than other statutory rights. A brief description of the origins and structure of the ECHR is given, detailing the provisions of the right to privacy and freedom of expression. The paper then examines two models that other countries used to establish their own versions of the rights embodied in the ECHR, and analyzes the impact of each model on the citizens, government, and legal systems of the United Kingdom. This section concludes by observing how future changes to the international ECHR might impact domestic UK law.

The issue of whether a right to privacy exists, especially from invasions by the press, is the subject of the second part of this Comment. The unjustified invasion of a person's right to privacy by the press is a growing and important problem.¹⁸ In fact, some aspects of a privacy right have been recognized and protected by UK law, although different terminology and legal constructs have been used.¹⁹ However, case law, such as *Kaye v. Robertson*, illustrates that the existing remedies

control trespass, electronic eavesdropping and the use of intrusive cameras is necessary, but until [now] the press has got away with the "it's in the public interest" argument. That will no longer wash." *Id.*

15. See George Mckechnie, *The Press Must Clean Up Its Act*, HERALD (Glasgow), Sept. 1, 1997, at 4 (editorial) (commenting that the press has a duty of responsibility that comes with the sales and profits it receives).

16. See *Privacy: Law and Grief*, ECONOMIST, Sept. 13, 1997, at 58, 58.

17. See David Wastell, *Euro Privacy Laws 'Will Muzzle Media'*, SUNDAY TELEGRAPH (London), July 27, 1997, at 5 (discussing possible forms of incorporation, including parliamentary legislation and judge-made law).

18. See Penman, *supra* note 14, at 5 (referring to public comments that the press went too far in pursuing Princess Diana and that they had been walking on thin ice even before that).

19. See RAYMOND WACKS, PERSONAL INFORMATION: PRIVACY AND THE LAW 31, 33 (1989) (discussing how Justices Warren and Brandeis based the right to privacy in part on English cases).

for violation of this right to privacy do not adequately protect the individual from unjustified, invasive journalistic tactics.²⁰

Recognizing the need for an adequate remedy, this Comment addresses whether laws implementing this new right to privacy should be established by the British Parliament or courts. After examining the difficulties in defining the broad concept of a right to privacy, the Comment analyzes the present stances of the press, government, and judiciary as well as the arguments for and against the protection of privacy interests in each of these arenas. Concluding that privacy law will be developed as a result of incorporation of the ECHR, the suggestion is made that a common standard of acceptable press behavior be enforced Europe-wide by the Member States of the European Community.

II. INCORPORATION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS INTO BRITISH LAW

A. *Background and Nature of ECHR*

The ECHR was signed in Rome on November 4, 1950 and went into force September 3, 1953²¹ with the goal to protect, at an international level, human rights from violations by a State and to provide collective international enforcement of these rights.²² In this respect the ECHR diverges from

20. See *Kaye v. Robertson*, [1991] F.S.R. 62, 70 (Eng. C.A., 1990) (holding there is no cause of action for violating one's privacy in England).

21. Human Rights Convention, *supra* note 8, at 222.

22. See P. VAN DIJK & G.J.H. VAN HOOF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 1-2 (1984). The ECHR was a reaction to the inability to protect human rights at a national level during the Second World War. See *id.* at 1. The three main organs of the ECHR are the European Commission of Human Rights, the European Court of Human Rights, and the Committee of Ministers. See *id.* at 18-29. The European Commission of Human Rights and the European Court of Human Rights are established in Article 19 of the Convention. Human Rights Convention, *supra* note 8, art. 19, at 234. The primary duties of the Commission are to examine and determine the admissibility of applications by individuals and contracting States, to attempt a friendly settlement between the parties, and to make a report stating the facts and solutions or whether, in the Commission's opinion, the facts show a breach of the Convention. See *id.* arts. 28-30, at 238-40. The European Court of Human Rights, under Article 47, may take a case only after the Commission has failed to reach a friendly agreement. See *id.* art. 47, at 245. The contracting States are required to make their laws agree with decisions handed down by the Court. See VAN DIJK & VAN HOOF, *supra*, at 161-62. The Committee of Ministers was not established by the Convention. See *id.* at 27. Its structure, power, and general functions are governed by the Statute of the Council of

traditional concepts of international law in that it does not concern reciprocal engagements between contracting states.²³ Rather, it concerns the relationship between the State and the individual's human rights within a State's jurisdiction, regardless of the individual's nationality or residency.²⁴

This constitutional-like nature is consistent with the dynamic method of interpretation that has been used to achieve the ECHR's purpose of protecting individual liberties.²⁵ The Convention imposes on each contracting State²⁶ the duty to guarantee to each person in its jurisdiction the rights and freedoms in the ECHR.²⁷ Among these guaranteed rights are the right to privacy and the right to freedom of expression, established respectively, in Article 8²⁸ and Article 10²⁹ of the ECHR.

The interpretation and application of the guaranteed rights are not straightforward processes. There are several important considerations in interpreting the content and application of the ECHR. As previously stated, when interpreting the meaning of the guaranteed rights, the dynamic nature of the constitutional-like ECHR is to be considered.³⁰ Generalized terminology is used to enhance its

Europe. *See id.* The Committee's main function is to go to the merits of cases that are not, or cannot be, submitted to the Court. *See id.* at 161-62.

23. *See* DRZEMCZEWSKI, *supra* note 12, at 54 (commenting that the ECHR has some unique features that are uncharacteristic of traditional treaties).

24. *See* VAN DIJK & VAN HOOF, *supra* note 22, at 3 (discussing how Article 1 of the Convention affects the relationship between the State and persons within its jurisdiction).

25. *See* DRZEMCZEWSKI, *supra* note 12, at 26-29, 202-03.

26. The signatory countries to the Convention increased from the initial 8 to 25 by the end of 1991. *See* A. H. ROBERTSON & J. G. MERRILLS, HUMAN RIGHTS IN EUROPE 369 (1993). The 25 Member States of the Council of Europe are as follows: Austria, Belgium, Cyprus, Czech & Slovak F.R., Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. *See id.* at 413. Even though all these countries are parties to the ECHR, not all have made the ECHR part of domestic law. *See id.* at 26-27. It is controversial whether the ECHR requires this, but it seems the decision whether to make the ECHR part of domestic law and the method to be used are up to the individual States. *See id.* at 26.

27. *See* VAN DIJK & VAN HOOF, *supra* note 22, at 3. This applies to the rights and freedoms in Section I of the Convention. *See id.* If the State has ratified rights and freedoms in other protocols, it is bound to guarantee them as well. *See id.*

28. Human Rights Convention, *supra* note 8, art. 8, at 230.

29. *Id.* art. 10, at 230.

30. *See* DRZEMCZEWSKI, *supra* note 12, at 26-29, 203.

dynamic nature to allow the ECHR to function as a living document, with its meaning fluctuating as political, social, and cultural norms change.³¹

Another important aspect when interpreting the ECHR is determining to whom the ECHR applies. It is clear from the origins of the ECHR that the primary intent was to protect individual rights from abuses by the State.³² It is not as clear whether the ECHR can be used to govern relations between individuals.³³ In support of this proposition is the Doctrine of *Drittwirkung*, the basic premise of which is that human rights have an absolute effect when defined in constitutions.³⁴ By accepting that the ECHR is a constitutional document, its guaranteed fundamental rights are enforceable against private individuals as well as public institutions.³⁵ It can further be argued that the guaranteed rights of the ECHR are applicable to violations instigated by individuals under Article 1 if one concludes the Article imposes on the State the obligation to protect rights from any infringement, public or private, within its jurisdiction.³⁶

B. *What Led to Incorporation*

British citizens have only been able to enforce a privacy interest³⁷ by applying to have their case heard by the

31. See ROBERTSON & MERRILLS, *supra* note 26, at 41, 167.

32. See DRZEMCZEWSKI, *supra* note 12, at 200–05.

33. See VAN DIJK & VAN HOOF, *supra* note 22, at 13–15 (describing ways in which the Convention may be used to protect individuals from violations of their rights and freedoms by other individuals).

34. See DRZEMCZEWSKI, *supra* note 12, 199–202 (explaining the different views on the Doctrine of *Drittwirkung* and the arguments for inferring it from the ECHR).

35. See *id.* at 199–228 (discussing the Doctrine of *Drittwirkung* from both a domestic and international legal perspective).

36. Human Rights Convention, *supra* note 8, art. 1, at 224. “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” *Id.*; see also DRZEMCZEWSKI, *supra* note 12, at 221 (concluding that the State must protect an individual’s rights against infringement by other individuals based on the use of the wording “shall ensure” and “everyone”). *But see* VAN DIJK & VAN HOOF, *supra* note 22, at 15 (stating that Article 1 alone cannot be used to determine whether the States must secure the rights of individuals against intrusion by other individuals as well as public authorities).

37. All privacy cases lodged against the United Kingdom have been directed toward privacy abuses by the government that were sanctioned by domestic statute or common law. See Ronald J. Krotoszynski, Jr., Note, *Autonomy, Community, and Traditions of Liberty: The Contrast of British and American Privacy Law*, 1990 DUKE L.J. 1398, 1419 (1991).

European Court of Human Rights in Strasbourg.³⁸ This extremely lengthy process³⁹ discourages aggressive litigation of human rights by UK citizens.⁴⁰ However, the inadequacy of this method to enforce privacy rights is not the main factor in the willingness of the United Kingdom to finally incorporate the ECHR into domestic law.⁴¹

In fact, there has been a movement for the last thirty years to incorporate the ECHR into domestic law,⁴² but attempts have been unsuccessful until now.⁴³ Failure to incorporate the Convention was largely due to the unwillingness of the Conservative Party to relinquish one iota of parliamentary control.⁴⁴ With the election of Tony Blair and his Labour government, this viewpoint changed.⁴⁵ As part of his constitutional program,⁴⁶ Blair forged ahead with

38. See *id.* at 1418; see also *Europe Unveils World's Largest Permanent Court*, Agence France-Presse, Nov. 4, 1998, available in LEXIS, News Library, Affpr File.

39. See Frances Gibb, *Human Rights Go To Court*, TIMES (London), Nov. 3, 1998, at 43. "The new Strasbourg court is unprecedented in legal history. It has jurisdiction over some 800 million people from Greenland to Russia. The court will have 40 judges, one from each member state of the Council of Europe, and it is likely to receive about 5,000 cases a year." *Id.* Also, unlike its predecessor, the new court will operate full-time. See *id.*

40. See John Kampfner & Robert Rice, *Government Decides Against Privacy Law: European Convention to be Used Instead*, FIN. TIMES (London), Sept. 17, 1997, at 1.

41. See Frances Gibb, *Peer's Efforts Bear Fruit After 30 Years*, TIMES (London), July 5, 1997, at 7. The Thatcher and Major administrations did not support incorporation, feeling that this would give judges too much power. See *id.*

42. See *id.*

43. See *id.*

44. See *id.*

45. See Rachel Sylvester, *Britain's Judges to Rule on Human Rights*, DAILY TELEGRAPH (London), Oct. 11, 1997, at 11. At a meeting of the Council of Europe in October 1997, Tony Blair stated,

The new Labour Government in Britain is committed to putting the rights and freedoms of its citizens at the centre of its policies. It was the Labour government under Clement Attlee that promoted the convention immediately after the Second World War. It was a Labour government that announced in 1965 that the United Kingdom had decided to accept the right of individuals to petition the Human Rights Commission and the compulsory jurisdiction of the European Court. And it is the Labour government I lead which will incorporate the Convention into United Kingdom domestic law.

Id.

46. See Patrick Wintour, *Politics: Can Do, Will Do*, OBSERVER (London), May 18, 1997, at 21. Blair's constitutional reforms included the following: 1) three

the incorporation of the ECHR, radically compromising the status quo of long-lived parliamentary sovereignty for the idea that “any government that wants to change Britain for the better has to care about political renewal.”⁴⁷ Having decided to adopt the ECHR provisions, the question becomes how to incorporate these rights into British law; are these rights superior to or equal to existing statutory law?

C. Canadian and New Zealand Models

Parliament considered two models in determining the weight to give these new statutory rights.⁴⁸ The choice is quite significant for several reasons. It determines whether individuals will be able to enforce their fundamental rights in domestic courts or whether they will, in some cases, still need to make application to the Commission in Strasbourg.⁴⁹ The choice also determines if the national courts will give a higher status to the adopted ECHR provisions than to other domestic legislation.⁵⁰ The two models considered were the Canadian model⁵¹ and the New Zealand model.⁵²

In Canada, the people’s fundamental rights are included in the Canadian Charter of Rights and Freedoms.⁵³ If there is a conflict between Charter rights and other legislation, precedence is given to the Charter.⁵⁴ However, parliamentary

referendums dealing with the devolution of Scotland and Wales and a strategic authority for London; 2) incorporation of the ECHR into British law; 3) a White Paper on freedom of information combined with legislation in 1998; 4) an elected mayor for London; 5) a committee to reform reliquaries which have hampered Parliament; 6) regional development agencies in all areas of England; 7) a Welsh assembly; 8) a tax-raising parliament for Scotland; 9) a public inquiry into the funding of political parties; and 10) elimination of the hereditary seats of Parliament, ensuring all seats of Parliament are held by elected politicians. *See id.* As of November 12, 1998, the Labour Party had yet to force passage of the ECHR into British law. *See The Guardian Home Page*, GUARDIAN (London), Nov. 12, 1998, at 15.

47. Wintour, *supra* note 46, at 21.

48. *See* John Wadham, *Convention Dictates*, GUARDIAN (London), July 1, 1997, at 17.

49. *See id.*

50. *See id.*

51. *See id.* (crediting the Canadian model with recognizing the importance of human rights while preserving legislative sovereignty).

52. *See id.* (contrasting the Canadian model with the New Zealand model where the statute always prevails to the detriment of victims of human rights violations).

53. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms).

54. *See* Wadham, *supra* note 48, at 17.

sovereignty is still maintained, since in the event of a conflict, the missing rights are read into the statute, or it is clearly stated that in specific circumstances the statute does not apply.⁵⁵ Parliament is then free to change the statute so that it complies with the court's ruling, or to specifically state that the statute applies despite the violation of human rights.⁵⁶ The main advantage to this model is that the courts can expedite the judicial process, having the ability to modify legislation that violates guaranteed rights.⁵⁷ This model also serves as a political check on Parliament, since Parliament must clearly state in its legislation if a new law may violate human rights, seemingly something for which most politicians would be reluctant to be accountable.⁵⁸

In contrast, under the New Zealand model, a conflict between a guaranteed right and a statute is resolved in favor of the statute.⁵⁹ Judges must interpret law as being compatible with the Convention, but cannot strike it down if it is not.⁶⁰ This means that even if an individual can demonstrate in domestic court that his rights have been violated, he has no local recourse.⁶¹ Instead, the individual must bring his case to Strasbourg to the European Commission of Human Rights.⁶² Critics of the New Zealand model say it may be used to target unpopular groups since Parliament is under no pressure to change the law.⁶³ In

55. *See id.*

56. *See id.* (stating that Parliament has the "opportunity of either cleaning up the statute to comply with the ruling or re-enacting the statute and adding a clause stating that the provision applies 'notwithstanding' the Charter").

57. *See id.* (comparing the Canadian model, in which unintentional human rights violations by Parliament can be put right by the courts, with the New Zealand model, in which the courts cannot correct the violation, thus sending claimants to Strasbourg).

58. *See id.* "In Canada the procedure is rarely used." *Id.*

59. *See id.*

60. *See id.*; *see also* Frances Gibb, *First Bill of Rights Since 1689 Will Give Courts New Powers*, *TIMES* (London), May 15, 1997, at 11. Lord Lester originally penned a Canadian-like model, which would allow the courts to strike down a statute. *See id.* He drafted a revised approach, however, which takes after the New Zealand model. *See id.*

61. *See* Wadham, *supra* note 48, at 17 (stating that "the individual who was able to show . . . that his or her Convention rights had been violated would nevertheless lose the case").

62. *See id.* (commenting that a loser's only choices would be to petition the Commission in Strasbourg for redress or to wait for Parliament to correct the offending legislation).

63. *See id.* (criticizing the New Zealand model for its failure to protect target groups such as terrorists or protestors).

response, supporters cite Parliament's willingness to comply with rulings from Strasbourg.⁶⁴ Because of this past compliance, supporters argue that Parliament should be even more willing to comply with rulings by its highest court.⁶⁵

An example of actual legislation and its impact highlights the difference the choice of models can make. The Human Fertilisation and Embryology Act⁶⁶ prohibits a potential recipient from access to sperm without the donor's consent.⁶⁷ This Act prevented a woman from obtaining the sperm of her dead husband so that she could have his child.⁶⁸ Using the Canadian model, the national court would be flexible and consider this issue in the context of the right to family life guaranteed in Article 8 of the ECHR.⁶⁹ The court could then rule accordingly.⁷⁰ In contrast, by utilizing the New Zealand model, the literal meaning of the act as drafted by Parliament would have to be adhered to by the court, not allowing the wife to have her dead husband's sperm since consent is literally impossible.⁷¹ She would then have to take her case to the ECHR, which would only be possible if she had both the time and the resources to do so.⁷²

64. See Patrick Wintour & Andrew Adonis, *Stern New Laws Will Protect Privacy*, OBSERVER (London), July 27, 1997, at 1 (quoting Lord Irvine of Lairg who said that "precedents showed that British governments had complied with rulings from Strasbourg and would be even more compliant if they were now issued direct from the highest British court").

65. See *id.*

66. Human Fertilisation and Embryology Act, 1990, ch. 37 (Eng.).

67. See Wadham, *supra* note 48, at 17 (reporting that the Human Fertilisation and Embryo Act prevents use of sperm without the donor's consent, which consent is impossible to obtain when the donee is deceased).

68. See *id.* (referring to the case of Diane Blood, who "wanted to have her dead husband's child but needed access to his sperm").

69. Human Rights Convention, *supra* note 8, art. 8, at 230 ("Everyone has the right to respect for his private and family life, his home and his correspondence."); see also Wadham, *supra* note 48, at 17 (comparing the more flexible Canadian system, which grants courts the power to protect human rights, with the more restrictive New Zealand system, under which the courts are powerless to do anything but complain).

70. See Wadham, *supra* note 48, at 17 (arguing that had the courts been able to "consider the rules in the context of the right to family life in Article 8 of the Convention, the [Blood] case could have been resolved more quickly").

71. See *id.* (discussing the limitations of the New Zealand model in restricting judicial protection against offensive statutes).

72. See Wintour & Adonis, *supra* note 64, at 1 (stating that pursuing a claim in Strasbourg is "costly and lengthy" compared to going directly to the British courts).

Although the Canadian model clearly has the advantage of a more flexible and expedient judicial process, the Human Rights Act more closely resembles the New Zealand model.⁷³ The supremacy of parliamentary sovereignty is a major premise of the UK government.⁷⁴ The New Zealand model is more supportive of this concept since, under this model, the courts do not have the ability to consider any circumstances that Parliament has not.⁷⁵

D. *Impact of Incorporation of the ECHR on UK Citizens*

Despite the limited judicial flexibility under the New Zealand model, either model enhances the protection of human rights within the United Kingdom.⁷⁶ Providing local access to redress for invasions of privacy and thus simplifying the process will encourage more citizens to seek judicial enforcement of their human rights.⁷⁷

The present process for an individual to seek redress for a violation of privacy is lengthy and expensive,⁷⁸ as a brief synopsis illustrates.⁷⁹ First, the individual must apply to the European Commission of Human Rights, which will

73. See Dyer, *supra* note 7, at 21; see also Gibb, *supra* note 60, at 11 (predicting that the model used would be the “one [that] most likely resembles the New Zealand Bill of Rights Act 1990”); Patrick Wintour & Andrew Adonis, *The Lord Chancellor: Radical Zeal of a Truly Cautious Man*, OBSERVER (London), July 27, 1997, at 20 (noting the government’s intention to adopt the New Zealand model).

74. See *A Milestone for Human Rights; But Keep Judges from Privacy*, GUARDIAN (London), Oct. 25, 1977, at 22 [hereinafter *Milestone for Human Rights*] (explaining that parliamentary sovereignty is a basic constitutional principle, meaning that “Parliament is competent to make any law on any matter of its own choosing and no court may question the validity of any Act that it passes”).

75. See Wadham, *supra* note 48, at 17 (arguing that the New Zealand model would not have changed the outcome of Diane Blood’s case, because the courts would have enforced the law as written by Parliament).

76. See Human Rights Convention, *supra* note 8, art. 50, at 248; VAN DIJK & VAN HOOF, *supra* note 22, at 146 (stating that if a violation is found that cannot be repaired by the State internally, the European Court “may afford just satisfaction”).

77. See Wintour & Adonis, *supra* note 73, at 20 (stating that Lord Irvine expects a “rush of landmark civil rights cases” following incorporation).

78. See Gibb, *supra* note 60, at 11 (confirming that the “benefit would be that they could take allegations of abuse of human rights to the courts in this country, instead of following the long and costly route through the European Court of Human Rights in Strasbourg”).

79. See VAN DIJK & VAN HOOF, *supra* note 22, at 53–73 (outlining the procedure for application to the Commission).

determine the admissibility of the application.⁸⁰ One of the requirements is that all domestic remedies have been exhausted.⁸¹ At present this is not an issue since there is no cause of action for invasion of privacy in the United Kingdom.⁸² After the Commission has declared an application admissible, it conducts an examination of the merits of the complaint.⁸³ This alone can take up to two years due to the backlog and infrequency with which the Commission meets.⁸⁴ Simultaneous with the merits examination, the Commission attempts a friendly settlement.⁸⁵ If this attempt fails, a report is sent to the Committee of Ministers, which then may choose to make a decision or refer the matter to the European Court of Human Rights.⁸⁶ The entire process can take up to five years.⁸⁷

Due to the expense and length of this process, and the distance of Strasbourg from the United Kingdom, it is not unreasonable to suppose that many individuals are discouraged from litigating possible abuses of human rights.⁸⁸ Currently the United Kingdom has one of the worst records of adverse rulings by the European Court of Human

80. See ROBERTSON & MERRILLS, *supra* note 26, at 263.

81. See Human Rights Convention, *supra* note 8, art. 26, at 238.

82. See Wadham, *supra* note 48, at 17 (stating that the reason the incorporation of the ECHR into English government has such "great constitutional significance" is that for the first time, positive rights including the right to privacy, are recognized by law).

83. See ROBERTSON & MERRILLS, *supra* note 26, at 274 (noting that after the Commission admits an application, "its second task is to establish the facts").

84. See *id.* at 275–80 (giving brief descriptions of landmark cases that took the Commission at least two years to decide).

85. See Human Rights Convention, *supra* note 8, art. 50, at 248; see also VAN DIJK & VAN HOOF, *supra* note 22, at 101 (stating that Article 28 of the ECHR indicates that its drafters intended for attempts at a friendly settlement to occur at the same time as an examination of the merits).

86. See Human Rights Convention, *supra* note 8, art. 50, at 248; see also VAN DIJK & VAN HOOF, *supra* note 22, at 111 (providing that "[a]fter an application has been declared admissible by the Commission and attempts to reach a friendly settlement have failed, within a period of three months from the date on which the Commission has transmitted its report to the Committee of Ministers, the case may be referred to the European Court of Human Rights").

87. See *Council of Europe to Set Up Full-Time Rights Court*, Agence France-Presse, Oct. 11, 1997, available in LEXIS, News Library, Afpr File.

88. See Gibb, *supra* note 60, at 11 (stating that one of the benefits of incorporation is that litigants can take their claims of human rights violations to local courts, which is not as costly or time consuming as going to the European Court of Human Rights in Strasbourg).

Rights,⁸⁹ indicating a need to better protect the human rights of UK citizens. With the incorporation of the ECHR, ninety percent of such cases will now be decided in the United Kingdom instead of Strasbourg, thus guaranteeing more UK citizens protection of their fundamental rights.⁹⁰ Although either model gives UK citizens the right to seek redress and compensation in domestic courts,⁹¹ the Canadian model allows the courts to better protect human rights by having the flexibility to make adjustments when ECHR guidelines conflict with domestic law.⁹² Use of the New Zealand method insures that any conflict must still be resolved far away and at great cost in Strasbourg.⁹³ If forced to go to Strasbourg, and if the European Court of Human Rights finds the UK law does not conform to the ECHR, Parliament is then asked to bring domestic law into compliance with the ECHR.⁹⁴ In addition to the increased length of the process, findings against the United Kingdom by the European Court can result in large fines and fees.⁹⁵ This expense would have been significantly reduced if the Canadian model was used, as compliance could be achieved locally.⁹⁶

89. *See id.*

90. *See id.*

91. *See id.* Regardless of which model is adopted,

[t]he Bill will strengthen the powers of judges by incorporating the European Convention on Human Rights into domestic law and enabling them to hear human-rights cases.

....

The key question in framing legislation is whether the judiciary would have the power to strike down Acts of Parliament, or whether Parliament would preserve its sovereignty. That depends on which model is adopted.

Id.; *see also* Wadham, *supra* note 48, at 17 (describing models of incorporation of the ECHR).

92. *See id.* (explaining that in Canada the courts have the flexibility to fill in missing rights without striking down a statute).

93. *See id.* (stating that “many who claim their rights have been infringed will still have to make the long trek to Strasbourg”).

94. *See* David Buchan, *Blair Sets Out Timetable for Human Rights Law*, FIN. TIMES (London), Oct. 11, 1997, at 5 (reporting that the United Kingdom has had to change its law several times as a result of being in violation of the ECHR).

95. *See* Human Rights Convention, *supra* note 8, art. 50, at 248 (stating that if a violation is found, and the local law of the High Contracting Party can only partially compensate the injured party, damages will be awarded against that High Contracting Party).

96. *See* Wadham, *supra* note 48, at 17 (illustrating that the Canadian model allows courts to correct unintended consequences of legislation).

E. Impact of the Human Rights Act on the Courts and Parliament

One of the more significant impacts of the Human Rights Act is the shift in power from Parliament to the courts.⁹⁷ The degree of this shift is lessened under the New Zealand model.⁹⁸ However, Parliament's power will still be reduced according to international law, as it will become subject to changes made by international bodies.⁹⁹

The scope of cases the courts may hear is expanded under both the Canadian and New Zealand models. Not only will the courts now be able to hear human rights cases and test whether British laws comply with the ECHR,¹⁰⁰ their jurisdiction will be extended to cover any decisions made by government entities which might interfere with the rights guaranteed in the ECHR.¹⁰¹ Additionally, the power of the courts is significantly increased by the Human Rights Act.¹⁰² Due to traditional British judicial views and parliamentary

97. See Rachel Sylvester, *Privacy Law 'Will Rob MPs of Power,'* DAILY TELEGRAPH (London), July 28, 1997, at 2 (stating that adoption of the ECHR will allow British judges to hear cases rather than having the cases sent to Strasbourg, thereby leaving the judiciary rather than politicians responsible for implementing the convention).

98. See Gibb, *supra* note 60, at 11 (reporting that Lord Lester, who authored the revised New Zealand model, believes this version will have more support from judges because there is less threat to parliamentary sovereignty, and they are less at "odds with the elected branch of parliamentary government").

99. See Human Rights Convention, *supra* note 8, arts. 32, 50, 53, at 240–48 (explaining that Parliament has agreed to abide by the European Court's determinations of Convention violations; and remedies awarded to injured parties).

100. See Gibb, *supra* note 60, at 11 (reporting that the Bill of Human Rights will give "judges power to test British laws against the European Convention on Human Rights and ensure these comply with the convention").

101. See *id.*; see also Frances Gibb, *Bingham Says Privacy Law Will Evolve in Courts,* TIMES (London), Oct. 9, 1997, at 7 (quoting Lord Bingham for the proposition that incorporation of the European convention will "increase protection of the right of the press to free speech"). These rights include the right to life; right to be free from torture; right to be free from slavery and forced labor; right to liberty and security; right to a fair trial; right to be free from punishment without law; right to respect for private and family life; freedom of thought, conscience, and religion; freedom of expression; freedom of assembly and association; right to marry; freedom from discrimination; right to the safety of one's property; right to education; right to free elections; and with limited exceptions, freedom from the death penalty. See Human Rights Act, 1998, ch. 42, § 1 & pts. 1–3 (Eng.).

102. See Gibb, *supra* note 60, at 11 (stating that incorporation will generally "strengthen the powers of judges").

concerns over sovereignty,¹⁰³ the Parliament chose to base the Human Rights Act on the New Zealand model. Under the New Zealand model, the courts will still be able to use the ECHR to develop the common law.¹⁰⁴ The common law will then be used to establish precedent for later decisions.¹⁰⁵ The Human Rights Act recognizes these concerns and requires courts to construe the meaning of statutes and the common law as being consistent with European Convention rights.¹⁰⁶ In the cases that the statutes or common law are in direct conflict with the Convention, they will be decided in Strasbourg, and Parliament will be asked to comply with that ruling.¹⁰⁷ Where secondary legislation is in conflict, judges will be able to override the regulations.¹⁰⁸ Since secondary legislation makes up a large amount of the UK law,¹⁰⁹ the ability to override such legislation is significant.

F. Application of International Law

At an international level, the potential impact of incorporation of the ECHR on the power of Parliament and the courts is even more dramatic. The two main views on the place of international law in English law are the “doctrine of

103. See Gavin Drewry, *Judicial Politics in Britain: Patrolling the Boundaries*, in *JUDICIAL POLITICS AND POLICY-MAKING IN WESTERN EUROPE* 9, 11 (Mary L. Volcansek, ed., 1992). The British doctrine of parliamentary sovereignty dictates that the courts are subordinate to the Parliament and the acts of the Parliament are never subject to external limitations. See *id.* Even the Court of Appeal in the United Kingdom cannot invalidate a Parliamentary Act. See *id.*

104. See Buchan, *supra* note 94, at 5 (noting that the Prime Minister supports the idea that British judges will be able to make “their own distinctive contribution to the development of human rights” by interpreting the Convention directly into common law).

105. See Gibb, *supra* note 60, at 11 (stating that Anne Owens, Director of Justice, “welcomed the fact that judges would be able directly to use the convention in developing the common law”).

106. See Human Rights Act, 1998, ch. 42 § 3 (Eng.); see also *Milestone for Human Rights*, *supra* note 74, at 22 (stating that although Parliament has stressed that parliamentary sovereignty is still the norm, judges will make a “declaration of incompatibility” if a statute conflicts with the ECHR, thereby likely prompting Parliament to change the statute).

107. See Human Rights Convention, *supra* note 8, art. 53, at 248 (showing that as a member to the Convention, the United Kingdom has agreed to abide by the European Court’s findings in Strasbourg).

108. Secondary legislation includes regulations passed by administrative agencies. See Dyer, *supra* note 7, at 21.

109. See *id.*

incorporation” and the “doctrine of transformation.”¹¹⁰ The critical difference between the two doctrines is the effect that changes to international law will have on English law under each doctrine.¹¹¹

According to the doctrine of incorporation, international law is a part of English law unless it is in conflict with an act of Parliament.¹¹² A change in international law means that English law changes automatically as a result.¹¹³ Under the competing doctrine of transformation, international law is not part of English law except to the extent it has been adopted and made part of the law by the courts, Parliament, or long standing custom.¹¹⁴ Therefore, English law does not change along with contemporary international law, as it is only bound by international law that has been accepted and developed in the past.¹¹⁵ Although both of these views have support in the English courts,¹¹⁶ the judgments of Lord Denning and Lord Shaw in *Trendtex*¹¹⁷ indicate that the doctrine of incorporation is the preferred view,¹¹⁸ hence the more likely to be used in applying the ECHR.

Trendtex examines how international law functions in conjunction with British law. The facts of the case are not complex. The Bank of Nigeria, through a correspondent bank in London, issued a letter of credit to Trendtex for cement to ultimately be delivered to Nigeria.¹¹⁹ Due to over-ordering, the

110. See *Trendtex Trading Corp. v. Central Bank of Nig.*, 1977 Q.B. 529, 553 (Eng. C.A.).

111. See *id.*

112. See *id.*

113. See *id.* “Under the doctrine of incorporation, when the rules of international law change, our English law changes with them.” *Id.*

114. See *id.*

115. See *id.* (noting that under the doctrine of transformation, English law does not necessarily develop along with international law).

116. See *id.* (stating that the doctrine of incorporation relates back to 1737 and was accepted by Lord Mansfield and Sir William Blackstone, while the doctrine of transformation only dates back to 1876).

117. *Id.* at 529.

118. See *id.* at 554, 576. In his concurring opinion, Lord Shaw stated that “[I]n the conditions of international relations which now prevail the restrictive principle which has emerged is manifestly in better accord with practical good sense and with justice. This is indeed the motive force which has brought about its establishment in place of the old rule.” *Id.* at 576. He further noted his approval of Lord Denning’s opinion for the court to not only recognize this new principle, but also to adopt and apply it. See *id.*

119. See *id.* at 549. The correspondent bank, Midland Bank Ltd., was not a party to the action. See *id.* It was merely acting as an agent for the Central

Nigerian government did not allow the cement to be delivered, so Trendtex sued for the price of the contract in England.¹²⁰ The Bank of Nigeria claimed it was immune from suit, because as a department of the Nigerian government, the bank was entitled to absolute immunity from suit in England under international law.¹²¹ Counsel for Trendtex claimed that although absolute immunity had once been the international law, it was replaced by the concept of restrictive immunity, where a governmental entity was granted immunity only with regard to governmental functions, as opposed to commercial transactions.¹²²

In *Trendtex*, Lord Denning made an eloquent and persuasive argument to use the doctrine of incorporation to apply international law to English law.¹²³ He stated that the rules of international law arise out of the consensus of nations.¹²⁴ To some degree, each nation determines the bounds and exceptions of international law.¹²⁵ Lord Denning believed it is the province of the courts to determine these bounds and exceptions, perhaps utilizing court decisions from other countries.¹²⁶ Having established the court's authority to apply international law, he concluded that the court is free to make such application in this case without a

Bank of Nigeria, and did not confirm the credit and thus could not be held liable. *See id.*

120. *See id.* at 548–51. In early 1975, the Nigerian government departments, in order to cope with its rapidly developing society, imported 10 times its average rate of cement. *See id.* at 548. The over-ordering and mismanagement resulted in severe port congestion. *See id.* This major crisis thrust a new military administration into government. *See id.* As a first step to control this crisis, the new government issued a notice suspending the import of cement into Nigeria. *See id.* at 548–49.

121. *See id.* at 551. Lord Denning discussed the concept of sovereign immunity, noting that it is rooted in international law. *See id.* at 552. He further noted that one of the rules of international law is that “a sovereign state should not be impleaded in the courts of another sovereign state against its will. Like all rules of international law, this rule is said to arise out of the consensus of the civilised nations of the world.” *Id.* Every nation agrees upon it and therefore “it is a part of the law of nations.” *Id.*

122. *See id.* at 567. In alignment with Trendtex's claim, Lord Denning restated the modern rule, “a foreign sovereign has no immunity when it enters into a commercial transaction with a trader here and a dispute arises which is properly within the territorial jurisdiction of our courts.” *Id.* at 557 (quoting *Thai-Europe Tapioca Serv. Ltd. v. Government of Pak., Directorate of Agric. Supplies*, [1975] 1 W.L.R. 1485, 1491 (Eng. C.A.)).

123. *Id.* at 553–54.

124. *See id.* at 552.

125. *See id.*

126. *See id.*

corresponding act of Parliament changing the old rule of absolute immunity to restrictive immunity.¹²⁷ Lord Denning proposed that a change in international law is supported when many nations have departed from a rule or have applied a new or variant rule.¹²⁸ This, he said, has been the case with restrictive immunity.¹²⁹ Lord Denning concluded that *stare decisis* does not apply to international law, and therefore, if the court believed the law had changed, it could have given effect to this change.¹³⁰ The court would then be free to allow *Trendtex* to bring its commercial suit against the Bank of Nigeria in the English courts.¹³¹ Lord Shaw concurred with Lord Denning, emphasizing the need to apply the present law of nations rather than past international law.¹³²

It is necessary to note that despite this generally strong judicial support of the doctrine of incorporation, there are members of the judiciary who oppose its application.¹³³ In his statement of judgment in *Trendtex*, Lord Stephenson agreed that *Trendtex* may bring suit in England, but not because the UK courts must recognize a change in international law that would be in conflict with existing parliamentary law.¹³⁴ Rather, he stated that the Bank of Nigeria is not a governmental department, so it is not entitled to absolute

127. *See id.* at 554–55 (reflecting that when international law condemned slavery, the English courts legitimately applied modern rules of international law without a corresponding act of Parliament).

128. *See id.* at 554.

129. *See id.* at 555. For example, the courts in Belgium, Holland, the German Federal Republic, and the United States, among others, have abandoned the doctrine of absolute immunity and adopted the doctrine of restrictive immunity. *See id.* at 555–56.

130. *See id.* at 554, 561 (concluding that since *stare decisis* does not apply to international law, the Central Bank of Nigeria is not availed by the plea of sovereign immunity).

131. *See id.*

132. *See id.* at 579 (Shaw, L.J., concurring). Lord Shaw explained his adoption of Lord Denning's statement that "international law knows no rule of *stare decisis*." *Id.* He further reasoned that *stare decisis* does not preclude a court from applying a rule which was not in existence when the earlier decision was made. *See id.* (referring to the application of a new rule, which has the effect in international law of quashing the old rule).

133. *See id.* at 567–69 (Stephenson, L.J., concurring) (citing judgments in support of the rule of transformation as opposed to incorporation and explaining his reservations to accepting restrictive immunity in place of absolute immunity).

134. *Id.* at 565, 571–72.

immunity.¹³⁵ In direct opposition to Lords Denning and Shaw,¹³⁶ he maintained that the courts are not free to accept the international rule of restrictive immunity, as the court is bound by previous decisions interpreting international law.¹³⁷ Lord Stephenson concluded that although decisions by other nations' courts may influence Parliament to change the law, absolute immunity is the international law until the House of Lords or legislature declares otherwise.¹³⁸

It remains to be seen whether the British courts will use the doctrine of incorporation to apply international laws to a right to privacy. However, Prime Minister Tony Blair's constitutional program shows a radical departure from the status quo. This willingness to change, Blair's stated support of judge-made law as opposed to legislation in the realm of privacy, along with strong judicial support for the incorporation doctrine, strongly indicates that the doctrine of incorporation will be used to apply international law to British decisions.¹³⁹ This will have an enormous impact because the ECHR is not a traditional treaty, because it governs relations between a state and its citizens rather than relations between states.¹⁴⁰ Theoretically, a law on privacy applied by the English courts could be based on a consensus of the countries of the EU and decisions of the European Court of Human Rights. This law would then take precedence over acts of Parliament.¹⁴¹ Therefore, the passage of the

135. See *id.* at 563, 565, 572 (Stephenson, L.J., concurring) (doubting the proposition that the bank was created by an Act of the Nigerian Government and recognizing that while an entity may change its form by amending its constitution, the Bank had not incorporated itself into "an organ of the Nigerian State").

136. See *id.* at 576 (Shaw, L.J., concurring) (agreeing with Lord Denning's position on restrictive immunity and disagreeing with Lord Stephenson).

137. See *id.* at 571-72 (Stephenson, L.J., concurring).

138. See *id.* at 572.

139. See Michael White, *No Back Door Privacy Laws, Pledges Blair*, *GUARDIAN* (London), Feb. 12, 1998, at 8 (emphasizing that Blair had signaled his willingness to ensure incorporation of the ECHR into British law).

140. See DRZEMCZEWSKI, *supra* note 12, at 54 (quoting the European Court of Human Rights as saying, "Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States").

141. See Mary L. Volcansek, *The European Court of Justice: Supranational Policy-Making*, in *JUDICIAL POLITICS AND POLICY-MAKING IN WESTERN EUROPE* 109, 111 (Mary L. Volcansek, ed., 1992). The EU has its foundation in the European Coal and Steel Community, which was created in 1951 when the Treaty of Paris was signed. See *id.* at 109. The membership and scope of the EU was enlarged by the Treaty of Rome in 1957, the Merger Treaty in 1967, and the Single

Human Rights Act and application under the doctrine of incorporation could precipitate complete domestic reform of the laws covered by the ECHR, including privacy and the freedom of expression. This could effectively tip the balance of power in favor of the courts, possibly ending the ultimate sovereignty of Parliament.

III. IS THERE A LEGITIMATE NEED FOR A RIGHT TO PRIVACY FROM THE PRESS IN THE UNITED KINGDOM?

Before answering the question of whether there is a need for a right to privacy from unjustified invasion by the press in the United Kingdom, it is necessary to define what privacy means in this context. Studies on the right to privacy abound, with various attempts at definition. However it has been stated more than once that the ambiguity of the term makes a complete definition virtually impossible.¹⁴² A valid starting point in defining the right to privacy from unjustified invasion by the press is the examination of how the right to privacy is handled in the existing law of another common law country, the United States.¹⁴³ U.S. law recognizes four torts relating to privacy.¹⁴⁴ They are as follows:

- a) Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs;
- b) Public disclosure of embarrassing private facts about the plaintiff;
- c) Publicity which places the plaintiff in a false light in the public eye; [and]
- d) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.¹⁴⁵

European Act of 1986. *See id.* The judicial branch of the EU is the Court of Justice (ECJ). *See id.*

142. *See* Krotoszynski, *supra* note 37, at 1400 (noting the U.S. Supreme Court's failure to provide a "clear and reliable standard for identifying protected privacy rights").

143. *See* WACKS, *supra* note 19, at 31-33 (noting how two famous American scholars, Warren and Brandeis, incorporated English cases involving breach of confidence, property, copyright, and defamation into an American common law right to privacy). The most notable study of the right to privacy in American law, Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), is regarded as "the outstanding example of the influence of legal periodicals upon American law." William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 383 (1960).

144. *See* WACKS, *supra* note 19, at 35.

145. *Id.*

These torts are based on the proposals of William L. Prosser, a leading authority in privacy law.¹⁴⁶ This Comment is concerned with only the first two torts, intrusion and public disclosure.¹⁴⁷ It is notable that the U.S. courts and Prosser have not tried to define specifically what privacy is in the context of these two torts.¹⁴⁸ Instead, the American courts have developed guidelines to determine whether there have been tortious violations of the right to privacy.¹⁴⁹ Basically, for infringement of the right to privacy to be found, the intrusion or disclosure must be “offensive and objectionable to a reasonable man of ordinary sensibilities.”¹⁵⁰ This, then, is a dynamic objective standard that is dependent on the views and customs of the community.¹⁵¹ The strong public reaction to Princess Diana’s death, including public calls for self-censure by the press,¹⁵² indicates that pursuing persons relentlessly for the purpose of ferreting out the intimate details of their lives is offensive and objectionable to a reasonable man of ordinary sensibilities. In fact, in an editorial by the *Observer*, it was stated that Britain’s rules for the media were balanced so as to give very little protection to people’s private lives.¹⁵³ It concluded that this balance “no longer corresponds to the core values of British Society.”¹⁵⁴ It is fair to conclude that the objective and reasonable UK citizen believes there is a need to increase protection of an individual’s private life.

146. *See id.*

147. This is based on Raymond Wacks’s argument that the false light and appropriation torts are a questionable application of privacy. *See id.* at 38. False light is already covered by the tort of defamation, and appropriation is more a “proprietary wrong” than a privacy interest. *Id.*

148. *See id.*

149. *See id.* at 39 (stating that the law requires something similar to a mores test that creates liability for those intrusions that an ordinary person would find objectionable).

150. *Id.*

151. *See id.*

152. *See The Crown Tarnished Before Our Eyes*, *OBSERVER* (London), Sept. 7, 1997, at 7 (editorial) (noting the relaxation of libel laws coupled with the public’s right to information instills a duty upon the press to regulate the way highly personal and intrusive pictures are obtained and published).

153. *See id.*

154. *Id.*

A. *Damage Caused by Invasion of Privacy by the Press*

The individual and societal harm caused by the press' invasion of privacy provides further justification for protective legislation. An example of harm to individuals is well illustrated in the following circumstance. Selina Scott, an unmarried anchorwoman, had no legal recourse when a man falsely claimed to have had sex with her eighteen years previously.¹⁵⁵ He attempted to sell the story several years later, initially without success.¹⁵⁶ At that time, Ms. Scott notified the police who took no action.¹⁵⁷ Years later, the man sold the story to the tabloids for 20,000 pounds.¹⁵⁸ With no available legal remedy, her only avenue of protest was to file a complaint with the press' self-regulatory body, the Press Complaints Commission (PCC).¹⁵⁹ The PCC found that the tabloid had made no attempts to confirm the story and that there was no independent evidence to support the man's story.¹⁶⁰ The PCC then ordered the paper to carry the PCC's judgment that the story was unfounded.¹⁶¹ The paper complied, but the judgment was hidden on an inside page and was stated in such complex legal jargon that it was nearly incomprehensible.¹⁶² The conclusion then, is that this unmarried woman, and any other single individual, having no legal redress via a right to privacy, can at any time be made the subject of published fabrication about intimate details of that individual's life.¹⁶³ The publication of these unverified intimate acts can cause substantial mental distress to the individuals involved. The need to prevent this indiscriminate publication and resulting harm arguably outweighs the competing interest of the public's right to know.

In addition to personal harm, substantial social harm has resulted from invasive journalism in the United Kingdom. Maire Geoghan Quinn, a leading politician in Ireland, had a

155. See Selina Scott, *My Tabloid Sex Hell*, SUNDAY TELEGRAPH (London), Apr. 28, 1996, at 32 (noting that in the absence of monetary damages a single person in Britain has no recourse against fabricated sex stories).

156. See *id.*

157. See *id.*

158. See *id.*

159. See *id.*

160. See *id.*

161. See *id.*

162. See *id.*

163. See *id.*

promising career and was slated for a top position in the government.¹⁶⁴ Her nation was stunned when she resigned because of the press' harassment of her son.¹⁶⁵ Her resignation from public office is but one example of the harm intrusive media actions cause society when capable individuals decide not to represent the interests of society for fear of privacy intrusion.

Most notably, the death of Diana has, and will continue to have, a tremendous negative social impact, both domestically and internationally. She was renowned as a philanthropist, working tirelessly to raise money for important social causes.¹⁶⁶ At the time of her death, she was supporting the worldwide ban on the use of land mines.¹⁶⁷ Lending her image and support to this cause, she brought this critical issue to the public's attention.¹⁶⁸ Undoubtedly, if she had lived, she would have continued to benefit society by continuing to support such causes.

A final societal harm worthy of mention is the possibility that the public will become less informed as legitimate news stories are squeezed out by more sensational items.¹⁶⁹ It is also possible to conclude that since morals of society are influenced by information received from the media, the replacement of newsworthy items with gossip can have a negative influence on values held by society.¹⁷⁰ Alan Rusbridger, editor of the Guardian, makes this point quite well in the following comment regarding Rupert Murdoch, editor of the Sun,

[H]e more than any other single individual in the past 30 years, is responsible for pushing back the bounds of what is considered acceptable in mainstream newspapers—family newspapers, he would call them—in this country. We have long since ceased to be shocked at naked pin-ups in papers

164. See Martin Hannan, *Changes Unlikely To Alter Face of News as the Public Knows It*, SCOTSMAN, Sept. 26, 1997, at 13, available in LEXIS, News Library, Scotsm File.

165. See *id.*

166. See, e.g., Peter Hooley et al., *Tragedy Shatters Diana's Brief Joy*, OBSERVER (London), Aug. 31, 1997, at 3.

167. See *id.*

168. See *id.*

169. See Alan Rusbridger, *Stop Now Before It's Too Late*, DAILY TELEGRAPH (London), Sept. 15, 1997, at 20.

170. See *id.*

which go to four million homes a day. We shrug at the lucrative market in kiss-and-tell memoirs, whereby virtually anyone who has ever been to bed with a “celebrity” can earn ready cash for spilling the intimate beans—often a form of legitimised blackmail. We have reached the anaesthetised state where the Sun—barely three short weeks ago—could run a front-page headline in letters two inches tall proclaiming “Dodi was a Dud in Bed” and no one blinks an eye.¹⁷¹

B. *A Growing Problem in Europe*

The failure to recognize a right to privacy has caused harm not only within the United Kingdom, but also on an increasingly international level.¹⁷² This is well illustrated by the fact that seven paparazzi were charged with manslaughter in France for their role in the death of Princess Diana.¹⁷³ This increase in media intrusion excesses in France continues even though France has some of the toughest privacy laws in Europe.¹⁷⁴ A “sleaze packed” magazine, *Voici*, has been blamed as a catalyst to many other French publications becoming increasingly invasive.¹⁷⁵

There has also been a recent shift toward invasive journalism in Scandinavia and the Netherlands.¹⁷⁶ Recently, in order to get a photograph of a member of royalty, Dutch photographers scaled a wall and held on by their ankles to get the desired photograph.¹⁷⁷

In Germany, the publication of a picture of the Mercedes in which Diana died, with her still in it, has triggered a

171. *Id.* But see Piers Morgan, *Cry Press Freedom*, GUARDIAN (London), June 9, 1997, at T6 (regarding Rusbridger’s criticism of the tabloid press as somewhat hypocritical in the sense that he has filled his own paper with many analyses of tabloid stories, and from their sales).

172. See Geoff Meade, *EU Privacy Warning to Editors*, Press Ass’n Newsfile, Sept. 7, 1997, available in LEXIS, News Library, Panews File.

173. See Julie Read & Birna Helgadottir, *How Europe’s Royals Are Snapped and Snap Back*, EUR., Sept. 4, 1997, at 14, available in LEXIS, News Library, Eupean File.

174. See *Privacy and the Press*, SUNDAY TELEGRAPH (London), Sept. 14, 1997, at 32.

175. Read & Helgadottir, *supra* note 173, at 14.

176. See *id.*

177. See *id.*

heated debate on invasion of privacy by the press.¹⁷⁸ Roy Perry, Tory Euro-spokesman on the media, emphasized invasive journalism was escalating internationally when he said, "Media intrusion into private lives is a Europe-wide problem and needs European action."¹⁷⁹ In offering condolences to British Prime Minister Tony Blair for Diana's death, Chancellor Kohl of Germany suggested a "pan-European approach" towards resolving the issue of invasive journalism.¹⁸⁰

Further support of a European-wide recognition of the right to privacy is also evidenced by a directive to be introduced in the EU next year.¹⁸¹ This directive pertains to acceptable methods of gathering information on individuals and is applicable to the entire EU.¹⁸²

C. *There Has Always Been a Right to Privacy*

Although the United Kingdom rejects privacy as a useful legal construct, it has in effect been given recognition and protection under British law since the 1800s.¹⁸³ The courts have recognized this right in the common law actions of breach of confidence, defamation, and trespass.¹⁸⁴ The legislative body has attempted to offer relief in the form of a copyright and an anti-harassment act.¹⁸⁵ Also the press itself has given some relief to individuals by allowing complaint to the PCC.¹⁸⁶ Unfortunately none of these avenues has proved adequate to prevent unjustified invasions by the press.

178. *See id.*

179. Meade, *supra* note 172.

180. Read & Helgadottir, *supra* note 173, at 14.

181. *See* Richard Norton-Taylor, *Privacy Law May Curb the Media*, *GUARDIAN* (London), Aug. 1, 1997, at 1 (mentioning a little-noticed Brussels directive covering methods of gathering, processing, and storing information). The directive is a result of escalating concern about the use of personal data. *See id.* Although the concern is mainly with regards to governmental bodies, it also applies to companies and the media. *See id.*

182. *See id.*

183. *See* WACKS, *supra* note 19, 31-33.

184. *See id.*; *see also* Geoffrey Bindman, *Privacy Policies*, *L. SOC'Y GAZETTE*, Mar. 1, 1995, at 15 (discussing the "piecemeal development" of laws addressing intrusions into privacy).

185. *See* Bindman, *supra* note 184, at 15; Copyright Act, 1956, 4 & 5 Eliz. 2, ch. 74 (Eng.); Protection from Harassment Act, 1997, ch. 40, § 3 (Eng.).

186. *See Public Rights, Private Lives*, *SUNDAY TIMES* (London), Aug. 3, 1997, at 4.

The purpose of this section is not to give a complete analysis of the aforementioned remedies. Instead, they are briefly discussed and examples are cited to show the recognition of a privacy interest in the United Kingdom, albeit using different terminology. It also shows how these remedies have proven unable to fill the gap left by the absence of a statutory right to privacy.

1. Common Law Actions

Breach of confidence is one common law action which has arguably been used to uphold privacy interests. There are three elements of the cause of action for breach of confidence.¹⁸⁷ They are: 1) the information is of a type that would be considered confidential, which is usually proved by showing that the information is not public property or public knowledge; 2) the information was disclosed under circumstances implying a confidential relationship; and 3) the information was used in an unauthorized fashion by the party confidentially obligated to the discloser of the information.¹⁸⁸ An excellent example of this cause of action being used to protect private information is found in the judgment of *Duchess of Argyll v. Duke of Argyll*.¹⁸⁹ Despite the defendant's argument that the plaintiff had previously disclosed intimate details to the public about her marriage with defendant, plaintiff was granted an injunction prohibiting the defendant and a newspaper from publishing confidences she had disclosed to her husband during their marriage.¹⁹⁰ This decision is widely believed to demonstrate the ability to protect personal information under the common law.¹⁹¹ A major weakness of using an action for breach of

187. See WACKS, *supra* note 19, at 51–52.

188. See *id.*

189. [1967] Ch. 302, 304–07.

190. See *id.* at 304–05.

191. See WACKS, *supra* note 19, at 88. *But see* Woodward v. Hutchins, [1977] 2 All E.R. 751, 756 (Eng. C.A.). The plaintiffs, public entertainers, were refused an interlocutory injunction to prevent a former employee from disclosing personal details about the entertainers' lives to the Daily Mirror. See *id.* These activities were regarded as being in the public domain. See *id.* at 755. The apparent contradiction with the judgment in *Argyll*, where arguably the Duchess had voluntarily placed intimate details of her marriage in the public domain, may be reconciled by focusing on the relationships involved. Compare *Argyll* 1967 Ch. at 322 with *Woodward* 2 All E.R. at 754. It has been suggested that if the Duke and Duchess had not been married, the injunction would not have been granted. See Francis Gibb, *Princess Has Good Chance of Victory*, *Carter-Ruck Says*, *TIMES* (London), Nov. 9, 1993, available in LEXIS, World

confidence to protect privacy interests is that the recipient of the information must break a confidence, implying a private relationship between the recipient and the discloser.¹⁹² This limitation would exclude journalists who might spy on someone with a telephoto lens, therefore forming no such relationship of confidence.¹⁹³

Also available in common law are the actions of defamation and trespass.¹⁹⁴ In *Tolley v. JS Fry & Sons Ltd.*,¹⁹⁵ a well-known amateur golfer was granted damages for the use of his caricature in an advertisement without his consent.¹⁹⁶ Plaintiff's argument was that he had been libeled, since the advertisement implied he had received payment to allow use of his caricature.¹⁹⁷ This, he claimed, would cause him monetary damage by impugning his reputation as an amateur golfer.¹⁹⁸ Unfortunately, a similar argument did not work in the case of *Kaye v. Robertson and Another*.¹⁹⁹ The standard for an injunction in a libel cause of action is that it is inevitable that any jury would find libel.²⁰⁰ Because the court did not find this conclusion to be inevitable, it could not base the injunction on the libel cause of action.²⁰¹ Kaye also claimed trespass to the person, but this too was rejected as a basis for injunction.²⁰² Trespass, then, was also an ineffective method to protect privacy since Kaye was required but unable to show actual physical damage in order to prevail.²⁰³

Library, Allwld File (stating that lawyers believe the *Argyll* case establishes that "marital intimacy can be protected by the doctrine of breach of confidence").

192. See Patrick Milmo, *Confidence and Privacy*, NEW L.J., Nov. 19, 1993, at 1629. In some cases, confidential information is protected by contract; in others, such information is protected by the unique nature of the relationship between the parties, such as marriage. See *id.*

193. See *id.* (mentioning a failed case against a reporter for invasion of privacy for allegedly taking aerial photographs of a lord's house without his consent).

194. See WACKS, *supra* note 19, at 33.

195. [1931] App. Cas. 333 (P.C.) (appeal taken from K.B.).

196. See *id.*

197. See *id.*

198. See *id.*

199. [1991] F.S.R. 62, 67 (Eng. C.A., 1990).

200. See *id.*

201. See *id.*

202. See *id.* at 68-69.

203. See *id.* (concluding that taking photographs is not a battery unless it can be shown that the bright lights of the flash injured another's eyes or resulted in some other physical injury).

2. Statutory Legislation

The Royal Family has used the 1956 Copyright Act²⁰⁴ to protect their privacy interests. Section 39 of the Act grants the Sovereign an intellectual property right for any original work she directs.²⁰⁵ This proviso allowed the Queen to bring suit against the *Sun* for publication of a photograph taken of Princess Bea.²⁰⁶ Although the *Sun* settled out of court, the photograph was still published.²⁰⁷ In fact, the photo was published twice.²⁰⁸ This shows the inability of the Act to effectively protect privacy interests. The narrowly drawn statute is also limited in that it only supplies some relief for invasions of privacy by the press if the plaintiff is the Sovereign.²⁰⁹

On the other hand, the 1997 Harassment Act²¹⁰ does not limit its protection to the Sovereign.²¹¹ The Act was introduced to prohibit stalking, but could also be used to curb unjustified invasive journalism.²¹² The Act provides for two criminal offenses and also makes harassment a tort, allowing courts to grant injunctions to prevent it.²¹³ The Act could potentially make breach of an injunction a criminal offense, punishable with up to a five-year jail sentence.²¹⁴ This could be enforced not only against the harasser, but also against anyone who bought and published the harasser's information.²¹⁵ One defense could be that the

204. Copyright Act, 1956, 4 & 5 Eliz. 2, ch. 74 (Eng.).

205. See *id.* § 39; see also *Sun Cheek*, NEW L.J., Nov. 25, 1988, at 857 (reporting that the Royal Family has brought copyright actions against a newspaper under the Copyright Act).

206. See *Sun Cheek*, *supra* note 205, at 857.

207. See *id.* (disclosing the *Sun* agreed to pay £100,000 to charity in settlement of the claim).

208. See *id.*

209. See Copyright Act, 1956, 4 & 5 Eliz. 2, ch. 74, § 39 (Eng.).

210. Protection from Harassment Act, 1997, ch. 40 (Eng.).

211. Section 1 of the Act applies to all persons. See *id.* § 1.

212. See Neil Addison & Tim Lawson-Cruttenden, *How Can Victims Fight Back?*, TIMES (London), Sept. 9, 1997, at 33 (describing the Act and its provisions). Although unprecedented in the United Kingdom, breach of an injunction can be a criminal offense in Canada and most American States. See *id.*

213. See Protection from Harassment Act, 1997, ch. 40, § 3 (Eng.).

214. See *id.*; see also Addison & Lawson-Cruttenden, *supra* note 212, at 33 (outlining the important provisions of the Act).

215. See Addison & Lawson-Cruttenden, *supra* note 212, at 33.

actions were reasonable.²¹⁶ Despite its potential use as a method to protect privacy, the inappropriateness of applying this Act, which was intended to control stalkers, against paparazzi or the press is problematic.²¹⁷ By subjecting editors of newspapers to the possibility of prison sentences, it is surely not unreasonable to conclude they will avoid any information that might possibly be the result of any invasive tactics, unjustified or not. Sometimes proper journalism breaches privacy interests for reasons of legitimate public interest.²¹⁸ Potential application of this Act to journalists could chill these legitimate actions.

3. *Press Remedies*

The press itself recognizes that members of its industry can exceed acceptable reporting standards, so it provides for complaints to be made to the PCC, the press' self-regulatory body.²¹⁹ The previously discussed case of Selina Scott demonstrates the inadequacy of this process.²²⁰ Unsubstantiated intimate accusations against her, published nationally, only resulted in an incomprehensible printing of the PCC's finding buried inside the offending paper.²²¹ This light slap on the wrist is insufficient to deter offenders from repeated unjustified invasions of privacy.

IV. HOW WILL A RIGHT TO PRIVACY BE IMPLEMENTED?

Having recognized that protection of the right to privacy in the United Kingdom is inevitable with the passage of the Human Rights Act, and that it is a legitimate need for which

216. See Protection from Harrassment Act, 1997, ch. 40, § 3 (Eng.); see also Addison & Lawson-Cruttenden, *supra* note 212, at 33.

217. See Addison & Lawson-Cruttenden, *supra* note 212, at 33 (noting that the problem with applying the legislation to paparazzi and stalkers is ensuring the enforcement of court orders).

218. See *id.*

219. See *Public Rights, Private Lives*, *supra* note 186, at 4.

220. See Scott, *supra* note 155, at 32.

It was incumbent on the News of the World to carry the PCC's judgment. Inevitably it tucked it away on an inside page. In any case, so couched was it in legal jargon that I doubt if anyone bothered to read it through, far less understand it. Since no further sanctions seem likely, the News of the World and MacLeod can now laugh their way to their respective banks.

Id.

221. See *id.*

the present remedies are inadequate, the question then becomes what is the most effective manner to protect unjustifiably invasive journalism. Any proposed solution needs to consider that there are three interests which need to be safeguarded.²²² These interests are the individual's right to privacy, the press' right to freedom of expression, and the public's right to know information.²²³ The three primary options that may be used to balance these interests are self-regulation by the press, common law development by the courts, and privacy legislation enacted by Parliament.²²⁴ In order to evaluate these competing considerations and the rationales of these three bodies, it is useful to discuss how they currently operate in the United Kingdom.

A. *Right to Privacy: The Press, the Courts, and Parliament Prior to Implementation of the Human Rights Act*

1. *Self-Regulation by the Press*

Self-regulation by the press has considerable historical support as there have been no press laws for the last 350 years.²²⁵ The PCC is the successor to the Press Council, formed as a result of the 1989 Calcutt report into privacy.²²⁶ The "discredited Press Council"²²⁷ was a regulatory body whose primary objectives were "advancement of the freedom of the press and the promotion of 'adherence to high ethical standards.'"²²⁸ In 1989 the Press Council was attacked as being incapable of regulating its industry and Parliament threatened to enact legislative control.²²⁹ However, the government agreed that legislation would be suspended for

222. See Alan Rusbridger & Gerald Kaufman, *The Privacy Challenge*, EVENING STANDARD (London), July 30, 1997, at 51, available in LEXIS, News Library, Estand File.

223. See *id.*

224. See *infra* notes 225–68 and accompanying text.

225. See David Newell & Santha Rasaiah, *Pressing Matters—A Review of the Developments in European Law Which Affect UK Media*, L. SOC'Y GUARDIAN GAZETTE, Sept. 22, 1993, at 17, available in LEXIS, UK Library, LSG File.

226. See Jonathan Ames, *Privacy Law Forced Back on Agenda*, L. SOC'Y GAZETTE, Feb. 12, 1992, at 8, available in LEXIS, UK Library, LSG File.

227. *Id.*

228. David Newell & Catherine Courtney, *Media Law in 1989*, LAW SOC'Y GAZETTE, May 2, 1990, at 16, available in LEXIS, UK Library, LSG File.

229. See *id.*

an eighteen month period to see if the press and the newly formed PCC could regulate its industry.²³⁰

Legislation was never passed, but the capability of the PCC to regulate its industry has been under attack for the last several years.²³¹ Following Diana's death, claims that the press was not capable of policing itself via the PCC escalated.²³² In order to combat this negative view, Lord Wakeham, chairman of the PCC, proposed changes to the PCC's code of industry standards, the Code of Practice, which would be "the toughest set of industry regulations anywhere in Europe."²³³ The new guidelines include "a ban on pictures obtained by persistent pursuit, preventing media scrums and collective harassment, more protection for children, and widening the definition of private property on which individuals can expect not to be photographed."²³⁴ Further bolstering support for self-regulation by the press is Tony Blair's public announcement of his support.²³⁵

2. *Parliamentary Stance on Privacy Law*

Parliament has grappled with the right to privacy for the last four decades.²³⁶ During the 1960s, Parliament was sympathetic to privacy legislation as a means to control the press.²³⁷ Three privacy bills pertaining to the disclosure and intrusion aspects of privacy were initiated in Parliament.²³⁸ Although all three were defeated, the last bill prompted Parliament to authorize the Committee on Privacy in May 1970 to study interference with individual privacy.²³⁹

230. See Ames, *supra* note 226, at 8.

231. See *Privacy Law Probe*, L. SOC'Y GAZETTE, Sept. 2, 1992, at 6, available in LEXIS, UK Library, LSG File.

232. See Alison Boshoff, *The Death of Diana*, DAILY TELEGRAPH (London), Sept. 1, 1997, at 4.

233. Hannan, *supra* note 164.

234. *Press Code of Conduct Unthinkable in the United States*, Agence France-Presse, Sept. 26, 1997 available in 1997 WL 13402593.

235. See Robert Peston, *Blair Backs Self-Regulation of Press Despite 'Media Intrusion'*, FIN. TIMES (London), at 10.

236. See *infra* notes 237-51 and accompanying text.

237. See Krotoszynski, *supra* note 37, at 1404 & n.35.

238. See WACKS, *supra* note 19, at 39-42, 40 n.38 (discussing the three privacy bills introduced between 1961 and 1988); see also WALTER F. PRATT, PRIVACY IN BRITAIN 161-62, 180 (1979) (discussing the introductions of the Lyon Bill in 1967 and the Walden Bill of 1969).

239. See WACKS, *supra* note 19, at 41.

The Committee on Privacy, headed by Kenneth Younger, rejected the creation of a general right to privacy, even though it recognized privacy as “a basic need, essential to the development and maintenance both of a free society and of a mature and stable individual personality.”²⁴⁰ Adhering to the principle of parliamentary sovereignty, the committee concluded the “best way to ensure regard for privacy is to provide specific and effective sanctions against clearly defined activities which unreasonably frustrate the individual in his search for privacy.”²⁴¹ This statement indicates that the committee was in favor of specific privacy legislation.

In 1989 Parliament became increasingly hostile toward the press due to the behavior of certain press members.²⁴² However, bills that would protect privacy and provide a right of reply, thereby increasing constraints on the press, were not enacted because of the formation of the Calcutt committee as a solution to the problem.²⁴³

The formation of the Calcutt committee partially resulted from the widely perceived injustice of the result in *Kaye*.²⁴⁴ This committee had the following terms of reference:

In the light of recent public concern about intrusions into the private lives of individuals by certain sections of the press, to consider what measures (whether legislative or otherwise) are needed to give further protection to individual privacy from the activities of the press and improve recourse against the press for the individual citizen, taking account of existing remedies, including the law on defamation and breach of confidence; and to make recommendations.²⁴⁵

In its final report of 1990, the Committee concluded that the tort of privacy was not desirable, as such a tort might interfere with the media’s ability to effectively function.²⁴⁶ However, in 1992, members of Parliament and lawyers

240. *Id.*

241. *Id.*

242. See Newell & Courtney, *supra* note 228, at 16.

243. See *id.*

244. See Raymond Snoddy, *The Press on a Slippery Slope*, FIN. TIMES (London), June 23, 1990, at 7.

245. Newell and Courtney, *supra* note 228, at 16.

246. See Krotoszynski, *supra* note 37, at 1406.

renewed efforts to legislate the press.²⁴⁷ This effort was in reaction to a stolen document being published by several newspapers.²⁴⁸ A proposal was made to draft narrowly drawn legislation to prevent future publication of illegally obtained documents.²⁴⁹ However, this attempt also proved unproductive, since no law was ever enacted.

The death of Diana and the passage of the Human Rights Act have once again placed privacy legislation at the forefront of Parliament's agenda.²⁵⁰ But it seems unlikely that legislation will be enacted because, following a four-decade-long tradition, Prime Minister Blair has declared that privacy legislation will not be made by Parliament.²⁵¹

3. *The Court's Stance on Privacy Law*

Historically, the courts have had opportunities to recognize a right to privacy in the common law but have refused to do so.²⁵² This inaction by the courts is in deference to the major premise of UK law, parliamentary sovereignty.²⁵³ In the United Kingdom, the primary source of legal rights is statutory law, not generalized rights open to interpretation.²⁵⁴ As creation of new statutory law is considered the province of Parliament, the courts for the most part have followed the

247. See Ames, *supra* note 226, at 8.

248. See *id.*

249. See *id.* "[O]ne prominent lawyer, Geoffrey Robertson QC, . . . called for 'proper drafting' of legislation 'that establishes that privacy is just as much a human right as is freedom of expression.'" *Id.*

250. See Alison Boschoff & Rachel Sylvester, *The Death of Diana: 'Every Editor That Has Paid for Intrusive Photographs Has Blood on Their Hands'*, DAILY TELEGRAPH (London), Sept. 1, 1997, at 4.

251. See *id.* (stating that the Prime Minister prefers self-regulation of the press because parliamentary control of the press might interfere with "legitimate journalistic inquiry").

252. See James A. McLean, *Privacy, Scots Law, Human Rights and Europe*, 38 J. L. SOC'Y OF SCOT. 21, 22 (1993), available in LEXIS, Ukjnl Library, J1ss File (stating that although the ECHR promotes a clear right to privacy, the British courts have refused to rely on the Convention's findings); see also *Kaur v. Lord Advocate*, 1980 Sess. Cas. 319 (Scot.) (relying on English law for its conclusion that the Convention is irrelevant in a court of law if its provisions have not been officially endorsed by the legislature).

253. See Drewry, *supra* note 103, at 11; see also Krotoszynski, *supra* note 37, at 1404 (discussing the reluctance of the British courts to embrace the right of privacy out of respect for the supremacy of Parliament).

254. See Krotoszynski, *supra* note 37, at 1404.

principle of positivism.²⁵⁵ Under positivist theory, the law is applied as it is stated, meaning that the courts do not question the purpose of the law or try to interpret it.²⁵⁶ Lord Simon showed this deferential attitude in *Director of Public Prosecutions v. Withers*²⁵⁷ when he refused to recognize the tort of invasion of privacy.²⁵⁸ He made it clear that he believed that such a tort could be derived from the common law using the tort of breach of confidence.²⁵⁹ However, he went on to say that this would not be appropriate since Parliament was already studying the issue.²⁶⁰

The courts have also refused to use Article 8 of the ECHR as a common law base for the right to privacy, claiming that the domestic courts of England did not have authority to hear cases arising under the ECHR.²⁶¹ The rationale for this stance is that the provisions of the ECHR are not embodied in domestic law.²⁶² This barrier to the courts creating a common law right to privacy has been removed with the passage of the Human Rights Act.²⁶³

255. *See id.* (stating that British judges are precluded from developing social policy and are discouraged from implementing broad-reaching legal constructs, such as a right to privacy, when deciding cases).

256. *See* P. S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS 421 (1987) (stating that the dominant tenet of English positivist theory is the separation of law and morals and that Positivists claim that by separating law and morals, they are able to describe the law more accurately).

257. [1974] 3 All E.R. 984 (H.L.).

258. *See id.* at 995.

259. *See id.*

260. *See id.*

261. *See* McLean, *supra* note 252, at 21–22 (quoting the court in *Kaur*, “[A] Convention is irrelevant in legal proceedings unless and until its provisions have been incorporated or given effect to in legislation. To suggest otherwise is to confer upon a Convention concluded by the Executive an effect which only an Act of the legislature can achieve.”). *But see* *Pan-American World Airways Inc. v. Department of Trade*, [1976] 1 Lloyd’s Rep. 257, 261 (Eng. C.A.) (Scarman, L.J., concurring) (arguing that in certain circumstances “it does become the duty of our courts to look at the international convention and to interpret the law . . . in the light of the convention”).

262. *See* McLean, *supra* note 252, at 22–23.

263. *See id.* at 23.

The obligations of the UK under treaties such as the European Convention on Human Rights . . . are not just about relations between states. They are about the rights of individuals within states. Their full implementation requires a response from national legal systems. This has been recognised by the English courts and sooner or later the Scottish courts will find it necessary to follow suit. If, by that time, a

B. Regulation by the Press Under the Human Rights Act

The Human Rights Act combines self-regulation and judicial oversight.²⁶⁴ Under the Human Rights Act, the PCC is treated as a public body.²⁶⁵ A person whose right to privacy has been violated by a member of the press must first exhaust its remedies under the PCC.²⁶⁶ If unsatisfied with the outcome, the aggrieved party may challenge the decision in court.²⁶⁷

The reasons and rationale offered in support of self-regulation by the press vary, with some arguments being quite persuasive. Other arguments simply seem invalid. The most persuasive argument is that a free and unhampered press providing information within the public's interest is necessary for the effective functioning of a democracy. In order to make electoral choices the citizens have a right to know about pertinent qualities of a person holding public office, representing society's interests.²⁶⁸ If this premise is accepted, then it must also be accepted that the government should not be able to control the entity which acts as the watchdog for the government, since it would then have the power to pick and choose which information is given to the public.²⁶⁹

In France, the ability of the press to report on matters the government does not feel are appropriate has been severely limited.²⁷⁰ In a democracy, it is the people and not the government who should make this choice. However, it is too simple to take this argument and conclude that the press

right of privacy has not been fully established in Scotland, whether by statute or by case-law, then we should expect it to emerge shortly afterwards.

Id.

264. See Frances Gibb, *Rights Act Will Allow Judges To Shape Our Lives*, *TIMES* (London), Oct. 27, 1998, at 10.

265. See *id.*

266. See *id.*

267. See *id.*

268. See *Privacy and the Press*, *supra* note 174, at 32.

269. See *id.* (arguing that in a democracy politicians should not be able to dictate what information the public receives).

270. See *id.* The French privacy laws restrict the press from reporting information that the public would consider relevant to their decisions as voters. It also prohibits journalists from publishing illegal drug use or domestic violence by a political candidate. See *id.*

should be allowed to report, unchecked, on any matter.²⁷¹ Even though the people have a right to know what is in the public's interest, it is unimaginable that a person has the right to know all private details pertaining to a person, whether that person is a public or private individual.²⁷² This being the case, it is not right for the press to report that which an individual is not entitled to know.²⁷³

Also worthy of consideration is the argument that it is harassment, and not invasion of privacy, that should be monitored and controlled.²⁷⁴ Invasion of privacy is sometimes necessary for investigative journalism that is in the public's interest, however it is not right to hound and harass someone to obtain information.²⁷⁵ Recently, Parliament enacted a harassment act that could offer substantial protection to persons who are victims of intrusive journalistic tactics.²⁷⁶ However, there is a substantial danger that application of the provisions of the act could be used to restrict justifiably invasive journalism.²⁷⁷

271. *See id.* ("Self regulation by the press is undoubtedly bad. But the alternative—regulation by the state—is worse.")

272. *See Reforming the Press, Step by Step*, 139 NEW L.J. 245, 245 (1989) (editorial) (stating that there is confusion as to what is in the public's interest and what is interesting to the public); *see also* Eric Barendt, *End This Intrusion Now*, GUARDIAN (London), Sept. 24, 1997, at 19 (proposing that even public figures are entitled to privacy and concluding that there is no public interest justification for publishing details of a politician's love life if it does not interfere with the discharge of his duties).

273. *See Privacy and the Press*, *supra* note 174, at 32. The article also makes the counter argument that people who live in the public eye consent to the publication of personal details of their lives and cannot complain if journalists release private details for which consent was not given. *See id.*

274. *See* Addison & Lawson-Cruttenden, *supra* note 212, at 33.

275. *See id.*

276. *See id.*

277. *See* Alan Rusbridger, *Stop Now Before It's Too Late*, DAILY TELEGRAPH (London), Sept. 15, 1997, at 20.

[S]omeone will one day soon need to address the balance of all the laws that concern the publication of information in this country. We have only a lukewarm promise of freedom of information legislation to cling to. Meanwhile we are burdened not only with Draconian libel laws, but are about to be hit with swathes of new legislation which will, in effect, serve as a crude backdoor privacy law. . . . Article 8 of the European Convention on Human Rights will be interpreted by judges as a weapon against newspapers rather than . . . a weapon against an overbearing state. . . . The 1997 Harassment Act may in future be used by an individual, company or community to keep reporters—whether "good" or "bad"—at bay.

Id.; *see also* Protection From Harassment Act, 1997, ch. 40 (Eng.).

Journalists claim that the PCC can successfully regulate the media by the use of individual press standards.²⁷⁸ Supporting this argument is the PCC's call for tougher codes, including an agreement to refrain from photographing Princes William and Harry until they are adults.²⁷⁹ Also, the *Times* has shown its intolerance for unjustified invasions of privacy in its policy of not publishing photos gained by invasive tactics.²⁸⁰

Only the most naive optimist could accept the last rationale without a healthy degree of cynicism. Not only has the PCC shown itself unable to prevent past intrusions,²⁸¹ its own chairman, Lord Wakeham, wrote in response to complaints by Princess Diana of intrusive journalism, "privacy can be compromised if we voluntarily bring our private life into the public domain. Those who do that may place themselves beyond the PCC's protection."²⁸² According to this rationale, the PCC shows its belief that once any individual brings his life before the public, the PCC has a basis to deny relief when that individual is subjected to reprehensible journalistic tactics.²⁸³ It is not surprising, in light of the PCC's inability to regulate its industry and statements such as the one made by Lord Wakeham, that the majority of the population in the United Kingdom has stated it does not trust journalists to tell the truth.²⁸⁴

A self-serving argument has also been put forward that legislation directed solely at abuses by journalists would violate the principle of equality before the law.²⁸⁵ The alternative, supporters of this argument claim, would be that

278. See Carol Midgley, *Children May Have Privacy Rights Extended*, *TIMES* (London), Sept. 8, 1997, at 9 (illustrating various policies of prominent newspapers that respect the privacy of public figures in private situations).

279. See *id.*; see also *Privacy: Law and Grief*, *supra* note 16, at 58 (reporting that the *Sun* and the *Daily Mirror* pledged to refrain from purchasing paparazzi photographs of Princes William and Harry).

280. See Midgley, *supra* note 278, at 9.

281. See Piers Merchant, *Press and Private Parts*, *GUARDIAN* (London), Feb. 7, 1998, at 20.

282. *Privacy and the Press*, *supra* note 174, at 32.

283. See *id.*

284. See Alan Rusbridger & Gerald Kaufman, *The Privacy Challenge*, *EVENING STANDARD* (London), July 30, 1997, at 51, available in *LEXIS*, News Library, Estand File (reporting that a recent poll reflected that 75 percent of the population does not trust the press to tell the truth).

285. See *Privacy and the Press*, *supra* note 174, at 32 (arguing that the basic element of 'equality before the law' prohibits the enactment of a law that holds only journalists liable without binding every citizen).

all persons would have to be held accountable for unjustified invasions of privacy.²⁸⁶ This would mean that neighbors gossiping over the fence could be penalized, flooding the courts with trivial matters.²⁸⁷ A valid response to this argument is that the private individual and the press are not equal, and, therefore do not need to be so treated. The private individual gossiping over the fence does not have a forum of millions of people and is not capable of causing the same magnitude of damage to another individual that the press can. From the viewpoint of proportionality before the law, it is right that the body capable of causing more harm should be subject to more stringent standards and penalties.

Another persuasive argument in favor of self-regulation by the press is that the press should not be restricted from providing information that the citizenry has a right to know.²⁸⁸ This right to know, however, is not absolute when the individual's right to privacy is considered as well.²⁸⁹ Nor is it impossible to effectively balance these interests.²⁹⁰ This balancing has been effectively done in the United States, where, for example, despite privacy laws protecting individuals, investigative journalism fulfilled its democratic function of informing the people when it served as a catalyst to the resignation of President Nixon.²⁹¹

286. See *id.* (stating that the law of privacy should be similar to the law of defamation, which has been used indiscriminately against people or newspaper reporters who attack the reputation of another in letters, public houses, or private clubs).

287. See *id.*

288. See Rusbridger & Kaufman, *supra* note 284, at 51. *But see Privacy and the Press*, *supra* note 174, at 32 (stating that some commentators reject this proposition, arguing that the public's right to know is the *worst* rationale for self-regulation).

289. See *Privacy and the Press*, *supra* note 174, at 32. (listing examples of private matters that should not be announced to the public, such as medical history and adultery).

290. See Rusbridger & Kaufman, *supra* note 284, at 51 (suggesting that (1) criminal offenses should be limited to what everyone would regard as sensible, (2) that the right to privacy should be specifically defined (3) for every criminal or civil offense defined in the law, that there should exist an extremely broad public-interest defense, and (4) that a privacy law should be accompanied by the enactment of a Freedom of Information Act).

291. See *id.* "Bad newspapers are preferable to bad law. The press has a right to be proud of its role in exposing such scandals as cash for questions, the Pergau dam and thalidomide. It is justifiable to ask whether such investigative journalism would have been possible under a restrictive privacy law." *Id.*; see also Linda Quigley & Sandy Smith, *What's a Good Christian to Do?*, TENNESSEAN, June 24, 1997, at D1 (attributing the downfall of American

C. Parliament or the Courts?

As much as the press would like to avoid any type of privacy law, whether made by the courts or Parliament, the incorporation of the ECHR ensures the implementation of a right to privacy domestically.²⁹² However, the ECHR also guarantees freedom of expression, including that of the press.²⁹³ Obviously, in order to reconcile these competing interests, they will need to be balanced. The courts should balance which right, freedom of the press or privacy, is more important in relation to the public's right to know. By using this standard a distinction can be drawn between justified and unjustified invasive journalism. If the information is clearly trivial and is gained through methods physically or mentally damaging to the individual, the privacy interest would outweigh the public's interest of the right to know. If the issue is not considered trivial, then the public's right to know would safeguard the right to freedom of expression. Unfortunately, parliamentary drafting does not lend itself to such a balancing process.²⁹⁴ When Parliament drafts a statute, it is followed to the letter. This was exemplified in the case of the woman who was denied access to the sperm of her dead husband in the absence of consent.²⁹⁵ This allows no room for flexibility due to exceptions or unforeseen circumstances, which a balancing process by its very nature requires. Case by case decisions made by the court allow for flexibility and a balancing of interests.²⁹⁶ Human rights such as privacy and freedom of expression are very complex and cannot be adequately applied using stringent statutes.²⁹⁷ Also, judges can make more objective and balanced decisions since they are not subject to the same day to day pressures as a politician.²⁹⁸ Determination of fundamental rights are

President Richard M. Nixon to "dogged reporting by *Washington Post* reporters Carl Bernstein and Bob Woodward").

292. See Rusbridger & Kaufman, *supra* note 284, at 51.

293. Human Rights Convention, *supra* note 8, art. 10, at 230.

294. See *infra* notes 295, 297–99 and accompanying text.

295. See *R v. Human Fertilisation and Embryology Auth.*, [1997] 2 All ER 687, 687–88 (Eng. C.A.).

296. See *infra* notes 297–92 and accompanying text.

297. See MICHAEL F. MAYER, *RIGHTS OF PRIVACY* 98 (1972).

298. See Rabinder Singh, *A Special Status for Human Rights*, *THE LAW.*, Sept. 30, 1997, at 15, available in LEXIS, Ujnl Library, Lawyer File (arguing that enforcement of human rights by the courts is legitimate because it ensures that everyone has freedom of speech and protects disenfranchised minorities).

better made within a framework of what is best for society as opposed to what is best for a political career.

Prime Minister Tony Blair announced that the government will not enact privacy legislation, thus lending support to the argument that the courts should shape privacy laws.²⁹⁹ Critics of this decision cite as dangers the libel laws already in effect and believe a privacy tort could lead to substantial litigation and heavy penalties.³⁰⁰ The alternative though is for Parliament to create its own fines, which would give it too much power over the body that monitors the government.³⁰¹ It has also been claimed that members of the senior judiciary are specialists in commercial law rather than human rights law.³⁰² A valid reply to this criticism is that neither Parliament nor the courts have human rights law experience. The courts however have had extensive involvement in dealing with the public's interest and balancing of interests in their dealings with defamation cases.³⁰³ Therefore, the courts are more qualified to balance interests as required when dealing with privacy and press issues on a case by case basis.

It seems inevitable that the New Zealand model of incorporation will be followed when introducing the ECHR

299. See Wintour & Adonis, *supra* note 64, at 1.

300. See *id.* Lord Irvine stated the following:

The common law cannot fashion remedies with quite the subtlety of Parliament because Parliament is all-powerful and can do anything it likes. All I am saying is that a law of privacy is likely to develop and if it develops as a tort of privacy for damages, then you can imagine heavy actions and court cases . . . Why would the closest analogy not be libel? . . . What I find rather hilarious is that you could end up with a law of privacy developed by the judges which the press might in 10 years' time be petitioning Parliament asking for a weaker remedy to be put into being, consistent with Articles 8 and 10.

Id.

301. See *A Law That Is Not for Judges to Make*, OBSERVER (London), July 27, 1997, at 21 (noting that it may be "paradoxical to recommend that [Parliament] who have been the victims of tabloid exposes should draw up a privacy law").

302. See *id.* (noting that the generally conservative judiciary has not dealt with human rights cases and fails to understand the necessity of defending the freedom of speech).

303. See Clare Dyer, *Privacy: The Media Take a Shot in the Dark*, GUARDIAN (London), Dec. 19, 1997, at 15 (discussing prior case law which shows that the courts have had to balance various interests in privacy and defamation cases); see also Lord Alexander, *This Law Must Come*, GUARDIAN (London), Feb. 13, 1998, at 17 (discussing the role defamation cases have played in the development of British civil law and the public-issue defense).

into domestic law.³⁰⁴ This model does not allow courts to strike down statutes made by Parliament, which means that parliamentary sovereignty will be preserved.³⁰⁵ Lord Bingham, a member of the senior judiciary, has declared the courts amenable to this approach.³⁰⁶ This less radical form of incorporation should somewhat appease those nervous of court usurpation of parliamentary sovereignty. This outcome, guaranteeing the sovereignty of Parliament, combined with the ability of the courts to balance the interests involved, creates a better forum for privacy of the individual to be reconciled with the press' right of freedom of expression.

V. POSSIBLE SOLUTION

In the short term, passage of the Human Rights Act will provide the citizens of the United Kingdom with a domestic recourse for violations of fundamental rights by the State.³⁰⁷ If the doctrine of *Drittwirkung*³⁰⁸ is given effect, the constitutional-like nature of the ECHR will also provide relief from violations by nongovernmental bodies, including the press.³⁰⁹ It appears most likely that the complex analysis necessary for a balanced application of the ECHR guaranteed rights will take place in the courts, developing rules through the common law.³¹⁰ Although this is a significant and necessary advancement toward properly balancing privacy interests against freedom of expression, it is unlikely to completely remedy the problem of unjustified invasive journalism. As long as there exists a worldwide market for information gained through these methods, the situation will continue. The fact that the United Kingdom may be able to stem the publication of such information locally does not

304. See Patrick Wintour & Andrew Adonis, *Exclusive Interview: The Lord Chancellor: Radical Zeal of a Truly Cautious Man*, OBSERVER (London), July 27, 1997, at 20.

305. See *id.*

306. See Gibb, *supra* note 101, at 7 ("I think it is vastly preferable that judges do not embark on an exercise to disapply Acts of Parliament. It is not part of our constitutional tradition to do so and is bound to give rise to disquiet and unrest in Parliament.").

307. See *supra* notes 32, 36–38, 76–78 and accompanying text.

308. See VAN DIJK & VAN HOOFF, *supra* note 22, at 13–18 (explaining the widely divergent views on *Drittwirkung* and the arguments for inferring it from the ECHR).

309. See *supra* notes 25–36 and accompanying text.

310. See Gibb, *supra* note 101, at 7; see also Wintour & Adonis, *supra* note 304, at 20.

mean that it will not be available in other countries.³¹¹ The press, due mainly to technological advances, knows no national boundaries. For example, a picture taken in the United Kingdom or another country could be sold in a country where these tactics are not regulated.³¹² The media carrying the picture could then distribute it in the United Kingdom. Examining what would be required to stem the distribution of this sort of information worldwide is beyond the scope of this Comment. However, it is useful to briefly examine how this might be accomplished in Western Europe.

The EU treaties differ from ordinary international treaties such as the ECHR.³¹³ Member states of the EU have limited their sovereign rights in particular fields covered by EU law.³¹⁴ It is also accepted that EU law takes precedence over domestic law.³¹⁵ This binding force, uniformity, and precedence over domestic law indicate that a body of common European law is being formed in certain areas, primarily economics.³¹⁶

The European Court of Human Rights has stated that a “uniform conception of morals” does not exist in the ECHR,³¹⁷ but it is not unreasonable to propose that it is their duty to aid in developing one.³¹⁸ In several application reviews, the ECHR noted that one of the purposes was to establish

311. See *Privacy and the Press*, *supra* note 174, at 32 (citing as an example Princess Diana’s encounter with the French press).

312. See *id.*

313. See Case 26/62 *Van Gend en Loos v. Nederlandse Administratie Der Belastingen*, [1963] 2 C.M.L.R. 105, 129 (defining the purpose of the EEC Treaty as “to create a Common Market, the functioning of which directly affects the citizens of the [European] Community,” which implies “more than an agreement creating only mutual obligations between the contracting parties”).

314. See *id.* at 129 (holding that “the Community constitutes a new legal order in international law, for whose benefit the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member- States but also their nationals”).

315. See *id.* at 129–30 (explaining that the EEC Treaty imposes “clearly defined” obligations and grants legal rights to individuals and member-States, and in the context of Article 12, “sets out a clear and unconditional prohibition,” which is a duty “imposed without any power in the States to subordinate its application to a positive act of internal law”).

316. See DRZEMCZEWSKI, *supra* note 12, at 231–42 (discussing constitutional and legislative factors in the application of EU law in domestic courts).

317. *Handyside v. United Kingdom*, 1 Eur. Ct. H.R. (ser. A) at 737, 753 (1976).

318. See VAN DIJK & VAN HOOFF, *supra* note 22, at 435.

common standards for the public in Europe.³¹⁹ This purpose, coupled with the fact that “morals” is repeatedly stated in the ECHR, suggests that a goal of the ECHR is the establishment of a common standard of morals.³²⁰

It is also well established that the ECHR can be considered a part of EU law.³²¹ However, the Court of Justice of the EU has only mentioned the protection of fundamental rights in relation to EU organs, declining to apply these principles to the domestic sphere of the member states.³²² An attempt to do this has been made, but was unsuccessful.³²³ However, it is possible as pressure for a Pan-European solution to the problem of unjustified invasive journalism increases that a future attempt would be successful.³²⁴ This attempt would be a first step toward European-wide recognition of a common standard of what is acceptable behavior by the press in gaining access to people’s private lives. The balancing process of freedom of expression, privacy interests, and the public’s right to know could be uniformly effected by the application of the Court of Justice of the EU, the EEC arm of justice.

319. See DRZEMCZEWSKI, *supra* note 12, at 24–25 (quoting App. 2294/64, 1965 Y.B. Eur. Conv. on H.R. 315, 320 (Eur. Comm’n on H.R.) which states “that the interests served by the protection of the human rights and fundamental freedoms guaranteed by the Convention *extend beyond the individual interests of the parties concerned . . . they have led the member Parties to the Convention to establish standards forming part of the public law in Europe*”) (emphasis and alteration in original).

320. See VAN DIJK & VAN HOOF, *supra* note 22, at 435; *cf. The Court of 700m Citizens*, IRISH TIMES, Nov. 2, 1998, at 13 (editorial), available in LEXIS, News Library, Itimes File. (commenting that the ECHR allows discretion over the application of its principles when there is no uniform European system of morals).

321. See Volcansek, *supra* note 141, at 116 (stating that the Court of Justice relied on the ECHR to enlarge the scope of human rights protected against Community action).

322. See *id.* at 117.

323. See *id.*

324. See Meade, *supra* note 172 (quoting Tory Euro-spokesman on the media, Roy Perry, who argued that “[m]edia intrusion into private lives is a Europe-wide problem and needs European action”).

† This comment won the Gus Schill writing award.