

Safeguarding Privacy from Criminal Process

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Thesis submitted to University of Nottingham for the degree
of Doctor of Philosophy

June 2017

Abstract

This thesis focuses on the privacy interests of those subject to a criminal process. The thesis investigates the extent to which the privacy interests of those subject to such a process are recognised and afforded adequate protection in England and Wales. Over the last thirty years policing has become increasingly proactive and preventive. Advances in technology have given rise to new policing strategies, which emphasise the need to manage 'risky' groups and individuals through the collection and retention of disparate pieces of personal information. Whilst there is a significant body of criminological literature documenting this trend, and raising the possibility that these developments could pose a threat to the privacy interests of those subject to such preventive policing measures, criminological theorising alone cannot provide a defensible normative model for assessing the impact of such developments. Moreover, criminal procedure scholarship tends to focus on human rights insofar as they regulate adjudicatory policing measures geared towards the prosecution of suspected offenders. This procedural scholarship does not focus centrally on the wider functions of the police in maintaining order and protecting the public by gathering intelligence on 'risky' individuals and groups.

This thesis aims to fill this gap in the literature through an assessment of how such policing activities set back privacy related rights. An interdisciplinary method is used, which draws on philosophical literature, European and domestic human rights and criminal procedure jurisprudence, and relevant policing and criminal justice scholarship. The first broad task for the thesis is to develop a normatively defensible model which can identify where privacy interests are set back as part of a criminal process, and articulate why it is important for those tasked with regulating such a process to recognise and appropriately protect these interests. This normative model is then used to assess English law's response in different contexts to the police use of privacy interfering measures against those subject to the criminal process. It is noted that the European Court of Human Rights Article 8 jurisprudence has (generally

speaking) had a positive impact on English law in this area, but concerns are raised that domestic lawmakers consistently fail to strike a fair balance between the privacy interests of those subject to a criminal process and the legitimate crime prevention goals of the police.

Acknowledgments

Since starting this thesis, I have met and worked with some great academics and research students, far too many to thank here. My heartfelt thanks to my supervisors, Paul Roberts and John Jackson, for their inspiration, encouragement, and support. I have benefited from how they think, how they write, and from the scrutiny each has paid to this thesis over the last four years.

I am also grateful to my fellow research students at the University of Nottingham. Ed Wright, Usmaan Siddiqui, Lisa Warwick, Helen Creswick, and Jamie Jordan have provided invaluable moral support throughout this process, and have each occasionally played the role of sounding board to numerous presentations, and chapter ideas. Pete and Julia Norton have also been very helpful over the years. I owe a debt to my new colleagues at the Law School, University of East Anglia. They have been tremendously supportive in the last few months, particularly Ian Edwards, Sabine Jacques, Angelika Reichstein, Gemma Mitchell and Rob Heywood.

I would like to offer my special thanks to all my friends and family for the welcome relief they continue to provide from the pressures of working life. I am immensely grateful to my parents, Julia and David. Both have provided me with enthusiastic support throughout my education, and my life. I also owe special thanks to Craig and Katie, who have always been available for a pep talk, even when they have had their own academic stresses to think about. I am indebted to my partner Holly who, from the beginning, has assisted me with proof reading, laughed at my jokes, and reminded me to take the challenges one at a time. Finally, this thesis would not have been completed without the support of an ESRC 1+3 award (no: 1232069).

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Introduction

Have advances in policing technology and methods shifted the balance between the legitimate functions of the police and individual privacy interests too far in favour of the state? To what extent are the privacy interests of those subject to the criminal process (i.e. those investigated, arrested, charged or subject to other coercive measures in connection with a criminal matter) recognised, and afforded protection, in England and Wales? To what extent *should* they be recognised? This thesis offers an answer to these questions. It does so using an interdisciplinary method which draws on philosophical literature, European and domestic human rights and criminal procedure jurisprudence, and relevant policing and criminal justice scholarship. The details of the approach to be taken will be set out towards the end of this Introduction. But first, the salience of the research questions will be elucidated, in two stages. First, criminological literature, which highlights how contemporary Western democracies have put an increased focus on managing 'risky' - but not convicted - sections of the population, is briefly surveyed. This literature flags up the possibility that such changes pose an undue threat to the privacy interests of those subject to the criminal process. However, it does not offer a method for understanding what these interests are, much less for resolving questions concerning the extent to which constraints in the pursuit of ensuring other public goods are justifiable.¹ Turning then to the second point of elucidation, the thesis's specific focus on privacy interests, and not more 'mainstream' criminal procedure rights, will be explained.

1. A Criminological Theory and Penal Policy Context

Over the last three decades the capacity of public authorities to interfere with the privacy related interests of those subject to the criminal process has increased

¹ Public or common goods, as referred to in this thesis, relate to those goods that are not the sum of the good of individuals but to those goods which serve the interests of people generally in a conflict-free, non-exclusive and non-excludable way. See J. Raz, *Ethics in the Public Domain* (Oxford: Oxford University Press, 1994) 52. These broadly defined goods serve the importance of our 'lives in common' in liberal democratic thinking. See J. Horder, *Ashworth's Principles of Criminal Law* (8th edn. Oxford: Oxford University Press, 2016) 49.

exponentially. However, the relationship between the rapid development of privacy eroding technologies and their use against those subject to the criminal justice process is complex. Lyon has commented on how technological developments and social processes mutually shape one another 'co-constructing' surveillance.² As the technological means to subject individuals to intrusive scrutiny advance, they shape the ways in which crime is controlled; in turn, the changing nature of the agencies responsible for controlling crime (integrated within larger sociocultural shifts) has a role to play in driving the development of particular policing technologies.³ Whilst privacy interfering measures targeted against suspected offenders are often accepted as a necessary function of the police for the prevention of disorder or crime, their proliferation as a tool in the fight against crime over the last twenty years has taken place in the context of broader socio-political and economic changes in society. Compelling accounts have emerged to explain why advances in such technology in post-industrial societies have led to the proliferation of their use against those subject to the criminal process.

In his seminal work, *Discipline and Punish*, Foucault describes Bentham's *Panopticon* as the architectural form of disciplinary power. The Panopticon is a prison designed with a watchtower in the centre where the guards can constantly observe the transparent cells around the circumference of the prison whilst concealing themselves, thereby creating the aura of omnipresence.⁴ For Foucault, this design was emblematic of the disciplinary society. This invisibility, for Foucault, was crucially important to the maintenance of order; it led the subjects to internalise the idea that they could be under observation at any time, and thus to self-regulate:

Hence the major effect of the Panopticon: to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power. So to arrange things that the surveillance is permanent in its effects, even if it is discontinuous in its action; that the perfection of power should tend to render its actual exercise unnecessary; that this architectural apparatus

² D. Lyon, 'Surveillance Technology and Surveillance Society' in T. Misa, P. Brey, and A. Feenberg (eds.) *Modernity and Technology* (Boston: MIT Press, 2003) 161-184 at 178.

³ *ibid* at 178.

⁴ J. Bentham, *Proposal for a New and Less Expensive Mode of Employing and Reforming Convicts* (London, 1792).

should be a machine for creating and sustaining a power relation independent of the person who exercises it; in short, that the inmates should be caught up in a power situation of which they are themselves the bearers.⁵

Foucault terms the effect of this permanent surveillance, and the automatic functioning of this disembodied power, 'panopticism'. Whilst Bentham presented the Panopticon as an architectural design for a particular institution, Foucault viewed it as 'the diagram of a mechanism of power reduced to its ideal form.'⁶ For Foucault, the Panopticon is a figure of political technology detached from any specific use, such as the prison model described by Bentham:

There are two images, then, of discipline. At one extreme, the discipline-blockade, the enclosed institution, established on the edges of society, turned inwards towards negative functions: arresting evil, breaking communications, suspending time. At the other extreme, with panopticism, is the discipline mechanism: a functional mechanism that must improve the exercise of power by making it lighter, more rapid, more effective, a design of subtle coercion for a society to come.⁷

This society to come was to be the disciplinary society, where power relations were maintained through panopticism. According to Foucault, whilst the laws in modern society appear to fix limits on the exercise of power; through panopticism, the disciplines operate on the 'underside of the law'. Panopticism goes beyond the limits of the law: 'whereas the juridical systems define juridical subjects according to universal norms, the disciplines characterise, classify, specialise; they distribute along a scale, around a norm, hierarchise individuals in relation to one another and, if necessary, disqualify and invalidate.'⁸

Panopticism, then, operates as a parallel law. It regulates and disciplines those in society beyond the extent of the formal law. Surveillance and other risk management techniques are important to maintain order in such a society, not only because they allow public authorities to monitor individuals in society, maintaining order through the effective investigation and prosecution of those who violate the law; but also

⁵ M. Foucault (A. Sheridan trans.), *Discipline and Punish: The Birth of the Prison* (London: Penguin, 1997. Originally published 1975) 201.

⁶ *ibid* 205.

⁷ *ibid* 209.

⁸ *ibid* 223.

because they give the impression of omnipresence. Surveillance is one way in which discipline is exercised in society. If one does not know when one is being subject to surveillance, and more importantly, when one is not, but knows that it is possible at any time, then one inscribes the power relation between surveiller and surveilled upon oneself, becoming the principle of one's own subjection.

In short, for Foucault, discipline is a mode of governance: it renders populations measurable through categorisation, separation, and sorting into hierarchies and power relations. Panopticism is a function that maintains these hierarchies and power relations by creating among individuals in society a sense that they may be subject to surveillance or other forms of monitoring or management, at any time. This Foucauldian conception of how power operates in society goes beyond the traditional notion that the state holds power and wields it over society; in disciplinary society, power relations subdivide between institutions and a range of official actors. This suggests that the policing measures under study in this analysis may have a wider role than simply to help state authorities detect and prosecute serious crime. More than just a tool for observation, panopticism transforms the individual's relation with him or herself, to maintain discipline in society. Thus, the well-documented use of such policing measures and the laws permitting their use may serve the function of maintaining discipline.

Foucault's account of how changes in criminal justice and crime control can be situated in a wider context has been widely influential. In particular, Foucault's work drew attention to the nature of surveillance and the subtle role it plays in governing populations. Building on Foucault's theorising, Shearing and Stenning observe how more recently discipline and order are driven by the 'instrumental' aims of private corporations.⁹ Using the example of how order is maintained in Disney World, Shearing and Stenning show that control is deeply *embedded* in the architecture of

⁹ C. Shearing and P. Stenning, 'Say "Cheese"!': The Disney Order that is not so Mickey Mouse' in C. Shearing and P. Stenning (eds.), *Private Policing* (California: Sage, 1987) 317-323.

the site so that it is invisible yet ever-present and pervasive.¹⁰ Other criminologists have drawn upon 'governmentality' literature to explore how prevailing modes of governance in society can account for the 'need' to develop and deploy ever-more intrusive surveillance methods against those subject to the criminal justice process.¹¹ Whilst these accounts differ to varying degrees in what they describe as the fundamental processes at work which have led to these modern crime control techniques, they all attempt to explain changing criminal justice and crime control orientated policies in a social context. Such endeavours are important. Social and cultural changes inevitably impact upon policing, security and crime control.

For Feeley and Simon, the ever-increasing use of surveillance and other information gathering, processing, and disseminating practices which function as crime control mechanisms are symptoms of a paradigm shift from the 'old penology', with its focus on the identification, prosecution, punishment, and treatment of offenders, to the 'new penology', which is concerned with managing and classifying groups in terms of the danger they pose.¹² In the latter, probability calculations based on the traits of the person or group take precedence over individualised evidence-based suspicions that a crime has been committed. As a result, justice is becoming more 'actuarial' as it focuses on assessing risks and controlling crime pre-emptively. Policing strategies have increasingly focused on managing different groups within society and managing the risks they pose to social order. Evidence of this paradigm shift might be found in the increased use of mass surveillance and profiling techniques that have become more ubiquitous over the last thirty years.

¹⁰ *ibid* at 322.

¹¹ K. Stenson and R. Sullivan, *Crime, Risk and Justice: The Politics of Crime Control in Liberal Democracies* (Cullompton: Willan Publishing, 2001).

¹² M. Feeley and J. Simon, 'Actuarial Justice: The Emerging New Criminal Law' in D. Nelken (ed.) *The Futures of Criminology* (London: Sage, 1994) 173-202 at 175.

These trends are also said to be indicative of a broader societal transition towards the 'risk society'.¹³ Giddens, drawing on Beck, defines the concept as 'a society increasingly preoccupied with the future (and also with safety), which generates the notion of risk'.¹⁴ This occurs because modern societies are subject to new risks as a result of the modernisation process itself. Giddens terms these types of risk 'manufactured'. Examples of such risks include those associated with nuclear energy, or human driven climate change. The emergence of such 'manufactured' risks has led to changes in the way societies organise themselves in order to defuse and manage such threats.¹⁵ Thus, with the introduction of these manufactured threats to human society, social relations have changed. One consequence is said to be that widespread consideration is given to precaution and preventive measures to reduce risk levels in society.¹⁶

In the context of policing, Ericson and Haggerty argued that risk serves a dual function of identifying both problem and procedure.¹⁷ Firstly, risk identifies deviant groups or individuals as 'risky'. Then risk analysis offers procedures and technologies for managing the dangers posed by risky populations. These categorisations perpetually sort people and organisations in terms of whether they are more or less efficient, useful, or qualified instead of focusing on the moral blameworthiness of individuals. Ericson and Haggerty invoke the metaphor of a 'transmission society' to describe this process:

It regulates the pace of contributions to society by rating credentials, personal handicaps, creditworthiness, productivity and so on ... Some people are destined for the autobahn, others relegated to highways with speed limits, and still others to local roads with speed bumps.¹⁸

¹³ See generally U. Beck, *Risk Society: Towards a New Modernity* (London, Sage Publications 1992); A. Giddens, *The Third Way: The Renewal of Social Democracy* (Cambridge: Polity Press, 1998); U. Beck, *World at Risk* (Cambridge: Polity Press, 2008) 1-47; A. Edwards and G. Hughes, 'The Preventive Turn and the Promotion of Safer Communities in England and Wales' in A. Crawford (ed.) *Crime Prevention Policies in Comparative Perspective* (Cullompton: Willan Publishing, 2009) 62-85; A. Williams and M. Nash, 'The Realities of Legislating Against and Protecting the Public from Risky Groups' in K. McCartan, *Responding to Sexual Offending: Perceptions, Risk Management and Public Protection* (London: Palgrave, 2014) 1-19; A. Ashworth and L. Zedner, *Preventive Justice* (Oxford: Oxford University Press, 2014).

¹⁴ Giddens, n 13, 3.

¹⁵ *ibid.*

¹⁶ R. Hopkins-Burke, *An Introduction to Criminological Theory* (3rd edn. Cullompton: Willan, 2009) 315.

¹⁷ R. Ericson and K. Haggerty, *Policing the Risk Society* (Oxford: Oxford University Press, 1997) 39.

¹⁸ *ibid* 40.

This 'risk society' relies on information to sort individuals into categories based on the risks they pose to order. In risk society, the focus of the police shifts from repressive and deterrent measures to control those who have violated the criminal law, rooted in moral considerations, to a focus on surveillance to produce knowledge of populations for the purpose of administering them based on the level of risk posed. Thus, surveillance is a tool used throughout society to organise populations and manage the risks they pose to other populations and society itself. Those populations that pose the most significant risk will be subject to the surveillance systems of the police, welfare, and mental health services among others; whilst those populations that pose lesser risks, and in turn receive more trust, are subject to the less intrusive regulatory and surveillance systems of taxation, education, licensing, and health services.¹⁹ Thus, risk drives crime control policy and furthers technological innovations with disciplinary potential. More recently, commentators such as Kohler-Hausmann have noted how the police are increasingly functioning to control sections of the population without pursuing a criminal conviction or imposing a criminal sanction.²⁰ According to Kohler-Hausmann, penal power can effectively operate without the pursuit of criminal convictions as information recorded about individuals as part of a non-adjudicative criminal process (e.g. arrest records) can be used to assess, evaluate, and manage the individual now and into the future.²¹

Criminologists have advanced numerous theories which attempt to grasp how social changes have affected penal policy and administration. The present discussion cannot cover them all. However, one consistent theme in the literature is that crime control has increasingly become a more proactive, pre-emptive, and preventive pursuit. Questions remain as to whether or not shifting policing priorities which focus on economic rationality, the management of risk, and the prioritisation of controlling

¹⁹ *ibid* 41.

²⁰ See generally B.E. Harcourt, *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age* (Chicago: University of Chicago Press, 2007); I. Kohler-Hausmann, 'Misdemeanor Justice: Control Without Conviction' (2013) 119 *American Journal of Sociology* 351-393 at 353; A. Ristroph, *Regulation or Resistance? A Counter-Narrative of Constitutional Criminal Procedure* (2015) 95 *Boston University Law Review* 1555-1617.

²¹ Kohler-Hausmann, *ibid*; Ristroph, *ibid* 1557-1565.

populations, unduly undermine the privacy interests of those subject to the criminal justice process. Criminological theories explain social trends in crime control and also, inevitably, raise the question: so what? That is to say, what is the impact that social and technological developments have on the way individuals experience policing? Do they, as one might assume, adversely affect the fundamental rights of those identified as 'risky'? And, if so, can such strategies be squared with the due process values which underpin liberal democratic criminal justice systems?

This thesis aims to fill at least some of the normative gap left behind by this body of literature. It focuses on the impact such changes have had on individuals investigated in connection with, but not convicted of, a criminal offence. Such individuals fall outside the remit of the legitimate role of various criminal justice agencies in censuring and sanctioning individuals for criminal wrongs. However, as we shall see, such individuals can be particularly vulnerable to privacy interferences. They can lawfully be subject to a range of coercive measures as part of the evidence-gathering process and, increasingly, as part of police attempts to manage and monitor any future risks they might pose to society. Often measures geared towards the latter aims can infringe on the fundamental rights of the individual long after the conclusion of the proceedings in which he or she was initially an object of official suspicion or inquiry.

2. Why Privacy Now?

Legal commentators have predominantly focused on the effects that social changes have on 'mainstream' criminal procedure rights, such as the right to liberty and fair trial rights, rather than on privacy.²² This is unsurprising given that many of the

²² See, for example, S. Trechsel, *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press, 2006); J. McEwan, 'From Adversarialism to Managerialism: Criminal Justice in Transition' (2011) 31 *Legal Studies* 519-546; Ashworth and Zedner, n 13, 51-72; L. Weber, E. Fishwick, and M. Marmo, *Crime, Justice and Human Rights* (New York: Palgrave, 2014) 129-147; A. Amatrudo and L.W. Blake, *Human Rights and the Criminal Justice System* (Abingdon: Routledge, 2015) 18-34. There are, of course, some commentators that have focused on how social changes can present a threat to back privacy interests in the context of criminal proceedings: K. Starmer, *Criminal Justice, Police Powers and Human Rights*

protections that regulate the fair treatment of defendants do, incidentally at least, protect privacy interests. For example, whilst the legal principles of the right of silence, the privilege against self-incrimination, and rules governing the admissibility of improperly obtained evidence primarily operate to ensure due process and limit miscarriages of justice,²³ they also protect privacy interests by regulating the conduct of police in searches, interviews, and other investigatory activities. However, in the context of movements towards pro-active, intelligence-led styles of policing, which focus not only on ensuring effective prosecutions, but also on the management of risky sub-populations, questions remain as to whether a focus on these procedural rights is sufficient to fully understand the normative consequences of such changes. Ristroph, for example, suggests that traditional procedural guarantees focus primarily on the resistance of state punishment and miscarriages of justice; relegating constraints on coercive policing to a subsidiary consideration.²⁴ Indeed, in many of the cases to be considered in this thesis, the coercive activities of the police are not geared towards any form of criminal prosecution. Rather, they are focused on intelligence gathering, crime prevention, and the management of individuals and groups who, despite not being convicted of any criminal offence, are, for whatever reason, considered by the police to be legitimate targets of such measures. Miller has observed how such non-adjudicative exercises of police coercion are often under-regulated to the detriment of the due process rights of the individuals targeted by such measures.²⁵ Drawing on policing scholarship, Miller outlines various functions of the police role which are adjudication-independent:

Much police activity on the street does not aim at criminal prosecution or the imposition of criminal punishment, but instead seeks to impose non-criminal sanctions, to identify individuals as subject to surveillance, to report individuals to coordinate state institutions outside the criminal justice system, to resolve

(Oxford: Oxford University Press, 2001) 80-94; B. v.S-T. Larsen, *Setting the Watch: Privacy and the Ethics of CCTV Surveillance* (Oxford: Hart Publishing, 2011).

²³ J. Jackson, 'Re-Conceptualizing the Right of Silence as an Effective Fair Trial Standard' (2009) 58 *International and Comparative Law Quarterly* 835-861; P. Roberts, 'Groundwork for a Jurisprudence of Criminal Procedure' in R. A. Duff and S.P. Green (eds.), *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2013) 379-408.

²⁴ See generally Ristroph, n 20.

²⁵ E. Miller, 'Challenging Police Discretion' (2015) 58 *Howard Law Journal* 521-556 at 522-524; E. Miller, 'Policing Criminal Justice: A Fair Cop and a Fair Trial' (2016) Unpublished conference paper at: *Obstacles to Fairness in Criminal Proceedings*, University of Nottingham, September 1-2, Nottingham.

petty disputes, to pre-empt public wrongdoing, to restore public order, and so on.²⁶

In England and Wales, the use of such measures is often challenged on the grounds that they constitute a violation of the individual's right to respect for private life under Article 8 of the European Convention on Human Rights. However, Article 8 legitimises the use of such measures for many of these non-adjudicative, preventive policing purposes. Where a measure which interferes with the Article 8 rights of the individual is considered lawful and necessary it may be used by the police if, through its use, the police aim to *prevent* disorder or crime.²⁷ Thus, where lawful, proportionate, and necessary, the police may deploy the tools of criminal justice not only to remediate wrongdoing or disorder, but to obviate it.²⁸

Most forms of electronic surveillance, including the targeted use of CCTV cameras, Global Positioning System (GPS) tracking, and phone tapping can be used not only to investigate crimes that have been committed, but also to gather intelligence on the movements of individuals and groups with a view to preventing future criminal activities. The police also construct databases containing the personal information of individuals who have usually been categorised based on some information which is thought to make them worthy targets of such 'dataveillance'.²⁹ The UK National DNA Database (NDNAD), for example, holds DNA and fingerprint samples taken from those arrested for recordable criminal offences, which are retained for varying lengths of time depending on the seriousness of the offence, the disposal, and the age of the arrestee. Other police databases contain intelligence reports and records of individuals belonging to particular subsets of the population for numerous reasons, such as their political affiliations, participation in protest movements, or association with known offenders. Such non-adjudicatory information may also be disclosed to employers, public authorities, or even members of the public in order to prevent

²⁶ Miller, 'Policing Criminal Justice: A Fair Cop and a Fair Trial', *ibid* 4.

²⁷ Harcourt, n 20, 77-80.

²⁸ Miller, 'Policing Criminal Justice: A Fair Cop and a Fair Trial', n 25, 5.

²⁹ See generally, D. Lyon (ed.), *Surveillance as Social Sorting: Privacy risk and digital discrimination* (New York: Routledge, 2003).

crime or disorder. For example, Enhanced Criminal Records Certificates, which are disclosed to employers where an individual seeks to work in certain positions of trust, may contain non-conviction information contained in police records pertaining to previous arrests, investigations, or convictions of known associates.³⁰ Moreover, the Domestic Violence Disclosure Scheme permits the police, in certain circumstances, to disclose non-conviction information about the individual to his or her partner, or a concerned third party, if based on the information stored in their records the police determine that the partner is at risk of falling victim to domestic violence.³¹

It is not suggested here that all non-adjudicative applications of legitimate police coercion will necessarily set back privacy interests. For example, if the police were to impose containment measures to ensure the orderly running of a public protest, this non-adjudicative coercion would, on the face of it, limit the contained individuals' exercise of their liberty interests and not necessarily their privacy related interests. However, many non-adjudicative measures will involve some interference with what might broadly be described as privacy related interests. It is, therefore, important that the domestic legal framework regulating the use of such measures recognises and affords adequate protection to these interests. However, a defensible normative model, against which the domestic legal framework might be measured, cannot be developed through criminological theorising alone. Instead, attention to the underlying normative structure, values, and priorities of liberal democratic societies is required. This thesis aims to fill some of the normative gaps, which cannot be addressed through criminological theorising and are left largely undiscussed in criminal procedure scholarship. The exposition is structured as follows:

Chapter 1 reflects on the concept of privacy. It lays the theoretical foundations for the thesis, giving an account of how we should approach questions concerning the scope, content, and value of the concept. This analysis reveals that, to overcome the

³⁰ Disclosure and Barring Service, *A Guide to Eligibility for DBS Checks* (London: OGL, 2015) 1.

³¹ P. Strickland, *Clare's Law: The Domestic Violence Disclosure Scheme* (London: House of Commons Library, 2013).

difficulties theorists have had with defining privacy, it is important to recognise that privacy is a pluralistic concept. This approach recognises that privacy interests are not amenable to a narrow, monistic definition; they are broad, covering a range of considerations that are often distinct, yet related in the sense that they limit the extent to which the individual can be accessed by others. From here, it is argued that privacy has value relative to the function it serves in a particular context. Whilst the value of privacy may be ranked differently depending on one's broader commitments in political morality, Chapter 1 concludes that privacy is an important social and individual value for all who view individual well-being as a central concern.

Building on this philosophical analysis, Chapter 2 assesses the impact of Article 8 of the European Convention on Human Rights and the associated jurisprudence of the European Court of Human Rights (ECtHR), both in terms of its interpretation of the scope of the right to respect for private life, and the framework Article 8 offers for weighting privacy interests against competing societal claims and aims. The chapter outlines the structure and scope of Article 8. It reveals how the scope of 'private life' has expanded over the last quarter of a century. The merits of a broad interpretation of 'private life' are stressed. The ECtHR's approach to resolving conflicts between Article 8 and other interests is then analysed. This chapter concludes that, despite some flaws, the ECtHR's approach to interpreting Article 8, considered in general terms, offers a rational structure for resolving tensions between privacy and the legitimate functions of public authorities.

Chapter 3 focuses specifically on the privacy interests of those subject to a criminal process. It maps the different ways in which privacy interests are set back as part of this process before summarising the key interpretive principles in the jurisprudence of the ECtHR in three areas: (i) where personal information is collected from those subject to the criminal process, or they are subject to physically invasive measures; (ii) where personally identifiable information is retained or processed by the police;

and (iii) where such information is disseminated by the police. The first three chapters, taken together, establish a conceptual and normative framework for assessing the adequacy of the domestic law. The subsequent three chapters develop this assessment, focussing on three areas of activity: (i) overt photography; (ii) DNA and fingerprint retention; and (iii) Enhanced Criminal Record Certificate disclosure. These areas were selected to illuminate a broad typology of different privacy interferences.

Chapter 4 considers the extent to which the privacy interests of those overtly photographed by police as they occupy publicly accessible space are recognised and protected in England and Wales. The focus is on elucidating how such photography is used against those subject to the criminal justice process, and on how such targeted surveillance is regulated under the domestic law of England and Wales. In particular, the degree to which domestic law and operational practices comply with the normative philosophical framework and ECHR norms expounded in the previous chapters is assessed.

Chapter 5 focuses on issues pertaining to the retention and processing of personal information. In particular, the legislative framework regulating the retention of DNA and fingerprint data taken from those subject to the criminal process is subjected to critical scrutiny. The chapter documents legal and political developments in this area, from the Police and Criminal Evidence Act 1984 to the Protection of Freedoms Act 2012. This section highlights a lack of recognition of how DNA and fingerprint data retention sets back privacy related interests, and assesses the extent to which the domestic legal framework poses an unjustified threat to the privacy interests of those subject to the criminal process.

Chapter 6 focuses on the disclosure of non-conviction information as part of an Enhanced Criminal Record Certificate (ECRC). This sets out and examines the current

legal framework regulating such disclosures in all its complexity. The aim is to assess the legal framework regulating the dissemination of such information by the police in terms of how it recognises and protects the privacy interests of those subject to such disclosure. In contrast to DNA and fingerprint retention, the domestic law has, for the most part, consistently recognised that the disclosure of non-conviction information stored in police records represents a serious affront to privacy interests. This chapter raises concerns regarding inconsistencies in the way the law has been applied in this area.

The thesis concludes that in each of the specific areas considered in detail, English law fails fully to appreciate and protect the privacy interests at stake when the police use non-adjudicative measures against those subject to the criminal process. This is due to myriad factors ranging from the political climate over the last twenty years to a general view of privacy as an individual right, and the lack of recognition for its social value as an aspect of the common good. Whilst there are signs of an increasing recognition of the need to respect the privacy of those subject to the criminal process, the thesis argues that the balance between such interests and competing aims and values needs to be redressed and considered afresh.

1 The Theoretical Foundations of Privacy

This chapter surveys philosophical literature on the scope and value of privacy. It explores key philosophical debates surrounding privacy and explains why it is both an important and contested concept in moral and political philosophy. The chapter suggests that privacy is significant as a moral, political, and jurisprudential concept in contemporary liberal democracies. It demonstrates that to exist in a condition of privacy is important for a number of collective and individual ends. These ends are broad and diverse. Thus, the value of privacy can only be determined through an assessment of the function it serves in a particular context. This theoretical conclusion motivates the rest of the thesis where the interplay between privacy interests and competing interests in different criminal justice contexts will be considered.

The task for this chapter is twofold. Part 1 surveys different approaches to defining privacy. It attempts to ascertain the scope of the concept. This part proposes that privacy is best understood as a condition of limited access. It also charts some of the problems theorists have encountered when attempting to define privacy. The reductionist position, that the task of defining privacy should be abandoned, will be rejected. I conclude that privacy is a pluralistic concept. To exist in a condition of privacy can mean different things, and the extent to which one can be said to exist in such a condition can only be assessed contextually. The definition offered here is necessarily broad, reflecting the diversity of ways in which privacy interests can be engaged. This understanding of privacy recognises that the scope of the concept changes depending on other contextual factors.

This primarily expository chapter clarifies basic concepts and establishes the theoretical foundations for the argument developed in the thesis. Part 2 of the chapter explores the value of privacy. It contains two subsections. The first looks at the content of the concept and the values privacy protection can further. Several

accounts of the value of privacy are considered. These can be grouped as autonomy-based accounts and dignity-based accounts. Privacy can enrich both personal autonomy and dignity. However, the normative value of privacy is not constant. Indeed, in many cases violations of privacy can be detrimental to both the individual and society. From here, a number of competing theories on where the value of privacy should rank next to other competing interests are surveyed. This analysis shows that the ranking of privacy depends on one's broader commitments in political morality. Nonetheless, this section concludes that the protection of privacy is important for all in contemporary liberal societies.

1. What is Privacy?

The scope of the concept of privacy has been fiercely contested in philosophical literature over the last century.³² However, this controversy has not prevented it from being credited with underpinning a range of normative interests such as the interest in controlling personal information about oneself;³³ control over access to the self;³⁴ and the interest in developing social relationships.³⁵ This situation led Gerety to observe that, to its detriment, privacy has 'a protean capacity to be all things to all lawyers.'³⁶ This part surveys a number of prominent attempts to conceptualise privacy since the turn of the twentieth century. In doing so, it highlights some of the difficulties with defining privacy and aims to bring clarity to discussions of the normative significance of when an individual's privacy is threatened. It is from this vantage point that we can begin to consider what is at stake when privacy interests are threatened, and explain the value of privacy. This part assesses some of the strengths and weaknesses with conventional attempts to account for the essence and scope of privacy. These attempts are broadly categorised as follows: (i) claim-based

³² See A. Westin, *Privacy and Freedom* (New York: Atheneum, 1967) 7; J.C. Inness, *Privacy, Intimacy, and Isolation* (Oxford: Oxford University Press, 1992) 3-5.

³³ Westin, *ibid*, 7.

³⁴ H. Gross, 'Privacy and Autonomy' in J. Chapman and J. Pennock (eds.), *Nomos XIII, Privacy* (New York: Artherton, 1971) 169-182 at 169.

³⁵ J. Rachels, 'Why Privacy is Important' (1975) 14 *Philosophy & Public Affairs* 323-333.

³⁶ T. Gerety, 'Redefining Privacy' (1977) 12 *Harvard Civil Rights-Civil Liberties Law Review* 233-297 at 234.

definitions; (ii) control-based definitions; (ii) condition-based definitions; (iv) reductionism; and (v) the pluralistic contextual approach.

1.1 Privacy as a Claim

Claim-based conceptions tend to assert that privacy is a claim or right which is positively asserted by the individual. Perhaps the most prominent claim-based conception of privacy derives from Warren and Brandeis' celebrated 1890 article, *The Right to Privacy*.³⁷ Privacy, according to Warren and Brandeis, should be defined as 'the right to be let alone';³⁸ but the authors did not elaborate much further on what this meant, or on the scope of the concept. Warren and Brandeis' conception of privacy has subsequently been invoked in US Fourth Amendment jurisprudence.³⁹ Despite this, the formulation of privacy as 'the right to be let alone' does little to give us a philosophical understanding of the scope and normative value of the concept. Instead of focussing on developing a conception of privacy, Warren and Brandeis' article aimed at filling gaps in United States common law torts. The 'right to be let alone' conception is palpably too vague and imprecise for conceptual clarity. For example, behaviours that would not typically be associated with privacy, such as assaults or acts of vandalism, seem, on the face of it, to constitute privacy violations under Warren and Brandeis' conception.

The 'right to be let alone' definition focuses on the normative value of being let alone without giving due attention to the conceptual parameters of privacy. The argument is that the various interests an individual has in being let alone should be protected by a legal right to privacy. However, Judith Thomson draws attention to two conceptual problems with this interpretation. Firstly, this definition seems to ignore those privacy interferences which take place without interfering with the autonomous

³⁷ S. Warren and L. Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193-220.

³⁸ *ibid* at 195.

³⁹ See, for example, *Eisenstadt v Baird* (1972) 405 U.S. 438, 454; *Stanley v Georgia* (1969) 394 U.S. 557, 564.

action of the individual. According to Thomson: 'The police might say, "We grant we used a special X-ray device on Smith, so as to be able to watch him through the walls of his house... but we let him strictly alone: we didn't touch him, we didn't even go near him – our devices operate at a distance."⁴⁰ This, according to Thomson, highlights a flaw in the 'right to be let alone' definition. Thomson argues that privacy invasions may occur without any interference with the individual's autonomous action taking place.

Thomson proposes that attempts to define privacy as a specific claim are too ambitious and that a better alternative would be to establish what constitutes a privacy violation, *why* this is the case, and what, if anything, would justify labelling something an invasion of privacy.⁴¹ The concerns raised by Thomson may also apply to other claim-based definitions of privacy. The difficulty of identifying the specific qualities of a claim-based definition of privacy is exemplified in the scepticism expressed by English common lawyers at the prospect of developing a legal tort of privacy.⁴²

Westin suggests that 'privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.'⁴³ However, definitions which view privacy as a claim to determine how one's information is communicated to others are criticised for being too narrow and for leaving privacy at the discretion of the individual.⁴⁴ Solove highlights why it may be problematic to define privacy as an individual's claim to information, pointing out that such a conception of privacy may fail to account for aspects of privacy that are not informational, such as bodily or proprietary privacy.⁴⁵

⁴⁰ J. J. Thomson, 'The Right to Privacy' (1975) 4 *Philosophy & Public Affairs* 295-314 at 295.

⁴¹ *ibid* at 296.

⁴² This scepticism is well encapsulated in the following comment from Mummery LJ: 'As to the future I foresee serious definitional difficulties and conceptual problems in the judicial development of a "blockbuster" tort vaguely embracing such a potentially wide range of situations.' *Home Department v Wainwright* [2002] QB 1334 at [60].

⁴³ Westin, n 32, 7.

⁴⁴ D. Solove, 'Conceptualising Privacy' (2002) 90 *California Law Review* 1088-1154.

⁴⁵ *ibid*.

One overarching problem with the claim-based definitions of privacy is that it is difficult to determine the scope of the claim to privacy. These difficulties constitute no fatal objection to the theory that privacy is a claim of some sort. Rather they put the onus on the proponents of such definitions to elaborate on the detail of what should be protected by such a claim and the practical implications of their elucidation.⁴⁶ Crucially, claim-based understandings of privacy do not appreciate the complex and multifarious nature of the relationship between consent and losses of privacy. According to McCloskey, claim-based definitions imply that the self-disclosure of personal information involves no invasion or loss of privacy and that habituation to invasions; and further losses of privacy that lead to acquiescence or consent to such invasions, causes them to become neither invasions nor losses of privacy.⁴⁷ For example, the proliferation of social networking and social media, along with advances in surveillance and data monitoring technologies, has led to vast numbers of people freely accepting significant inroads into their privacy.⁴⁸ However, on a claim-based definition, privacy is no longer at issue so long as the individual has relinquished his or her claim to privacy. This does not seem to capture the essence of the concept or its normative significance.

1.2 Is Privacy a Control of Realms?

Others have characterised privacy in terms of the 'control' it affords to the individual. Fried argued that privacy is 'not simply an absence of information about us in the minds of others; rather it is the *control* we have over information about ourselves.'⁴⁹ On this view, to have privacy is to have control over personal information. This definition of privacy may also be too narrow. With its focus on information, Fried's conception of privacy overlooks aspects of privacy that are not informational and instead concern access to intimate parts of the body. More

⁴⁶ H.J. McCloskey, 'Privacy and the Right to Privacy' (1980) 55 *Philosophy* 17-38 at 23.

⁴⁷ *ibid* at 23.

⁴⁸ JUSTICE, *Freedom from Suspicion: Surveillance reform for a digital age* (London: JUSTICE, 2011) 82.

⁴⁹ C. Fried, 'Privacy' (1968) 77 *Yale Law Journal* 475-493 at 482 (emphasis in original).

recent variations on this theme focus on the control over access to the self.⁵⁰ These perspectives tend to draw on Goffman's *The Presentation of Self in Everyday Life*, and the idea that, to flourish, the individual needs to have control over the discrepant roles which are said to make up his or her everyday interactions with others.⁵¹ Privacy is the control over presentation or access to the self, and is said to be useful for a range of normative ends.

These conceptions cover a more diverse range of privacy interests than controlling personal *information*. The control-over-access-to-the-self and control-over-the-presentation-of-self conceptions can capture objectionable incursions into the personal space of an individual, which may or may not concern information that is personally identifiable to the individual. For example, where an individual is subject to covert observation whilst getting undressed, such an observation may be considered a privacy related intrusion as it circumvents measures the individual might have taken to control who does and does not have access to him or her, but it does not necessarily relate to information. Even if the observer gleans no novel information about the individual, the observation removes the individual's control over who can and cannot observe him or her. Thus, it may engage privacy interests.

In focusing solely on 'control', these conceptions nonetheless unduly limit the scope of the concept, overlooking circumstances where privacy exists beyond the control of the individual. For example, if an individual is placed in solitary confinement (assuming the individual is not subject to surveillance or other forms of monitoring), the individual is undoubtedly left in a condition of relative privacy, even though he or she has no control over this. Inness disagrees on this point, suggesting that privacy is a positively valued status and that, as such, an individual is not in a condition of

⁵⁰ B. Röessler, *The Value of Privacy* (Cambridge: Polity Press, 2005) 116; A. von Hirsch, 'The Ethics of Public Television Surveillance' in A. von Hirsch, D. Garland and A. Wakefield (eds.), *Ethical and Social Perspectives on Situational Crime Prevention* (Oxford: Hart Publishing, 2000) 59-77; B. v.S-T. Larsen, *Setting the Watch: Privacy and the Ethics of CCTV Surveillance* (Oxford: Hart, 2011); A. Marmor, 'What is the Right to Privacy' (2015) 43 *Philosophy and Public Affairs* 3-26.

⁵¹ E. Goffman, *The Presentation of Self in Everyday Life* (London: Penguin, 1990) 87.

privacy when subject to such isolation.⁵² Inness derives her support for this position from what she describes as 'our privacy intuitions and linguistic usage [of the concept]'.⁵³ Inness suggests: 'We can imagine a shipwrecked person running to her rescuer and offering thanks for the relief of her isolation, but it is awkward at best to imagine this person praising her rescuer for relieving her privacy.'⁵⁴ The implication is that, with the absence of control over the isolation, the individual does not have privacy. However, the response of the person in this scenario seems to be based more on the relief one would feel at being rescued from such a grave situation as a shipwreck, than indicating anything about the value of privacy. Inness' position commits her to suggesting that the shipwrecked person is somehow not in a condition of privacy. On the contrary, it seems that the enjoyment of privacy would be one of the few plus sides of finding oneself in the dreadful situation of the shipwreck. At least, it might be argued, the shipwrecked person can engage in whatever activities he or she chooses safe from the prying eyes of others. Indeed, it would seem to constitute a graver situation if the individual's plight were to have privacy intrusions added. Let us imagine the shipwrecked person's struggle for survival is covertly documented in all its grim detail and broadcast to anyone who should want to observe. Here, the individual has no less control than before, but is surely further removed from a condition of privacy than in the original scenario.⁵⁵

Several commentators with otherwise opposing views regarding the normative value of privacy agree that privacy is a form of control an individual can exercise in order to achieve a normative end. Gross argues that privacy is the control over acquaintance with one's personal affairs.⁵⁶ This means that privacy describes the limits an individual sets on his personal affairs which provide a physical area, or an area defined by social convention, in which the individual has exclusive control of access.

⁵² See: Inness, n 32 above, 43.

⁵³ *ibid* 44.

⁵⁴ *ibid*.

⁵⁵ *ibid*.

⁵⁶ n 34 at 169.

Gross goes on to account for privacy's normative value as integral to the promotion of self-determination and self-discovery.⁵⁷ Parker expands on this definition, arguing that privacy is control over when and by whom various parts of us can be sensed by others.⁵⁸ The 'parts of us' to which Parker refers include parts of our bodies, our voices, and objects that are closely associated with us such as material possessions; and by 'sensed by others' Parker means received through the senses (i.e. smelled, touched, seen, heard or tasted).⁵⁹

Parent contends that all such control-based definitions should be jettisoned:

To see why ... consider the example of a person who voluntarily divulges all sorts of intimate, personal and undocumented information about [her]self to a friend. She is doubtless exercising control ... But we would not and should not say that in doing so she is preserving or protecting her privacy. On the contrary, she is voluntarily relinquishing much of her privacy.⁶⁰

Parent raises an interesting point. By divulging information about one's self, an individual is exercising control over who he or she grants access to personal information, whilst seemingly relinquishing the ability to keep the information private. However, Moore replies that this does not undermine control-based definitions of privacy. Instead Moore suggests that when an individual yields control over such information to others the condition of privacy is diminished or no longer obtains.⁶¹ Therefore, to be in a condition of privacy is to have control of access to the self or information about the self regardless of whether, in exercising this control, you then cease to be in such a state.

The premise that privacy describes an individual's control over access to him or herself or personal information is accepted by all of the control-based definitions examined above. They state that privacy is the control over some X. However, these

⁵⁷ *ibid* at 175.

⁵⁸ R. Parker, 'A Definition of Privacy' (1974) 27 *Rutgers Law Review* 275-297 at 281.

⁵⁹ *ibid*.

⁶⁰ W.A. Parent, 'Privacy, Morality and the Law' (1983) 12 *Philosophy and Public Affairs* 269-288 at 273.

⁶¹ A. Moore, 'Defining Privacy' (2008) 39 *Journal of Social Philosophy* 411-428 at 415.

definitions have different normative connotations attached. They do not describe a condition of privacy as a situation where others simply do not have access to an individual or information about him or her. Such definitions refer to privacy as an access control to places, bodies, or personal information.⁶² One advantage of such control-based definitions of privacy is that they can incorporate different values associated with privacy. However, Thomson finds the premise underpinning control-based definitions puzzling. She argues that whether or not someone has *control* is not important when attempting to establish a descriptive definition of privacy. In her counterexample, somebody possesses an X-ray device which enables him to look through walls - thereby depriving his neighbour of the control over who can see him in his home - but does not train the device on his neighbour's house.⁶³ With this example, Thomson shows that an individual can have privacy without having control of access because the man with the X-ray device has control of access to his neighbour but chooses not to exercise it. Thus, whilst the neighbour has lost control of access, no loss of privacy seems to have occurred. Control-based definitions posit that privacy necessarily requires some form of 'control'. Such conceptions do not seem to adequately reflect the empirical reality of privacy.

1.3 Condition-Based Definitions and the Neutral Conception of Privacy

Allen views privacy as the condition of limited accessibility.⁶⁴ On her account, 'the conditions that "privacy" is properly used to describe are conditions in which, to some extent and in some respect, accessibility is restricted.'⁶⁵ Other theorists have described privacy as 'a condition of limited access to an individual's life experiences and engagements,'⁶⁶ and as 'related to our concern over our accessibility to others:

⁶² *ibid* at 417.

⁶³ n 40 at 305.

⁶⁴ A. Allen, *Uneasy Access: Privacy for Women in a Free Society* (Maryland: Rowman & Littlefield, 1988) 10.

⁶⁵ *ibid*.

⁶⁶ D. O'Brien, *Privacy, Law, and Public Policy* (Santa Barbara: Praeger Publishers, 1979) 22.

the extent to which we are known to others, the extent to which others have physical access to us, and the extent to which we are the subject of others' attention.⁶⁷

Such theories have been criticised as falling back on the identification of universally accepted privacy-related interests, which, according to Hughes, simply do not correspond to the way we each experience privacy differently.⁶⁸ Modern variations on the limited-access approach address this supposed shortcoming. Moreham conceptualises privacy as a condition of *desired* inaccess or 'freedom from unwanted access.'⁶⁹ In her own thoughtful conception, Hughes takes this further, drawing on social interaction theory to explicate how such inaccess is experienced and achieved in a social setting.⁷⁰

These accounts are illuminating as they extend beyond control to grasp why interferences with the personal space or solitude of another may constitute privacy invasions.⁷¹ In his taxonomy of privacy interferences, Solove describes the *exposure* of certain 'primordial' physical activities or attributes to others as a form of information dissemination which sets back privacy interests.⁷² For example, if a media outlet were to print pictures of an individual defecating or fornicating, this act might be said to diminish the individual's privacy. However, it is not only when such information is disseminated to others that privacy is diminished. If, for example, an individual were to covertly observe another person as he or she took a shower, the continued observation of the individual diminishes privacy *not* (or at least not only) because information about the individual is being collected, but rather because

⁶⁷ R. Gavison, 'Privacy and the Limits of Law' (1980) 89 *Yale Law Journal* 421-471 at 423.

⁶⁸ K. Hughes, 'A Behavioural Understanding of Privacy and its Implications for Privacy Law' (2012) 75 *Modern Law Review* 806-836 at 809.

⁶⁹ N.A. Moreham, 'Privacy in the Common Law' (2005) 121 *Law Quarterly Review* 628-656 at 636.

⁷⁰ n 68 at 809-810.

⁷¹ H. Nissenbaum, *Privacy in Context: Technology, Policy and the Integrity of Social Life* (California: Stanford University Press, 2010) 70.

⁷² D. Solove, *Understanding Privacy* (Cambridge, Massachusetts: Harvard University Press, 2009) 147.

identifiable limits (the bathroom door, curtains, etc.) the individual has set on how he or she can be accessed whilst engaged in such an activity have been breached.⁷³

However, like the 'right to be let alone' conception, limited access conceptions of privacy tend to fall foul of the 'too broad' critique.⁷⁴ That is to say, such theories tend not to differentiate between those forms of access that diminish privacy and those which do not. For example, if an individual subjects me to a passing glance as I walk down a public street, then he or she has gained some degree of access to me (i.e. through perceptual experience of me). However, any construction of a moral or legal protection to privacy stretching this far is bound to be as unworkable as it would be undesirable. This point does not defeat the notion that privacy is best conceived of as a condition of limited access. Rather it emphasises the need for any moral or jurisprudential protections based on this conception to contain a threshold criterion for determining the extent to which a measure limiting access is sufficiently serious to warrant justification. The details of how such a threshold might be established are discussed in subsequent chapters of the thesis.

Gavison argues that a value-laden interpretation of the concept of privacy will potentially pre-empt inquiries into the normative value of privacy, and laws protecting privacy interests.⁷⁵ To avoid this methodological problem, Gavison conceptualises privacy as a condition of life or as 'a situation of an individual vis-à-vis others,'⁷⁶ rejecting claim and control orientated definitions. This 'neutral concept' of privacy is not irreconcilable with claims or control in determining the normative value of privacy. Rather, the 'neutral concept' allows for any subsequent normative analysis to develop without just reiterating the normative aspects of the definition. Value-laden interpretations of the concept of privacy potentially pre-empt important

⁷³ Hughes uses the example of a public toilet to demonstrate how such limits to access can be physical (e.g. the toilet door and cubicle walls) and behavioural (social norms that militate against peering over the physical obstacles to observe the individual using the public toilet). See n 68 at 813.

⁷⁴ n 40 above at 295.

⁷⁵ n 67 at 424.

⁷⁶ *ibid* at 425.

definitional questions regarding what constitutes a condition of privacy. They also conflate the question of what constitutes a condition or state of privacy with questions concerning how that condition is, and should be, preserved or controlled.

As a methodological starting point, Gavison suggests that a person is in complete privacy when he or she is completely inaccessible to others: 'in perfect privacy no one has any information about *X*, no one pays any attention to *X*, and no one has physical access to *X*.'⁷⁷ If *X*, and everything about *X*, were completely cut off from the rest of the world, then *X* would appear to be in a condition of *perfect* privacy. However, such an observation does not tell us much about the scope of privacy in terms of its essential characteristics. Therefore, whilst a definition which simply describes the condition of privacy can avoid pre-empting normative questions regarding the value of privacy, it is largely uninteresting.⁷⁸ As Gavison acknowledges, the definition of privacy as a condition of splendid isolation does not resolve debates concerning the characteristics of privacy.⁷⁹ Gavison suggests that, because this state of perfect privacy and the extremity of a complete loss of privacy are almost impossible in any society, we should turn our attention to losses of privacy.⁸⁰ Here, Gavison argues that the crucial test for a proposed concept of privacy is its explanatory power in capturing the tenor of most privacy claims and in facilitating coherent reasoning for the legal protection of such claims.⁸¹

The neutral conception of privacy outlined by Gavison is advantageous as it does not beg the question regarding the normative values protected by privacy. However, Gavison's conception becomes too narrow when she identifies the three elements which constitute the 'irreducible elements' of privacy: secrecy, anonymity, and solitude.⁸² This conception seems to exclude Government interferences which might

⁷⁷ *ibid* at 428.

⁷⁸ n 61 at 414.

⁷⁹ n 67 at 428.

⁸⁰ *ibid*.

⁸¹ *ibid* at 428.

⁸² *ibid*.

prohibit certain decisions regarding one's health or sexual conduct, which do not seem to relate to matters of secrecy, anonymity or solitude.⁸³ Moreover, a descriptive account of privacy as a form of splendid isolation does not offer much insight into privacy as a concept related to other similar, yet distinct, concepts such as dignity and autonomy. Gavison's 'neutral conception' is simply too abstract to answer complicated questions about the scope of privacy, and to establish the unifying links between seemingly disparate types of interference with an individual's privacy. Whilst the notion that privacy is a condition predicated on being withdrawn from others to some degree does help to burn off some of the fog which arises when normative and definitional aspects of privacy are conflated, the idea that privacy is a condition of limited access does little to assuage concerns that privacy is too unwieldy a concept.⁸⁴ Thus, more is needed to clarify which types of access limit an individual's privacy and which do not.

The difficulties in outlining the conceptual parameters of privacy that have been encountered so far have led to calls to abandon the concept altogether. This reductionist position will now be considered.

1.4 The Reductionist Challenge

Addressing a series of failed attempts to conceptualise privacy in the preceding decade, Thomson observed in 1975 that 'the most striking thing about the right to privacy is that nobody seems to have any clear idea what it is.'⁸⁵ Referring to the moral right to privacy, Thomson suggested:

[t]he right to privacy is itself a cluster of rights... it is not a distinct cluster of rights but itself intersects with the cluster which the right over the person consists in and also with the cluster of rights which owning property consists in.⁸⁶

⁸³ For example, the criminalisation of homosexual activities or other sexual activities between consenting adults is widely argued as an intrusion which diminishes the privacy of those affected. See: *Laskey v United Kingdom* (1997) 24 EHRR 39 at [45]-[48].

⁸⁴ R. Wacks, *Law, Morality, and the Private Domain* (Hong Kong: Hong Kong University Press Law Series, 2000) 237-238.

⁸⁵ n 40 at 295.

⁸⁶ *ibid* at 306.

Thomson's *simplifying hypothesis* presents one of the most prominent challenges to the notion that there exists a discernible moral right to privacy. This hypothesis proposes that privacy can be reduced to discussions of other rights from which the right to privacy derives. Thomson argues that most conceptions of privacy are too broad, too narrow, or both.⁸⁷ According to Thomson, when justifying the claim to privacy in moral theory, privacy theorists ultimately refer to principles that are independent of privacy.⁸⁸ This view is *reductionist* in that it views privacy as something that can be reduced to discussions of other rights and interests. Privacy, on this account, is a derivative concept with no discernible scope. Using the example of a person training an amplifier on her home to listen to a marital argument with her husband, Thomson seeks to demonstrate that, whilst this might traditionally be viewed as a violation of her right to privacy, the amplifier operator is in fact violating her right not to be surreptitiously listened to by unknown others, which is derivative of a cluster of rights Thomson describes as 'the rights over the person and property rights.'⁸⁹

Thomson seeks to demonstrate that privacy can be reduced to a cluster of other rights, which intersect with one another. Thus, privacy is merely derivative of other 'grand' concepts such as the right to liberty, the right not to be hurt, and property rights.⁹⁰ So, whilst Thomson is not denying the existence of privacy, she argues that discussions of its scope are futile because it is conceptually incoherent and refers to a mesh of different claims.⁹¹ According to Thomson, this means for example that:

I don't have a right that no one shall torture me in order to get personal information about me because I have a right to privacy; ... it is because I have *these* rights that I have a right to privacy.⁹²

⁸⁷ *ibid* at 295.

⁸⁸ Thomson describes a series of 'un-grand' rights, such as the right not to have your hair cut against your will, and groups such rights under the term 'the right over the person.' *ibid* at 304-5.

⁸⁹ *ibid* at 305.

⁹⁰ *ibid* at 308.

⁹¹ *ibid* at 309.

⁹² *ibid* at 312.

Thomson concludes that, if she is correct, there is no need to settle disputes regarding the boundaries of the concept of privacy because it is possible to explain how we came to have each right in the right to privacy cluster without reference to the right to privacy.⁹³ Thus, any discussions of the violation of privacy *per se* are superfluous. According to Thomson, discussions of the concept of privacy should be 'reduced' to discussions of the other concepts from which privacy is merely derivative.

The notion that discussions of the concept of privacy can be reduced to discussions of other concepts, such as property or autonomy, is certainly thought-provoking. If true, it suggests that philosophical attempts to conceptualise privacy are essentially futile. At first glance, the argument also seems to hold *some* water. Looking at another individual's correspondence would typically be considered a privacy violation. It also can be described as a violation of a property right: 'He tampered with *my* telephone line, and looked at *my* e-mails without permission.' Similarly, interferences with the person typically described as privacy invasions might also be talked about in terms of rights over the person: 'She filmed up my skirt!'

In her detailed critique of this reductionist challenge, Inness demonstrates that, whilst this relationship between privacy and other concepts is certainly plausible in at least some cases, privacy often extends beyond the particular claim of the right from which privacy is said to derive:

To illustrate this, imagine that I have written a number of love letters to another person. By sending these letters to the person, I relinquish possession of them, yet although the letters are no longer mine, my privacy is still violated if my lover copies the letters and distributes them to others without my consent. In this case, my claim to privacy with respect to the love letters can be disconnected from ownership, the claim continuing to have a foundation even when my ownership rights have been relinquished (although we could clearly argue about the strength of the claim).⁹⁴

⁹³ *ibid* at 313.

⁹⁴ Inness, n 32, 33.

Thomson focuses on the derivative normative value of the moral right to privacy without specifying a clear conception of privacy. This does not trouble Thomson because she suggests that there is no need for a clear conception of privacy as it is simply an umbrella term for a number of other related interests.⁹⁵ However, Reiman replies that, even if privacy is derivative in the way that Thomson suggests it is (which is by no means self-evident), to conclude that there is thus no need to seek a conception of privacy is a non sequitur.⁹⁶ Reiman makes the comparison between criminology and privacy, arguing that criminology is probably derivative of sociology, law, and other subjects in the same way that Thomson holds privacy to be derivative of other interests and rights to person and property. But this does not mean that there is no good reason to find a unifying theme of criminological studies or to establish the scope of criminology; the same goes for privacy.⁹⁷ Whilst Thomson successfully demonstrates that privacy has a complicated relationship with a number of other interests and moral rights, this does not pre-empt discussions of the scope and boundaries of the concept of privacy or the significance of conceptual clarification.

Thomson's careful analysis made a significant contribution to debating the concepts of privacy, raising important questions regarding the relationship between privacy and other rights. It is clear that an individual's privacy can be violated if his or her property or person is subjected to the unwanted scrutiny of another. This makes Thomson's counter-intuitive argument seem appealing. However, from a closer analysis of the premises underpinning reductionism, two conclusions emerge. First, whilst privacy overlaps with other concepts, it seems to track dimensions of experience that cannot be captured through discussions of other, overlapping notions.⁹⁸ Secondly, even if privacy is conceptually derivative, it is not clear that this is cause for abandoning the use of the concept or establishing its parameters in

⁹⁵ n 40 at 313.

⁹⁶ J. Reiman, 'Privacy, Intimacy and Personhood' (1976) 6 *Philosophy & Public Affairs* 26-44 at 28.

⁹⁷ *ibid.*

⁹⁸ n 72, 38.

relation to other concepts. The best understandings of the concept of privacy to emerge so far recognise that privacy is a term used to refer to a condition of limited access. The ways in which the individual can be accessed and thus removed from this condition vary in both type and degree. The next section shows how, from this conceptual baseline, the specific content of the concept must be determined contextually.

1.5 A Method for Developing the Content of the Concept: The pluralistic contextual approach

In response to the 'disarray' surrounding the concept of privacy, which was said to have become too large and nebulous to be of much use as a philosophical or legal concept,⁹⁹ Solove draws on Wittgenstein's notion of 'family resemblances'¹⁰⁰ to explain how, even though the concept of privacy has many different uses, these uses are related.¹⁰¹ Thus, privacy is a pluralistic concept. According to Solove, this approach represents the best way to overcome the problems of over-and/or under-inclusiveness which have plagued attempts to conceptualise privacy in terms of a single common denominator. Solove observes that it is 'no accident that various things are referred to under the rubric of "privacy."¹⁰² He argues that we should classify something as involving privacy when it bears resemblance to other things we classify in the same way. This, according to Solove, must be done at a certain level of generality, allowing the concept of privacy to 'transcend the particularities of specific contexts and thus giving it wide-ranging applicability.'¹⁰³ However, to avoid the problems of an overly-broad conception, Solove borrows from the philosophy of pragmatism¹⁰⁴ to argue that the conceptualisation task should begin with a focus on

⁹⁹ n 84, 237; Thomson, n 40.

¹⁰⁰ See generally L. Wittgenstein (G.E.M. Anscombe, P.M.S Hacker, and J. Schulte trans.), *Philosophical Investigations* (Sussex: Blackwell Publishing, 2009, Originally published. 1958).

¹⁰¹ n 72, 43-44.

¹⁰² *ibid* 46.

¹⁰³ *ibid*.

¹⁰⁴ In particular, Solove relies on William James' pragmatic philosophy which moves away from abstract notions of concepts to focus on concrete facts which originate through experience. See W. James,

understanding privacy in specific contextual situations.¹⁰⁵ This emphasis on the social context in which privacy issues arise is important when it comes to assessing the weight of an individual's privacy interest against other interests in a particular situation. It recognises that privacy norms vary temporally and geographically.

In another attempt to understand privacy as a pluralistic concept, Nissenbaum explicates a framework of contextual integrity, which, she suggests, captures the meaning of privacy.¹⁰⁶ According to Nissenbaum, social activity is governed by context-relative norms, which regulate information in terms of 'appropriateness' and 'flow of distribution'.¹⁰⁷ From this picture of social interaction, Nissenbaum concludes that we have a right to privacy, which she describes as a 'right to live in a world where our expectations about the flow of personal information are, for the most part, met'.¹⁰⁸ The contextual integrity framework ties adequate privacy protection to the norms of specific contexts. According to Nissenbaum, this conception can help overcome the problems of being unable to account for the value of privacy in public space, which are associated with previous accounts focusing on the control of information.

Both Nissenbaum and Solove make compelling arguments regarding the significance of context. Indeed, to understand where the line should be drawn between privacy and countervailing interests, it is necessary to understand the circumstances of the particular situation. A number of commentators have drawn attention to cultural variations in privacy norms and have even suggested that cultural attitudes to privacy are so divergent as to undermine the usefulness of a unified concept.¹⁰⁹ Notably, Whitman argues that differences in privacy law in the United States and

'Pragmatism' in G. Gunn (ed.) *Pragmatism and Other Writings* (New York: Penguin Books, 2000, 1907) 24-25.

¹⁰⁵ n 72, 47.

¹⁰⁶ n 71, 14.

¹⁰⁷ *ibid* 135-184.

¹⁰⁸ *ibid* 231.

¹⁰⁹ See D. Rosen, 'Private Lives and Public Eyes: Privacy in the United States and Japan' (1990) 6 *Florida Journal of International Law* 141-175 at 151-155; J.Q. Whitman, 'Two Western Cultures of Privacy: Dignity Versus Liberty' (2004) 113 *Yale Law Journal* 1151-1221.

Europe stem from fundamentally different conceptions of privacy. According to Whitman, European conceptions of privacy have a deeper concern for human dignity, whereas in America privacy is valued for its liberty enhancing qualities, particularly the negative liberty from Government intrusions it affords to the individual. Thus, Whitman concludes:

[T]he emphases and sensibilities of the law on either side of the Atlantic remain stubbornly different, whatever careful philosophical logic might allow or dictate. Privacy law is not the product of logic. But neither is it the product of "experience" or of supposed "felt necessities" that are shared in all modern societies. It is the product of local social anxieties and local ideals. In the United States those anxieties and ideals focus principally on the police and other officials, and around the ambition "to secure the blessings of liberty," while on the Continent they focus on the ambition to guarantee everyone's position in society, to guarantee everyone's "honor."¹¹⁰

Different populations undeniably experience privacy differently. Solove, however, views this perspective as too essentialist, arguing that the differences can be boiled down to enforcement strategies rather than conceptual differences, and that Whitman's approach overlooks the extent to which similarities exist between the two continental perspectives.¹¹¹ It is also noteworthy that, when speaking of Europe (or the United States) as anything like homogenous legal or cultural entities, there is a danger of oversimplifying the infinitely complex differences within these regions. Although the socio-cultural context in which the action takes place is certainly a factor to be taken into account, the diverse range of issues which might be said to set back privacy interests are, if not universal, remarkably consistent across contemporary western societies. Whitman's sceptical conclusion, that the divergent nature of privacy interests makes a general theory of privacy impossible (or at least not worth the effort), seems mistaken. Solove posits that an adequate theory of privacy must incorporate the general features of the concept *and* provide a means of

¹¹⁰ Whitman, *ibid* at 1220.

¹¹¹ The Snowden leaks represent perhaps the most striking example of a Government intrusion into the private lives of citizens, which caused popular disquiet on both sides of the Atlantic, for broadly similar reasons. Whilst this fact alone is not entirely inconsistent with Whitman's position, it is noteworthy that arguments both for and against such intrusive activities of the security services were broadly along the same lines. Contrast M. Sledge, 'The Snowden Effect' *Huffington Post* 5 June 2014 at http://www.huffingtonpost.com/2014/06/05/edward-snowden-nsa-effect_n_5447431.html (last visited 12 May 2016); and M. Schwartz, 'The Whole Haystack: The N.S.A. claims it needs access to all our phone records. But is that the best way to catch a terrorist?' *The New Yorker* 26 January 2016 at <http://www.newyorker.com/magazine/2015/01/26/whole-haystack> (last visited 12 May 2016).

resolving the particular tensions which may arise in particular contexts. Thus, one ambition of the general theory is to explain the diversity of privacy interferences and show how they are linked within identifiable social or institutional processes.

Solove develops a taxonomy of privacy 'problems', determining what is private by looking to social practices, without any *a priori* conception of privacy.¹¹² He argues that the focus on problems in our experiences allows us to generalise in a useful way about privacy whilst still being flexible enough to take account of contextual factors. Solove rejects other focal points for a conceptual analysis of privacy interests, such as the nature of the information or matter, a focus on the preferences of the individual, or criteria specifying reasonable expectations of privacy.¹¹³ His taxonomy, comprising problems posed by 'information collection', 'information processing', 'information dissemination', and 'invasion', is useful in navigating the problems associated with previous conceptions, especially over- and under-inclusiveness. Solove's attempt to delineate a taxonomy is not intended to represent the end of the conversation regarding privacy interests. Subjectivity is inevitable in such an exercise and new privacy 'problems' will continue to arise after the taxonomy has been completed.¹¹⁴ However, Solove's contribution does offer a basis for us to shift our focus in the search for a useful concept of privacy from a preoccupation with unifying essences, towards encompassing the value and functions of privacy adopting a 'critical reflective attitude.'¹¹⁵

The most serviceable description of privacy is as *a condition of limited access*. This definition serves as the baseline for establishing whether privacy is 'in play' in a particular situation. For example, if the state inserts a listening device into the home of an individual and monitors his or her conversations, this is a privacy issue as the individual has been removed from a condition of limited access. From here an

¹¹² n 72, 50.

¹¹³ *ibid* 67-74.

¹¹⁴ See P. O'Callaghan, *Refining Privacy in Tort Law* (London: Springer Heidelberg, 2013) 14.

¹¹⁵ H.L.A. Hart, *The Concept of Law* (2nd edn. Oxford: Oxford University Press, 1997) 57; *ibid* 20.

assessment of whether a particular form of access gives rise to privacy violations can only be made contextually. Privacy is a condition where the individual is inaccessible from some form of intrusion to some degree. Whether a type of intrusion engages privacy depends upon the manner and degree to which it increases the accessibility of the individual. This access may be physical, or involve the collection, retention, or dissemination of information. From this starting point, we can begin to discuss whether or not a particular form of access sets back privacy interests to the extent that it warrants legal protection, and whether or not, in any case, the interference is justified. These questions will be addressed in Chapter 2 of the thesis. However, before we reach this stage, more theoretical groundwork is required. The next part considers the value of privacy, and surveys the normative ends which adequate privacy protection can serve. The following discussion elucidates the value of privacy, both in terms of the normative interests it can protect for the individual, and its salience as a moral, political, and jurisprudential protection in liberal democracies.

2. What is the Value of Privacy?

This part demonstrates that privacy, as well as being a pluralistic concept, holds pluralistic value. It shows that, whilst privacy overlaps with concepts of dignity and autonomy, its value cannot be explained through reference to either one of these concepts alone. From here, rival perspectives in political morality will be surveyed in terms of their competing theories of how privacy ranks next to other societal interests.

2.1. The Autonomy-Based Accounts

Numerous theorists locate the value of privacy in the role it plays in furthering an individual's interest in making autonomous choices and actions. Stanley Benn suggests that privacy is normatively valuable as it provides the necessary conditions

for the individual to be respected as a *chooser*.¹¹⁶ Benn's argument is predicated on the assertion that there are two types of privacy invasion: (i) unwanted overt observations, and (ii) covert observations.¹¹⁷ In the case of unwanted overt observations, Benn argues that, in certain scenarios, to subject an individual to sustained observation without consent is to treat him or her as an object and not as a subject with sensibilities, morally responsible for his or her own decisions.¹¹⁸ Benn argues that such observations have an impact on the way an individual acts by transforming the options available to him, thus failing to respect him as a chooser.¹¹⁹ He elaborates, suggesting that, whilst not all unwanted observations change the person's choices in a given scenario, the lack of respect shown for a person in such observations is what violates the moral right to privacy:

A's uninvited intrusion is an impertinence because he treats it as of no consequence that he may have effected an alteration in C's perception of himself and the nature of his performance.¹²⁰

This argument suggests that the manner of the intrusion – regardless of how it affects the conditions in which the person can make choices – makes it a violation of the right to privacy. However, to suggest that the attitude of the violator of an individual's right to privacy is the most important factor in determining whether or not a violation has occurred seems misplaced. An individual can violate the privacy of another without having an indifferent attitude towards the observed person and his choices.¹²¹

Regarding covert observation, Benn suggests that this violates an individual's privacy 'because it deliberately deceives a person about his world, thwarting, for reasons that

¹¹⁶ S. Benn, 'Privacy, Freedom, and Respect for Persons' in J. Pennock and J. Chapman (eds) *Privacy: Nomos XIII* (New York: Atherton Press, 1971) 1-26 at 4.

¹¹⁷ *ibid.*

¹¹⁸ *ibid* at 6.

¹¹⁹ *ibid.*

¹²⁰ *ibid* at 10.

¹²¹ In reply to Benn, Hudson and Husak construct the example of a man who invades the privacy of another *because* he respects that person and his insights on a particular topic and wants to listen to a private conversation he is having with a friend. This seems to suggest, at the least, that the concept of 'respect' as used in this context, may be in need of further clarification. See S. Hudson and D. Husak 'Benn on Privacy and Respect for Persons' (2006) 57 *Australasian Journal of Philosophy* 324-329 at 327.

cannot be his reasons, his attempts to make a rational choice.¹²² The claim is that such covert observations alter an individual's conditions of action and thus deprive him of the ability to make choices by altering the choice-situation in a way of which the observed person is unaware. To indulge in such observations, according to Benn, is to fail to respect a person as a chooser and thus to violate his or her right to privacy.¹²³ However, this theory may give away *too much* privacy protection. It would mean that privacy is at issue wherever a person is observed covertly or observed overtly when he or she does not wish it. This, it might be argued, affords people the right not to be observed even in the most trivial of day-to-day interactions.

Another strand of autonomy-based accounts for the value of privacy focus on the role privacy can play in providing the individual with control over his or her social relationships. In *An Anatomy of Values*, Fried argued that privacy is important for the creation of social relationships.¹²⁴ This sharing of private information and controlling of who has access to intimate information about ourselves allows us to form intimate social relationships with others:

Love and friendship ... involve the voluntary and spontaneous relinquishment of something between friend and friend, lover and lover. The title to information about oneself conferred by privacy provides the necessary something.¹²⁵

Underpinning this theory is the notion that privacy serves an important role in allowing us to form social relationships with one another. Building on this idea, Rachels argues that privacy is necessary if we are to maintain the variety of social relationships with other people that we want to have.¹²⁶ Rachels suggests that we behave differently around the people we have different social relationships with in our lives. For instance, the behaviour a person might permissibly indulge in when out with his friends might not be permissible if it were repeated in the workplace. These changes in behaviour we exhibit in different contexts define our social relationships.

¹²² n 116 at 10 (emphasis in original).

¹²³ *ibid* at 11.

¹²⁴ C. Fried, *An Anatomy of Values: Problems of Personal and Social Choice* (Cambridge: Massachusetts University Press, 1970) 140-144.

¹²⁵ *ibid* at 142.

¹²⁶ n 35 at 326.

According to Rachels, the value of privacy lies in its affording us the ability to choose autonomously who has access to us, who knows what about us, and to allow us to maintain the variety of social relationships with other people that contribute to personal well-being.¹²⁷

These accounts do succeed in identifying interests that a right to privacy could protect. Indeed, a degree of privacy can undoubtedly help individuals manage the range of social relationships they maintain in everyday life. However, an account of the value of privacy focused solely on allowing us to develop social relationships seems insufficient as a general account of the normative value of privacy. It implies that an individual who is sentenced to life imprisonment in solitary confinement¹²⁸ or a person in a permanent vegetative state does not retain a right to privacy because he or she has no foreseeable capacity to develop social relationships. However, this suggests that intrusions to such individuals, which might normally warrant legal justification, can be applied indiscriminately. Moreover, if Thomson were to reply to such arguments, she could simply say that, on this account, privacy rights are derivative of the right to form social relationships. This is because, on this view, the right to privacy is contingent on the individual having the capacity to develop social relationships with others. The argument plays into Thomson's reductionist position that was rejected in the previous section.

Other commentators suggest along similar lines that the value of privacy comes from the protection it can afford to personal autonomy. Inness states that 'privacy is valuable because it acknowledges our respect for persons as autonomous beings with the capacity to love, care, and like – in other words, persons with the potential to freely develop close relationships.'¹²⁹ Rössler contends that privacy is a necessary condition to lead an autonomous life. According to Rössler, respect for privacy is

¹²⁷ *ibid* at 329.

¹²⁸ n 96 at 36.

¹²⁹ Inness, n 32 at 95.

important as a precondition for respecting autonomy in the following three 'dimensions': decisions, information, and the home.¹³⁰

To what extent is privacy valuable in furthering autonomy? This question demands a closer enquiry into the concept of autonomy. Like privacy, autonomy is not a straightforward concept. As Dworkin states, we face 'one concept and many conceptions of autonomy.'¹³¹ Moral philosophers have understood autonomy as synonymous with liberty;¹³² synonymous with self-rule;¹³³ or as acting 'from principles that we would consent to as free and equal rational beings.'¹³⁴ Arguably at opposing ends of the spectrum of these conceptions sit the perspectives of Immanuel Kant and John Stuart Mill. Mill's arguments for experiments in living for the sake of 'free development of individuality'¹³⁵ have influenced the contemporary ideal of personal autonomy which promotes 'self-authorship' and views autonomy as the freedom of action. Raz describes how this conception of personal autonomy encompasses the values underpinning personal autonomy as essential to individual well-being:

The idea of personal autonomy ... holds the free choice of goals and relations as an essential ingredient of individual well-being. The ruling idea behind the ideal of personal autonomy is that people should make their own lives ... The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.¹³⁶

This conception of autonomy is broadly concerned with the development of individuality through the choices, decisions, and actions an individual takes in the course of his or her life. On this view, what makes a person autonomous is the ability to control, to some extent, his or her own destiny. This, according to Raz, is essential for individual well-being. Such a view of autonomy is focused on the action of the

¹³⁰ Röessler, n 50 at 71-79.

¹³¹ G. Dworkin, *The Theory and Practice of Autonomy* (Cambridge: Cambridge University Press, 1988) 9.

¹³² R.S. Downie and E. Telfer, 'Autonomy' (1971) 15 *Philosophy* 293-301 at 301.

¹³³ J. Feinberg, 'The Idea of a Free Man' in R. F. Dearden (ed) *Education and the Development of Reason* (London: Routledge and Kegan Paul, 1972) 161.

¹³⁴ J. Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971) 516.

¹³⁵ J.S. Mill, *On Liberty* in J. Gray (ed.) *On Liberty and Other Essays* (New York: Oxford University Press, 1991) 63.

¹³⁶ J. Raz, *The Morality of Freedom* (New York: Oxford University Press, 1986) 369.

individual. It suggests autonomy is the decisional capacities and material opportunities an individual possesses to take actions according to his or her own choices.

An alternative view of autonomy derives from the work of Immanuel Kant. Whereas Razian personal autonomy is based on the idea that the individual is (somewhat) free to control his destiny, Kantian 'moral' autonomy is based on the idea that moral agents are not only subject to moral requirements, they are in some sense the self-addressing legislators of these moral requirements.¹³⁷ This is different to personal autonomy as, for Kant, autonomy does not consist in being possessed of the freedom to take actions according to one's own unconstrained choices. Kantian autonomy is based on the idea that moral laws are laid down by oneself and these laws have authority over oneself.¹³⁸ In this sense autonomy is not a psychological or motivational capacity, such as the capacity to control one's own destiny, but is a normative concept which describes the independence of the rational will of the individual from externally imposed directives. As Kant put it:

[M]an is subject only to laws given by himself but still universal and he is bound only to act in conformity with his own will, which, however, in accordance with nature's end is a will giving universal law.¹³⁹

Kant thought of autonomy as a fundamental principle of morality, which suggests that, when one acts freely he grounds universal laws of morality. This cautions against the 'material' principle of morality which bases morality on an end that is given independently of a rational agent's input.¹⁴⁰ At the heart of the distinction between 'personal' and 'moral' autonomy, then, is that moral autonomy refers to the capacity of an individual to impose objective moral laws on oneself, whereas personal autonomy is not limited to questions of morality; a person can violate his own interpretation of the moral law whilst retaining personal autonomy. However, both

¹³⁷ I. Kant, 'Fundamental Principles of the Metaphysic of *Morals*' in C. Eliot, *Literary and Philosophical Essays*, Vol XXXII (New York: P.F Colier and Son, 1909-1914) 432.

¹³⁸ A. Reath, 'Autonomy of the Will as the Foundation for Morality' in A. Reath (ed), *Agency and Autonomy in Kant's Moral Theory: Selected Essays* (Oxford: Oxford University Press, 2006) 121-173 at 122.

¹³⁹ n 137, 432.

¹⁴⁰ n 138 at 133.

conceptions of autonomy refer to the individual's capacity to think, act, or be motivated in a way that is not completely coerced by external forces.¹⁴¹

Both moral and personal autonomy concentrate on an individual's capacity to make choices undetermined by the influence of external forces. However, personal autonomy builds on this idea, as it can only be enjoyed in certain environments that are conducive to leading an autonomous life.¹⁴² To make this distinction clear, Paul Roberts gives the example of a political prisoner of an authoritarian regime who is denied his personal autonomy in the modern liberal sense, as his choices and life-chances are reduced, whilst still retaining the capacity for Kantian moral autonomy.¹⁴³ Whilst Kant argues that a man is only bound to act in conformity with his own will, he also states that 'a will... is designed by nature to give universal laws.'¹⁴⁴ This, according to Feinberg, gives with one hand and takes away with the other, since an individual can only act in accordance with a will designed externally by nature.¹⁴⁵ When seeking to establish the nature of the relationship between privacy and autonomy, it is important to know which concept of autonomy we are referring to. As Roberts' example illustrates, Kantian autonomy is possible even in circumstances where personal autonomy and privacy would be severely constrained. The link between this form of autonomy and privacy therefore seems uninformative to debates concerning the meaning and scope of privacy as a workable criminal justice right.

Personal autonomy is generally understood to refer to one's capacity to live one's life according to choices that are one's own and not the product of manipulative external

¹⁴¹ It should be noted here that these two conceptions of autonomy are only indirectly related. As Raz warns: 'personal autonomy should not be confused with the only very indirectly related notion of moral autonomy' and that moral autonomy reduces 'authorship to a vanishing point as it allows only one set of principles which people can rationally legislate and they are the same for all.' See n 136, 370.

¹⁴² J. Feinberg, *The Moral Limits of the Criminal Law, Volume Three: Harm to Self* (New York: Oxford University Press, 1986) 30.

¹⁴³ P. Roberts, 'Privacy, Autonomy and Criminal Justice Rights: Philosophical Preliminaries' in P. Alldridge and L. Brants (eds) *Personal Autonomy, the Private Sphere and the Criminal Law: A Comparative Study* (Oxford: Hart Publishing, 2001) 60.

¹⁴⁴ I. Kant (T.K. Abbott trans.), *Fundamental Principles of the Metaphysic of Morals* (Indianapolis: Bobbs-Merrill, 1949) 49.

¹⁴⁵ n 142, 35.

forces.¹⁴⁶ Autonomy, in this sense, clearly overlaps the concept of privacy referred to in the forgoing discussion. Many acts that might be said to set back privacy interests could also be said to set back personal autonomy. For example, an individual subjected to an involuntary strip search might argue, on several grounds, that his or her privacy has been invaded. This individual might also argue that his or her ability to live life according to his or her own choices is impaired by the person conducting the involuntary strip search.

The precise nature of the relationship between privacy and autonomy is less clear. It seems that privacy is essential for leading an autonomous life anywhere where personal autonomy is a prevailing ideal. Without privacy, an individual would not have the space to contemplate or experiment in different activities free from ridicule, censure or scrutiny. This would impede the opportunity an individual has to make choices autonomously. However, there are times when someone can make an autonomous decision to relinquish his or her privacy. For example, consider a naturist who, of his own volition, reveals intimate aspects of his body to passing observers on a regular basis. Furthermore, there are circumstances where privacy seems to be violated without any impact on the personal autonomy of the individual. For example, if I were to spy on an individual as he or she slept, I may not deprive the individual of the ability to make an autonomous decision, yet such actions still seem objectionable. A counter-argument might suggest that I could harm the individual because the information I retain about his or her sleeping habits could be made public at some point in the future, thus setting off a chain of events which could jeopardise the subject's autonomy. However, in focusing on the disclosure of such private information, this argument moves away from the issue of whether or not the covert observation of a sleeping person is morally objectionable in itself. Such observation seems to engage privacy interests in and of itself, in ways that cannot be explained through reference to autonomy alone.

¹⁴⁶ n 131, 34-49.

Thus, it is reasonable to conclude that whilst privacy can contribute to the conditions for the exercise of personal autonomy, this only accounts for part of the value picked out by the concept. The foregoing discussion suggests privacy may be grounded in other values. For example, if someone obtains unknown or otherwise unwanted access to another individual and finds out some embarrassing information about that person he or she may have invaded the privacy of that person without necessarily jeopardising autonomy. Whilst such forms of access may not set back autonomy based interests, they could interfere with the individual's overlapping interest in having his or her dignity respected.¹⁴⁷

2.2. The Dignity-Based Accounts

Other accounts of the value of privacy focus on human dignity. According to Taylor, dignity refers to 'our sense of ourselves as commanding respect.'¹⁴⁸ Respect for dignity then would be respect for the self by oneself or by others. Wicks notes how the concept of dignity in human rights treaties tends to imply that dignity is an essence in all living human beings.¹⁴⁹ This view seems to take for granted that all individuals are possessed of dignity as it is an integral part of our being. It draws on the Kantian concept of autonomy, distinguishing humans from other beings and implying that they should not be treated as objects.¹⁵⁰ However, this understanding of human dignity is criticised by Dupré for being too abstract:

The highly autonomous subject of rights born with dignity, who goes through his theoretical life, apparently effortlessly asserting his political preferences and living a private family life, does not exist in reality. Real lives are complex and messy; people are not all born in dignity.¹⁵¹

¹⁴⁷ As Feldman highlights, the two concepts overlap: 'In order to develop and exercise a capacity for self-determination, one needs to take oneself and others seriously as moral agents.' See: D. Feldman 'Secrecy, Dignity, Or Autonomy? Views of Privacy as a Civil Liberty' (1994) 47 *Current Legal Problems* 41-71 at 54.

¹⁴⁸ C. Taylor, *Sources of the Self: The making of modern identity* (Cambridge: Cambridge University Press, 1989) 15.

¹⁴⁹ E. Wicks, 'The Meaning of 'Life': Dignity and the Right to Life in International Human Rights Treaties (2012) 12 *Human Rights Law Review* 199-219 at 212.

¹⁵⁰ C. Dupré, 'Unlocking Human Dignity: Towards a Theory for the 21st Century' [2009] *European Human Rights Law Review* 190-205 at 192.

¹⁵¹ *ibid* at 193.

Against the conception of dignity as a fundamental essence of all living human beings, Dupré argues that, whilst autonomy is linked to dignity, it offers an incomplete foundation for defining the concept.¹⁵² Dignity, according to Dupré, should be understood in a more pluralistic way in terms of (i) the inner mental and emotional worlds of the person; and (ii) the outer social being of the person.¹⁵³

Dupré raises an interesting point. Individuals are not isolated monads who should be understood solely from the perspective of their individual autonomy. People usually have complex inter-relationships with others, socially, in families, and in their working lives. Though an exhaustive analysis of the concept of dignity is not needed here, it is noteworthy that under different circumstances individuals may have different views of what it means to respect dignity as a result of the conditions in which they find themselves. A person who works in a call centre might find the work of a coal miner to be lacking in dignity and vice versa. Therefore, a conception of dignity which reflects the complex nature of the social world seems necessary in order to develop a fuller understanding of what it means to be in a condition of dignity.

Dignity may also deviate from personal autonomy. Whereas personal autonomy values each individual's personal choices, dignity has been invoked as a reason for prohibiting certain behaviours. For example, courts have prohibited the activity of dwarf-throwing as it is considered inherently undignified, irrespective of the autonomous choices of participants in this activity.¹⁵⁴ Beyleveld and Brownsword suggest that human dignity is a 'two-edged sword' which can both subvert and enhance personal autonomy.¹⁵⁵ On the one hand, to view dignity as the foundation for having one's own choices respected, purely for the reason that they are one's own, is to view dignity as something that empowers individuals (this was the

¹⁵² *ibid.*

¹⁵³ *ibid* at 204.

¹⁵⁴ See D. Beyleveld and R. Brownsword, *Human Dignity in Bioethics and Biolaw* (Oxford: Oxford University Press, 2001) 26.

¹⁵⁵ *ibid* at 26.

argument of the dwarves choosing to be thrown). On the other hand, dignity can be understood as an overriding value which should be respected by all members of society. Such a view of dignity makes personal autonomy a non-determinative factor when assessing whether or not certain acts may undermine dignity.¹⁵⁶ Dignity is evidently a complex concept. Appeals to dignity can be made to constrain or to empower personal autonomy: whether or not the French court was correct to decide the case as it did in order to protect dignity or other interests is another question. However, it is clear that for an individual to have dignity, that individual should be respected independently of his, or any other, subjective preferences.

Proponents of a dignity-based theory of the normative value of privacy argue that the importance of privacy is founded on an entitlement to respect for each individual's dignity. As well as suggesting privacy can further personal autonomy, Benn's arguments might also support a dignity-based account of its value. Benn proposed that to invade a person's privacy is to show less than proper regard for human dignity, and that, consequently, privacy is grounded in the principle of respect for persons:

A general principle of privacy might be grounded on the more general principle of respect for persons. By a *person* I understand a subject with a consciousness of himself as agent, one who is capable of having projects, and assessing his achievements in relation to them. To *conceive* someone as a person is to see him as actually or potentially a chooser, as one attempting to steer his own course through the world, adjusting his behaviour as his appreciation of the world changes, and correcting course as he perceives his error.¹⁵⁷

Whilst this account does not directly prescribe dignity as the fundamental basis for all privacy concerns, it certainly views the interest in privacy as something that is based on respect for the individual, regardless of his or her subjective preferences. Benn argues that privacy is founded on the idea that individuals should have respect for other persons because 'every human being, insofar as he is qualified as a person, is

¹⁵⁶ *ibid* at 27.

¹⁵⁷ n 116 above at 8-9 (emphasis in original).

entitled to this minimal degree of consideration.¹⁵⁸ Therefore, Benn suggests that if someone were to remove another from a condition of privacy this may fail to fundamentally respect that person, regardless of whether or not any material harms are also inflicted.¹⁵⁹ Charles Fried likewise suggests that privacy is valuable in ensuring respect for human dignity. Fried proposes that invasions of privacy injure the individual in his or her very humanity.¹⁶⁰ Thus, in Fried's view, privacy is a basic right in the Kantian sense; it requires the recognition of persons as ends.¹⁶¹

The claim that privacy is valued because it furthers human dignity is advantageous in explaining why invasions of privacy, which seemingly do not impinge on personal autonomy (e.g. covert monitoring or surveillance), nonetheless still seem objectionable. However, like autonomy, dignity does not seem to provide the basis for all privacy concerns. As the dwarf-tossing example illustrates, attempts to regulate activities or behaviours with a view to protecting human dignity can set back privacy related interests. Whether or not privacy is valuable for promoting dignity related ends, autonomy related ends, both of these, or none of these, seems to be a question that can only be answered contextually. Thus, it might be instructive to think of privacy as what Andrew Roberts describes as a 'mid-level' principle, a concept which 'mediates what the more abstract ideals and precepts of basic moral and political theories require in particular circumstances.'¹⁶² Privacy can further a number of different ends. However, the questions of how and when privacy does this can only be answered contextually, in relation to particular situations. As Feldman suggests, a focus on a single underlying value of privacy is likely to be positively misleading;¹⁶³ privacy is both autonomy-related and dignity-related, protecting the individual from outside interference in numerous contexts for various ends.

¹⁵⁸ *ibid* at 9.

¹⁵⁹ *ibid* at 10.

¹⁶⁰ n 49 at 475.

¹⁶¹ *ibid* at 478.

¹⁶² A. Roberts, *Privacy and Political Theory* (Melbourne Legal Studies Research Paper No. 690, 2014) 1-25 at 7.

¹⁶³ n 147 at 58.

2.3. Is Privacy a Relative Value?

Recent accounts of the value of privacy have acknowledged that privacy is a pluralistic value, useful for a number of ends.¹⁶⁴ This is undoubtedly true. Whilst privacy allows individuals to manage social relationships, it also enables the individual to limit access to his or her personal information, and to limit access to his or her personal space.

Solove suggests that conventional attempts to ascertain the value of privacy offer no guidance in resolving conflicts between interests. He observes that there is no consensus regarding a theory of the value of privacy. Thus, Solove suggests we should understand privacy in terms of its practical consequences, and ascertain its value through balancing it against opposing interests. Solove's rationale is as follows:

Because privacy conflicts with other fundamental values, such as free speech, security, curiosity, and transparency, we should engage in a candid and direct analysis of why privacy interests are important and how they ought to be reconciled with other interests. We cannot ascribe a value to privacy in the abstract. The value of privacy is not uniform across all contexts. We determine the value of privacy when we seek to reconcile privacy with opposing interests in particular situations.¹⁶⁵

From this methodological precept, Solove posits that the value of privacy in such a balancing exercise should be determined contextually. As we have seen, Solove's attempt to move beyond finding the common denominator in all privacy interests and to assess the value of privacy based on concrete problems appropriately reflects the complexity of the concept. However, his own account of the value of privacy is similarly under-specified. First, Solove provides little detail as to how the privacy 'problems' described in his taxonomy can or should be 'balanced' against competing interests.

¹⁶⁴ See n 68 at 809-810; N.A. Moreham, 'Beyond Information: Physical Privacy in English Law' (2014) 72 *Cambridge Law Journal* 350-377 at 352; Marmor, n 50 at 8-9.

¹⁶⁵ n 72, 87.

Furthermore, as Thierer suggests, at some point law-makers regulating privacy interests will have to decide, in the abstract, where privacy interests rank among various other interests.¹⁶⁶ For example, all other things held equal, the right to life trumps the right to privacy. If the Government were to take the life of an individual, this would be a more serious interference with that individual's rights than just about any privacy interference one could reasonably imagine. This is not to say that privacy rights cannot trump the right to life in certain circumstances, but that in all but the more extreme circumstances the right to life would take precedence. Exceptions could only be made where the degree of severity of the interference with privacy rights, and the certainty with which the interference will occur, 'outweigh' that of the interference with the right to life. In focusing solely on the context of the particular interference, Solove attempts to sidestep the fact that, to explain why one right trumps another, it is necessary to examine the political value of privacy, not only as an individual interest, but as an aspect of the common good.

Amongst modern privacy theorists, it is common ground that privacy is a broad concept which overlaps with a number of other moral interests and rights.¹⁶⁷ Whilst there is no single value of privacy, the cluster of privacy interests has normative significance irreducible to the source from which they are derived. The fact that certain interests relating to the person, social relationships, and property can be placed in a privacy cluster, in a manner that is not just arbitrary, suggests that they share something in common. For example, an individual can violate the property rights of another, say by stealing his or her car and driving it, but it is questionable whether or not this act alone would violate the car owner's privacy. However, if the individual were to steal someone's personal diary and read it, this violation of a property right seems also to violate the privacy rights of the diary owner.

¹⁶⁶ A. Thierer, 'Book Review: Solove's Understanding Privacy' *The Technology Liberation Front* 8 November 2008 at <https://techliberation.com/2008/11/08/book-review-soloves-understanding-privacy/> (last visited 16 May 2016).

¹⁶⁷ See n 68; Moreham, n 164; n 71, 71; R. Krotoszynski, *Privacy Revisited: A Global Perspective on the Right to be Left Alone* (Oxford: Oxford University Press, 2016).

In summary, Solove's pragmatic conception of privacy offers an approach for avoiding the 'disarray' in privacy scholarship. This conception, which treats privacy as a convenient label to describe a range of disparate 'privacy problems', denies that the concept serves any general theory or other fundamental values. However, this approach ultimately lacks the necessary coherence of a conception of privacy which carries moral weight. From the literature discussed so far, it is reasonable to infer that any attempt to conclusively resolve the disagreements over the concept of privacy, its definition, scope, content, and value will be futile. Andrew Roberts suggests that this ongoing disagreement is a manifestation of disagreements over fundamental moral and political principles and values.¹⁶⁸ This suggests not only that the search for a consensus regarding the underlying value of privacy is futile but also that a satisfactory account of privacy must explain its relationship to the set of moral and political values that it serves.

The following sections of this analysis turn attention to how perspectives in political philosophy account for the value of privacy. They show that a range of perspectives in political morality support privacy as a moral, political and jurisprudential concept. Perspectives in political morality which have suggested that privacy is a socially detrimental value will also be considered. I conclude that, even though there is merit in *some* of these sceptical claims, privacy is an important aspect of the common good, which protects significant individual and collective ends. Privacy has value as an individual right and social value. This must be recognised in any society which places importance on safeguarding individual well-being.

2.4. Privacy and the Liberal Orthodox

Liberal societies generally accept that individuals should have their privacy protected to a greater or lesser extent. The Fourth Amendment to the United States Constitution provides, for example 'the right of the people to be secure in their

¹⁶⁸ n 162 at 12.

persons, houses, papers, and effects, against unreasonable searches and seizures...'¹⁶⁹ This suggests that, unless there is sufficient reason to limit the Fourth Amendment in a particular circumstance, US citizens have the right to keep their person, their home, and information about their person private. Article 8(1) of the European Convention on Human Rights (ECHR) stipulates that: 'Everyone has the right to respect for his private and family life, his home, and his correspondence.' Whilst the limitations that can be imposed on this right under Article 8(2) will be discussed in the subsequent chapters of this thesis, the primary Article 8(1) right shows that privacy related interests are considered to be worthy of respect in contemporary liberal societies that are signatories to the Convention.

Liberalism is a political philosophy that advocates individual liberty and the ability of citizens to choose their own values and ends, free from the over-weening interference of the state or other individuals.¹⁷⁰ On this view, the state should not impose a preferred way of life upon citizens. This means that, even if it were in the interest of society to prohibit certain behaviours, such as abortion or the watching of pornography, these should not be prohibited because what might be considered good cannot override the free choices of individuals so long as such choices do not conflict with the liberty of others.¹⁷¹ There are many different types of liberalism and the extent to which liberal values such as toleration, equality, and liberty can override other societal values is a matter of continuous debate.¹⁷² However, there are two main perspectives which provide the moral basis for liberalism – one broadly Kantian, and the other utilitarian.

According to the characteristically liberal anti-perfectionist perspective, the state should not impose a preferred way of life upon its citizens, even if this is in the

¹⁶⁹ United States Constitution, Amendment IV.

¹⁷⁰ M. Sandel (ed.), *Liberalism and Its Critics* (New York: New York University Press, 1984) 2.

¹⁷¹ I admit to painting in broad-brush strokes in making this point. The extent to which pornography and abortion conflict with the liberty of others will not be discussed here.

¹⁷² For a useful overview see W. Kymlicka, *Contemporary Political Philosophy: An Introduction* (2nd edn. Oxford: Oxford University Press, 2002).

interests of its citizens, in part, because doing so will have worse consequences than if individuals are allowed to make their own choices. Mill argued that it is important for individuals to construct their own version of the good in their own way, so long as they do not attempt to deprive others of theirs and that this principle rests on the principle of utility: 'I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being.'¹⁷³ On this view, liberal ideals are justified on the grounds that they maximise utility. That is to say, they aggregate the amount of 'happiness' among individuals in society. On utilitarian grounds, the values and preferences of individuals should be aggregated in any calculation of the good, and not judged on the basis of their quality.

However, this aggregation of welfare is criticised by Kantian liberals for overriding the values and preferences of the minority in any liberal calculation. For instance, if the majority feel that the prohibition of homosexual activity is to the benefit of society then, on a utilitarian calculation, the suppression of homosexual activity would be justified on the grounds that this would maximise utility in society as long as the intensity of the preferences on either side was equal. Such a calculation, according to Kantian liberals, is unfit to serve as a basis for moral law because it involves privileging the interests of the majority and failing to respect the differences between persons.¹⁷⁴ Paul Roberts criticises this approach:

... the utilitarian's professed egalitarianism is a sham equality in which all persons 'count' the same only because everybody ultimately counts for nothing under the tyranny of familiar monist consequentialisms... Embodied individual *wellbeing*, rather than aggregated abstract welfare, should be the government's ultimate ethical consideration; reflecting liberal deontology's insistence that human beings are intrinsically valuable, Kantian ends-in-themselves.¹⁷⁵

Kantian liberals tend to argue that a distinction should be drawn between individual rights and the 'good'. On a Kantian liberal account, there should be a framework of

¹⁷³ n 135, 15.

¹⁷⁴ See for example, n 134, 560-565.

¹⁷⁵ P. Roberts, 'Criminal Law Theory and the Limits of Liberalism' in A.P. Simester, A. du Bois-Pedain and U. Neumann, *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Oxford: Hart Publishing, 2014) 327-360 at 332-333.

basic rights, and individuals should have the freedom to pursue their own conceptions of the good within that framework. Sandel uses the example of the right to freedom of speech to demonstrate this position:

It is one thing to defend the right to free speech so that people may be free to form their own opinions and choose their own ends, but something else to support it on the grounds that a life of political discussion is inherently worthier than a life unconcerned with public affairs, or on the grounds that free speech will increase the general welfare. Only the first defence is available on the Kantian view, resting as it does on the ideal of a neutral framework.¹⁷⁶

Thus, Kantian liberals advocate a neutral framework within which individuals and groups are assured the freedom to choose their own values and ends, whilst respecting the rights of others to do the same. Such a perspective privileges equal rights among persons, rather than a utilitarian system where the rights of the minority may be overridden in the interests of the greater good. However, there is notorious disagreement among Kantian liberals over what rights are fundamental.¹⁷⁷

Liberalism promotes a distinction between the private and the public, which can foster individual liberty and limits the power that the state can have over individuals. The liberal argument is that privacy protects the individual in society by providing a space where the individual is closed off from the outside world. This space can exist in the home or in public places and can protect the individual's thoughts, personal information, or physical space. However, the definition of what should be considered private and what should be considered public remains disputed. For instance, the scope of what is considered private varies across liberal societies, and within liberal societies over time.¹⁷⁸ Whilst privacy may serve an important function in protecting individuals in society, there is a great deal of variation in what societies feel should be covered by this interest. An absolute right to privacy in political society would be

¹⁷⁶ n 170, 4.

¹⁷⁷ See W. Kymlicka, 'Liberalism' in T. Honderich (ed.) *The Oxford Companion to Philosophy* (2nd edn. Oxford: Oxford University Press, 2005) 514-516.

¹⁷⁸ See generally H.J. Spiro, 'Privacy in Comparative Perspective' in J. Pennock and J. Chapman (eds.) *Privacy: Nomos XIII* (New York: Atherton Press, 1971) 121-148; Krotoszynski, n 167.

socially dysfunctional.¹⁷⁹ For example, if a suspected terrorist had an absolute right to privacy, the authorities would struggle to prevent any attack he or she might be plotting as they could not monitor any of his or her activities, communications, or, where necessary, detain the suspect for questioning. For many commentators, privacy is viewed as socially detrimental, since it can shield undesirable behaviours and action at the expense of other legitimate crime prevention and public safety concerns. Such perspectives will now be considered.

2.5. Does Privacy Threaten the Common Good?

The communitarian perspective conflicts with Kantian liberalism, in criticising a value system which, it argues, is founded on the idea that individuals are isolated monads and ignores the individual's role in, and obligation to, his or her community. This perspective emphasises the point that individuals are embedded in communities, and that values should consequently be rooted in communal interests and the individual's commitment to others. For communitarians, this ethical system reflects a more accurate conception of reality than liberal perspectives;¹⁸⁰ and prevents liberal rights from providing nearly absolute protection for any and all self-interests.¹⁸¹ For instance, Etzioni argues that, whilst liberal values may have helped earlier societies break away from totalitarian and authoritarian rule, the expansion of individual rights in modern liberal societies has gone too far:

American society has suffered from excessive individualism, a grand loss of commitment to the common good. In the 1960s, expressive individualism spread, which encouraged people to walk away from their societal obligations in order to "find themselves," to develop their identities and heed their innermost desires. In the 1980s instrumental individualism added insult to injury as Reagan, like Thatcher, made a virtue out of watching out for oneself. On top of these two waves of individualism came an explosion of a sense of entitlement and litigiousness, in the name of what was due to the individual, with precious little concern for the effects on others and the common good. In this society it

¹⁷⁹ D. Feldman, 'Privacy-related Rights and their Social Value' in P. Birks (ed.) *Privacy and Loyalty* (Oxford: Oxford University Press, 1997) 15-50 at 18.

¹⁸⁰ A. Gutmann, 'Communitarian Critics of Liberalism' in S. Avineri and A. de Shalit (eds.) *Communitarianism and Individualism* (Oxford: Oxford University Press, 1992) 120-137 at 121.

¹⁸¹ W. Lund, 'Politics, Virtue, and the Right To Do Wrong: Assessing the Communitarian Critique of Rights' (1997) 28 *Journal of Social Philosophy* 101-122 at 101.

was necessary to rein in excessive individualism and to shore up the common good.¹⁸²

From this basis, communitarians such as Etzioni argue that rights should be relative and subordinate to other societal goods. However, the reply from liberals tends to be that communitarian political morality can pave the way to prejudice, intolerance and totalitarianism.¹⁸³ Etzioni views individualism as a form of egotism. The liberal retort would suggest that liberal individualism is not a doctrine of greed or self-regard. Rather, it is a precondition of personal freedom, to make choices, and to be the part self-author of one's own life.¹⁸⁴

Communitarians argue that, whilst privacy is useful and necessary to prevent totalitarianism and unwarranted public control, the expansion of privacy rights in liberal democracies has gone too far. Etzioni states: 'important social formulations of the good can be left to private choices – provided there is sufficient communal scrutiny! That is, *the best way to curtail the need for governmental control and intrusion is to have somewhat less privacy.*'¹⁸⁵ Essentially, this communitarian perspective counters the liberal argument that individuals should enjoy the privacy to make choices that might be to the detriment of the wider community, subject to certain limitations. Instead, the communitarian perspective advanced by Etzioni is based on the idea that privacy should not be privileged over the common good. Etzioni argues that his communitarian approach to privacy avoids the failings of a static liberal conception of a right to privacy that ignores the contextual nature of privacy and the demands of public health and public safety.¹⁸⁶ Furthermore, the liberal conception of a right to privacy does not recognise that the more permissive society becomes, in allowing people to have unrestrained privacy in a given period,

¹⁸² A. Etzioni, *The Common Good* (Cambridge: Polity Press, 2004) 3.

¹⁸³ n 181 at 117-119.

¹⁸⁴ As Roberts suggests: 'One's life would not be authentically one's own if one were under a pervasive general duty to assist the needy or to sacrifice one's projects to the general good.' See: n 175 at 334.

¹⁸⁵ A. Etzioni, *The Limits of Privacy* (New York: Basic Books, 1999) 213 (emphasis in original).

¹⁸⁶ This is the central thesis of Etzioni's book, which uses the examples of ID cards, Megan's Law and the HIV testing of infants to demonstrate this point. *ibid.*

the more controls will be needed in subsequent years to maintain the same level of public order.¹⁸⁷

The communitarian perspective is interesting for a number of reasons. First, it offers a solution to the problems that have emerged in societies where a framework of rights has extended to the point where it allegedly allows individuals to make decisions that are harmful to communities. Also, by introducing the community as a 'third realm' between the state and the individual, Etzioni offers an alternative method of resolving disputes positioned between the need to ensure the common good is protected, and the need to prevent religious fundamentalism, extremism, totalitarianism, or tyranny. Like liberals, communitarians tend to oppose such controlling mechanisms by recognising the need to have privacy. However, communitarians maintain that the common good should not be compromised, if individual well-being in society is to be truly prioritised over the interests of those who wish to harm others.

However, for Etzioni to hold that the community has interests above the individual is misleading. If individual well-being is the criterion for a communitarian system of political morality, it is unclear how a system where the community has a higher value than its constituent individuals can maximise such well-being. The individual does not just have obligations to the community, he or she is *embedded* in it. The community is a structure capable of exercising pressure on individuals to behave a certain way and, as a result, the individual should have rights against the community. If collective interests are held to be fundamental in the way that communitarians prescribe, and these interests are derived from the community itself, this puts the individual at risk of being sacrificed for the interests of the community. To prevent injustice and ensure that individual well-being is afforded maximum protection in a

¹⁸⁷ *ibid* 215.

society, liberal values such as privacy, autonomy and human dignity should provide the justification for obligations imposed on individuals in a political community.¹⁸⁸

Furthermore, the communitarian view that associates privacy with the individual is misleading. Whilst legal protections for the distinction between the public and private lives of individuals are useful to further a number of our ends as individuals in society, such protections are also important in serving collective purposes.¹⁸⁹ Regan suggests that privacy is essential to ensure democracy as it limits the power of the state.¹⁹⁰ To illustrate the point, one only has to think about how the Stasi, Gestapo, and other secret police organisations used privacy-interfering measures to stifle any political dissent which might be mounted against the totalitarian regimes under which they operated. Furthermore, Andrew Roberts suggests that privacy is valuable in securing the republican aims of self-government and non-domination. According to him, privacy is a pre-requisite for effective participation in political life.¹⁹¹ Along similar lines, Goold highlights how part of privacy's social value stems from its importance to the exercise of other fundamental rights:

It is difficult to imagine, for example, being able to enjoy freedom of expression, freedom of association, or freedom of religion without some accompanying right to privacy. Individuals not only need to be able to be alone with their own thoughts, but they also need to be free to share those thoughts with others without being subject to the watchful, possibly critical, eye of the state. Indeed, one of the greatest dangers of unfettered mass surveillance... is the potential chilling effect on political discourse, and on the ability of both individuals and groups to express their views through comment, protest and other forms of peaceful civil action.¹⁹²

From these accounts, it is clear that privacy is important not only as an individual interest but also as a political value which enhances liberal democracy in various

¹⁸⁸ See Larsen's criticisms of the communitarian justification for the proliferation of public CCTV: Larsen, n 50, 38-41.

¹⁸⁹ P. Regan, *Legislating Privacy: Technology, Public Values and Public Policy* (Chapel Hill: University of North Carolina Press, 1995) 221; K. Hughes, 'The Social Value of Privacy, the Value of Privacy to Society and Human Rights Discourse' in B. Röessler and D. Mokrosinska (eds.), *Social Dimensions of Privacy* (Cambridge: Cambridge University Press, 2015) 225-243.

¹⁹⁰ Regan, *ibid* 224-225.

¹⁹¹ See generally A. Roberts, 'A Republican Account of the Value of Privacy' (2014) *European Journal of Political Theory* 1-25.

¹⁹² B. Goold, 'How Much Surveillance is Too Much: Some Thoughts on Surveillance, Democracy and the Political Value of Privacy' in D. Schartum (ed.), *Overvaaking i en Rettstat: Surveillance in a Constitutional Government* (Fagbokforlaget, 2010) 38-48 at 42-43.

ways. Privacy is not a mere indulgence of the individual at the expense of communal interests. Rather it is one aspect of the common good, which can in some circumstances conflict with other aspects of the common good. Thus, even if communitarians are correct in proclaiming that individual privacy interests should not prevail over the interests of the community at large, this provides no ground for disregarding the benefits to the community that adequate privacy protection can foster.

2.6. Does Privacy Entrench Gender Inequality?

Privacy has been criticised by feminist theorists for shielding male violence and entrenching gender inequality. MacKinnon argues that the distinction between what is 'public' and subject to the scrutiny of society, and what is 'private', can shield men from accountability for dominating and abusing women in the home.¹⁹³ This feminist perspective is based on the idea that privacy can be dangerous for women when it is invoked to conceal the subjection of women in the domestic sphere: 'The law of privacy ... translates traditional liberal values into individual rights as a means of subordinating those rights to specific social imperatives.'¹⁹⁴ According to MacKinnon, this process:

[e]nforces male supremacy with capitalism, translating the ideology of the private sphere into the individual woman's legal right to privacy as a means of subordinating women's collective needs to the imperatives of male supremacy.¹⁹⁵

Mackinnon advances a damning critique of the right to privacy as it operated in the U.S. Supreme Court cases of *Roe v Wade*¹⁹⁶ and *Harris v McRae*.¹⁹⁷ Essentially, Mackinnon suggests that the right to privacy, as interpreted in these two cases, perpetuated sexual inequality in a number of ways. First, construed as the right to be

¹⁹³ C.A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1989) 187.

¹⁹⁴ *ibid* 187.

¹⁹⁵ *ibid* 187-188.

¹⁹⁶ *Roe v Wade* (1973) 410 U.S. 438.

¹⁹⁷ *Harris v McRae* (1972) 448 U.S. 113.

free from state action, the right to privacy only protects the freedom and equality of powerful individuals in society, and second, it enables men to oppress women:

[I]f inequality is socially pervasive and enforced, equality will require intervention, not abdication, to be meaningful. But the right to privacy is not thought to require social change. It is not even thought to require any social preconditions, other than non-intervention by the public.¹⁹⁸

Thus, Mackinnon argues, the right to privacy justifies the exploitation of women by protecting illegitimate differences between men and women in society. Mackinnon claims that the focus of the privacy doctrine on intimate relationships allows privacy, as a legal right, to shield 'battery, marital rape, and women's exploited labour; [has] preserved the central institutions whereby women are deprived of identity, autonomy, control and self-definition; and has protected the primary activity through which male supremacy is expressed and enforced.'¹⁹⁹ Thus, Mackinnon concludes that the right to privacy, as construed in the U.S. Supreme Court's leading cases, is incompatible with genuine equality for women in society.

Mackinnon's analysis offers a thought-provoking challenge to liberal assumptions regarding the value of privacy. Indeed, privacy claims may perpetuate certain undesirable social structures. There are numerous examples of social life where legal protections of privacy seem to have detrimental effects on social justice. In the late 1980s, a number of empirical studies suggested that police officers often neglected to deal with cases of domestic violence in a robust manner because of concerns that they should be dealing with issues concerning public order, rather than interfering in the private and family lives of citizens.²⁰⁰ Such practices lend credence to MacKinnon's claims that the liberal focus on the need to protect the private lives of

¹⁹⁸ C.A. Mackinnon, 'Privacy v Equality: Beyond Roe v Wade' in C.A. Mackinnon (ed.), *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987) 93-103 at 100.

¹⁹⁹ *ibid* at 101.

²⁰⁰ See for example A. Sanders, 'Personal Violence and Public Order: The Prosecution of 'Domestic Violence' in England and Wales' (1988) 16 *International Journal of the Sociology of Law* 359-382; S. Stith, 'Police Response to Domestic Violence: The Influence of Individual and Familial Factors' (1990) 5 *Violence and Victims* 37-49. More recently, a report from Her Majesty's Inspectorate of Constabulary (HMIC) indicated that a failure of management in the police to reinforce the 'right behaviours, attitudes and actions of officers' had contributed to victims of domestic violence receiving a worse response from officers dealing with their case than victims of acquisitive and violent crimes. See HMIC, *Everyone's Business; Improving the Police Response to Domestic Abuse* (London: HMIC, 2014) 6.

individuals from the interference of the state may endanger victims of violence that takes place in private spaces, such as the home.

However, there are circumstances where privacy protection may be in the collective interests of women. To use another criminal justice example, a number of recent legal developments in England and Wales sought to protect the privacy of predominantly female rape complainants when they are cross-examined by defence barristers at trial.²⁰¹ Whilst, in certain circumstances, the liberal interest in protecting the privacy of individuals may conflict with the interests of certain groups in society, the argument that this is sufficient reason for jettisoning such interests would be overblown. However, when drawing the line between those behaviours and activities that should be protected from outside interference and those that should not, it is important that the full spectrum of interests is considered. In a detailed response, Lever highlights how the right to privacy and equality need not conflict. Rather, she argues, 'rights to privacy which justify sexual inequality depend on dubious premises about equality and individuals.' According to Lever, privacy and equality are interdependent. Hence, the meaning and justification of privacy must be squared with the meaning and justification of equality.²⁰² Indeed, many of Mackinnon's arguments focus on cases where the right to privacy has been understood as a legal constraint on state interference with the individual, which can be problematic in societies where women are structurally disadvantaged. However, the interdependence of these interests explains why they need not conflict. Rather, conflicts between these interests can be resolved through revisions of the content and justification of each.²⁰³ Privacy, as a concept, need not be shackled to an out-dated interpretation of the public/private dichotomy, which oppresses women. And the broad conception of privacy advanced in this thesis can help us see ways in which

²⁰¹ Youth Justice and Criminal Evidence Act 1999, section 41(1) sets forth that 'If at trial a person is charged with a sexual offence, then, except with the leave of the court – (a) no evidence may be adduced, and (b) no question may be asked in cross-examination, by or on behalf of any accused at the trial, about any sexual behaviour of the complainant.'

²⁰² A. Lever, *A Democratic Conception of Privacy* (Bloomington: Author House, 2013) 21.

²⁰³ *ibid* 40.

privacy can be valued where it furthers pro-social goals and norms of behaviour and rejected in contexts where it does not.²⁰⁴

Conclusions

This chapter has surveyed theoretical perspectives on the scope and value of privacy as a basis for assessing the extent to which the privacy interests of those subject to the criminal process are recognised and afforded adequate protection in England and Wales. Privacy has proven difficult to define. No attempt to identify a common denominator between privacy related interests is entirely satisfactory. This, it seems, is because privacy is a term employed to describe a range of distinct, yet related, interests. Our conclusion is that the most useful way to understand privacy is as a condition of limited access. Types of access which may remove one from a condition of privacy are varied. One may be accessed physically (if, for example, one is subject to a strip search), or may have the limits on one's accessibility diminished through the collection, processing, or dissemination of personal information. Whether or not existence in a condition of limited access is valuable depends on contextual factors. Nonetheless, this chapter has shown that privacy can support human flourishing by creating a space in society for individual choices and preferences. This can further the ends of human dignity and personal autonomy. Furthermore, the chapter has shown that, on any account of political morality which views human flourishing as a central concern, *some* degree of privacy in *certain* situations is important for a range of collective and individual ends.

However, the description of privacy as a condition of limited access does not offer much guidance in establishing a threshold for determining whether or not a moral (let alone legal) right to privacy has been engaged or violated in a particular situation. For example, to subject an individual to a passing glance on a public street

²⁰⁴ J.W. DeCew, 'The Feminist Critique of Privacy: Past Arguments and New Social Understandings' in B. Röessler and D. Mokrosinska (eds.), *Social Dimensions of Privacy* (Cambridge: Cambridge University Press, 2015) 85-103 at 103.

would diminish the extent to which that individual is in a condition of limited access. However, the casual glance surely does not constitute an interference that could or should be recognised in law. Thus, any properly formulated legal protection of privacy needs a threshold for determining whether an act, which limits an individual's existence in a condition of inaccessibility, should be circumscribed on privacy grounds. In some circumstances, privacy interests can justifiably be overridden in favour of competing interests. Privacy is not an absolute right that cannot be limited or sacrificed in the interests of ensuring public safety or preventing crime. Assessing where and how the line *should* be drawn between privacy interests and other conflicting interests is a significant undertaking.

This chapter has shown that privacy is an important social and individual value. Privacy is of fundamental importance in protecting various autonomy- and dignity-based interests. Consequently, assuming principles of liberal democracy, the capacity of the state to interfere with privacy interests should be restricted, subject to legitimate overriding interests which may conflict with privacy. Chapter 2 examines Article 8 of the ECHR (and its associated jurisprudence) as a frame of reference to identify an appropriate threshold for establishing where forms of 'access' should be permitted, and for considering how disputes between privacy interests and these other interests should be settled.

2 Privacy and Article 8 of the European Convention on Human Rights

Chapter 1 focused on why privacy is an important concept in contemporary liberal democracies. One of the main conclusions to emerge was that the social and individual value of privacy is relative to the functions it serves in a particular context. But how does, and indeed how *should*, one set about making such assessments of the value of privacy in contexts where an individual is subject to the criminal process in England and Wales? A plausible starting point to answer this question is an analysis of the framework offered by Article 8 of the European Convention on Human Rights (ECHR). This provides:

- (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 is 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 disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.²⁰⁵

Under section 6 of the Human Rights Act 1998 (HRA 1998), it is unlawful for any public authority to act in a way that is incompatible with such a Convention right.²⁰⁶

Article 8 might be termed a 'qualified' Convention right. It is protected, but with the proviso that it may be interfered with to a minimal extent in pursuit of certain legitimate aims stated in Article 8(2).²⁰⁷ Though there is no official hierarchy of ECHR rights, according to Ashworth, the qualification in Article 8(2) (which is mirrored in Articles 9, 10, and 11, the other qualified rights) is a major point of differentiation between this and other, stronger Convention rights which cannot be limited in the

²⁰⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI. 1950.

²⁰⁶ See section 6(1) HRA 1998.

²⁰⁷ See A. Ashworth, 'The Exclusion of Evidence Obtained by Violating a Fundamental Right: Pragmatism Before Principle in the Strasbourg Jurisprudence' in P. Roberts and J. Hunter, *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Oxford: Hart Publishing, 2012) 146-161 at 147.

same way.²⁰⁸ Thus, at the outset we can infer that the right to respect for private life is not an *absolute* (human) right. This seems to reflect the idea discussed in the previous chapter that the value of privacy is relative to the function it serves in a particular context and may be overridden if there is a weightier countervailing interest at stake.

Chapter 2 takes another step towards preparing the ground for later enquiry, by setting out the structure of Article 8 ECHR. The aim is to examine the framework for protecting privacy interests set forth under Article 8 (and the associated jurisprudence of the European Court of Human Rights (ECtHR)). In particular, Chapter 2 seeks to understand the (implicit) philosophical values underpinning the reasoning of judges in the court in cases where privacy related interests are at issue. It is hoped that the body of philosophical literature discussed in Chapter 1 can inform our understanding of how Article 8 is being applied, and how it should be applied, to protect privacy-related interests.

The chapter is divided into two parts. Part 1 focuses on Article 8(1) of the ECHR. In particular, this part considers the development and content of the core Article 8 interests, the scope of the right, and how the ECtHR determines whether or not Article 8(1) is engaged. Part 2 focuses on how, once it is determined that Article 8 is engaged (i.e. the measures taken on behalf of the Contracting State have interfered with the Article 8(1) rights of the applicant), the ECtHR adjudicates the conflict between Article 8 rights and countervailing interests. This requires an analysis of the criteria set forth in Article 8(2) ECHR. The chapter shows that Article 8 offers the outline of a useful framework for interpreting the scope of privacy interests. The ECtHR has developed a right, which recognises that privacy related interests are broad, distinct, yet related. Article 8(2) also offers a coherent framework for resolving conflicts between these interests and other societal concerns. This chapter

²⁰⁸ *ibid.*

provides necessary background on Article 8. The approach of the ECtHR to protecting the privacy interests of those subject to a criminal process, and how this jurisprudence has been applied domestically, will be evaluated in subsequent chapters.

1. How Does the ECtHR Interpret the Scope of Article 8?

The provisions of Article 8(1) set out the basic interests protected by Article 8, namely respect for 'private life', 'family life', 'home', and 'correspondence'. In its Article 8 analysis, the ECtHR has to consider whether or not Article 8(1) is engaged.²⁰⁹ However, the legal protection of 'privacy' or 'private life' is a relatively new phenomenon. Prior to World War II, the constitutions of liberal democratic societies generally protected aspects of privacy, such as the inviolability of the home, or the body of the individual. No state constitution, however, set forth a more expansive right to privacy, or right to respect for private life.²¹⁰ In this way privacy bucks the trend of 'hard core' fundamental rights guaranteed in liberal state constitutions becoming international human rights.²¹¹ When formulated as an international human right, privacy went beyond anything in state constitutions from its very beginning.²¹² Revisiting the drafting processes of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the European Convention on Human Rights (ECHR), Diggelmann and Cleis note how the human right to privacy had a 'silent birth'. That is to say, in the drafting processes of all three of these international instruments, there is little evidence of a conscious decision to create an overarching human right, which

²⁰⁹ A. Mowbray, *Cases, Materials and Commentary on the European Convention on Human Rights* (3rd edn. Oxford: Oxford University Press, 2012) 488-597.

²¹⁰ O. Diggelmann and M.N. Cleis, 'How the Right to Privacy Became a Human Right' (2014) 14 *Human Rights Law Review* 441-458 at 441.

²¹¹ C. Tomuschat, *Human Rights: Between Idealism and Realism* (3rd edn. Oxford: Oxford University Press, 2014) 26-28.

²¹² n 210 at 442.

protects anything near the range of privacy-related interests discussed in the previous chapter:

Umbrella terms were introduced, eliminated and replaced as if such decisions were merely editorial details. Explanations were rarely offered. A vague - and not even uncontested - consensus on the necessity to include protection of privacy was regarded as a sufficient basis for the editorial work.²¹³

Whether or not the drafters of the ECHR foresaw that the use of the umbrella term 'private life' in Article 8(1) would open the door for a broader range of privacy interests falling within the scope of Article 8(1) (and in all likelihood they did not),²¹⁴ this undoubtedly *did* happen. The scope of Article 8 now stretches far beyond avoiding the 'horrors, tyrannies and vexations' of fascist and communist inquisitorial practices²¹⁵ to include the regulation of the civil status of babies,²¹⁶ homosexual relations,²¹⁷ and freedom of association for those imprisoned.²¹⁸ This raises two questions for consideration in this part: (i) what is the scope of Article 8? And, (ii) is Article 8, as some detractors suggest, too unwieldy and imprecise in its scope to be of jurisprudential value?

The Convention sets out positive and negative obligations for Contracting States to ensure that they 'respect' the interests in Article 8(1).²¹⁹ The negative obligation is that the Contracting State and its public authorities refrain from interfering with the rights protected in Article 8(1).²²⁰ This means, for example, that the Contracting State has a duty to desist from authorising public authorities, such as the police, to use arbitrary powers which interfere with the interests protected under Article 8(1)

²¹³ *ibid* at 457.

²¹⁴ As Lord Walker JSC notes: 'It is not necessary to go far into the travaux préparatoires to see that the founding fathers of the [ECHR] did not perceive it as inconsistent with, and potentially subversive of, large tracts of British law and social custom, from sexual offences to social housing.' See Lord Walker JSC, *The Indefinite Article 8* (Thomas More Lecture, Lincoln's Inn, 9 November 2011) 4.

²¹⁵ This, according to United Kingdom Judge, Sir Gerald Fitzmaurice, was the intended sphere of application for Article 8, in his famous dissenting opinion in *Marckx v Belgium* (1979) 2 EHRR 330 at [7].

²¹⁶ *ibid*.

²¹⁷ *Dudgeon v United Kingdom* (1981) 4 EHRR 149.

²¹⁸ *McFeeley v United Kingdom* (1981) 3 EHRR 161.

²¹⁹ According to Feldman, the word 'respect' was included by the drafters as a means of toning down the obligations imposed by Article 8 and limiting its scope. See D. Feldman, 'Privacy-related Rights and their Social Value' in P. Birks (ed.) *Privacy and Loyalty* (Oxford: Oxford University Press, 1997) 15-50 at 28. See also J.E.S. Fawcett, *The Application of the European Convention on Human Rights* (2nd edn. Oxford: Clarendon Press, 1987) 211.

²²⁰ This negative obligation is clearly articulated in Article 8(2) 'There shall be no interference by a public authority with the exercise of this right...'

unless the criteria in Article 8(2) are satisfied. The ECtHR has also set out the principle of positive obligations. This puts an obligation on the Contracting State to take steps to secure the Article 8 rights of individuals against interference from private organisations or other individuals:

[W]hile the essential object of Art.8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in an effective right to respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of relations of individuals between themselves.²²¹

It is not sufficient for Contracting States to refrain from interfering with the Article 8(1) rights of individuals; to the same extent, they must also ensure that others do not interfere with these Article 8(1) rights. However, this positive obligation is not without difficulties. The ECtHR has suggested that, so far as positive obligations are concerned, the notion of 'respect' is not clear-cut, and that: 'having regard to the diversity of practices followed and situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case.'²²²

The ECtHR has also stated that whether or not Article 8 imposes a particular positive obligation will depend on whether a fair balance between general interests and the interests of the individual has been struck in each case.²²³ The ECtHR is concerned to ensure that Contracting States cannot rely expressly on Article 8(2) to justify a breach of a positive obligation. However, the provisions in Article 8(2) will still be relevant when determining whether or not a fair balance has been struck.²²⁴ Article 8(2) refers to 'interferences' with the Article 8(1) right by the Contracting State and is, therefore, concerned with the negative obligations.²²⁵ This has not prevented the ECtHR from taking a strong stance when Contracting States fail in their positive obligation to ensure individuals' interests enshrined in Article 8(1) are protected. In *X*

²²¹ *Van Kück v Germany* (2003) 37 EHRR 51 at [70].

²²² *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471 at [67].

²²³ See *Von Hannover v Germany* (2005) 40 EHRR 1 at [57].

²²⁴ *Rees v United Kingdom* (1986) 9 EHRR 56 at [37].

²²⁵ *ibid.*

and Y v Netherlands,²²⁶ the applicant argued that the Netherlands Government had failed to respect her private life because a procedural gap in the domestic law prevented her from seeking an effective remedy against a family member who subjected her to sexual abuse.²²⁷ The court found that the lack of an effective remedy for the applicant constituted a violation of her Article 8 rights:

The Court finds that the protection afforded by the civil law in the case of wrongdoing of the kind inflicted on Miss Y is insufficient. This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated.²²⁸

The peculiarity of the gap in Dutch procedural law, the violent nature of the offence, and the vulnerable status of the victim in this particular case make it difficult to assess how widely this positive obligation should be interpreted by domestic courts. This early decision demonstrated that Article 8 may impose a positive obligation on a Contracting State to ensure that the private lives of individuals are respected through other individuals' compliance with the law. However, as the primary focus of this thesis relates to the negative obligations in Article 8, the scope of the positive obligations on the Contracting State will not be explored in depth. The focus is on the circumstances under which the activities of a public authority violate the Article 8 rights of those subject to this process. The proceeding survey does not attempt to provide an exhaustive list of situations where Article 8 has been or might foreseeably be engaged. Rather, it draws out the principles adopted by the ECtHR for establishing the scope and content of each of the interests in Article 8(1), with respect to the negative obligations each puts on the public authorities of a Contracting State.

The four core interests in Article 8(1) cannot be clearly distinguished from one another. There are instances where a public authority's intrusion upon the residence of an individual may engage Article 8(1) as it fails to respect 'private life' *and* 'home'. Whilst the four interests may overlap, and whilst an applicant can bring Article 8

²²⁶ *X and Y v Netherlands* (1985) 8 EHRR 235.

²²⁷ *ibid* at [12].

²²⁸ *ibid* at [27].

proceedings before the court without specifying which interest is concerned in the individual case,²²⁹ each of the interests has specific distinguishing features. In its application of Article 8, the ECtHR has taken a flexible approach to the definition of the rights protected by Article 8. For instance, when considering the scope of private life, the ECtHR noted that respect for private life should not be interpreted restrictively:

The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of 'private life'. However, it would be too restrictive to limit the notion to an 'inner circle' in which an individual may choose to live his personal life as he chooses and to exclude entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.²³⁰

This lack of definitional precision has allowed the court to interpret Article 8 in line with social and technological developments, and evolving standards of what constitutes a privacy setback. The flexible approach to interpreting the scope of Article 8(1) has expanded the range of activities falling under its protection.²³¹ The approach is consistent with the 'living instrument' doctrine which has emerged in the jurisprudence of the ECtHR. The living instrument doctrine was first referred to by the ECtHR in *Tyrer v United Kingdom*, where, in finding a violation of Article 3 for the use of corporal punishment, the court held that it 'cannot but be influenced by the developments and commonly accepted standards in the penal policy of the Member States of the Council of Europe in this field.'²³² The metaphor of a living instrument describes the position that the Convention must be interpreted in light of present-day conditions. Thus, if most Council of Europe Member States prohibit corporal punishment as a form of inhuman and degrading treatment, this should influence the way the ECHR is interpreted by the Strasbourg Court.

²²⁹ C. Grabenwarter, *European Convention on Human Rights: Commentary* (Oxford: Hart Publishing, 2014) 186.

²³⁰ *Niemietz v Germany* (1992) 16 EHRR 97 at [29].

²³¹ These areas include search and seizure, secret surveillance, immigration law, paternity and identity rights, child and family law, assisted reproduction, suicide, prisoner's rights, inheritance, environmental protection, and suspect's rights: See D.J. Harris, M. O'Boyle, and C. Warbrick, *Law of the European Convention on Human Rights* (2nd edn. Oxford: Oxford University Press, 2009); N.A. Moreham, 'The Right to Respect for Private Life in the European Convention on Human Rights: A Re-examination' [2008] *European Human Rights Law Review* 44-79.

²³² *Tyrer v United Kingdom* (1979-80) 2 EHRR 1 at [31].

Another idea underlying the living instrument doctrine is that the Convention should be subject to teleological, and not literal, interpretation. As Baroness Hale observed in a public lecture, 'there is no room for the more extreme versions of the American doctrine of originalism, whether this is based on what the original drafters must be taken to have actually meant (intentionalism) or on what original readers must be taken to have thought they meant (textualism)' when interpreting the scope and meaning of ECHR rights.²³³ Instead of attempting to give the language of the Convention its plain meaning, the ECtHR interprets the language of the Convention in such a way as to give effect to its purpose. For example, in *Golder v United Kingdom*, the applicant argued that the denial to exercise what was established as his 'civil' - for the purposes of Article 6 ECHR - right to access to a solicitor violated this Convention right.²³⁴ In finding a violation, the ECtHR observed that although no such right of access is expressly provided for in the wording of Article 6(1), the provision enunciates rights which are distinct but, taken together, make up the Article 6(1) provision. Thus, it was for the ECtHR to interpret whether or not access to the courts constituted an aspect of this right.²³⁵ In forming the conclusion that it did, the ECtHR relied upon Article 31 of the Vienna Convention on the Law of Treaties which, although not yet in force, afforded priority to the 'object and purpose' of the ECHR in interpreting Article 6. This led the ECtHR to the conclusion that, as access to the courts is an essential prerequisite to the rule of law, and as the rule of law is one of the central ideals underpinning the purpose of the Convention, the right of access 'constitutes an element which is inherent in the right stated by Article 6(1).'²³⁶ Defending this conclusion, the court went on: 'This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 (1) read in its context and having regard to the object

²³³ Baroness Hale of Richmond, *Beanstalk of Living Instrument? How Tall Can the ECHR Grow?* (Barnard's Inn, 2011) 6.

²³⁴ *Golder v United Kingdom* (1979-80) 1 EHRR 524 at [28].

²³⁵ *ibid.*

²³⁶ *ibid* at [36].

and purpose of the Convention, a law-making treaty, and to general principles of law.²³⁷

The purposive and evolutive approach to the interpretation of the scope of Article 8 and the ECHR is not without controversy. In *Golder*, Sir Gerald Fitzmaurice dissented on the court's Article 6(1) ruling that this section sets forth a right of access.²³⁸ Suggesting that the court may have been trespassing on the border of 'judicial legislation', Sir Gerald Fitzmaurice opined that the court's approach to interpreting the Convention should be more cautious, especially where the meaning of a provision might be uncertain, or 'where the effect of imposing upon the Contracting States obligations they had not really meant to assume, or would not have understood themselves to be assuming.'²³⁹ This reflects what has now become one of the main criticisms of the ECtHR by its detractors in the United Kingdom that, as Sir Nicolas Bratza summarises, 'the "living instrument" doctrine has increasingly been used as a fig-leaf to cover the court's enthusiasm for judicial activism, at the expense of the Convention's scope which its drafters had intended, and that the court has overreached itself in its methods of interpretation of the Convention and transgressed into the realm of policy-making.'²⁴⁰

Without treading too far into debates on the extent to which the living instrument doctrine, generally speaking, is a force for good in the interpretation of Convention rights (a matter falling beyond the scope of this thesis), a sensible conclusion would seemingly recognise that, whilst it is important to guard against judicial activism in interpreting the Convention, it is also important to recognise that the ECtHR has done this, to some extent at least. Though the court is not bound by its previous judgments, it has stressed as a guiding principle that, in the interests of

²³⁷ *ibid.*

²³⁸ Incidentally, Sir Gerald Fitzmaurice also dissented on the court's application of the living instrument doctrine in *Tyrer v United Kingdom*.

²³⁹ See Sir Gerald Fitzmaurice's dissent in *Golder v United Kingdom*, n 234 at [39].

²⁴⁰ N. Bratza, 'Living Instrument or Dead Letter? The Future of the European Convention on Human Rights' [2014] *European Human Rights Law Review* 116-128 at 118.

foreseeability and legal certainty, the ECtHR should not depart without good reason from precedent laid down in previous cases.²⁴¹ Moreover, whilst the living instrument doctrine may be criticised for overstepping the intention of the drafters of the Convention, in the case of the four rights enshrined in Article 8 - and especially the right to respect for private life - this section draws upon Chapter 1 to demonstrate that the most normatively coherent interpretation of Article 8 recognises that its scope is necessarily broad and changing in line with broader contextual developments.

1.1 Private Life

The ECtHR has not provided a comprehensive definition of 'private life'. It has, however, given guidance in a number of cases about the meaning of the term. One standard the ECtHR has applied to assess whether the right to respect for private life is engaged for the purposes of Article 8(1) is whether or not there exists a 'reasonable' or 'legitimate' expectation of privacy.²⁴² That is to say, whether or not, on the facts of the particular case it was reasonable for the applicant to expect that the activity he or she was partaking in should remain private. In contrast to a ruling to the contrary from the UK Supreme Court in *In re JR38*,²⁴³ the ECtHR has not employed the 'reasonable expectation of privacy' standard as a mandatory precondition for the application of Article 8 in all cases. Instead, whilst referring to reasonable expectations on occasion, the court's primary focus seems to be on assessing how the particular interfering measure may or may not set back the privacy interests of the individual, and the degree of any setback.

We can delineate some of the principles the ECtHR has established for defining the scope of the right through a brief survey of the court's jurisprudence. In *Niemietz v*

²⁴¹ In support of this position, Sir Nicolas Bratza referred to the following two cases: *Cossey v United Kingdom* (1991) 13 EHRR 622 and *Chapman v United Kingdom* (2001) 33 EHRR 18. *ibid* at 124.

²⁴² See *Halford v United Kingdom* (1997) 24 EHRR 523 at [45]; *Von Hannover*, n 223 at [51].

²⁴³ *In re JR38* [2015] UKSC 42.

Germany,²⁴⁴ the ECtHR ruled that the notion of 'private life' should encompass aspects of an individual's life that stretch beyond that which he or she deliberately excludes from the outside world.²⁴⁵ The notion of 'private life' embraces certain activities that may take place in a public setting. Furthermore, in *Pretty v United Kingdom*,²⁴⁶ the ECtHR indicated that personal autonomy is an important principle underpinning the right to respect for private life.²⁴⁷

In *L v Lithuania*,²⁴⁸ the ECtHR observed that human dignity and quality of life are important aspects of private life, a notably expansive interpretation. In *Amann v Switzerland*,²⁴⁹ the ECtHR ruled that respect for private life comprises the right to develop relationships with other human beings and, therefore, cannot exclude activities of a professional or business nature, even if these activities take place in a public context.²⁵⁰ However, there are limits to which activities can be considered part of an individual's private life. For example, in *Friend and Countryside Alliance*,²⁵¹ the ECtHR considered whether or not the ban on fox hunting in the United Kingdom constituted a violation of Article 8. The court held that, because hunting was a public activity, done for personal fulfilment alone, the ban did not amount to an interference with the right to respect for private life.²⁵² The ECtHR determined that, as there was not a 'direct link' between the actions of the state and the private lives of the applicants, Article 8 was not engaged.²⁵³ Whether or not there exists such a direct link seems to come down to a value judgment by the court on whether the activity that the state seeks to prohibit is a sufficiently important aspect of the individual's private life. The court in *Friend and Countryside Alliance* distinguished the ban on fox hunting from a ban on joining the Lithuanian Civil Service owing to prior previous

²⁴⁴ n 230.

²⁴⁵ *ibid* at [29].

²⁴⁶ *Pretty v United Kingdom* (2002) 35 EHRR 1.

²⁴⁷ *ibid* at [61].

²⁴⁸ *L v Lithuania* (2008) 46 EHRR 22 at [56].

²⁴⁹ *Amann v Switzerland* (2000) 30 EHRR 843.

²⁵⁰ *ibid* at [65].

²⁵¹ *Friend and Countryside Alliance v United Kingdom* (2010) 50 EHRR SE6.

²⁵² *ibid* at [43].

²⁵³ *ibid*; *Botta v Italy* (1998) 26 EHRR 241 at [34].

membership of the KGB in *Sidabras v Lithuania*.²⁵⁴ This distinction was made on the basis that the fox hunting ban did not adversely effect the applicants' possibility of earning a living, and the ban did not stigmatise the applicants.²⁵⁵ Notwithstanding the decision in *Sidabras*, the ECtHR has consistently held that the Convention does not guarantee a right to choose a particular profession.²⁵⁶

This jurisprudence, though informative, still begs the question: what is the scope of the right to respect for private life under Article 8? Different commentators have come up with different ways of categorising the private life interest.²⁵⁷ Their categorisations cover broadly the same interests. The first is the interest in physical and psychological integrity. This is the protection from assaults or humiliating forms of treatment by public authorities that do not meet the severity of treatment requirements needed for the purposes of Article 3 of the Convention (which protects individuals against torture and inhuman or degrading treatment or punishment).²⁵⁸ For example, in *Wainwright v United Kingdom*, the ECtHR found a violation of Article 8 where the applicants, two visitors to a local prison, had been strip-searched to an extent that was held to be disproportionate.²⁵⁹ The court found that the physically invasive strip search should automatically engage Article 8(1) as this provides protection for physical and moral integrity under the private life head.²⁶⁰ Indeed, any coherent conception of privacy must recognise forms of access to the physical self. As Moreham suggests, the interference in these cases is sensory: through use of the senses (listening, touching, watching) the interferer physically accesses the individual, which can set back privacy interests in a range of contexts.²⁶¹

²⁵⁴ *Sidabras v Lithuania* (2006) 42 EHRR 6 at [48].

²⁵⁵ n 251 at [45].

²⁵⁶ *Vogt v Germany* (1996) 21 EHRR 205 at [44]; *Thlimmenos v Greece* (2001) 31 EHRR 15.

²⁵⁷ For examples of different categorisations compare n 229, 187-193, and Moreham, n 231.

²⁵⁸ *YF v Turkey* (2004) 39 EHRR 34 at [33]. See also D. Feldman, 'The Developing Scope of Article 8 of the European Convention on Human Rights' [1997] *European Human Rights Law Review* 265-274 at 267.

²⁵⁹ *Wainwright v United Kingdom* (2007) 44 EHRR 40 at [48]-[50].

²⁶⁰ *ibid* at [43].

²⁶¹ See N. Moreham, 'Beyond Information: Physical Privacy in English Law' (2014) 73 *Cambridge Law Journal* 350-377 at 354.

The right to respect for private life also covers the protection of personally identifiable information. It is well established in the jurisprudence of the court that the state has a negative obligation to refrain from monitoring or recording private information about individuals.²⁶² There is significant overlap here between the right to respect for private life and protection for correspondence. Telephone conversations are covered under both the notions of 'private life' and 'correspondence' for the purposes of Article 8.²⁶³ In *Rotaru v Romania*,²⁶⁴ the ECtHR ruled that Article 8(1) is applicable in cases where public authorities systematically collect and store information about an individual, irrespective of whether the information is of a private or public nature.²⁶⁵ The applicant brought proceedings before the court because the intelligence services in Romania retained information about his political activities and his criminal record.²⁶⁶ The ECtHR held that 'any information relating to an identified or identifiable individual'²⁶⁷ could fall within the scope of 'private life'. Thus, the right to respect for private life can include the protection of information relating to the public life of a person, including past criminal convictions or political activities.²⁶⁸ The court has also held that the systematic collection and storage of such information will engage Article 8(1), even if such information is not of a particularly sensitive or personal nature:

[I]t is not for the Court to speculate as to whether the information gathered on the applicant was sensitive or not or as to whether the applicant had been inconvenienced in any way. It is sufficient to find that data relating to the private life of an individual were stored by a public authority to conclude that, in the instant case, the creation and storing of the impugned card amounted to an interference, within the meaning of Article 8, with the applicant's right to respect for his private life.²⁶⁹

The ECtHR clearly acknowledged that an important part of the normative interest in privacy concerns the freedom from having one's personal information accessed or used by others. Indeed, drawing on the findings from Chapter 1, the storage of such

²⁶² See for example *Leander v Sweden* (1987) 9 EHRR 433; *Kopp v Switzerland* (1997) 27 EHRR 91; *Amann v Switzerland* (2000) 30 EHRR 843 at [65].

²⁶³ *Malone v United Kingdom* (1984) 7 EHRR 14 at [64]

²⁶⁴ *Rotaru v Romania* (2000) 8 BHRC 449.

²⁶⁵ *ibid* at [43].

²⁶⁶ *ibid* at [14].

²⁶⁷ *ibid* at [43].

²⁶⁸ *ibid*.

²⁶⁹ *Amann*, n 262 at [70].

information removes an individual from a condition of limited access.²⁷⁰ The court's fairly recent recognition that privacy can protect an individual's personal information as well as incursions into the physical space of the individual provides further vindication for the court's purposive and evolutive approach to the interpretation of Article 8. Over the last quarter of a century technological advancements have posed a significant threat to the individual's ability to limit access to information about him or herself. Numerous academic commentators have highlighted the adverse impact such developments can have on privacy interests.²⁷¹ Technological advances make the individual vulnerable to surveillance by state authorities or other third party individuals or organisations. Such activities can involve treating the individual as an object to be looked at, or found out about at a whim and not as an autonomous subject.²⁷² Thus, the ECtHR's recognition of such informational privacy interests is a welcome development.

The Strasbourg institutions have also embraced sexual autonomy as an aspect of the right to respect for private life. In *Laskey v United Kingdom*,²⁷³ a case where the applicants were convicted for a series of violent offences relating to their participation in sado-masochistic activities, the European Commission on Human Rights (ECommHR) swiftly concluded that 'the conduct of the applicants, carried out in private and for the purpose of mutual sexual gratification, must be regarded as falling within the scope of [Article 8(1)].'²⁷⁴ Returning to *Pretty v UK*,²⁷⁵ the court considered whether or not the forced prolonging of life against the wishes of an individual constituted an interference with the right to respect for private life. The ECtHR held that the state's imposition of criminal measures prohibiting the

²⁷⁰ Chapter 1, Part 2.2.

²⁷¹ See C. Fried, *An Anatomy of Values: Problems of Personal and Social Choice* (Cambridge: Massachusetts University Press, 1970) 140-144; J. Reiman, 'Privacy, Intimacy and Personhood' (1976) 6 *Philosophy & Public Affairs* 26-44; T. Nagel, 'Concealment and Exposure' (1998) 27 *Philosophy and Public Affairs* 3-30; B. v-S.T. Larsen, *Setting the Watch: Privacy and the Ethics of CCTV Surveillance* (Oxford: Hart, 2011); A. Marmor, 'What is the Right to Privacy' (2015) 43 *Philosophy and Public Affairs* 3-26.

²⁷² S. Benn, 'Privacy, Freedom, and Respect for Persons' in J. Pennock and J. Chapman (eds) *Privacy: Nomos XIII* (New York: Atherton Press, 1971) 1-26 at 7.

²⁷³ *Laskey v United Kingdom* (1997) 24 EHRR 39.

²⁷⁴ *ibid* at [47]. When the case reached the ECtHR, the Court accepted that these sexual activities fell within the scope of the private life only because this was conceded by the UK Government. See *ibid* at [36].

²⁷⁵ *Pretty v United Kingdom* (2002) 35 EHRR 1.

applicant's husband from taking steps to encourage or assist her suicide or to kill her, interfered with the applicant's right to respect for private life.²⁷⁶

This is a sensible approach for the court to take, so long as the right to respect for private life is not stretched to the point where it becomes a legal synonym for personal autonomy interests. The ECtHR approach correctly acknowledges that privacy interests are important, at least in part, for fostering an environment where autonomous action can take place. Whether or not the use of positive criminal law by the UK government in the *Pretty* case can be justified morally (all things considered) and under the provisions in Article 8(2) is a separate matter falling beyond the scope of this thesis. However, this case shows that the ECtHR recognises that privacy protections can overlap with, and secure, the protection of personal autonomy.

The purposive approach has been criticised on the grounds that it has made the 'private life' indefinite; lacking any coherent or discernible structure.²⁷⁷ On balance, it is submitted that whilst the court's broad interpretation of the 'private life' is commendable, the approach lacks threshold criteria for determining whether a setback to a privacy related interest is sufficiently serious. Instead, the court seems to make such assessments on an *ad hoc* basis, occasionally having regard to whether the individual might hold a reasonable expectation of privacy. The full implications of this approach for those subject to the criminal process will be considered in subsequent chapters. However, the lack of such a threshold to determine an interference represents a missed opportunity to provide domestic courts with sufficient guidance to ensure consistency on the types of activity of a public authority that are likely to engage privacy interests. The *ad hoc* approach, which involves the ECtHR declaring which activities are protected on a case-by-case basis, presents difficulties for domestic judges and legislators in predicting how the ECtHR would interpret the scope and applicability of 'private life' in cases where there is not a clear

²⁷⁶ *ibid* at [62].

²⁷⁷ n 214, 4.

precedent. To ensure consistency and maximise legal certainty, the ECtHR should be more forthcoming in offering guidance to domestic courts on how the scope of Article 8 should be interpreted.

1.2 Family Life

Taking account of social change since the inception of the ECHR, the court has extended the meaning of family life beyond the family based on a traditional marriage.²⁷⁸ Therefore, when establishing in a particular case whether or not a 'family' exists within the meaning of Article 8(1), the court will consider a number of factors, including the length of a relationship or cohabitation, and the nature of relationships with any children arising from such cohabitation.²⁷⁹ The Strasbourg institutions have confronted a number of difficult questions when attempting to define family life. For instance, in *X, Y and Z v UK*,²⁸⁰ the ECtHR has considered whether a law preventing X, a female to male transsexual, from registering as the father of Z, the child of Y – with whom X had been in a permanent relationship since 1979 – constituted a violation of Article 8 because it failed to respect the family life of X.²⁸¹ The Court found that Article 8 was engaged in this case because there were *de facto* family ties linking all three applicants.²⁸²

Despite the eventual conclusion that there had been no violation of Article 8, the Court found that the relationships enjoyed by the applicants fulfilled both the appearance and substance of 'family life'.²⁸³ The expansion of this right to protect non-traditional family relationships such as that in the above case is a clear example of how the evolutive and purposive approach to the interpretation of the ECHR has allowed the Strasbourg institutions to apply the language of the Convention to situations which may not have been contemplated by the original drafters, but are

²⁷⁸ See *Marckx v Belgium*, n 215.

²⁷⁹ *Kroon v Netherlands* (1995) 19 EHRR 263 at [31]-[33].

²⁸⁰ *X, Y and Z v United Kingdom* (1997) 24 EHRR 143.

²⁸¹ *ibid* at [12]-[19].

²⁸² *ibid* at [36].

²⁸³ *ibid* at [37].

appropriately covered by the terms used, and are consistent with the underlying principles of the Convention.²⁸⁴ As an ECHR concept, 'family life' evidently does not rely on the existence of a biological relationship between parents. The court has also ruled that the relationship of a cohabiting same-sex couple living in a *de facto* partnership constitutes a family life in the same way that it would for a heterosexual couple in the same situation.²⁸⁵ Other non-traditional family relations can also fall within the scope of family life under Article 8(1). For example, cohabitation is not a necessary precursor to the existence of a family life under Article 8.²⁸⁶ Moreover, the concept of 'family life' includes the relationship between step-parents and step-children,²⁸⁷ and between children and non-parent legal guardians.²⁸⁸ In short, family life is interpreted broadly for the purposes of Article 8.

In establishing whether a particular 'family life' falls within the ambit of Article 8, much turns on a contextual assessment of the effectiveness of the 'personal ties' in question. In *Soderback v Sweden*, the ECommHR and ECtHR ruled that the applicant's relationship with his infant daughter fell within the scope of Article 8(1), despite the fact that he had only met her on sporadic occasions:

[T]he Commission considers that Article 8 cannot be interpreted as only protecting family life which has already been established but, where the circumstances warrant it, must extend to the potential relationship which may develop between a natural father and a child born out of wedlock. Relevant factors in this regard include the nature of the relationship between the natural parents and the demonstrable interest in and commitment by the natural father to the child both before and after the birth.²⁸⁹

In this case the limited number of contacts between the applicant and his daughter was not held to create the 'exceptional circumstances' necessary to break the personal ties between them. However, in *G v The Netherlands*, the ECommHR determined that a man acting as a sperm donor cannot invoke a right to respect for family life after the birth of his child without the existence of a close personal

²⁸⁴ n 233, 10.

²⁸⁵ *Schalk v Austria* (2011) 53 EHRR 20 at [94].

²⁸⁶ *Eriksson v Sweden* (1990) 12 EHRR 183 at [58].

²⁸⁷ *Soderback v Sweden* (2000) 29 EHRR 95.

²⁸⁸ *Yousef v The Netherlands* [2003] 1 FLR 210.

²⁸⁹ n 287 at [35].

relationship with the child.²⁹⁰ In this case the applicant father agreed to donate his sperm on the understanding that a lesbian couple known to him would raise and take full custody of the child after its birth. The Commission considered that a 'situation in which a person donates sperm only to enable a woman to become pregnant through artificial insemination does not of itself give the donor a right to respect for family life with the child.'²⁹¹ In concluding that insufficient other personal ties had emerged between the applicant and child for the relationship to fall within the scope of Article 8 protection, the Commission had regard to the lack of financial contribution from the applicant to the child, and that the applicant had only met the child briefly and infrequently. This shows that in determining the scope and meaning of the family life concept the Strasbourg institutions will take into consideration a number of different factors, and that much turns on the circumstances of each particular case assessed in its context. Like the private life concept, the court does not adopt a strict definition or threshold for establishing the existence or non-existence of family life in a particular case. Instead, it proceeds on the basis that the concept is not amenable to exhaustive definition, and its scope is to be determined on a case-by-case basis.

1.3 Home

Article 8(1) also confers a right to respect for home, which is distinct from the right to a home. The scope of this protection is broad, covering houses, flats and even business premises, regardless of their legal status or use.²⁹² So, what does and does not constitute a 'home' under Article 8? In acknowledgment that the home serves an important role in an individual's private life, the ECtHR has found that the two concepts overlap. This is why, in *Miallhe v France*,²⁹³ the ECtHR did not examine whether or not the search of two houses used as business premises, involved the

²⁹⁰ *G v The Netherlands* (1993) 16 EHRR CD38.

²⁹¹ *ibid* at [1].

²⁹² n 230 at [31].

²⁹³ *Miallhe v France* (1993) 16 EHRR 332.

'home' as the actions of the state were sufficient to constitute an interference with the right to 'private life'.²⁹⁴

In *Selçuk and Asker v Turkey*,²⁹⁵ the court found that the deliberate destruction by security forces of the applicants' home violated Article 8 on the grounds that it constituted an unjustified interference with the applicants' rights to respect for home and the free enjoyment of their possessions.²⁹⁶ Whilst such a right may stem from ownership of the possessions, it goes beyond traditional property rights. The right to respect for home affords the individual the freedom to *enjoy* his or her home and the possessions contained within. The court shows a sophisticated understanding of the role the home plays in affording an individual the space to enjoy his or her possessions and live in private. Thus, the right to respect for home protects the normative interest in privacy as it affords the individual the space to exist free from the interferences that the state might legitimately place upon individual liberties in publicly accessible spaces.

The right to respect for home is a broad right which protects a physically defined area where private and family life can take place:

Breaches of the right to respect for the home are not confined to concrete or physical breaches, such as unauthorised entry into a person's home, but also include those that are not concrete or physical, such as noise, emissions, smells or other forms of interference.²⁹⁷

It is for this reason that it has long been established that the failure of public authorities to deal with environmental pollution affecting the 'home' can also engage Article 8.²⁹⁸ The right to respect for 'home' affords the individual the freedom to create a space where he or she can have quiet enjoyment free from the interference of public authorities or other third parties. This goes beyond the right to respect for private life *per se*, which does not necessarily encompass the right to enjoy a

²⁹⁴ *ibid* at [28].

²⁹⁵ *Selçuk and Asker v Turkey* (1998) 26 EHRR 477.

²⁹⁶ *ibid* at [86].

²⁹⁷ *Giacomelli v Italy* (2007) 45 EHRR 38 at [76].

²⁹⁸ See *Lopez Ostra v Spain* (1995) 20 EHRR 277.

particular physical space free from external interferences. The 'home' is given an autonomous meaning. In determining its existence, the ECtHR will, once again, have regard to a number of factors – including an assessment of the existence of 'sufficient and continuous links' with the property in question.²⁹⁹ This approach seems consistent with the court's interpretation of the other protections set forth in Article 8.

1.4 Correspondence

As with the other interests protected under Article 8, the right to respect for correspondence is interpreted broadly in the jurisprudence of the ECtHR. According to the court, all written communication is covered throughout the channel of that communication.³⁰⁰ The right to respect for correspondence also covers telephone conversations, and other forms of communications such as text messages and e-mails.³⁰¹ In *A v France*,³⁰² the ECtHR also found that the right protects the means of communication irrespective of the content of the communication. Here, the Government argued unsuccessfully that Article 8(1) was not engaged by the recording of a telephone conversation between the applicant and a third party, because the applicant was discussing her criminal activities during the phone conversation.³⁰³ The court found that Article 8 had been violated because the recording of the telephone conversation constituted an unjustified interference with the applicant's right to respect for her correspondence.³⁰⁴

There are limits to the scope of the right to respect for correspondence. The right does not put a positive obligation on the state to ensure that postal or other correspondence services should run perfectly.³⁰⁵ There may be expectations of confidentiality in cases where a special relationship between the sender and recipient

²⁹⁹ *Prokopovich v Russia* (2006) 43 EHRR 10 at [36].

³⁰⁰ n 229, 198.

³⁰¹ *Copland v United Kingdom* (2007) 45 EHRR 37 at [44].

³⁰² *A v France* (1994) 17 EHRR 462.

³⁰³ *ibid* at [35].

³⁰⁴ *ibid*.

³⁰⁵ *X v Federal Republic of Germany* (1979) 17 DR 227.

of the correspondence exists (e.g. lawyer/client or doctor/patient).³⁰⁶ This shows that, in cases where interference with correspondence is at issue, private life and correspondence complaints may overlap. In such cases, the court normally considers private life and correspondence considerations together.³⁰⁷ However, in the case-law it is clear that the right to respect for correspondence is properly recognised as a stand-alone right.³⁰⁸ The right to respect for correspondence provides an added level of protection to individuals where their correspondence has been interfered with but in the absence of consequential interference in their private life. For instance, if the authorities were to withhold or delay the mail of a prisoner, without reading it, this might constitute an interference with the right to respect for correspondence under Article 8(1),³⁰⁹ without engaging broader privacy concerns. The court has determined that any form of correspondence will be *prima facie* protected from the imposition of restrictions or other interference from a public authority unless such an interference meets the criteria set forth in Article 8(2).³¹⁰ However, the ECtHR has suggested that if an applicant were to receive prior warning that his or her communications could lawfully be monitored (by an employer on a phone owned by the employer, for example) this may fall outside the scope of Article 8 protection.³¹¹

1.5 Assessing the ECtHR's Approach to the Interpretation of Article 8(1): The purposive and evolutive approach vindicated?

The four interests protected under Article 8(1) each serve a unique role in protecting privacy-related interests. In the Chapter 1, we saw how privacy interests are various, overlapping, yet distinct.³¹² These values range from familiar interests in personal autonomy and human dignity to the much-less discussed interest in not having one's

³⁰⁶ *Szuluk v United Kingdom* (2010) 50 EHRR 10.

³⁰⁷ See n 301 at [43]-[44].

³⁰⁸ *A v France* (1994) 17 EHRR 462.

³⁰⁹ *Silver v United Kingdom* (1983) 5 EHRR 347 [84].

³¹⁰ See *Halford v United Kingdom* (1997) 24 EHRR 523 at [43]; *Copland*, n 301 at [41].

³¹¹ *Copland*, *ibid* at [42]; *Barbulescu v Romania* [2016] IRLR 235 at [37].

³¹² See Chapter 1, Part 1.5 above.

pornographic picture looked at, as in Judith Thomson's (abstract) thought experiment.³¹³ The aim of this section has been to briefly survey the four interests in Article 8(1) with a view to assessing the scope of the privacy related interests covered in Article 8 and the persuasiveness of the ECtHR's interpretation of this right. Two main conclusions can be drawn. Firstly, the purposive and evolutive approach to the interpretation of the scope of Article 8 has enabled this right to cover a broad array of interests. This is entirely consistent with the findings from the previous chapter that privacy is a broad term covering a plurality of different activities; the scope of any interest in privacy can only be determined having regard to the context in which it is invoked.³¹⁴ The ECtHR has recognised and protected privacy interests in public spaces, and has recognised a broad range of informational privacy interests. Secondly, from this survey of the ECtHR jurisprudence, there is a lack of a clear threshold for determining whether a setback to a privacy related interest is sufficiently serious to warrant the protection of Article 8. The ECtHR has had regard to the 'reasonable expectations' of the applicant at the time of an alleged interference. The merits and drawbacks of this approach will be explored in subsequent stages of this thesis. However, it is worth noting that the ECtHR does not seem to adopt the 'reasonable expectation of privacy' standard as anything like a mandatory precondition of Article 8 engagement in most cases. No such similar precondition is made explicit in the jurisprudence of the ECtHR. Instead, the court seems to assess whether Article 8 is engaged through a contextual assessment of the seriousness of the impact of a particular measure on the private life of the individual. This may unduly limit the clarity of the scope of Article 8(1), presenting a danger that the right may be interpreted inconsistently at the domestic level. The next section of this analysis will consider how the court assesses the legitimacy of any interference with Article 8(1) rights under Article 8(2) of the Convention.

³¹³ J.J. Thomson, 'The Right to Privacy' (1975) 4 *Philosophy & Public Affairs* 295-314 at 295-296.

³¹⁴ See H. Nissenbaum, *Privacy in Context: Technology, Policy and the Integrity of Social Life* (California: Stanford University Press, 2010) 14; Chapter 1, Part 1.5.

2. When is an Interference with Article 8 Justifiable?

Under Article 8(2) of the Convention, any interference with Article 8(1) must be justified as being (i) in accordance with the law; (ii) in pursuit of a legitimate aim; and (iii) necessary in a democratic society. This section will consider how, once an interference is established, the Strasbourg institutions have determined whether or not it is justified under Article 8(2). Particular attention will be paid to principles that have emerged in the jurisprudence of the court which structure the judicial process in this area.

2.1 In Accordance with the Law

A measure which interferes with an Article 8(1) right must be 'in accordance with the law'. One principle underlying this criterion of Article 8(2) is that any such interference must have a basis in domestic law.³¹⁵ 'The law' refers to the domestic law of the Contracting State in question, which includes statute law, common law, and other non-statutory instruments such as codes of practice and guidance.³¹⁶ The mere existence of such legal instruments to regulate an interference is not sufficient for a measure to be considered 'in accordance with the law'. The ECtHR also assesses the quality of the domestic law that is in place to regulate any interference with Article 8(1).³¹⁷ This means the court takes a leading role in assessing the quality of the legal safeguards which permit public authorities to undertake interfering measures.

A second principle is that the law must be adequately accessible. In *Silver v United Kingdom*,³¹⁸ the court found that Article 8 had been violated when prison authorities stopped and delayed the applicant prisoner's mail. The court found '[t]he law must be adequately accessible: the citizen must be able to have an indication that is

³¹⁵ *Sunday Times v United Kingdom* (1979) 2 EHRR 245 at [47].

³¹⁶ *Golder v United Kingdom* (1975) 1 EHRR 524 at [45].

³¹⁷ See for example *Silver v United Kingdom* (1983) 5 EHRR 347 at [90].

³¹⁸ *ibid.*

adequate in the circumstances, of the legal rules applicable to a given case.³¹⁹ The interference was not 'in accordance with the law' because orders and instructions accompanying the Prison Act 1952, which gave a legal basis for the interference, were not published.³²⁰ Here, the court demonstrated the active role it takes in assessing the quality of domestic safeguards that are in place to regulate the Contracting State's use of interfering measures.

An aspect of accessibility is that the domestic provision must be foreseeable. In *Olsson v Sweden*, where the applicants unsuccessfully argued that their Article 8 rights were violated when their children were taken into care,³²¹ the ECtHR ruled that the domestic law should be formulated with sufficient precision:

A norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen—if need be, with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.³²²

Despite this, the court also underlined the importance of affording appropriate discretion to public authorities:

To confine the authorities' entitlement to act to cases where actual harm to the child has already occurred might well unduly reduce the effectiveness of the protection which he requires. Moreover, in interpreting and applying the legislation, the relevant preparatory work provides guidance as to the exercise of the discretion it confers.³²³

This led the court to find that the domestic law in question was 'in accordance with the law' for the purposes of Article 8(2), as the scope of the discretion conferred on the authorities by the domestic law was deemed to be reasonable for the purposes of Article 8.³²⁴ This foreseeability requirement cannot apply to cases of secret surveillance, where the individual could adapt his conduct if he knew he were the subject of such measures.³²⁵ However, in such cases, the ECtHR does recognise the

³¹⁹ *ibid* at [87].

³²⁰ *ibid*.

³²¹ *Olsson v Sweden* (1989) 11 EHRR 259.

³²² *ibid* at [61].

³²³ *ibid* at [62].

³²⁴ *ibid* at [63].

³²⁵ *Leander*, n 262 at [51].

need to guard against such powers being exercised arbitrarily; hence, the need for clarity is emphasised in domestic legal provisions which permit the use of secret surveillance.³²⁶ In this context, the court also details a number of minimum safeguards in the case-law, which should be set out in statute law to avoid abuses of power through secret surveillance.³²⁷ These safeguards include a definition of the categories of people liable to having their telephone tapped; a limit on the duration of telephone tapping; and procedures for examining, storing and using the data obtained.

The principle of legality contained in Article 8(2) is an important component of Article 8 jurisprudence. It necessitates that any measure taken by a public authority, which interferes with the Article 8 rights of the individual, must not only comply with domestic law, but also be compatible with the rule of law. As part of the latter requirement, the ECtHR has taken an active role in assessing the quality of the domestic provisions regulating interferences in Contracting States, considering whether the domestic provision is sufficiently accessible and foreseeable. This demonstrates the point that the ECtHR made in *Golder v United Kingdom* that the reference to the rule of law in the preamble of the Convention is more than a rhetorical reference, devoid of relevance for those interpreting the Convention.³²⁸ The ECtHR seeks to uphold the rule of law in interpreting the Convention. The effect of this provision in England and Wales will be subject to scrutiny in subsequent sections of this thesis.

2.2 In Pursuit of a Legitimate Aim

To justify an interference with Article 8(1), Contracting States must also show that an interference was in the pursuit of a legitimate aim. This requirement restricts the Contracting State to interfere with the Article 8 rights of the individual only in pursuit

³²⁶ *Weber v Germany* (2008) 46 EHRR SE5 at [94].

³²⁷ See *ibid* at [95].

³²⁸ n 234 at [34].

of an objective that is considered so important that it can offer a basis for an interference. A Contracting State cannot interfere with an individual's Article 8 rights for the purpose of demonstrating its military might, even if it does so only to the minimum degree required to achieve the objective. The aims are interpreted broadly by the court and the legitimate aim requirement restricts the power of the Contracting State to the effect that Article 8 can only be limited to protect the specified interests, which are of fundamental importance for the effective functioning of society. The requirement puts the onus on a Contracting State to show that the basis for an interference is sufficiently important to the interests of wider society. An aim forming such a basis should be of significant importance to the wider interests of others in society. This is perhaps the least controversial of the requirements in Article 8(2). It is rare that a Contracting State will challenge an Article 8 claim where it is not using an interfering measure squarely in the pursuit of a legitimate aim.³²⁹ Each of the legitimate aims contained in Article 8(2) are invoked for particular types of cases by Contracting States. The aim of protecting national security and public safety is often invoked where Contracting States aim to show that special measures such as secret surveillance are needed to prevent acts such as foreign espionage,³³⁰ or terrorism.³³¹ However, in *Smith and Grady v United Kingdom*,³³² the court found that the British armed forces' protracted investigations into the private lives of the two homosexual applicants did not pursue the legitimate aim of protecting national security and public safety.³³³

Unlike the other legitimate aims which may be used to justify an interfering measure, the aim of securing 'the economic well-being of the country' is unique to Article 8 of the Convention.³³⁴ The court recognises that there may be occasions where the Government may need to interfere with the rights enshrined in Article 8(1) in order

³²⁹ There are, of course, exceptions. See *Nowicka v Poland* [2003] 1 FLR 417 at [75].

³³⁰ *Klass v Germany* (1978) 2 EHRR 214 at [56].

³³¹ *Leander*, n 262 at [60].

³³² *Smith and Grady v United Kingdom* (1999) 27 EHRR CD42.

³³³ *ibid* at [74].

³³⁴ This particular legitimate aim is not found in Articles 9(2), 10(2), or 11(2) of the Convention.

to pursue aims that are in the interests of the economic well-being of the country. However, this added aim may dilute the force of Article 8. It is not clear from the drafting process why this was seen as a legitimate aim exclusively for interference with Article 8. The extent to which this *should* provide a legitimate basis for interference is seldom discussed in the case-law. In *Powell and Rayner v United Kingdom*,³³⁵ for example, it was accepted by the applicants and the court that the development of a large international airport pursued the legitimate aim of protecting the country's economic well-being, even though it was developed in a well-populated urban area.³³⁶ However, the ECtHR's silence on this point is not especially surprising given the constitutional role of the ECtHR is to interpret the scope of the legitimate aims and not to redraft them.

Article 8(2) also allows for interfering measures to be used to prevent disorder or crime. Many of the police powers to subject individuals to surveillance, or to retain and use personal data taken from those subject to the criminal process will be undertaken in pursuit of this aim. The aim of preventing or detecting crime has been invoked in cases where prisoners' correspondence has been supervised,³³⁷ and in certain search and seizure cases.³³⁸ Again, this aim is a relatively easy hurdle for the Contracting State to clear.³³⁹ The Contracting State only has to convince the court that the measure *pursues* the aim. Whether or not it is successful in this pursuit falls to a consideration of whether the measure is 'necessary in a democratic society'. In pursuing this aim the public authority can also simultaneously prevent the harms to privacy and other interests which would ultimately result if crimes were to go unpunished, investigated, or prevented. In this sense the legitimate aim and the Article 8 right are complementary in ensuring privacy interests are protected. However, to maximise the extent to which the interests of individuals and society are

³³⁵ *Powell and Rayner v United Kingdom* (1990) 12 EHRR 355.

³³⁶ *ibid* at [42].

³³⁷ *Campbell v United Kingdom* (1992) 15 EHRR 137.

³³⁸ n 293 at [44].

³³⁹ For example, see n 330 at [46]; and n 337 at [41].

realised, it is important that the aim of preventing disorder or crime and privacy related interests must be balanced where they conflict.

A fourth legitimate aim mentioned in the text of Article 8(2) and recognised by the ECtHR is to use an interfering measure 'for the protection of health or morals'. In such cases, the Contracting State justifies an interference on the grounds it is necessary to protect the health and morals of society in general, or of particular groups within society.³⁴⁰ In *Laskey v United Kingdom*,³⁴¹ the ECommHR and ECtHR held that the criminalisation of sado-masochistic activities pursued the legitimate aim of protecting health and morals.³⁴² Here, the Commission determined that, even though the activities of the applicants were consensual and fell within the scope of their private lives, the fact that they involved the infliction of serious injury was sufficient to form a basis for an interference by the Contracting State, on health grounds. Finally, the legitimate aim of 'protecting the rights and freedoms of others' has considerable overlap with the protection of health and morals.³⁴³

The court took account of both legitimate aims in finding a violation of Article 8. The 'protection of rights and freedoms of others' as a legitimate aim is, essentially, an acknowledgment that there are occasions where the Contracting State may have to interfere with the Article 8 rights of an individual or group of individuals to protect the legitimate interests of other individuals in society. For instance, in *Chapman v United Kingdom*,³⁴⁴ the court held that the eviction of gypsies from land that was occupied without effective planning permission pursued this legitimate aim as there were environmental factors relating to the gypsies' occupation of the land in question, which posed a threat to other members of society.³⁴⁵ The legitimate aims are couched in general terms which Contracting States have generally had little

³⁴⁰ *Dudgeon v United Kingdom* (1982) 4 EHRR 149 at [47].

³⁴¹ *Laskey v United Kingdom* (1997) 24 EHRR 39.

³⁴² *ibid* at [53].

³⁴³ n 340 at [47].

³⁴⁴ *Chapman v United Kingdom* (2001) 33 EHRR 18.

³⁴⁵ *ibid* at [82].

trouble meeting. The ECtHR has been notably deferent to domestic lawmakers at this stage. Once an interference is deemed to be supported by a legitimate aim, the final – and somewhat more difficult – hurdle to overcome for Contracting States is to justify the interference as necessary in a democratic society. This is a much more exacting task.

2.3 Necessary in a Democratic Society

The final stage in determining whether or not an interference with Article 8(1) is justified requires the Contracting State to show that the interference is ‘necessary in a democratic society’. This criterion must be satisfied wherever a qualified right has been engaged. This section shows how the Strasbourg institutions have evolved a version of the globalised four-part proportionality analysis.³⁴⁶ In *Handyside v United Kingdom*,³⁴⁷ the court outlined a number of principles relevant to the assessment of whether or not an interference was ‘necessary in a democratic society’ for the purposes of Article 10(2) of the ECHR. Whilst this case did not concern Article 8, the principles which emerged have subsequently been drawn upon by the court in the case-law of Article 8.³⁴⁸ The ECtHR found that Contracting States are afforded a margin of appreciation to assess the ‘necessity’ of an interfering measure.³⁴⁹ This margin of appreciation serves as a recognition that state authorities are best placed to determine the content of a restriction on an ECHR right, and to determine whether an interfering measure is necessary for that particular Contracting State:

[I]t is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place... By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them.³⁵⁰

³⁴⁶ A. Sweet and J. Matthews, ‘Proportionality, Balancing and Global Constitutionalism’ (2008) 47 *Columbia Journal of Transnational Law* 72-164.

³⁴⁷ *Handyside v United Kingdom* (1979) 1 EHRR 737.

³⁴⁸ For example see n 340 at [50]-[55].

³⁴⁹ n 347 at [48].

³⁵⁰ *ibid.*

This margin of appreciation is essentially a space for manoeuvre which the court grants Contracting States in order to determine how the Convention should be codified and applied in domestic legal systems.³⁵¹ The court acknowledges that it is important that the ECtHR take into account the cultural, religious, historical, and philosophical differences between Contracting States when assessing whether or not a measure interfering with a Convention right is 'necessary in a democratic society'. The margin of appreciation is a power conceded to the Contracting State with the intention that the state will address the various elements of the Convention when assessing the justification for an interference with a Convention right.³⁵²

The function of the ECtHR is to ensure that the Contracting State does not exceed this margin of appreciation in any particular case. Thus, the court has played a 'subsidiary' role to that of national legal systems in protecting human rights.³⁵³ This margin of appreciation doctrine allows the Convention to accommodate different legal systems and different conceptions of the rights contained within it, thus affording the Contracting State the capacity to determine how their obligation to respect Convention rights can be balanced against their sovereignty. Whilst the Contracting State is afforded this margin to decide whether an interfering measure can be considered necessary, the ECtHR is empowered to give the final ruling on whether or not an interfering measure is justified.³⁵⁴

In *Sunday Times v United Kingdom*,³⁵⁵ the court elaborated on the scope of the margin of appreciation to suggest that it will change according to the legitimate aim that is pursued by the Contracting State, and the level of common ground amongst Contracting States regarding the type of interference concerned.³⁵⁶ If the legitimate aim pursued by the Contracting State is 'the protection of morals', the Contracting

³⁵¹ S. Greer, *The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights* (Council of Europe Publishing, 2000) 5.

³⁵² Harris, O'Boyle and Warbrick, n 231, 350.

³⁵³ n 347 at [48].

³⁵⁴ *ibid* at [49].

³⁵⁵ n 315.

³⁵⁶ *ibid* at [59]-[60].

State would be afforded a wide margin of appreciation because the requirements of morals varies from time to time and from place to place.³⁵⁷ Therefore, because there is a lack of common ground on what constitutes 'the protection of morals' in the domestic laws and practices of Contracting States, they are afforded a wider margin of appreciation in this area.³⁵⁸ Other aims, such as the need to ensure public safety, will attract a narrower margin of appreciation due to an increased level of consensus across Contracting States. The principle of subsidiarity, which underpins the margin of appreciation doctrine, has gained an increasingly high profile in recent years.³⁵⁹ In 2013, the ECHR was amended under Protocol 15 (not yet in force) to add reference to the principle in the preamble in the following terms:

Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.³⁶⁰

This legal reform, which brings the term subsidiarity explicitly into the Convention, is consistent with a number of other reforms undertaken by the ECtHR as part of the interlaken process, which aimed to increase the efficiency of the ECtHR and improve the protection of human rights at the domestic level.³⁶¹ These reforms came at a time where the court had faced unprecedented criticism for its supposed 'human rights imperialism',³⁶² and for second-guessing domestic policy choices and judicial rulings in the national application of human rights.³⁶³ ECtHR judges have generally responded to such criticisms with persuasive arguments that the court has for a long

³⁵⁷ n 347 at [48].

³⁵⁸ n 315 at [59].

³⁵⁹ See A. Mowbray, 'Subsidiarity and the European Convention on Human Rights' [2015] 15 *Human Rights Law Review* 313-341 at 313.

³⁶⁰ Protocol No 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS 213, 24th June 2013.

³⁶¹ ECtHR, *The Interlaken Process and the Court (2015 Report)* (Council of Europe, 12 October 2015).

³⁶² See Lord Dyson, *The Extraterritorial Application of the European Convention on Human Rights: Now on a Firmer Footing, But is it a Sound One?* (University of Essex, 30 January 2014).

³⁶³ The precise role of the ECtHR is an area of ongoing trenchant debate between (predominantly UK based) judges, and the ECtHR. See further: Lord Hoffmann, *The Universality of Human Rights*, (Judicial Studies Board Annual Lecture, 19 March 2009) 14; N. Bratza, 'The Relationship Between the UK Courts and Strasbourg' [2011] *European Human Rights Law Review* 505-512; R. Spano, 'Universality or Diversity of Human Rights?' (2014) 14 *Human Rights Law Review* 487-502.

time accepted and incorporated a principle of subsidiarity.³⁶⁴ Whilst this analysis will not stray into debates regarding the scope of the constitutional role of the ECtHR, the move in recent years towards an increased emphasis on 'applying a robust and coherent concept of subsidiarity' and, thus, increasing diversity in the protection of human rights is noteworthy.³⁶⁵ It may indicate a degree of sensitivity from the ECtHR towards political and popular backlash against the 'human rights revolution', particularly in the UK where the Human Rights Act 1998 conferred upon domestic courts the power to scrutinise the actions of both public authorities and Acts of Parliament and assess the extent of their compliance with the ECHR – a move which profoundly shifted the constitutional balance of power between the judiciary and the legislature.³⁶⁶

In *Handyside*, the court also explained the meaning of the term 'necessary' as follows:

The Court notes at this juncture that, whilst the adjective 'necessary', within the meaning of Article 10 (2), is not synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'. Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context.³⁶⁷

This suggests a fairly strict interpretation of the term 'necessary', which implies the existence of a 'pressing social need'. Furthermore, in *Olsson v Sweden*,³⁶⁸ the court refined what is meant by 'necessary' by including a requirement of 'proportionality'.³⁶⁹

³⁶⁴ For example, as Sir Nicolas Bratza observes, the ECtHR has 'been particularly respectful of decisions emanating from courts in the United Kingdom since the coming into effect of the Human Rights Act 1998 and this is because of the very high quality of the judgments of these courts, which have greatly facilitated [the ECtHR's] task of adjudication. In many cases, the compelling reasoning and analysis of the relevant case-law by the national courts has formed the basis of the Strasbourg Court's own judgment.' See: Bratza, *ibid* at 507.

³⁶⁵ Spano, n 363 at 491.

³⁶⁶ See A. Brady, *Proportionality and Deference under the UK Human Rights Act: An Institutionally Sensitive Approach* (Cambridge: Cambridge University Press, 2012) 1-2; R. Masterman, 'The United Kingdom' in J. Gerards and J. Fleuren (eds.), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-Law: A Comparative Analysis* (Cambridge: Intersentia, 2014) 297-333 at 327-330.

³⁶⁷ n 347 at [48].

³⁶⁸ *Olsson v Sweden* (1988) 11 EHRR 259.

³⁶⁹ *ibid* at [67].

To understand how the court establishes whether or not an interference with Article 8 is justified then, it is important to understand the meaning of these terms and the exercise of establishing the necessity of an interfering measure in the jurisprudence of Article 8. The next sections focus on elucidating the content of these concepts, as used by the ECtHR in its Article 8 jurisprudence, and the overlapping relationship between them.

2.3.1. Pressing Social Need

When considering whether or not a pressing social need exists the court will consider whether or not the interests pursued through the interfering measure could have been achieved in a way that did not interfere with the applicant's rights under the Convention. For example, in *Ploski v Poland*,³⁷⁰ the court found that the failure of the domestic authorities to allow the applicant leave from prison, where he was held on remand, to attend the funerals of his parents violated Article 8. The applicant was refused permission to attend the funerals because he was a habitual offender who may not return to prison and the offence for which he was subsequently convicted (larceny) involved a 'significant danger to society.'³⁷¹

The ECtHR found that the interference was in accordance with the law and also pursued the legitimate aims of 'public safety' and 'the prevention of disorder or crime'.³⁷² However, the court was not satisfied that the interference responded to a pressing social need.³⁷³ The concerns of the Contracting State could have been addressed through the use of escorted prisoner leaves, which were available at the time.³⁷⁴ Thus, a violation of Article 8 had occurred as the concerns of the Contracting State could have been addressed through less intrusive means.

³⁷⁰ *Ploski v Poland*, App No 26761/95 (ECtHR, 12 November 2002).

³⁷¹ *ibid* at [20].

³⁷² *ibid* at [33]-[34].

³⁷³ *ibid* at [39].

³⁷⁴ *ibid* at [36].

The 'pressing social need' requirement puts the onus on Contracting States to show that any interfering measures they impose are not only done in pursuit of a legitimate aim, but are also done to the minimal extent to fulfil this aim, after any alternative options have been given due consideration. However, the interpretation of what exactly the 'minimally intrusive means' principle requires from a Contracting State is controversial in the ECtHR jurisprudence and academic commentary.³⁷⁵ In the *Animal Defenders International v United Kingdom* case, the ECtHR observed:

The more convincing the general justifications for a general measure are, the less importance the court will attach to its impact in a particular case ... The central question as regards such measures is not, as the applicant suggested, whether less restrictive measures should have been adopted or, indeed, whether the state could prove that, without the prohibition, the legitimate aim would not be achieved. Rather the core issue is whether, in adopting the general measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it.³⁷⁶

This suggests that, so long as a measure is generally expected to fulfil the legitimate aim, the court will be less exacting in its assessment of the extent to which the measure is minimally intrusive. However, this departure from previous authorities has faced criticism for its unprincipled interpretation of the minimally intrusive means test.³⁷⁷ Conversely, in *Hämäläinen v Finland*,³⁷⁸ the joint dissenting opinion of Judges Sajó, Keller, and Lemmens presents an alternative view on how the court should assess the existence of a pressing social need. The court found no violation of Article 8 when the Finnish Government required the married transsexual applicant to transform his marriage into a registered partnership in order to obtain full legal recognition for his change of gender.³⁷⁹ The court reasoned that the requirement to change the marriage to a registered partnership would have minimal or no effect on the applicant's family life and, consequently, that the maintenance of this system was generally justified.³⁸⁰

³⁷⁵ J. Rivers, 'The Presumption of Proportionality' (2014) 77 *Modern Law Review* 409-433.

³⁷⁶ *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21 at [109]-[110].

³⁷⁷ See T. Lewis, '*Animal Defenders International v United Kingdom*: Sensible Dialogue or a Bad Case of Strasbourg Jitters?' (2014) 77 *Modern Law Review* 460-474 at 473.

³⁷⁸ *Hämäläinen v Finland*, App no 37359/09 (ECtHR, 16 July 2014).

³⁷⁹ *ibid* at [3].

³⁸⁰ *ibid* at [85].

However, Judges Sajó, Keller, and Lemmens argued that the 'pressing social need' requirement had not been sufficiently observed by the court:

The Government have not argued that there would be significant practical difficulties if married transgender individuals were allowed to obtain legal recognition of their post-transition gender. The only interest in issue is, in plain terms, the public interest in keeping the institution of marriage free of same-sex couples. While we do not purport to deny the legitimacy of the State's interest in protecting the institution of marriage, we do consider that the weight to be afforded to this argument is a different question and one that must be considered separately.³⁸¹

The dissenting judges point out that the issue of whether the Government has struck a fair balance between the protection of the institution of marriage and the Article 8 rights of the applicant is a separate issue to whether the interfering measures respond to a pressing social need. So, whilst the measures taken by the authorities in *Hämäläinen* may have been proportionate to the aim of protecting the institution of marriage, which is subsumed within the broader aim of protecting morals contained in Article 8(2), it did not respond to a pressing social need.³⁸² In the view of the dissenting judges, the existence of a pressing social need for such a measure is dependent on whether or not the measure is needed to prevent significant practical difficulties for the Government in question.

In *Animal Defenders*, the ECtHR seems to diminish the effect of the pressing need requirement to put subsidiarity before a rigorous review of necessity. The extent to which this has happened in Article 8 cases where the applicant is subject to the criminal process will be considered later in the thesis. However, it is submitted that such a course dilutes the proportionality analysis. If an applicant can show that a public authority could reasonably have achieved the same objective, to the same extent, through less intrusive means, then it is surely disproportionate for the public authority to have opted for the more intrusive means of achieving the same objective.

³⁸¹ See jointly dissenting opinion of Judges Sajó, Keller, and Lemmens in *Hämäläinen*, *ibid* at [11].

³⁸² *ibid* at [12].

2.3.2. Proportionality

The next stage in assessing whether an interfering measure is 'necessary in a democratic society' requires the court to consider whether or not the measure is proportionate to its stated legitimate aim. This principle of proportionality is recurrent throughout the whole of the ECtHR jurisprudence.³⁸³ The principle has also become the globalised standard for resolving conflicts between constitutional values, which has generated a vast body of literature discussing its scope and proper use.³⁸⁴ In *Soering v United Kingdom*, the ECtHR observed that 'inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental human rights.'³⁸⁵ The proportionality principle requires the court to find a fair balance between interests pursued by the Contracting State and the need to protect the fundamental human rights of individuals. The need to find this balance is made explicit in the text of the qualified rights of the Convention. The principle of proportionality requires the intensity of the interfering measure to be (metaphorically speaking) proportional in relation to the legitimate aim that is pursued.

In judging the proportionality of an interference, the court has taken numerous factors into account. Firstly, the court may consider whether or not the interfering measure leaves some scope for the exercise of the right that has been interfered with. In *Jacobowski v Germany*,³⁸⁶ the court found that an injunction preventing the applicant – a former employee of a news agency, who was dismissed for financial mismanagement - from disseminating adverse comments about his former employers in a circular was a proportionate interference with the applicant's right to freedom of expression under Article 10 of the Convention.³⁸⁷ The court found that because the injunction did not prevent the applicant from voicing his opinions in ways other than

³⁸³ See J. McBride, 'Proportionality and the European Convention on Human Rights' in E. Ellis (ed.) *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart Publishing, 1999) 23-36.

³⁸⁴ See generally *ibid*; n 346.

³⁸⁵ *Soering v United Kingdom* (1989) 11 EHRR 439 at [89].

³⁸⁶ *Jacobowski v Germany* (1995) 19 EHRR 64.

³⁸⁷ *ibid* at [10].

in the circular, it left scope for him to exercise his right to freedom of expression by other means.³⁸⁸

Secondly, the context in which the interference takes place has a significant bearing on proportionality assessments. In *Murray v United Kingdom*,³⁸⁹ the six applicants had their home entered and searched by British Army personnel in connection with the first applicant's suspected involvement in the collection of money for the purchase of firearms for the Irish Republican Army in the USA.³⁹⁰ The applicants complained that the entry into and search of their family home by the Army, including the confinement of five other applicants for a short while in one room, violated Article 8. In finding no violation of Article 8, the court considered the 'conditions of extreme tension' in Northern Ireland at the time of the case to be a significant factor when assessing whether or not the interfering measures taken by the Army were proportionate to the legitimate aim of preventing crime.³⁹¹

A third factor the court will consider in making proportionality assessments is whether there is sufficient basis for believing that the particular interest the Government seeks to protect through the interfering measure is in peril. In *Hertel v Switzerland*,³⁹² the court found that an injunction preventing the applicant from making statements about the dangers of microwave ovens violated his freedom of expression under Article 10 of the Convention as it was not 'necessary in a democratic society'.³⁹³ The prohibitions imposed on the applicant by the Government were intended to protect consumers and suppliers from the dissemination of misleading information about the characteristics of services and goods on offer. It thus pursued the legitimate aim of the 'protection of the rights of others'.³⁹⁴ However, the court found that measures taken by the Government could not be

³⁸⁸ *ibid* at [29].

³⁸⁹ *Murray v United Kingdom* (1995) 19 EHRR 193.

³⁹⁰ *ibid* at [11].

³⁹¹ *ibid* at [92].

³⁹² *Hertel v Switzerland* (1999) 28 EHRR 534.

³⁹³ *ibid* at [51].

³⁹⁴ *ibid* at [40]-[42].

considered proportionate because the means by which the applicant disseminated his views – a specialist periodical with a small subscriber base - were unlikely to have a measureable impact on the sale of microwave ovens.³⁹⁵

The court found that the objective pursued by the Government was not logically furthered by the means employed as the applicant's conduct did not have sufficient impact to threaten the rights of others. Thus, if an interfering measure limits the exercise of a Convention right which, through its exercise, does not imperil a competing interest, it will be considered a disproportionate interference.³⁹⁶

Fourthly, the nature of the burden put upon an individual will be balanced against the competing interest. In *Z v Finland*,³⁹⁷ the applicant complained that there had been a violation of her right to respect for private and family life under Article 8 when details of her medical history were included in criminal investigation files, including her HIV status, and were subsequently presented to an appeal court in the manslaughter trial of her husband, X.³⁹⁸ The court found that the private and family life considerations to be weighted in a proportionality calculation were especially significant in this case, due to the fact that the disclosure of confidential information about the applicant's HIV infection might dramatically affect her private and family life, as well as her social and employment situation.³⁹⁹ Here, the domestic court had acted in pursuit of a legitimate aim and ensured that the use of the material was necessary for the purpose of fulfilling that legitimate aim. However, the nature of the burden on the individual was sufficient for the court to find that the interfering measures were disproportionate.⁴⁰⁰

³⁹⁵ *ibid* at [49].

³⁹⁶ *ibid* at [49] and [53].

³⁹⁷ *Z v Finland* (1998) 25 EHRR 371.

³⁹⁸ *ibid* at [9]-[43].

³⁹⁹ *ibid* at [96].

⁴⁰⁰ *ibid* at [113].

The principle of proportionality is now entrenched in the jurisprudence of the ECtHR. Whilst the court has not provided a prescriptive methodology for weighting the public interest against fundamental human rights, it has outlined several factors it will consider at this stage. The principle of proportionality gives the court a means of assessing each Contracting State's application of its margin of appreciation. The proportionality assessment is a tool for interpretation of the Convention that is used by the court to assess whether or not the interfering measures taken to protect the interests of the community or a collection of individuals are justified. However, these attempts to balance human rights against wider community interests are not uncontroversial.⁴⁰¹ Whilst, the proportionality framework provides a degree of structure to ensure that conflicts between qualified human rights and community interests can be settled in a systematic and coherent fashion, it has been criticised on a number of grounds. The next section considers the extent to which the proportionality analysis is an appropriate tool for balancing constitutional values.

3. Is Balancing an Appropriate Method for Adjudicating Article 8 Claims?

To better understand the significance of the role of the proportionality analysis in Article 8(2), it is useful to temporarily broaden the scope of the analysis to consider the principle of proportionality as a core element of constitutional rights reasoning. As constitutional law is becoming increasingly globalised, balancing, as part of a proportionality analysis, has become the 'dominant technique of rights adjudication in the world.'⁴⁰² However, the expansion of proportionality, and balancing, as the

⁴⁰¹ For an overview of these see S. Tsakyrakis, 'Proportionality: An assault on Human rights?' (2009) 7 *International Journal of Constitutional Law* 468-493 at 476.

⁴⁰² 'From German origins, [the proportionality analysis] has spread across Europe, including to the post-Communist states in Central and Eastern Europe, and into Israel. It has been absorbed into Commonwealth systems-Canada, South Africa, New Zealand, and via European law, the U.K. and it is presently making inroads into Central and South America. By the end of the 1990s, virtually every effective system of constitutional justice in the world, with the partial exception of the United States, had embraced the main tenets of [the proportionality analysis].' n 346 at 72. See also T.A. Aleinkoff, 'Constitutional Law in the Age of Balancing' (1987) 96 *The Yale Law Journal* 943-1005.

'multipurpose, best practice standard'⁴⁰³ of human rights adjudication has been met with severe criticism. Tsakyrakis, for instance, views the proportionality analysis as 'an assault on human rights.'⁴⁰⁴ Webber argues that proportionality analyses pretend to 'balance values' while wrongly circumventing political and moral questions inherent in the process of rights reasoning.⁴⁰⁵ It is not an aim of this analysis to add, by way of an exhaustive discussion of the proportionality analysis, to the vast amount that has already been written on this subject. Rather, this section of the analysis aims to give an overview of some of the merits and limitations of the proportionality analysis as it is applied in the jurisprudence of the ECtHR, particularly in Article 8 cases.

The structure of the proportionality analysis in the jurisprudence of the ECtHR (broadly)⁴⁰⁶ covers the same well-established four steps as Robert Alexy's proportionality assessment,⁴⁰⁷ and other proportionality analyses adopted by a range of domestic jurisdictions. These steps are as follows: (i) an assessment of whether the measure pursues a legitimate aim; (ii) whether the measure is suitable or rationally connected to achieving the legitimate aim; (iii) whether the measure is minimally intrusive (i.e. no more than is necessary to achieve the legitimate aim); and (iv) whether the measure is proportionate in the narrow sense (i.e. whether it produces a net gain, when the interference with the right is weighed against the realisation of the legitimate aim.)⁴⁰⁸ In the ECtHR's jurisprudence, for the interference to be considered 'necessary in a democratic society', it must respond to a 'pressing social need' and be 'proportionate to the legitimate aim pursued'.⁴⁰⁹ The former test requires that the reasons advanced in justification are 'relevant and

⁴⁰³ Sweet and Matthews, *ibid* at 73.

⁴⁰⁴ n 401.

⁴⁰⁵ G.C.N. Webber, 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship' (2010) 23 *The Canadian Journal of Law and Jurisprudence* 179-202 at 191.

⁴⁰⁶ The specific structure of a proportionality analysis adopted by a particular jurisdiction is not always clear. See Aleinkoff, n 402 at 943; M. Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice' (2004) 2 *International Journal of Constitutional Law* 574-596 at 579.

⁴⁰⁷ R. Alexy (J. Rivers trans.), *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002) 396-406.

⁴⁰⁸ See *ibid*; M. Klatt and M. Meister, *The Constitutional Structure of Proportionality* (Oxford: Oxford University Press, 2012) 8.

⁴⁰⁹ n 368 at [67].

sufficient',⁴¹⁰ whilst the latter requires a fair balance between the competing interests at stake.⁴¹¹

Kumm illustrates how the proportionality analysis operates in the adjudication of the Article 8 case of *Lustig-Prean v United Kingdom*,⁴¹² where the applicants complained that their dismissal from the armed forces on the grounds that they were practising homosexuals constituted a violation of their rights under Article 8.⁴¹³ In doing so, Kumm also effectively illustrates the relevant stages of a proportionality analysis:

First, the [ECtHR] addressed the existence of a *legitimate aim*. In this instance, [Article 8] limited the kind of aims that were legitimate for the purpose of justifying an infringement of privacy. The U.K. offered the maintenance of morale, fighting power, and operational effectiveness of the armed forces – a purpose clearly related to national security – as its justification for prohibiting homosexuals from serving in its armed forces.

The next question assessed whether disallowing gays from serving in the armed forces was a suitable means of promoting the legitimate policy goal. This is an empirical question... In this case, a government-commissioned study had shown that it would pose integration problems for the military system if declared gays were to serve in the army...

A more difficult question was whether the exclusion of homosexuals from military service was necessary... In this case the issue was whether a code of conduct backed by disciplinary provisions, certainly a less intrusive measure, could be regarded as equally effective. Ultimately the court held that the government had not shown that this alternative could not adequately deal with any behavioural issues that might arise.

Finally, the court had to assess whether the measure was proportional in the narrow sense, applying the so-called balancing test, based on what Alexy calls the "Law of Balancing": "The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other." To further guide the exercise, Alexy suggests a three-level scale distinguishing between serious, moderate, and relatively minor infringements, on the one hand, and very important, moderately important, and relatively unimportant gains on the other... The decisive question in the case of the gay soldiers discharged from the British armed forces was whether, on balance, the increase in the morale, fighting force, and operational effectiveness achieved by prohibiting homosexuals from serving justified the degree of interference in their privacy.⁴¹⁴

⁴¹⁰ See n 370; *Stoll v Switzerland* (2007) 44 EHRR 53 at [101]; jointly dissenting opinion of Judges Sajó, Keller, and Lemmens in *Hämäläinen*, n 378 at [12].

⁴¹¹ See *Z v Finland* (1998) 25 EHRR 371 at [96].

⁴¹² *Lustig-Prean v United Kingdom* (2000) 29 EHRR 548.

⁴¹³ Kumm, n 406 at 581.

⁴¹⁴ *ibid* at 579-581 (emphasis in original).

Thus, the legitimate aim requirement in Article 8(2) specifies the interests that may count as a 'legitimate' basis for an interfering measure under the first step of the proportionality test. The necessity and proportionality requirements in Article 8(2) also cover the second and third steps combined, and the fourth step of the proportionality assessment.⁴¹⁵

Tsakyrakis identifies two controversial assumptions underlying this approach: (i) that public interests 'can always be weighted against human rights'; and (ii) 'that measures aimed at promoting a public interest may prevail unless they impose an excessive restriction compared to the benefit they secure'.⁴¹⁶ According to Tsakyrakis, the first assumption leaves advocates of balancing faced with the problem of incommensurability. The metaphor of balancing is said to 'conceal the impossibility of measuring incommensurable values by introducing the image of a mechanistic, quantitative common metric'.⁴¹⁷

Klatt and Meister identify, and effectively respond to the two main variants of the incommensurability objection.⁴¹⁸ The first variant highlights that not all principles are amenable to quantification and comparison.⁴¹⁹ Whilst some rights are closely linked to a monetary valuation (for e.g. property rights), others - particularly those related to privacy which are difficult enough to define, let alone quantify - are not. This objection is premised on the (mistaken) assumption that balancing depends upon an exact quantification of colliding principles. However, as Klatt and Meister observe, 'balancing works fine as long as it is possible to assign weights to [competing interests] with the help of Alexy's triadic scale 'light, moderate, and serious'.⁴²⁰ Whilst the attribution of a weight may be disputed, this is a matter of external

⁴¹⁵ Klatt and Meister, n 408, 10.

⁴¹⁶ n 401 at 476.

⁴¹⁷ *ibid* at 471.

⁴¹⁸ Klatt and Meister, n 408, 58-66.

⁴¹⁹ See n 401 at 475.

⁴²⁰ Klatt and Meister, n 408, 59.

justification (through, for example, practical moral reasoning of the sort undertaken in Chapter 1) rather than a criticism of the use of a metric such as the triadic scale.⁴²¹

The second variant of the incommensurability objection is that, even if relevant principles can be quantified, they do not belong to a common scale.⁴²² Thus, in creating an artificial scale (such as the triadic scale) to compare incommensurable values, balancing masquerades as being morally neutral, whereas in fact what is necessary is to establish priorities for principles through moral reasoning. However, this view seems to overlook the fact that balancing, in the form outlined above, provides for moral reasoning and demonstrates at what stage and to what extent such reasoning is necessary in the process of rights adjudication.⁴²³

Tsakyrakis' second criticism of balancing is that it puts rights and the public interest on an equal footing, putting rights at risk of being overridden in favour of the majoritarian interests of the public. As Tsakyrakis puts it, the balancing approach 'reduces conflicts between rights and between rights and the common good to comparisons of relative weights and thus overlooks the justification-blocking function of rights.'⁴²⁴ Habermas famously suggested that balancing breaks down the 'fire wall' that constitutional values should represent.⁴²⁵ Thus, through balancing, rights are deprived of their proper normative power. However, the model of rights adjudication outlined here can overcome this criticism. First, this is because only stated legitimate aims are able to compete with rights. This guarantees that only those aims that are of particular importance can form the basis of justification for an interference with a right. Second, the fact that the principle of proportionality does not prioritise

⁴²¹ The classification of interferences as light, moderate, or serious is a heuristic tool designed to represent an evaluation of the degree of interference with Article 8(1). This is not to be mistaken for an attempt to quantify principles, but rather as an attempt to rank the degree of interference caused by an interfering measure. This is roughly based on Alexy's triadic scale, which helps make explicit the structure of the balancing exercise: see R. Alexy, 'The Weight Formula' in J. Stelmach, B. Brozek, and W. Zaluski (eds.) *Studies in the Philosophy of Law: Frontiers of the Economic Analysis of Law* (Krakau: Jagiellonian University Press, 2007) 9-27.

⁴²² See Webber, n 405 at 194; n 401 at 471.

⁴²³ Klatt and Meister, n 408, 62.

⁴²⁴ n 401 at 489.

⁴²⁵ J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: Polity Press, 1996) 258.

individual rights over collective public interests at the structural level, does not mean (as proponents of Tsakyrakis' second criticism seem to assume) that such a priority cannot be given adequate expression within that structure.⁴²⁶ Moreover, the rights contained in the ECHR are afforded differing levels of priority. Article 3 (the right to be free from torture, inhuman or degrading treatment), enjoys the status of an 'absolute' right, meaning that it is not subject to limitation for the pursuit of a legitimate aim. Articles 5 and 6, the 'intermediate' rights in the Convention, are not subject to explicit qualification and, at a minimum, require stronger justification for interference than that required to interfere with a qualified right. Taken together, these considerations allow for the proper status of a right, whatever that is in a particular case, to be reflected in any balance.

The main issue with the criticisms of the proportionality analysis coming from Tsakyrakis and others is not the internal coherence of their criticisms but rather that the criticisms take the proportionality analysis for something that it is not. The proportionality analysis is not a utilitarian calculation that attempts to quantify all values and compare them on a common scale. Nor is it a theory of rights. Rather it is part of a two-stage process of rights adjudication. The first looks at the scope of the interest, and the second focuses on striking a fair balance between the interfering measure and competing interests. As Letsas highlights, 'the language of balancing rights and public interests, is merely a rough conceptual framework that courts use to establish what rights litigants have. The framework has not precluded courts from recognising and upholding strong anti-majoritarian moral rights.'⁴²⁷

Conclusions

The ECtHR has interpreted the scope of the application of Article 8 appropriately broadly. The right protects diverse privacy related interests, from prisoners' mail to

⁴²⁶ Kumm, n 406 at 148.

⁴²⁷ G. Letsas, 'Rescuing Proportionality' in R. Cruft, S.M. Liao and M. Renzo (eds.), *Philosophical Foundations of Human Rights* (Oxford: Oxford University Press, 2015) 316-340 at 328.

sadomasochistic practices, from arbitrary interference by a public authority. The court also assesses the *seriousness* of an interference having regard to a range of contextual factors. This approach to the interpretation of Article 8(1) seems to reflect an understanding from the ECtHR that, as was discussed in Chapter 1, privacy is a pluralistic concept; with a normative value relative to the function it serves in a particular context.⁴²⁸ The ECtHR has recognised that the scope of the Article 8 right cannot be untrammelled and, as such, has imposed some limits on the scope of the interests it protects. In doing so the court has referred to the existence of a 'direct link' between the activity of the state and the individual's private life. It has also referred to the existence of any 'reasonable expectations' the individual might hold to be free from the interfering measure. However, neither of these considerations has been applied as a mandatory precondition for Article 8 engagement and, for reasons to be explored in subsequent chapters of this thesis, nor should they. The ECtHR determines an interference on a case-by-case basis, without adopting a consistent threshold criterion. Whilst this might be said to allow the ECtHR to take an 'evolutive' and purposive approach to the interpretation of Article 8, it might also invite criticism for reducing the extent to which an individual can predict whether a particular measure unlawfully interferes with his or her Article 8 rights. The need for such a threshold was highlighted in Chapter 1, and the attempts of domestic courts to use the existence of a 'reasonable expectation of privacy' as the threshold test for Article 8 engagement will be discussed in Chapter 4.

Article 8(2) of the ECHR specifies the criteria under which measures interfering with Article 8(1) can be justified by Contracting States. The domestic courts of Contracting States and, ultimately, the Strasbourg Court are required to reconcile the fundamental human rights of individuals with wider community interests. Whilst the legality and legitimate aim requirements (at this stage) are relatively uncontroversial, the necessity criterion requires an assessment of whether or not the interfering

⁴²⁸ Chapter 1, Part 2.3.

measure can be justified in pursuit of its legitimate aim. This inevitably requires the court to engage in a process of balancing, which can only be done on a case-by-case basis. One criticism of this balancing approach is that the rulings of the court could be seen merely as the result of its own arbitrary preferences, rather than principled evaluations of how the balance between human rights and other interests should be achieved. However, this criticism can be answered, to some extent, by the principles that have emerged from the jurisprudence of the court, which offer at least some formal structure to assessments of necessity in this area. Whilst this chapter has not sought to engage in an exhaustive assessment of the framework set forth in the jurisprudence of the ECtHR for adjudicating Article 8 cases, it has described the relevant stages of the framework and commented on its key features, with the aim of illustrating how the ECtHR identifies an interference with Article 8(1), and determines whether or not this interference violates the Article 8 rights of the applicant.

The next chapter extends the theoretical framework developed in Chapters 1 and 2. It maps the numerous ways in which an individual's privacy related interests can be set back as part of a criminal process. The chapter goes on to consider how the ECtHR framework discussed in this chapter protects the privacy interests of those subject to the criminal process. Chapter 3 will complete the task of setting out how, from both a moral and legal standpoint, domestic courts can and should draw upon the ECtHR jurisprudence to assess whether or not a public authority has struck a fair balance in its use of privacy interfering methods as part of a criminal process.

3 Article 8 and the Criminal Justice Process

The previous chapters established the foundations for an assessment of the privacy related interests of those subject to the criminal justice process, and how these interests are protected in England and Wales. But how should such an analysis be structured in more detail? This chapter extends what has been covered in the first two chapters to focus specifically on the privacy related interests of those subject to the criminal process, and on how these interests are protected at the level of the ECtHR. The chapter outlines a range of privacy interests that are typically engaged as part of a criminal process. It shows that such a process can set back privacy interests in numerous ways that are not typically acknowledged or protected through legal provisions and principles geared towards ensuring procedural fairness, such as the privilege against self-incrimination, the right to silence or the presumption of innocence. The chapter also shows that, if interpreted appropriately at the domestic level, the Article 8 ECHR framework can afford adequate protection to those subject to the criminal process.

The task is two-fold. Part 1 considers several prominent attempts at developing a taxonomy of privacy related interests. It assesses some of the merits and limitations of developing such a taxonomy, with a view to providing the necessary background for identifying and categorising the privacy interests of those subject to the criminal process. These interests are then mapped drawing on the philosophical literature covered in Chapter 1. Part 2 applies this literature to the jurisprudence of Article 8, paying attention to how the ECtHR has interpreted the scope of the right to respect for private life and established how the limits on this right should be interpreted in the context of criminal investigations.

Before engaging in this analysis, it is instructive to outline what constitutes being 'subject to the criminal justice process'. In its Article 6 jurisprudence, the ECtHR has held that criminal proceedings begin at the moment a person has been 'charged' with a criminal offence.⁴²⁹ However, the term 'charge' should be subject to autonomous interpretation and could be 'the date of arrest, the date when the person concerned was officially notified that he would be prosecuted, or the date when preliminary investigations were opened.'⁴³⁰ For the purposes of this analysis the term 'subject to the criminal justice process' will be given a broader meaning. To be 'subject to the criminal process' for the purpose of this analysis means that an individual has been targeted either formally or informally by the police for any of its legitimate functions related to the prevention or investigation of crime. This broader meaning captures potentially coercive activities of the police that do not form part of a police investigation targeted against a particular individual.⁴³¹

1. Mapping Privacy Setbacks as Part of a Criminal Process

1.1 How Can Privacy Interests Be Categorised?

Before attempting to set out how privacy interests can be set back as part of a criminal process, it is instructive to look at previous attempts at developing taxonomies of privacy interests or setbacks. These attempts can offer useful insights into the range of activities that can set back privacy interests, and can be drawn upon to assist in the task of understanding the range of ways privacy is diminished as part of a criminal process. Most prominent attempts to develop a taxonomy of privacy interests include some form of interest in protecting personally identifiable information about oneself. Prosser's well-known attempt at constructing a privacy

⁴²⁹ For example, see *Eckle v Germany* (1983) 5 EHRR 1.

⁴³⁰ *ibid* at [73].

⁴³¹ See Introduction, Part 2. See also: E. Miller, 'Challenging Police Discretion' (2015) 58 *Howard Law Journal* 521-556 at 522-524; E. Miller, 'Policing Criminal Justice: A Fair Cop and a Fair Trial' (2016) Unpublished conference paper at: *Obstacles to Fairness in Criminal Proceedings*, University of Nottingham, September 1-2, Nottingham.

taxonomy through an analysis of U.S. tort case law counts the following as groups of setbacks to privacy related interests: (i) the public disclosure of private facts about an individual; and (ii) the appropriation of an individual's name or likeness.⁴³² Each of these forms of setback involve the appropriation or use of information that is identifiable to an individual (henceforth 'personal information'). Discussing the first type of setback, Prosser emphasised that the disclosure must be public, and it must be of *private* facts about the individual.⁴³³ Thus, in protecting the individual from such disclosures, a right to privacy may protect aspects of the reputation of the individual.⁴³⁴

The second type of setback occurs when the individual's personal information is used without his or her consent to 'advertise the defendant's product, or to accompany an article sold, to add luster to the name of a corporation, or for other business purposes.'⁴³⁵ Prosser argues that this strand of the taxonomy protects the individual's identity. It is worth remembering that Prosser's taxonomy was based on an analysis of tort case law. However, this type of setback may be encountered in a criminal justice context where, for example, a public authority discloses private facts about an individual for purposes related to the operational function of its organisation.⁴³⁶

Prosser's privacy taxonomy underlines the significance of the relationship between privacy and personal information. Indeed, the significant role privacy plays in limiting the extent to which information about an individual can be accessed by others, in the furtherance of a range of normative ends, has been well-documented in privacy

⁴³² W. Prosser, 'Privacy' (1960) 48 *California Law Review* 383-423 at 389.

⁴³³ According to Prosser, privacy protection in this context extends only to those facts that have not been left open to the public eye: 'Certainly no one can complain when publicity is given to information about him which he leaves open to the public eye, such as the appearance of the house in which he lives, or to the business in which he is engaged.' See *ibid* at 394.

⁴³⁴ *ibid* at 398.

⁴³⁵ *ibid* at 391-402.

⁴³⁶ See, for example, the *Peck* case where public authorities disclosed public CCTV images of a man whom they had detained after his attempted suicide with the aim of inspiring public confidence in CCTV, and deterring crime *Peck v United Kingdom* (2003) 36 EHRR 41 at [69].

scholarship.⁴³⁷ However, no matter how many cases or works are surveyed to reach the point where a definition of the phenomenon exists, the taxonomy relies on a judgment by the author over which are relevant, and cannot cover new cases and problems that arise after the taxonomy has been completed.⁴³⁸ Nonetheless, such taxonomies are useful in that they allow for our understanding of privacy to continue to develop in line with changes in society.

More recent attempts at mapping out privacy interests have acknowledged that privacy can be interfered with physically, and through interference with an individual's personal information. Allen's attempt focuses on what she terms 'unpopular privacies': privacies that are disvalued or disliked by their intended beneficiaries. Allen recognises the (sometimes unwanted) physical privacy interests of 'seclusion' and 'modesty', and informational privacy interests in 'confidentiality' and 'data protection'.⁴³⁹ After charting some of the new risks posed to privacy through technological advancements, and a generalised indifference to some of these risks in the general population (for example, the risks to an individual's reputation through the wide accessibility and permanency of social media posts, and the seeming indifference to this risk from some of those who post regularly on social media), Allen argues that coercive, paternalistic regulations are warranted to combat these threats.⁴⁴⁰ This work is useful in that it highlights particular privacy interests that can exist despite the individual's particular regard for them. However, in focussing on just these forms of privacy, the taxonomy neglects forms of privacy interest that individuals, generally speaking, will actively seek to protect. Whilst this is not a criticism of Allen's taxonomy, it is merely to state that, with its focus on these interests, the taxonomy is of limited use for the purposes of this analysis.

⁴³⁷ See J. Rachels, 'Why Privacy is Important' (1975) 4 *Philosophy and Public Affairs* 232-333 at 325; B. Röessler, *The Value of Privacy* (Cambridge: Polity Press, 2005) 116; A. Marmor, 'What is the Right to Privacy' (2015) 43 *Philosophy and Public Affairs* 3-26 at 9.

⁴³⁸ P. O'Callaghan, *Refining Privacy in Tort Law* (London: Springer Heidelberg, 2013) 14.

⁴³⁹ A. Allen, *Unpopular Privacy: What Must We Hide?* (Oxford: Oxford University Press, 2011).

⁴⁴⁰ *ibid* 173.

Solove's taxonomy of privacy setbacks is based on United States privacy law more generally.⁴⁴¹ This contemporary contribution also recognises how technological and societal developments have changed the landscape of privacy interests:

Modern privacy problems emerge not just from disclosing deep secrets, but from making obscure information more accessible (increased accessibility) or from consistent observation or eavesdropping (surveillance).⁴⁴²

Solove's taxonomy focuses on problems that have occurred in the United States, explaining how they might set back an individual's privacy interests. This taxonomy consists of the four following groups of setback: (i) information collection, (ii) information processing, (iii) information dissemination, and (iv) invasion. These groups are arranged around the individual, whose privacy related interests are affected by the activities in question. Thus the 'information' in question is information pertaining to the individual. The first three groups move the control of personal information progressively away from the individual, whereas the latter group, invasions, do not necessarily involve personal information.⁴⁴³ Instead, these setbacks intrude into the life and physical space of the individual.

Solove's taxonomy goes much further than Prosser's earlier attempt. In particular, Solove's taxonomy places significant emphasis on personal information, taking account of the expanding ways in which information about the individual can be collected, processed, or disseminated as information technologies continue to advance. Privacy interests, and threats to these interests, change contextually and temporally.⁴⁴⁴ Thus, no attempt at developing a taxonomy of such interests can mark the end of the conversation. However, Solove's categories of 'invasions', 'information collection', 'information processing', and 'information dissemination' do seem to effectively capture the different ways in which privacy interests are engaged by public and private bodies in the twenty-first century. Drawing on Solove's attempt, and on broader privacy and criminal justice scholarship, this part aims to map how

⁴⁴¹ D. Solove, 'A Taxonomy of Privacy' (2006) 154 *University of Pennsylvania Law Review* 477-560 at 482.

⁴⁴² *ibid* at 560.

⁴⁴³ *ibid* at 488-489.

⁴⁴⁴ See Chapter 1, Part 2.3.

privacy interests are set back as part of a criminal justice process. The aim is not to give an exhaustive list of every example of how such a setback can occur. Rather, it is to develop a general understanding of how certain common features of a criminal process will likely set back the privacy interests of the individual.

A comprehensive coverage of all the ways in which those subject to the criminal process may have their personal information collected, processed, and disseminated is not feasible within the parameters of this research. In part, this is due to the wide discretion afforded to front-line police officers. 'Lower-level' police officers that work 'on the beat' are frequently left to make discretionary decisions with regard to when they should investigate, arrest, search, or collect personal information.⁴⁴⁵ Consequently, in many cases, the decision to collect personal information from an individual, or subject him or her to physical coercion will fall to the police officer responding to a particular incident. The circumstances under which a police officer may decide it is necessary to collect the personal information of potential witnesses, victims, or suspects are innumerable. This is because the 'encounters'⁴⁴⁶ a police officer may engage in are numerous and diverse; they can range from the minimally intrusive and unregulated exchanging of pleasantries to the more intrusive stops, searches, or surveillance measures.⁴⁴⁷ A full analysis of whether this discretion is exercised in a manner that gives due regard to the privacy interests of the individual cannot be conducted solely through looking at the legal regulations in place. It would require empirical research falling beyond the scope of this thesis.

Even if the analysis is limited to where privacy interests are set back within the strictures of legality, the number of different provisions permitting public authorities to set back the privacy interests of those subject to the criminal justice process is too great for an exhaustive analysis of each using the methods of this inquiry. The focus

⁴⁴⁵ See S. Bronitt and P. Stenning, 'Understanding Discretion in Modern Policing' (2011) 35 *Criminal Law Journal* 319-332.

⁴⁴⁶ E. Miller, *Police Encounters with Race and Gender* (2015) 5 *UC Irvine Law Review* 735-758.

⁴⁴⁷ *ibid* at 736.

instead will be on looking in-depth at different types of setback and how these are protected at the domestic level. However, first I will set out what these types of interest are, and how the protection of these interests should be approached, drawing on the philosophical literature and European human rights jurisprudence already discussed.

1.2. Information Collection and Physical Invasions

Solove argues that information collection creates disruption because it involves data gathering.⁴⁴⁸ He identifies two methods of information collection in this context: surveillance and interrogation. Though Solove does not give a specific definition of surveillance, he argues that it can have problematic effects as it can lead to discomfort, self-censorship, and inhibition.⁴⁴⁹ Whilst covert surveillance does not have the same effects, according to Solove, its harm lies in the 'panoptic effect' it may have on people who know they *could* be watched at any time but do not know when or at what times they will be watched.⁴⁵⁰ Solove's succinct analysis gives an accurate account of the potential setbacks to privacy related interests which may arise as a result of modern surveillance techniques. The collection of personal information through monitoring and recording certainly removes the individual from a condition of limited access to a significant degree.

Interrogation is identified as the second form of information collection said to set back privacy related interests. This is defined by Solove as 'the pressuring of individuals to divulge information.'⁴⁵¹ For Solove, part of the issue associated with interrogation comes from the degree of coercion involved. However, even where no compulsion or coercion to answer questions exists, interrogation and the asking of

⁴⁴⁸ n 441 at 491.

⁴⁴⁹ *ibid* at 493. See also A. von Hirsch, 'The Ethics of Public Television Surveillance' in A. von Hirsch, D. Garland, and A. Wakefield (eds.) *Ethical and Social Perspectives on Situational Crime Prevention* (Oxford: Hart Publishing, 2004) 59-76.

⁴⁵⁰ For a more general discussion of this panoptic effect and its links to modern surveillance technology see D. Lyon, *The Electronic Eye: The Rise of the Surveillance Society* (Minneapolis: University of Minnesota, 1994).

⁴⁵¹ n 441 at 500.

unduly probing questions can set back privacy related interests as it may cause an individual to feel uncomfortable and concerned about how his or her responses might be perceived.⁴⁵²

The purpose of asking questions which are 'none of your business' is undoubtedly to collect, or attempt to collect, personal information from another and, irrespective of the degree of coercion employed, it can set back privacy interests. To stop a stranger in the street and ask probing questions about his or her private life, his or her medical history, or criminal record is to subject the stranger to unwarranted scrutiny, even if this individual is under no obligation to answer those questions.

A further way information collection can set back privacy interests is through biometric sample collection. Biometric or other samples of information that are identifiable to an individual comprise a part of that individual's personal information. In the criminal justice context, individuals can be put under pressure or coercion to provide such samples. For example, the request for DNA samples from a particular subset of a population who may fit the profile of a suspected offender (otherwise known as a DNA dragnet) may constitute an interrogation under Solove's interpretation, or an infringement on the privilege against self-incrimination,⁴⁵³ as individuals may feel pressured into proving their innocence or fear the associated stigma and suspicion which may arise if they refuse to provide a sample.⁴⁵⁴ The extent to which such requests for samples or other such information constitute an 'interrogation' is questionable. However, even in the absence of such a request (for instance, where the sample is collected from a crime scene by forensic investigators), it is undeniable that personal information is contained within such samples.

⁴⁵² *ibid.*

⁴⁵³ See, for example, *Saunders v United Kingdom* (1994) 18 EHRR CD23.

⁴⁵⁴ Issues concerning the extent to which such DNA dragnets involve voluntary and informed consent are discussed more fully in D. Wilson, *Genetics, Crime and Justice* (Cheltenham: Edward Elgar, 2015) ch. 3.

There is often a degree of overlap between measures involving the collection of information and physical invasions in the criminal justice context. Most methods of surveillance and searches, for example, not only gather personal information; they also seem to be, on the face of it, invasive (perhaps with the exception of secret surveillance measures). Solove identifies two types of invasion: intrusion and decisional interference. Intrusions probe into one's life.⁴⁵⁵ These involve an incursion into a physical space that, taking into account contextual factors, constitutes a part of the individual's private sphere. They can also be non-physical. For example, through prolonged staring at an individual. Intrusions can account for the wrongness in invading the physical space of an individual (without occasioning an assault etc.) or covertly watching an individual get undressed where no new information is collected about the individual.⁴⁵⁶ Decisional interference involves unwanted incursions into an individual's decisions. Protection from what Solove refers to as 'decisional interference' can, for all intents and purposes, be equated with setbacks to autonomy-based privacy interests.⁴⁵⁷

The collection of personal information and invasions are a central feature of criminal investigation. To identify a suspected offender, or mount a prosecution against an individual, it is often important for the police to request information about an individual from witnesses, to collect samples from a public space, or to ask probing questions of an individual they believe may have committed a crime. Such information collection often also involves physical invasion, either through decisional interference, or intrusion into the life of the individual. In England and Wales, much of this activity is governed by implicit common law powers and requires no specific legal authorisation. As Paul Roberts states:

Just as you or I can stop a stranger in the street to request directions, to ask the time, to solicit a donation to charity or for any other lawful purpose, the police are similarly entitled to stop a stranger in the street and ask him or her what he or she is doing, whether he or she has seen anything suspicious, where

⁴⁵⁵ D. Solove, *Understanding Privacy* (Massachusetts: Harvard University Press, 2008) 162.

⁴⁵⁶ See N.A. Moreham, 'Privacy in the Common Law' (2005) 121 *Law Quarterly Review* 628-656 at 636.

⁴⁵⁷ See H. Nissenbaum, *Privacy in Context: Technology, Policy and the Integrity of Social Life* (California: Stanford University Press, 2010) 82.

he or she lives, etc... Any conduct that takes place in plain view is liable to be observed, photographed, recorded and reported, by amateur or professional sleuths; any property or other matter (say blood spatters or a fingerprint) abandoned in the street or other public venue can be recovered by the police as evidence, just as it might be appropriated by a tinker or made into modern art by a passing conceptualist.⁴⁵⁸

The police can investigate crime without having or requiring formal or codified legal powers to use measures of coercion beyond that which is permissible for all citizens through implicit common law powers. However, when the gentle approach to gathering personal information is insufficient, the police may invoke a range of statutory powers authorising them to forcibly collect bodily samples and biometric information, to use intrusive covert surveillance methods, to search an individual and seize his or her property, or to detain and interrogate him or her for long periods of time.⁴⁵⁹ But how do these different types of information collection and physical invasion, as used by the police, interfere with individual privacy interests?

Solove highlights how interrogation can interfere with privacy interests because it makes an individual feel uncomfortable and concerned about how his or her responses might be perceived.⁴⁶⁰ Part of the harm that can arise through interrogation depends upon the degree of coercion applied. At the extreme end, physical torture as part of an interrogation is manifestly harmful, not least to privacy interests.⁴⁶¹ However, even where the degree of coercion is minimal, such as in circumstances where an individual has volunteered to be interviewed by the police as part of a criminal investigation, interrogation can set back privacy interests. Where, for example, an investigating officer is tasked with eliciting information from an interviewee, the officer may pursue a line of questioning which concerns an intimate, or even incriminating, part of an individual's life. Such interrogations can be

⁴⁵⁸ P. Roberts, 'Law and Criminal Investigation' in T. Newburn, T. Williamson, and A. Wright (eds.), *Handbook of Criminal Investigation* (Cullompton: Willan, 2007) 92-145 at 96.

⁴⁵⁹ See generally, K. Starmer, *Criminal Justice, Police Powers and Human Rights* (London: Blackstone Press, 2001); I. Bridges and F. Sampson, *Blackstone's Police Operational Handbook 2015* (9th edn, Oxford: Oxford University Press, 2014) 719-754.

⁴⁶⁰ n 441 at 500.

⁴⁶¹ This is why torture is forbidden not only as part of a criminal investigation but also by ordinary criminal and human rights law: see A. Ashworth and M. Redmayne, *The Criminal Process* (4th edn. Oxford: Oxford University Press, 2010) 30.

embarrassing or upsetting for the individual; putting pressure on him or her and causing emotional discomfort.⁴⁶²

In England and Wales, the extent to which this pressure may be exerted is limited by procedural safeguards restricting interrogations, such as the privilege against self-incrimination, the right to silence, and statutory provisions governing the conduct of police during investigations such as the Police and Criminal Evidence Act 1984, designed to give effect to these broader principles.⁴⁶³ Whilst these procedural safeguards are primarily in place to ensure accurate fact-finding and protect the fair trial rights of the suspect, they can also protect an individual from setbacks to privacy interests. These procedural safeguards can preempt the need to discuss the privacy interests set back through some measures, such as interrogation, at length. If an individual subject to the criminal process is not compelled to discuss any personal information about him or herself during an interview, then the individual can be said to be in a condition of limited access in this context. However, if such procedural safeguards were to be diminished, this may pose a threat to the privacy interests of those subject to the criminal process as such persons may be put under pressure to disclose information about themselves which may be distorted or made to fit a pre-existing narrative the interrogator has formed in his or her own mind.⁴⁶⁴ However, a full discussion of the extent to which these procedural safeguards are currently being protected, and how effective such regulation is in practice is beyond the parameters of this study.⁴⁶⁵ Owing to the fact that interrogations have significant potential to setback the privacy interests of the individual, and to impact upon the

⁴⁶² n 455, 114.

⁴⁶³ Such procedural safeguards are generally accepted by the ECtHR to be a necessary component of a fair trial, as is stated in the *Murray* case: 'Although not specifically mentioned in Article 6 of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aim of Article 6.' *Murray v United Kingdom* (1996) 22 EHRR 29 at [45].

⁴⁶⁴ Incidentally, such procedural safeguards have been diminished in England and Wales. Under section 34 Criminal Justice and Public Order Act 1994 the tribunal of fact has been empowered to draw adverse inferences from an accused's silence. One effect of this provision is to increase the pressure or incentive for the accused to respond to police questions. See H. Quirk, *The Rise and Fall of the Right to Silence* (Oxon: Routledge, 2017) 44-46.

⁴⁶⁵ See A. Choo, *The Privilege Against Self-Incrimination and Criminal Justice* (Oxford: Hart Publishing, 2013).

individual's fair trial rights, such measures are subject to generally more stringent regulation than the types of interfering measures discussed in this thesis.

Various samples may be taken from an individual as part of a criminal process. A non-exhaustive list of the types of samples that may be collected includes the following: photographs, DNA data, fingerprints, body samples such as hair, urine, saliva and blood, dental impressions and voice samples. Samples are commonly taken from arrestees at a police station, whilst some are also taken in public or private spaces by police officers on patrol.⁴⁶⁶ The extent to which the collection of a sample interferes with privacy interests depends on the content of the personal information in the sample, and on the context in which the sample is taken. For example, to collect an impression of an individual's shoeprint by requesting that he or she stand on an impression generator would constitute a relatively minor setback to his or her privacy interests as this does not require the individual to reveal intimate parts of his or her body, and the content of the information is only minimally revealing of the identity, characteristics, and behaviour of the individual (e.g. approximate shoe size, design, and how much the shoe has been worn). Conversely, a sample of pubic hair may require much more invasive techniques to obtain, contain genetic information which can be identified to the individual with greater precision, and reveal much more detail about the individual and his or her characteristics, than a shoeprint. The collection of this sample would likely constitute a more severe setback to the privacy interests of the individual.

Any collection of a sample containing personal information involves some kind of engagement of individual privacy interests. It removes the individual from a condition of limited access to some degree. However, this fact alone does not mean that an individual has a right to the protection of this information. Even where a blood spatter is abandoned in the street, as in Roberts' example, the collection of that

⁴⁶⁶ For instance, breath samples are often taken from drivers whom it is suspected might be over the prescribed limit for alcohol.

sample by the police sets back the privacy interests of the person from whom the sample originated as it involves the collection of information that is personally identifiable to the individual which has the potential to be processed in a number of ways. The question of whether or not the collection of such information is legally permissible turns on whether the privacy interests pertaining to the information are sufficient to warrant protection of the information, and whether the collection can be justified for the purposes the collector sought to achieve.

Methods of surveillance can set back privacy interests in a number of ways. The intrusion into spaces that are 'private' to the individual will plainly set back privacy interests, removing the individual from a condition of limited access in such a way that might be corrosive to his or her privacy and autonomy based privacy interests. As Benn argues, covert observation treats the individual as an object, undermining his or her autonomous decisions and disrespecting the individual as a human being.⁴⁶⁷ When occupying 'public space', one's claim to privacy is reduced as one is open to the scrutiny and judgment of other people who are using the same public space at that time. Social conventions and legal prohibitions curtail the extent of such scrutiny in 'real-space' appraisal.⁴⁶⁸ Others cannot persistently touch me or harass me beyond acceptable limits as I use public space as this may be against the law.⁴⁶⁹ The dictates of social convention also suggest that others should only subject one to casual and fleeting face-to-face scrutiny. However, when public CCTV cameras are used to subject an individual to targeted surveillance, they go far beyond what would be considered acceptable when an individual is subject to 'real-space' appraisal, and in a number of ways.⁴⁷⁰ First, such surveillance is purposeful and systematic, not casual. The individual is being targeted for a particular purpose. Second, such

⁴⁶⁷ S. Benn, 'Privacy, Freedom, and Respect for Persons' in J. Pennock and J. Chapman (eds.) *Privacy: Nomos XIII* (New York: Atherton Press, 1971) 1-26 at 6.

⁴⁶⁸ B. vS-T. Larsen, *Setting the Watch: Privacy and the Ethics of CCTV Surveillance* (Oxford: Hart Publishing, 2011) 59-60.

⁴⁶⁹ Whilst, generally speaking, unlawful physical force against another person constitutes a battery in English law, there are exceptions where, for instance, a police officer makes an arrest, or implied consent exists. See *Collins v Wilcock* [1984] 1 WLR 1172, 1177 per Goff L.J.

⁴⁷⁰ This is not to say CCTV that is not targeted to particular individuals in this way is innocuous for privacy interests. Such CCTV usage falls outside the focus of this section.

surveillance might be more problematic if it is covert. In such cases the observer has the benefit of monitoring the individual subject to the criminal process without that individual being able to see the observer or detect that he or she is being subjected to such targeted scrutiny. The individual might also be subject to closer scrutiny than he or she could be if such cameras were not used. Public CCTV can overcome physical barriers when used from vantage points.⁴⁷¹ Such surveillance poses a clear threat to the privacy related interests of individuals subjected to it as it significantly reduces the control an individual has to determine who can gain access to his or her person and personal information about his or her movements and conduct in public space. As a result, such surveillance undermines the personal autonomy of the individual as the knowledge that he or she *could* be subject to such observations at any particular time, whilst simultaneously having no way of knowing if he or she is being observed by public CCTV cameras at any particular time, creates a situation which may impact upon the autonomous decisions and actions of the said individual.⁴⁷² Of course, this argument relies on the individual having knowledge that he or she could be the object of such surveillance, and not on the surveillance itself.

However, even when the individual concerned does not know of such surveillance measures or the conditions under which such measures may be used; this does not mean the use of such measures is any less objectionable. Such surveillance measures are objectionable because this covert monitoring can pose a threat to the individual dignity of the subject concerned as it treats the individual as an object to be managed, categorised, and monitored, disregarding the individual altogether. In short, where privacy interests are set back to a significant degree, having regard to the nature of the information collected and any relevant contextual considerations, this must be justified by a compelling and conflicting need to occasion the setback.

⁴⁷¹ See n 468, 59-60.

⁴⁷² Such situations create what Foucault might describe as a panoptic power relation: where the individual induces a state of conscious and permanent visibility upon him or herself making the effects of such surveillance permanent, even if the use is discontinuous. See M. Foucault (A. Sheridan trans.), *Discipline and Punish: The Birth of the Prison* (London: Penguin, 1997. Originally published 1975) 197.

1.3. Information Processing

Solove gives the following definition of information processing:

Information processing refers to the use, storage, and manipulation of data that has been collected. Information processing does not involve the collection of data; rather, it concerns how already-collected data is [sic] handled.⁴⁷³

Thus, information processing can involve the storage and manipulation of personal information, but is differentiated from the dissemination of that information to others. Drawing on Solove's taxonomy, five types of processing are potentially harmful to the privacy interests of those subject to the criminal process, namely: aggregation, identification, insecurity, secondary use, and exclusion.

1.3.1. Aggregation

Aggregation involves gathering together various pieces of information about a person. Solove argues that this form of processing is significantly more problematic in the information age where technological advances have increased the capacity of data processors to engage in ever-more sophisticated and intrusive forms of analysis of such aggregated information. Aggregation can curtail the individual's personal autonomy as profiles of personal information can be used to evaluate and manage the individual.⁴⁷⁴ As an example of how such aggregation can occur in a policing context, consider how information from Automatic Number Plate Recognition (ANPR) systems can be aggregated.

ANPR cameras are capable of extracting vehicle registration numbers from registration plates. In addition to being mounted within police vehicles, ANPR cameras can be placed on roadsides or above motorways to collect the registration

⁴⁷³ n 441 at 504.

⁴⁷⁴ See M. Feeley and J. Simon, 'Actuarial Justice: The Emerging New Criminal Law' in D. Nelken (ed.) *The Futures of Criminology* (London: Sage, 1994).

plate data of passing vehicles.⁴⁷⁵ ANPR systems are often aggregated with information from other policing or law enforcement databases that fall outside the ANPR system's immediate remit.⁴⁷⁶ Accordingly, personal information from public or privately owned insurance databases, and police databases (such as the Police National Computer (PNC)), can be aggregated with other information stored on ANPR systems to create a 'hit' database.⁴⁷⁷ These 'hit' databases can then be linked to ANPR cameras so that when a vehicle of interest to the police passes an ANPR camera (for example, vehicles reported stolen, or suspected of being used in the commission of a crime), the ANPR system can automatically notify police officers of the 'hit', and the details of when and where the vehicle passed the ANPR camera in question.

This example shows how separate pieces of personal information about an individual, such as his or her vehicle particulars, registration plate, and separate information attached to the vehicle and owner can be aggregated together by police to assist with apprehending suspected offenders. Aggregation is beneficial in increasing expediency and efficiency in the prevention and detection of crime. However, the processing of personal information in this way can pose a threat to individual privacy interests. For instance, where an individual has disclosed personal information pertaining to his or her vehicle for one purpose (e.g. registering the vehicle so he or she can drive it on public roads) and this information is then combined with information from ANPR systems to track an individual's location, this form of processing has further removed the individual from a condition of limited access. Such aggregation and secondary use not only disregards the individual's preferences for how his or her personal information is used, it can, if left unchecked, result in the use of arbitrary and disproportionate practices against an individual or subset of individuals in society (e.g. through intensive surveillance or tracking of the individual's activities).

⁴⁷⁵ Home Office, *Automatic Number Plate Recognition* (London: Open Government Licence, 2015).

⁴⁷⁶ C. Parsons, J. Savirimuthu, R. Wipond, and K. McArthur, 'ANPR: Code and Rhetorics of Compliance' (2012) 3 *European Journal of Law and Technology* 1-28 at 7.

⁴⁷⁷ *ibid.*

1.3.2. Identification

Identification involves linking information to an individual. This can set back privacy interests as it can link the individual to information which he or she may want to dissociate with, limiting the extent to which the individual can exist in a condition of limited access. This goes a step further than aggregation as it links the aggregated profile of an individual to the person in real space. This represents an example of Ericson and Haggerty's 'transmission society' which, they suggest, 'regulates the pace of contributions to society by rating credentials, personal handicaps, creditworthiness, productivity, and so on.'⁴⁷⁸ This 'transmission society' can pose a threat to the personal autonomy of the individual as the different forms of personal data that are aggregated can be used to make assessments of the individual and can be used to limit the individual's capacity to pursue a life of his or her choosing by, for example, denying the individual of the opportunity to obtain credit, pursue his or her chosen career, or pass through a controlled border.

In the context of contemporary criminal justice, there are numerous ways in which a person can be identified in connection with previously collected personal information. Information stored on police records can be used identify an individual as part of a criminal process in a range of contexts. Whilst such forms of identification may well be justifiable, they are often threatening for an individual's autonomy-based privacy interests. For example, if the police store information that an individual has been arrested, this may pose the constant threat to the individual that he or she may be identified as an arrestee either by the police in a future investigation, or by the public. According to Nissenbaum, this threat of judgment or continuous passive

⁴⁷⁸ See: R. Ericson and K. Haggerty, *Policing the Risk Society* (Oxford: Oxford University Press, 1997) 40.

monitoring forces the individual to take others into account in determining his or her actions or decisions, undermining the extent to which such actions are voluntary.⁴⁷⁹

1.3.3. Insecurity

Insecurity is the failure to protect stored personal information from improper access by others. This can set back the privacy interests of individuals as their personal information may be used for purposes to which they have not consented. Solove cites the example of identity theft as a problem that may arise as a result of insecurity.⁴⁸⁰ Insecurity of stored information may pose problems for those subject to the criminal process. Such information is inherently of a sensitive nature and, consequently, any security breaches or losses of this information could have adverse consequences for the autonomy or dignity based privacy interests of the individual.

1.3.4. Secondary Use

Secondary use occurs where personal information is used beyond the purposes for which it was initially collected. This sets back privacy interests as it thwarts the individual's expectations of how his or her personal information will be used by the information processor. Secondary use goes hand-in-hand with what Lyon describes as 'function creep', where 'subsequent novel uses are devised for existing technical systems, which are added to the original panoply of functions.'⁴⁸¹ The effect of function creep is that the individual's personal information is used beyond the reasons for which it was originally collected, circumventing proper consideration of whether this further use constitutes a justified setback to the privacy interests of the individual. Even if the prospects of such secondary use are not realistically foreseeable, the fear of such secondary use, on the basis that personal information has been taken and stored by the police, may engender anxiety in the individual and,

⁴⁷⁹ n 457, 82.

⁴⁸⁰ n 455, 126-127.

⁴⁸¹ D. Lyon, 'The Border is Everywhere: ID Cards, Surveillance, and the Other' in E. Zureik and M. Salter (eds.) *Global Surveillance and Policing: Borders, Security, Identity* (Cullompton: Willan Publishing, 2005) 66-82 at 67.

consequently, have a chilling effect on his or her autonomous actions, or decision making.⁴⁸² Such effects may be detrimental not only for the individual but also for broader social interests such as the interest in preserving free speech as a pillar of democratic self-government.⁴⁸³ If an individual fears that, as a result of becoming politically active or participating in public discourse on an issue, information about him or her stored on police records may come to light as a result of the heightened scrutiny he or she is likely to be faced with, this may dissuade the individual from such participation to the detriment of the common good.⁴⁸⁴

1.3.5. Exclusion

Exclusion deprives the individual of the ability to know the extent of the personal information a data processor is holding about him or her, and how such information is used. Solove suggests that this can set back the privacy interests of the individual as it creates a sense of vulnerability and uncertainty.⁴⁸⁵ Exclusion, like the other potential threats listed, deprives the individual of the power to control how others use his or her personal information. In the criminal justice context, personal information taken from public protestors or individuals who police officers encounter on the street may be stored and processed on databases such as the National Domestic Extremism Database without the individual knowing about this.⁴⁸⁶

1.4. Information Dissemination

Dissemination occurs where personal information about the individual is revealed, or where the threat of the revelation of personal information exists.⁴⁸⁷ Dissemination can set back the privacy interests of those subject to a criminal process in a number of ways. Even the dissemination of truthful personal information about the individual

⁴⁸² A. Roberts and N. Taylor, 'Privacy and the DNA Database' (2005) 4 *European Human Rights Law Review* 373-386 at 384.

⁴⁸³ R. Krotoszynski, *Privacy Revisited: A Global Perspective on the Right to Be Left Alone* (Oxford: Oxford University Press, 2016) 178-180.

⁴⁸⁴ B. Goold, 'Surveillance and the Political Value of Privacy' (2009) 1 *Amsterdam Law Forum* 3-6.

⁴⁸⁵ n 441 at 521.

⁴⁸⁶ D. Wicks and D. Carney, 'Retention of Information on the National Extremism Database' (2013) 86 *Police Journal* 83-87 at 87.

⁴⁸⁷ n 441 at 523.

without his or her consent can be stigmatising.⁴⁸⁸ The potential harm in such disclosure lies in the effect it may have on the reputation of the individual, and the effect it could have on his or her ability to control presentation of the self in public.⁴⁸⁹

1.4.1. Exposure

Exposure involves the revealing of certain physical and emotional attributes about a person to others. Solove refers to the exposure of so called 'primordial' activities an individual will engage in such as sex, nudity, or defecation.⁴⁹⁰ As we have been socialised to conceal such activities, the exposure of an individual whilst partaking in them can cause embarrassment or humiliation.⁴⁹¹

1.4.2. Increased accessibility

This is where personal information that is already available to the public is made more accessible to a greater number of people. Increased accessibility can set back privacy related interests as it may widen disclosure and increases the likelihood that personal information is misused by others.⁴⁹²

1.4.3. Distortion

Distortion involves the manipulation of the way an individual is perceived and judged by others.⁴⁹³ This involves an inaccurate portrayal of an individual which affects the way he or she is perceived in society.⁴⁹⁴ For example, where information about an individual subject to a criminal process is disseminated to the media, or other non-state actors, there may be a risk that the disclosed information is distorted or sensationalised to the detriment of the individual concerned.

⁴⁸⁸ n 455, 142.

⁴⁸⁹ See E. Goffman, *The Presentation of Self in Everyday Life* (London: Penguin, 1990); n 468; Marmor, n 437 at 10.

⁴⁹⁰ n 455, 147.

⁴⁹¹ One does not have to address the question of whether such a social convention should be upheld to recognise that its existence alone is sufficient basis for Solove's argument that the exposure of such activities can set back an individual's privacy related interests. See generally: N. Elias, *The Civilizing Process* (2nd edn. Massachusetts: Blackwell, 2000).

⁴⁹² n 455, 150.

⁴⁹³ *ibid* 159.

⁴⁹⁴ For Solove's full analysis of these harms, see n 441 at 524-547.

The dissemination of personal information about those subject to the criminal justice process can set back privacy interests in various ways. Many of these harms are related to the reputation of the individual in public and aspects of his or her personal autonomy. They tend to affect the life of the individual in public. Contemplating the ways in which conventions and attitudes towards the private lives of public figures have changed in recent years, Nagel observes that '[t]he public, followed sanctimoniously by the media, feels entitled to know the most intimate details of the life of any public figure.'⁴⁹⁵

According to Nagel, this social environment can create situations where an individual is subjected to unwarranted levels of exposure which can leave the individual tarnished and discredited.⁴⁹⁶ Scrutiny deprives the individual of the opportunity to control how he or she presents his or herself to others, and can undermine the individual's interest in maintaining a public reputation. This is important not only because limitless exposure to the public can be demeaning for the individual, but also because an inability to present oneself to the public in a desired light may limit one's opportunities.⁴⁹⁷

Dissemination of personal information about the individual can open him or her up to uninvited scrutiny, to the judgments of others, and the consequences of these judgments.⁴⁹⁸ These consequences are numerous, potentially impacting the individual's feelings of self-worth, and how he or she defines him or herself. Such judgments may also have implications for the individual's social standing in society. Exposure may harm one's capacity to build relationships with others or advance in a chosen career. Even with the advent of social media, where people are seemingly opening more and more of their private lives to the scrutiny of others, privacy, and

⁴⁹⁵ T. Nagel, 'Concealment and Exposure' (1998) 27 *Philosophy and Public Affairs* 3-30 at 3.

⁴⁹⁶ *ibid* at 3.

⁴⁹⁷ *ibid* at 4.

⁴⁹⁸ See also: n 468, 6; Marmor, n 437.

the control over what personal information is uploaded, and how far it may permissibly be disseminated is of concern to users.⁴⁹⁹

For those subject to the criminal justice process, the dissemination of information about involvement in this process may have particularly negative consequences. Fenton and Rumney discuss how the stigma associated with sex offences is such that those merely suspected of committing such crimes can find themselves in a social world where distinctions between those who are accused and those who are convicted are not necessarily recognised, once information of an official suspicion has been disclosed to the public.⁵⁰⁰ Even where the individual is suspected of committing a more socially tolerable offence, this may colour perceptions of that individual in a range of different contexts. To bring this into focus, consider how the disclosure of an arrest for theft, or another offence related to dishonesty, on a job application, might impact upon a potential employer's perception of a particular candidate. Even though one might consciously make the distinction between suspicion and conviction, it is not difficult to envision how the association between an individual and such offending may subconsciously affect perceptions of the individual.

Most instances of collection, processing, and dissemination of personal information, and invasions of those subject to the criminal justice process will set back privacy interests in some respect. When determining whether or not such setbacks are justifiable as part of the criminal justice process, it is necessary to consider not only the degree to which a measure sets back these interests but also the ends achieved. The remaining sections of this analysis will consider how the ECtHR strikes this balance with regard to the privacy interests of those subject to the criminal justice process, and societal interests in maintaining public safety or the prevention of crime.

⁴⁹⁹ See, for example, D. Boyd, 'Facebook's Privacy Trainwreck: Exposure, invasion, and social convergence' (2008) 14 *The International Journal of Research into Media Technologies* 13-20; B. Debatin, J. Lovejoy, A-K. Horn, and B. Hughes, 'Facebook and Online Privacy: Attitudes, Behaviours and Unintended Consequences' (2009) 15 *Journal of Computer-Mediated Communications* 83-108.

⁵⁰⁰ The authors highlight how those suspected of committing such offences have been harassed or, in extreme circumstances, killed, as a result of their connection to such offences, despite not being convicted: P. Rumney and R. Fenton, 'Rape, Defendant Anonymity and Evidence-Based Policy Making' (2013) 76 *Modern Law Review* 109-133 at 127.

Once again, particular attention will be paid to the principles underpinning the decisions of the ECtHR, and the extent to which these principles guide the on-going development of a regulatory framework for reconciling the competing individual privacy interests, and societal interests in the criminal justice context.

2. To What Extent Does the ECtHR Recognise and Protect the Privacy Interests of Those Subject to a Criminal Process?

This section of the analysis focuses specifically on how the ECtHR (and the now disbanded ECommHR) determines whether or not measures taken as part of a criminal process violate Article 8. Firstly, the focus will be on identifying how the ECtHR establishes an interference with Article 8(1) in the criminal justice context. In Chapter 2 a number of principles for identifying an interference with Article 8 were established through a synthesis of relevant Article 8 case law. The first section of this analysis focuses on how these principles have been applied in cases where an individual is subject to the criminal process. Secondly, the focus will be on determining how the ECtHR assesses whether an interference with Article 8(1) as part of a criminal process is justifiable. In subsequent chapters, the ECtHR framework will be drawn upon when assessing the extent to which the privacy interests of those subject to the criminal process are afforded adequate protection in England and Wales.

2.1. Identifying an 'Interference' with Article 8(1)

This section shows that the purposive and evolutive approach to the interpretation of Article 8 has allowed the court to protect a broad range of privacy interests as part of a criminal process. Attention is drawn to some puzzling quirks of the ECtHR jurisprudence in this area, which, it is submitted, the court should clarify to help

ensure the consistent recognition of the privacy interests of those subject to a criminal process across all Contracting States.

2.1.1. Information Collection and Invasion

The collection of personal information using invasive and targeted surveillance methods will, in most foreseeable circumstances, engage Article 8. Furthermore, where officials of the state compel an individual to provide personal information, this will interfere with the right to respect for private life. For instance, in *X v United Kingdom*,⁵⁰¹ a compulsory public census including questions on sex and marital status was held to interfere with the Article 8(1) rights of the applicant.

In *Friedl v Austria*,⁵⁰² the applicant complained that the taking and storage of his photograph, name, and address whilst he participated in a public demonstration, violated his Article 8 rights. The ECommHR found that, whilst the taking and retention of photographs of the applicant did not interfere with his Article 8 rights, in establishing the applicant's identity and recording his personal data, the Government did occasion an interference.⁵⁰³ Thus, it would seem the Commission held processing to constitute a greater intrusion into the private life than the collection or mere retention of this personal information. Regarding the taking and retention of photographs, the court took into account the fact that the photographs related to an incident occurring in public, that they were taken for the purposes of recording the character of the incident, and that the photographs remained anonymous, meaning the individuals concerned were not identified through any processing.⁵⁰⁴ Whilst this seems to have indicated a reluctance from the Commission to acknowledge a right to privacy in public space for those subject to a criminal process, the Commission did observe that the questioning of the applicant, done for the purpose of establishing his identity, did interfere with Article 8(1). Despite the fact that this information

⁵⁰¹ *X v United Kingdom* (1982) 5 EHRR CD293.

⁵⁰² *Friedl v Austria* (1996) 21 EHRR 83.

⁵⁰³ *ibid* at [52].

⁵⁰⁴ *ibid* at [49].

collection took place in the course of the public demonstration, the Commission confirmed that intrusive questioning and interrogation can interfere with the right to respect to private life.⁵⁰⁵ This stance was reaffirmed in *Adamson v United Kingdom*,⁵⁰⁶ where the requirement for a sex offender to register his personal information with the police at regular intervals for an indefinite period constituted an interference with Article 8(1).⁵⁰⁷ The Commission recognised that interrogations do, in certain circumstances, interfere with the Article 8(1) rights of the individual.⁵⁰⁸

The ECtHR has broadened the scope of 'private life' ruling that Article 8 may be engaged once a 'systematic or permanent' record comes into existence of personal information taken from the public domain.⁵⁰⁹ For example, where a CCTV camera is monitoring public space, an interference may occur where a record of what is monitored is made, or where attempts are made to extrapolate personal information from the images collected.

In *Rotaru v Romania*,⁵¹⁰ the ECtHR held that personal information available in the public domain can fall within the scope of private life where it is collected and stored by public authorities. The information in question was the applicant's historic convictions and political activities, which were collected and retained by the Romanian Intelligence Service. The court ruled that the accuracy of the information in question was a significant factor, as this was disputed by the applicant. The interference was particularly pronounced due to the injurious effect it had on the applicant's reputation.⁵¹¹ Thus, the ECtHR recognised that privacy interests are intricately linked to the reputation of the individual and his or her interest in

⁵⁰⁵ *ibid* at [52].

⁵⁰⁶ *Adamson v United Kingdom* (1999) 28 EHRR CD209 at [212].

⁵⁰⁷ *ibid* at [212]. See also: *Murray v United Kingdom* (1995) 19 EHRR 195 at [84]-[86].

⁵⁰⁸ See n 441 at 500. The ECtHR also recognises that compulsion to provide information through physical coercion such as abusive interrogation also interferes with Article 8(1). See: *Al Nashiri v Poland* (2015) 60 EHRR 16 at [538].

⁵⁰⁹ *PG and JH v United Kingdom* (2008) 46 EHRR 51 at [57].

⁵¹⁰ *Rotaru v Romania* (2000) 8 BHRC 449 at [43].

⁵¹¹ *ibid* at [44].

managing such a reputation.⁵¹² Indeed, to exist in a condition of privacy is important not only for creating a space for an individual in society, but also for allowing the individual to manage and negotiate social relationships in day to day life.⁵¹³ The focus on the accuracy of the information may indicate a recognition from the ECtHR that the spreading of false or possibly false information can be particularly pernicious for the individual. It is one thing to remove an individual from a condition of limited access through spreading information about the individual that is stigmatising or harmful to his or her reputation, the individual is further wronged if such effects are suffered through the spreading of information that is inaccurate or completely false.

The collection and retention of bodily samples will also interfere with Article 8(1). In *PG and JH v United Kingdom*,⁵¹⁴ the ECtHR found that the recording of the applicant's voice, in a police station, for the purpose of identifying the applicant through comparison with other voice data interfered with Article 8(1). However, the court emphasised that this was, at least in part, due to the fact that the police had processed the data collected in this case.⁵¹⁵ In *McVeigh v United Kingdom*,⁵¹⁶ the ECommHR held that the taking of photographs, and DNA and fingerprint data to ascertain the identity an arrestee collectively constituted an interference with the right to respect for private life.⁵¹⁷ However, the court left open questions of whether or not the collection and retention of particular forms of personal information, separately, would constitute an interference with Article 8(1). It is noteworthy that the ECtHR has not established that all personal information, once stored, forms part of an individual's private life for Article 8 purposes.

The *Friedl* case confirmed that not all forms of personal information collection in the context of criminal investigations would fall within the scope of Article 8(1). In ruling

⁵¹² n 495 at 10-12.

⁵¹³ See J. Rachels, 'Why Privacy is Important' (1975) 4 *Philosophy and Public Affairs* 232-333 at 325; See Chapter 1, Part 2.2.

⁵¹⁴ n 509.

⁵¹⁵ *ibid* at [59].

⁵¹⁶ *McVeigh v United Kingdom* (1983) 5 EHRR 71.

⁵¹⁷ In *McVeigh*, the Commission held that the searching, questioning, fingerprinting and photography of arrestees interfered with Article 8(1): *ibid* at [224].

that the measures taken against the applicant fell outside the scope of Article 8(1), the Commission limited the scope of 'private life'. Considering the disinhibiting and discomforting effect that such information collection methods can have on the individual,⁵¹⁸ the notion that the collection of this personal information might not fall within the scope of the 'private life' seems to unduly narrow the scope of Article 8(1). In *Peck v United Kingdom*,⁵¹⁹ the court declined to revisit the issue where a suicidal man was filmed carrying a knife by the police as he occupied public space. In this case, the court focused instead on the dissemination of the collected images to local newspapers.⁵²⁰

The collection of any personal information and use of invasive search or surveillance techniques as part of a criminal process can in principle interfere with Article 8(1), but whether or not it will in fact do so depends on contextual factors, the nature of the information collected, and how the information is subsequently processed. In terms of context, where the individual is compelled to provide personal information to the authorities, and where personal information is collected through intrusive surveillance measures, it will most likely fall within the scope of private life due to the way in which it is collected. This contextual interpretation allows the ECtHR to adopt a flexible approach in assessing the extent to which the measures used to collect information interfere with Article 8(1). The court acknowledges that at least part of the harm arising from the collection of personal information about the individual can derive itself from the manner in which the information is collected. Marmor illustrates this point using the example of intimate photographs on a laptop:

Suppose you have an intimate photo of yourself saved on your laptop. You keep it for yourself, and you really do not want anyone to see it. One day you learn that Janet happened to see your photo. Has she violated your right to privacy? We cannot tell; it all depends on how she got to see it. If Janet hacked into your computer, then she clearly violated your right. If it turns out, however, that you e-mailed her (and perhaps many others) the photo by mistake, then it is not so clear that she violated your right.⁵²¹

⁵¹⁸ n 441 at 493. See also von Hirsch, n 449 at 65.

⁵¹⁹ *Peck v United Kingdom* (2003) 36 EHRR 41 at [59].

⁵²⁰ *ibid* at [60].

⁵²¹ See Marmor, n 437 at 4-5.

This shows that the manner in which the photographs are accessed by another can either aggravate or mitigate the deleterious impact of the privacy setback.⁵²² The contextual factors the ECtHR take into account when assessing whether Article 8 is engaged are logical. Whilst it is appropriate for Article 8 to encompass the privacy interests an individual may hold in public space, or in the absence of any physical interference, where an individual *is* physically invaded by another this reduces the scope for argument over whether a measure engages Article 8.

Regarding the nature of the information collected, two factors have a bearing on whether or not a particular measure interferes with the right to respect for private life: the accuracy of the personal information, and the extent to which it contains information identifiable to the individual.⁵²³ For example, in *S and Marper v United Kingdom*, a distinction is made between the amount of identifiable information which exists in fingerprints, and in cellular DNA samples and DNA profiles.⁵²⁴

The ECtHR recognises that, even where information is not proven (such as allegations, hearsay etc.), this information is still subject to regulation as personal information. The ECtHR recognises a significant potential for setbacks to privacy related interests where inaccurate information about the individual is *disseminated* in a manner that affects the way society perceives an individual. This is because it is the act of disseminating the information that is likely to harm the individual's privacy interests. However, in *Rotaru*, the mere collection and storage of such information interfered with Article 8(1) based on the likelihood that it could be disseminated in the future.⁵²⁵ This approach is flexible enough to account for how the potential future uses of such personal information can set back the individual's reputation and personal autonomy based interests.

⁵²² *ibid* at 4-5.

⁵²³ n 510 at [44].

⁵²⁴ *S and Marper v United Kingdom* (2009) 48 EHRR 50 at [86].

⁵²⁵ n 510 at [46].

The principles for establishing an interference with Article 8(1), where authorities collect personal information from those subject to the criminal justice process, are sufficiently broad and flexible to protect myriad privacy related interests from managing a public reputation to being free from intrusive and inhibiting surveillance measures. This contextual approach is useful. However, it is difficult to discern from the jurisprudence in this area how different factors are assessed against each other to determine whether or not a measure is sufficiently serious to constitute an interference with the individual's Article 8 rights. Whilst the ECommHR and ECtHR did not appear to give due regard to the ways in which certain forms of information collection can set back privacy interests in its earlier rulings, more recent authorities seem to have broadened Article 8(1) to include wider informational privacy interests.

2.1.2. Information Retention and Processing

It has long been established that the mere storing of data relating to the private life of the individual amounts to an interference within the meaning of Article 8(1), and that the subsequent use of such information has no bearing on this interference.⁵²⁶ Thus, once it is established that stored personal information relates to the private life of the individual, its retention will automatically amount to an interference. However, not all personal information involves aspects of the individual's private life. As discussed above, in establishing whether or not information retained by authorities does form part of the individual's private life, the ECtHR will consider the context in which the information is retained, the nature of the records, and the manner in which they are processed.⁵²⁷

The court recognises that where personal information is processed for the purposes of identifying an individual this can set back privacy related interests.⁵²⁸ In *S and*

⁵²⁶ *Leander v Sweden* (1987) 9 EHRR 433 at [48].

⁵²⁷ See n 519 at [59].

⁵²⁸ n 455, 124.

Marper v United Kingdom,⁵²⁹ the court held that the indefinite retention of fingerprint and DNA data of the applicants (two individuals arrested on suspicion of separate offences), after the termination of criminal proceedings against them, fell within the scope of the applicants' private lives. Interestingly, the ECtHR made a distinction between the retention of fingerprint data and DNA data, on the ground that DNA data, such as cellular samples and DNA profiles, have a stronger potential for the future processing of personal information.⁵³⁰ The court found that an individual's concern about how the Government might put retained private information to future use is a legitimate concern.⁵³¹ In addition, the court noted that the highly personal nature of cellular samples was a factor in determining an interference, as these samples contain information about an individual's health and 'genetic code'.⁵³² The ECtHR gave weight to the nature and amount of identifiable information contained within these samples, concluding that the retention *per se* must be regarded as interfering with the applicants' right to respect for private life.⁵³³ This shows that where data contains more personally identifiable information, its retention will interfere with Article 8(1) no matter how minimal the degree to which the data are processed, or the duration of the retention.

Recalling *PG and JH v United Kingdom*,⁵³⁴ the ECtHR held that where personal information collected from the public domain by a public authority is processed in the context of other information for the purposes of identifying an individual, this will interfere with the individual's rights under Article 8(1).⁵³⁵ The fact that a permanent record of the voice samples had been made and the information had been processed through a comparison with other samples led the ECtHR to conclude that the measures interfered with the applicants' rights under Article 8(1).⁵³⁶ Here, the court applied a broad definition of 'private life', superseding the narrower approach

⁵²⁹ n 524.

⁵³⁰ *ibid* at [69]; *MK v France*, App no 19522/09 (ECtHR, 18 April 2013).

⁵³¹ *S and Marper*, *ibid* at [71].

⁵³² *ibid* at [72].

⁵³³ *ibid* at [73].

⁵³⁴ n 509.

⁵³⁵ *ibid* at [59].

⁵³⁶ *ibid*.

adopted in the *Friedl* case. The ECtHR noted that, whilst an individual's reasonable expectation of privacy in public space is not a conclusive factor in determining an interference with Article 8(1),⁵³⁷ private life considerations may arise where a systematic or permanent record comes into existence of such material from the public domain.⁵³⁸ Thus, whilst the ECtHR may take the existence of a reasonable expectation of privacy into account in the context of criminal proceedings, it does not make the applicant's reasonably held expectation of privacy a precondition in determining the scope of Article 8.

In *Perry v United Kingdom*,⁵³⁹ the ECtHR found an interference with Article 8(1) where images of an individual suspected of participating in a series of robberies were obtained from a CCTV camera in a police custody suite and subsequently used in a montage of other CCTV images as part of an identification tape for witnesses.⁵⁴⁰

Whilst the court ruled that CCTV images of an individual do not constitute a part of his or her private life *per se*, the subsequent processing of these images may constitute an interference.⁵⁴¹ This stance is contestable. Though not the primary focus of this thesis, the proliferation of CCTV certainly restricts the extent to which individuals can be said to exist in a condition of limited access in public space, and this can be normatively problematic for a number of reasons, particularly when such images are collected by state authorities.⁵⁴² In the immediate case, the ECtHR noted that the processing which took place *did* interfere with the applicant's right to respect for private life because the footage 'had not been obtained voluntarily or in circumstances where it could be reasonably anticipated that it could be recorded and used for identification purposes.'⁵⁴³ Here, the ECtHR puts emphasis on the reasonable

⁵³⁷ Where, for instance, an individual walks down the street he or she is inevitably visible to others occupying that space, and thus does not necessarily hold a reasonable expectation that others will not look at or speak to him or her: *ibid* at [57].

⁵³⁸ *ibid* at [57].

⁵³⁹ *Perry v United Kingdom* (2004) 39 EHRR 3.

⁵⁴⁰ *ibid* at [19]-[43].

⁵⁴¹ *ibid* at [41].

⁵⁴² See generally von Hirsch, n 449.

⁵⁴³ n 539 at [42].

expectations of the applicant and broader contextual factors such as the fact that he had not waived any interest in maintaining his privacy by, for example, giving the authorities permission to process or disseminate his image.

Generally speaking, where a public authority processes information pertaining to the 'private life' of an individual subject to the criminal justice process, this will interfere with the individual's rights under Article 8(1). Thus the main consideration for the ECtHR in establishing an interference in such cases is whether or not the information in question constitutes a part of the individual's private life. However, the scope of private life is not explicitly defined by the ECtHR. Accordingly, it is difficult to discern that personal information which falls within the scope of Article 8 and that which does not. Notwithstanding this unclear distinction, the court has interpreted Article 8 broadly where a public authority processes personal information pertaining to a criminal investigation.

Recalling *S and Marper*, the ECtHR emphasised that the potential for future processing of personal information was an important consideration when establishing whether the retention of such information interferes with privacy interests. Advances in technology continue to expand the horizons of what processors can do with such information, and continue to outstrip legislative attempts to regulate the use of such information in criminal investigations.⁵⁴⁴ Examples of fairly recent advances in genetic technology in this area include the use of familial testing, where intentional searches for partial matches are made on a DNA database to narrow the search for a potential suspects down to a particular family, or phenotyping, which involves genetic testing to identify an individual's observable physical characteristics or traits.⁵⁴⁵ The ECtHR's approach acknowledges some of the potential pitfalls of secondary use in relation to genetic information. In making a distinction between genetic and fingerprint data, the ECtHR also recognises that different forms of biometric data will

⁵⁴⁴ For a full discussion see D. Wilson, *Genetics, Crime and Justice* (Cheltenham: Edward Elgar, 2015) ch. 3.

⁵⁴⁵ *ibid.*

inevitably hold different amounts of personal information about the individual which can be used for a number of ends, and some of these ends have greater potential to set back privacy interests than others.

Information processing shifts the power relationship between the individual and institutions of the state in favour of the state and, in finding an interference with Article 8(1) in both *Perry* and *PG and JH*, the ECtHR seems to recognise that such a shift can set back the privacy interests of individuals. Processing is not just potentially harmful to the interests of those subject to the criminal justice process because it may lead to a prosecution case being built; it also deprives the individual of an opportunity to influence the circumstances under which his or her personal information may be taken and used by public authorities. It removes the individual from a condition of limited access and, as has been explored, can have a range of adverse normative consequences for the individual and society at large.⁵⁴⁶ As such, the processing of personal information should only be done where the criteria in Article 8(2) are satisfied. The ECtHR has generally recognised the impact that technological advances have had on the extent to which public authorities can set back the privacy interests of those subject to the criminal process. However, it remains unclear why the ECtHR has not established that all such processing will engage Article 8(1).

2.1.3. Information Dissemination

Where personal information is disseminated to a degree that is beyond what might be considered foreseeable, this can constitute a serious interference with Article 8(1).⁵⁴⁷ In *Peck v United Kingdom*,⁵⁴⁸ CCTV images of the applicant, recorded in the aftermath of his suicide attempt, were disclosed to the public and media outlets. In finding an interference, the ECtHR distinguished *Peck* from the cases of *Friedl v*

⁵⁴⁶ See Chapter 3, Part 1.3; Chapter 1, Part 2.2.

⁵⁴⁷ n 519 at [61].

⁵⁴⁸ *ibid.*

*Austria*⁵⁴⁹ and *Lupker v the Netherlands*,⁵⁵⁰ where images of the respective applicants had not been disclosed to the general public, and, consequently, the applicants' images were not used beyond the limited policing purposes for which they had been collected.⁵⁵¹ In *Peck*, the ECtHR noted that the applicant's images were not adequately masked and that this resulted in the disclosure of his personal information far beyond what he could have reasonably anticipated at the time they were collected.⁵⁵²

The ECtHR recognises that dissemination, in such circumstances, can set back the privacy related interests of the individual.⁵⁵³ It is also noteworthy that this was described as a *serious* interference by the court. The distinction the ECtHR makes between *Peck*, and *Friedl* and *Lupker* suggests that the ECtHR recognises that the dissemination of personal information about the individual can set back his or her privacy related interests. However, the reasoning of the court in *Peck*, in terms of the normative arguments for *why* this instance of dissemination set back the applicant's privacy related interests, can be interpreted in a number of ways.

In one sense, the court appears to focus on the personal autonomy of the applicant. The ECtHR noted how the footage of the applicant, and other personal information had been broadcast to hundreds of thousands of people.⁵⁵⁴ Though the court does not speculate on the means by which this might set back the private life of the individual, its focus on the scale of the dissemination of this information may be a recognition that the individual's ability to pursue an autonomous life after this information has been disseminated may be hampered in various ways.

⁵⁴⁹ *Friedl v Austria* (1996) 21 EHRR 83.

⁵⁵⁰ *Lupker v the Netherlands*, App no 18395/91 (ECommHR, 7 December 1992).

⁵⁵¹ n 519 at [61].

⁵⁵² *ibid* at [62].

⁵⁵³ n 455, 142.

⁵⁵⁴ n 519 at [62].

A second interpretation of the ECtHR's finding is that the court finds the impact such dissemination may have on the dignity of the applicant is sufficient to interfere with Article 8(1). Solove argues that 'exposure', which involves the dissemination of true information about an individual in certain primordial physical or emotional states of being,⁵⁵⁵ can cause embarrassment or humiliation because it undermines an individual's dignity. The ECtHR noted that the applicant was 'deeply perturbed and in a state of distress' at the time of the incident.⁵⁵⁶ Thus, the court's finding may have been rooted in the fact that this dissemination threatened to exacerbate the extent to which the recording of this footage exposed the applicant in an undignified or primordial state at the time of his attempted suicide.⁵⁵⁷ Indeed, the ECtHR's finding may have been based on both of these considerations. As we have seen, both are certainly important privacy related interests.

In *MM v United Kingdom*,⁵⁵⁸ the ECtHR considered the extent to which the disclosure of the applicant's past criminal caution interfered with her right to respect for private life. First, the ECtHR determined that although criminal record data is in one sense public information (as it relates to a criminal matter), its disclosure long after the event may fall within the scope of the applicant's private life.⁵⁵⁹ This reaffirmed the court's stance in *PG and JH* that personal information collected from the public domain can become part of the private life of the individual when public authorities attempt to store, process, or disseminate the information.

Second, the ECtHR held that, even though the information was disclosed voluntarily by the applicant, the fact that this was done in response to a demand by her potential employers meant that the applicant had no real choice in the matter.⁵⁶⁰ Accordingly, the measures taken to disseminate the caution information so long after

⁵⁵⁵ n 455, 147.

⁵⁵⁶ n 519 at [62].

⁵⁵⁷ See: n 467 at 8-9; R. Gavison, 'Privacy and the Limits of Law' (1980) 89 *Yale Law Journal* 421-471 at 428.

⁵⁵⁸ *MM v United Kingdom*, App no 24029/07 (ECtHR, 13 November 2012).

⁵⁵⁹ *ibid* at [189].

⁵⁶⁰ *ibid* at [189].

the events leading to the caution constituted an interference with Article 8(1) of the ECHR.

In *Sciacca v Italy*,⁵⁶¹ the applicant, a school teacher, was investigated as part of a criminal investigation in relation to fraud and extortion offences. As part of this process, the police disseminated an image of the applicant, taken as part of the investigation for identification purposes, to local newspapers.⁵⁶² The ECtHR determined that there was an interference with Article 8(1) and that the applicant's status as an 'ordinary person' (and not a public figure or politician) enlarged the zone of interaction which may fall within the scope of private life.⁵⁶³ Notably, the court also held that the fact that the applicant was the subject of a criminal process did not curtail the scope of private life in this regard. Thus, the ECtHR does not make a distinction between the scope of the private life of those subject to criminal proceedings before conviction and those who are not. If a measure interferes with Article 8(1), it matters not that this interference was occasioned as part of a criminal process. This point, it seems, is relevant only in considering the extent to which an interfering measure is justified in accordance with Article 8(2).

The aforementioned cases may have implications for the circumstances under which police authorities can disseminate images of those subject to the criminal justice process in order to publicise the effectiveness of particular policing strategies or crime prevention technologies. Furthermore, the rulings may have implications for the regulation of new police technologies in Contracting States, such as the use of body worn video cameras, and in particular, for the storage and dissemination of any personal information obtained from such cameras, which stands in need of justification.

⁵⁶¹ *Sciacca v Italy* (2006) 43 EHRR 20.

⁵⁶² *ibid* at [7]-[12].

⁵⁶³ *ibid* at [29].

2.1.4. Article 8(1) and the Criminal Justice Process

The ECtHR has recognised that, where an individual is subject to the criminal process, his or her privacy interests can be set back in numerous discrete ways. This vindicates the court's purposive and evolutive approach to the interpretation of Article 8, which has allowed it to keep pace with technological advancements that pose particularly pernicious threats to the privacy related interests of those subject to the criminal justice process. It is commendable that the ECtHR makes no distinction between the privacy interests of those subject to the criminal process and those who are not in determining the applicability of Article 8. That privacy interests are set back as part of a criminal process should have no bearing on whether Article 8 is engaged, and becomes relevant in assessing the extent to which an interference is justifiable under Article 8(2). However, the lack of a definitive threshold test for the applicability of Article 8, which was discussed in Chapter 2,⁵⁶⁴ makes it difficult to predict whether or not the use of a particular measure will fall within the scope of Article 8(1). For instance, it is not clear whether and under what circumstances the use of public CCTV cameras to identify particular individuals, as part of a criminal process, will engage Article 8(1). Moreover, the ECtHR has not made the political value of privacy central when discussing whether an interfering measure engages Article 8 in the context of a criminal justice process. As Hughes suggests, 'to adequately deal with surveillance one needs to consider the broader impact that such measures can have upon society and the cumulative effect of seemingly justifiable limited erosions of privacy.'⁵⁶⁵ The ECtHR's analysis of the detrimental impact that coercive policing measures can have on democratic society is limited in this regard.

Notwithstanding these issues, the ECtHR has developed some guiding principles for establishing an interference with Article 8(1). Where personally identifiable

⁵⁶⁴ Chapter 2, Part 1.5.

⁵⁶⁵ K. Hughes, 'The Social Value of Privacy, the Value of Privacy to Society and Human Rights Discourse' in B. Röessler and D. Mokrosinska (eds.), *Social Dimensions of Privacy* (Cambridge: Cambridge University Press, 2015) 225-243 at 236.

information is collected using physically invasive techniques, is processed, or is disseminated by a public authority in the context of criminal investigation this will, in most foreseeable circumstances engage Article 8. However, if such personal information is collected as the police happen to be photographing a public event, or passively monitoring a public place, this will be unlikely to engage Article 8, unless the information is subsequently processed or disseminated.

2.2. Justifying Interferences with Article 8(1)

Many of the measures applied as part of a criminal process will involve the collection, processing, or dissemination of an individual's personal information, or invasion. The finding that a measure interferes with Article 8(1) does not automatically mean that there should be legal redress for the use of this measure. If an individual is actively planning a terrorist attack, for instance, it may be perfectly justifiable in the effort to protect the lives of others for state authorities to set back his or her interest in maintaining a private life. This section considers the specific issues at stake when the court assesses the extent to which an interference with Article 8(1) is justified in those cases where an individual is subject to the criminal process.

2.2.1. *'In accordance with the law'*

When determining whether an interference pertaining to the personal information of those subject to the criminal justice process is 'in accordance with the law' the ECtHR has developed similar principles for establishing a violation, irrespective of whether the interfering measure involves invasion, or the collection, processing or dissemination of personal information. As discussed in Chapter 2, the general principles used by the ECtHR to determine whether an interference is 'in accordance with the law' are: (i) that the interfering measure should have a basis in domestic law; and (ii) that it meets the quality of law requirement. This quality of law requirement puts an obligation on Contracting States to ensure that the law is foreseeable (i.e. that the individual concerned should be able to foresee the law's

consequences for him), and that the legal framework is compatible with the rule of law.⁵⁶⁶ For domestic law to meet these requirements, it must afford the individual adequate legal protection against arbitrariness and must indicate, with clarity, the scope of the discretion conferred upon competent authorities in the manner of its exercise.⁵⁶⁷

The domestic legal basis requirement also puts an obligation on public authorities to ensure that the measures under examination comply with the domestic law providing for the interference. In the context of criminal investigations, this point was highlighted in *Perry v United Kingdom*,⁵⁶⁸ where the court considered the taking and use of video footage for identification purposes to have sufficient basis in domestic law, but still held the activities of the police, in undertaking such measures, were not 'in accordance with the law' as they failed to comply with the procedures contained in the domestic legal framework in a number of ways.⁵⁶⁹

Prior to the introduction of the Regulation of Investigatory Powers Act 2000, the legal framework in England and Wales regulating the use of covert surveillance measures was successfully challenged on a number of occasions for failing to meet the quality of law requirement of foreseeability.⁵⁷⁰ At the crux of this series of challenges to the domestic regime was a conflict between the aims of such surveillance (e.g. to monitor the activities of those suspected of being involved in criminal activities), and the requirement that the laws regulating the collection of such personal information are foreseeable and accessible to those citizens. If an individual can foresee exactly when he or she is being subject to such surveillance, this can undermine the ability of public authorities to prevent and detect crime as the suspect can simply modify his or

⁵⁶⁶ See, for example, *Lambert v France* (2000) 30 EHRR 346 at [23].

⁵⁶⁷ See *Malone v United Kingdom* (1984) 7 E.H.R.R. 14 at [66]-[68]; n 510 at [55].

⁵⁶⁸ n 539.

⁵⁶⁹ *ibid* at [47].

⁵⁷⁰ See *Malone*, n 567 at [69]; *Halford v United Kingdom* (1997) 24 EHRR 523 at [61]-[63]; *Khan v United Kingdom* (2001) 31 EHRR 45 at [27].

her behaviour at times when he or she becomes aware of the fact that surveillance measures are being undertaken.

To address this tension, the ECtHR has developed through its jurisprudence the following minimum safeguards, which should be set out in the legal framework to ensure that covert surveillance operations are 'in accordance with the law': (i) the nature, scope, and duration of the possible measures; (ii) the grounds required for ordering them; (iii) the authorities competent to permit, carry out, and supervise them; and (iv) the kind of remedy provided by national law.⁵⁷¹ All of these safeguards are in place to ensure that covert surveillance methods, which inherently interfere with the right to respect for private life, cannot be used arbitrarily by domestic authorities. The need for detailed and clear rules governing the scope and application of an interfering measure used against those subject to the criminal justice process extends beyond the use of measures which gather personal information through covert surveillance. In *S and Marper v United Kingdom*,⁵⁷² referring to the laws governing the collection and retention of DNA and fingerprint data, the ECtHR reiterated this point:

[i]t is as essential, in this context, as in telephone tapping, secret surveillance and covert intelligence gathering, to have clear, detailed rules governing the scope and application of measures, as well as minimum safeguards concerning, *inter alia*, duration, storage, usage, access of third parties, procedures for preserving the integrity and confidentiality of data and procedures for its destruction, thus providing sufficient guarantees against the risk of abuse and arbitrariness.⁵⁷³

Thus, in the case of DNA retention and processing, there remains a need to have clear and detailed rules governing the scope and application of the measures. However, as the collection and processing of personal information in the *S and Marper* case differs - in terms of the content of the information collected, and the ways in which it will be retained and processed - from that in the covert surveillance cases, the types of minimum safeguard that need to be in place are also different.

⁵⁷¹ See *Uzun v Germany* (2011) 53 EHRR 24 at [61]; *Liberty v United Kingdom* (2009) 48 EHRR 1 at [62]; *Shimovolos v Russia* (2014) 58 EHRR 26 at [69].

⁵⁷² n 524.

⁵⁷³ *ibid* at [99].

Whether the interfering measure involves an act of invasion, information collection, processing, or dissemination, the requirement that appropriate safeguards are in place to prevent arbitrariness remains.

In the covert surveillance cases, the minimum safeguards (or lack thereof) were analysed as part of the legality test, and, when these were considered insufficient, this led to a violation of Article 8 without consideration of whether the interfering measure was 'necessary in a democratic society'.⁵⁷⁴ In *S and Marper* the ECtHR took a different approach. Noting that the questions relating to adequate safeguarding were closely related to the issue of whether the interference was 'necessary in a democratic society', the ECtHR did not determine whether the domestic legislation in the immediate case was 'in accordance with the law' and instead turned its attention to the necessity requirement, combining the two limbs of Article 8(2) in its judgment.⁵⁷⁵

According to Murphy, this combined approach in cases concerning the exercise of police powers against targeted individuals may indicate a growing recognition by the court of the overlap between legality and necessity tests in this particular context:

The combined approach recognises that issues are sometimes better addressed in tandem and considered in context, as opposed to being arbitrarily segregated. The adoption of the combined approach could represent the Court's attempt to correct the artificiality of the traditional separation of the questions.⁵⁷⁶

This argument seems to have some traction. In *S and Marper*, as part of the necessity analysis, the ECtHR seems to suggest that the domestic legal framework permitting the interfering measures did not meet the requisite level of minimum

⁵⁷⁴ A trend of the ECtHR in surveillance cases pre-RIPA would be to conclude, in light of the finding that an interference was not 'in accordance with the law' generally, that: '[t]he Court is not required to determine whether the interference was 'necessary in a democratic society' for one of the aims enumerated in paragraph 2 of Article 8.' *Khan*, n 570 at [28].

⁵⁷⁵ n 524 at [99].

⁵⁷⁶ M.H. Murphy, 'A Shift in the Approach of the European Court of Human Rights in Surveillance Cases: A Rejuvenation of Necessity?' (2014) 5 *European Human Rights Law Review* 507-518 at 512.

safeguarding that would need to be in place for the interference to be considered 'in accordance with the law'. The ECtHR stated that:

The retention is not time limited; the material is retained indefinitely whatever the nature or seriousness of the offence of which the person was suspected. Moreover, there exist only limited possibilities for an acquitted individual to have the data removed from the nationwide database or the materials destroyed; in particular, there is no provision for independent review of the justification for the retention according to defined criteria, including such factors as the seriousness of the offence, previous arrests, the strength of the suspicion against the person and any other special circumstances.⁵⁷⁷

The court indicated that the rules governing the interfering measures did not meet its own standards pertaining to the foreseeability requirement. For instance, the court observed that there were no minimum safeguards regarding the duration of storage and use of the genetic material, and that the domestic legislation was limited in terms of the guarantees it offered against the risk of abuse and arbitrariness. From this, it seems clear that the ECtHR could have found that the measures were not 'in accordance with the law' without addressing questions of necessity. In proceeding as it did, the court considered a number of other factors in its assessment of necessity, which might otherwise have been overlooked. As Murphy highlights, a combined approach may give the ECtHR the opportunity to elaborate more on the principles underlying the 'necessary in a democratic society' stage of the Article 8 analysis.

The ECtHR's seeming departure from such a formalistic analysis of the law as that employed in the surveillance cases - which, it might be argued, obviates the need to consider the necessity of a measure - allows for a richer discussion of the way in which privacy interests and countervailing societal interests can and should be reconciled in such cases. Murphy warns that if this combination approach is applied incautiously it could diminish the protection of private life by blurring the function of the separate requirements in Article 8(2).⁵⁷⁸ However, the ECtHR's decision in *MM v*

⁵⁷⁷ n 524 at [119].

⁵⁷⁸ n 576 at 512.

United Kingdom casts doubt on whether the *S and Marper* judgment was truly indicative of a sea change in the way these two limbs of Article 8(2) are analysed.⁵⁷⁹

In *MM*, the court found that the interference with the applicant's right to respect for private life was not 'in accordance with the law' and this fact, according to the court, overshadowed the need to determine whether the interference was 'necessary in a democratic society' for one of the legitimate aims detailed in Article 8(2).⁵⁸⁰ However, as part of its analysis of the formal aspects of the legal regime in Northern Ireland, the ECtHR did consider certain factors which might more appropriately form part of an analysis of the necessity of the interfering measures. For instance, the ECtHR drew upon statistical information that: '[i]n 2008/2009 almost 275,000 requests were made for ECRCs [Enhanced Criminal Record Certificates] alone.'⁵⁸¹ The court also noted that: '[i]n the majority of cases, an adverse criminal record will represent something of a "killer blow" to the hopes of a person who aspires to any post which falls within the scope of disclosure requirements.'⁵⁸² Thus it seems that, in assessing the legal framework against the backdrop of the serious implications the interference has for the autonomy of the individual, and statistical information regarding the broad reach of the measures, the ECtHR is open to using factors relevant to the proportionality of the measures in order to assess the extent to which the legal framework meets the quality of law requirement. This might lend credibility to the suggestion that the ECtHR is moving towards a combined approach in cases pertaining to those subject to the criminal justice process, notwithstanding the ostensible concentration on formal legality in *MM*.

If the ECtHR is indeed moving towards a combined approach, there could be a range of implications for the protection of the privacy related interests of those subject to the criminal justice process at the domestic level. In the surveillance cases of the

⁵⁷⁹ n 558.

⁵⁸⁰ *ibid* at [207].

⁵⁸¹ *ibid* at [200].

⁵⁸² *ibid* at [200].

1980s and 1990s, the ECtHR's judgments avoided politically contentious issues at the heart of the debate between the need to prevent crime and the right to respect for private life.⁵⁸³ De Hert and Gutwirth suggest that the necessity test serves an important function in dealing with political questions to do with how the balance between the societal aim to prevent and detect crime, and privacy interests should be struck.⁵⁸⁴

Thus, whilst the finding that a particular measure is not 'in accordance with the law' can lead to changes in the precision, accessibility, and transparency of laws governing interferences in this area, there is a danger that, in neglecting to pay detailed attention to the necessity of the interfering measures, the ECtHR may have missed valuable opportunities to offer useful guidance and criteria to Contracting States for assessing the extent to which the collection, processing, and dissemination of personal information is *justified*. This is no truer than in the murky area of criminal investigations, where individuals subject to these coercive measures are legally presumed innocent. The introduction of a combination approach, therefore, might have the impact of encouraging domestic legislators to carry out more systematic assessments of whether or not the domestic law regulating the use of privacy interfering measures against those subject to the criminal justice process is proportionate to its aim. However, in combining the two criteria and giving more detailed assessments of the proportionality of interfering measures, the ECtHR may be fuelling the argument that it is outgrowing its natural limits and straying into judicial activism, overstepping the margin of appreciation it affords to domestic lawmakers to make such assessments, and undermining the sovereignty of Contracting States.⁵⁸⁵

2.2.2. 'In pursuit of a legitimate aim'

⁵⁸³ n 576 at 516.

⁵⁸⁴ P. De Hert and S. Gutwirth, 'Data Protection in the Case Law of Strasbourg and Luxembourg: Constitutionalisation in Action' in S. Gutwirth, Y. Poullet, P. De Hert, J. Nouwt, and C. De Terwagne (eds.), *Reinventing Data Protection?* (Dordrecht: Springer Science, 2009) 3-44 at 21-22.

⁵⁸⁵ Chapter 2, Part 1.1.

Where the police use interfering measures against those subject to the criminal justice process as part of their core functions in detecting, preventing, or managing crime, it is usually uncontroversial that this serves both the aim of 'public safety' and 'the prevention of disorder and crime' as stated in Article 8(2). There is no reason to engage in a critical analysis of this approach.⁵⁸⁶

2.2.3. 'Necessary in a democratic society'

In Chapter 2 we established that the ECtHR uses two criteria in assessing whether or not an interfering measure is 'necessary in a democratic society'. The first is that the measure responds to a 'pressing social need', and the second is that the measure is 'proportionate to the legitimate aim pursued'.⁵⁸⁷ The requirement that a measure is necessary implies a careful balancing of the interests and values at stake regarding the use of a particular measure.⁵⁸⁸ This section considers how these principles have been applied where an individual is subject to the criminal justice process.

In *Funke v France*,⁵⁸⁹ where the applicant argued that French authorities violated his Article 6 and Article 8 rights by compelling him to produce self-incriminating documents as part of a tax evasion investigation, the ECtHR reaffirmed that in cases concerning the disclosure of personal data in a criminal process a margin of appreciation should be left to competent national authorities to strike a fair balance between the interests at stake.⁵⁹⁰ However, this margin of appreciation goes hand in hand with the supervision of the Strasbourg Court. In *McVeigh v United Kingdom*,⁵⁹¹ where the applicants complained that the retention of their fingerprints and photographs, taken as part of a criminal investigation, violated their Article 8 rights, the Commission took the following factors into account when assessing the necessity and proportionality of the measures:

⁵⁸⁶ S. Trechsel, *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press, 2005) 550.

⁵⁸⁷ *Ploski v Poland*, App No 26761/95 (ECtHR, 12 November 2002) at [39].

⁵⁸⁸ P. Popelier and C. Van De Heyning, 'Procedural Rationality: Giving Teeth to the Proportionality Analysis' (2013) 9 *European Constitutional Law Review* 230-262 at 252.

⁵⁸⁹ *Funke v France* (1993) 16 EHRR 297.

⁵⁹⁰ *ibid* at [55].

⁵⁹¹ *McVeigh v United Kingdom* (1983) 5 EHRR 71.

- (i) No criminal proceedings had been brought against the applicants and no reasonable suspicion had been established against them;
- (ii) The records had been kept separate from the normal system of criminal records, and were retained solely for the purpose of preventing terrorism;
- (iii) The critical importance that the retention of such information can have in the detection of those responsible for terrorist offences; and
- (iv) The serious threat posed by organised terrorism in the United Kingdom at the time.⁵⁹²

Considering the above factors, the ECommHR concluded that the measures were necessary in the interests of public safety and for the prevention of crime. In this relatively early case in the jurisprudence of the Commission, where the informational privacy interests of those subject to the criminal justice process were under consideration, the Commission took into account various factors including the limited use of the information by the police, and the importance of retaining such information. Despite an acknowledgment from the ECommHR that the information was retained when the applicants were no longer suspected of committing any offences, the ECommHR found no violation, giving weight to the threat posed by terrorism and their limited potential uses. In this case the four-part proportionality test, discussed in Chapter 2,⁵⁹³ was implicitly drawn upon to determine whether a violation of Article 8 had in fact occurred. Of the four factors listed above, we can see that the first suggests that there may be no rational connection between the aim of preventing crime and the interference with the Article 8 rights of the applicant; the second factor seems to show that the Commission recognises that the means are minimally intrusive; and the final two factors show that the Commission assessed the extent to which legislative objective was sufficiently important to justify an interference.

⁵⁹² *ibid* at [230].

⁵⁹³ Chapter 2, Part 2.3.

However, in subsequent cases, the Strasbourg institutions were less exacting in assessing the extent to which it approached balancing Article 8 rights against conflicting goods in the criminal justice context. In *Friedl v Austria*,⁵⁹⁴ the Commission held that the collection and retention of photographs of the applicant was 'necessary in a democratic society', as the 'relatively slight' interference into the applicant's private life was justified in the interests of the prevention and detection of crime. This conclusion was reached notwithstanding the Commission's acknowledgment that no criminal proceedings were brought as a result of the collection of the photographs, there existed no reasonable suspicion against the applicant in relation to any specific offence, and domestic authorities never pursued any form of prosecution against the applicant after identifying him, in view of 'the trivial nature of the offences' in question.⁵⁹⁵ The Commission noted that a broad operational justification for such retention practices existed, and characterised the interference as 'relatively slight'.⁵⁹⁶ In doing so, the Commission did not delve into a detailed constitutional check on the necessity of the measures, taking account of whether they responded to a pressing social need, and considering whether the measures were proportionate to the legitimate aim pursued.⁵⁹⁷ It reasoned that they plainly did so based on the minimal extent of the interference.

This, and other rulings of the ECommHR and ECtHR around this time,⁵⁹⁸ provoked criticisms that insufficient weight was afforded to the informational privacy interests of individuals in its proportionality assessments, with one commentator suggesting: 'The Strasbourg institutions seem to find more and more difficulty in recognising the fundamental nature of privacy and the plain fact that it does not require blood (but

⁵⁹⁴ n 549.

⁵⁹⁵ *ibid* at [66].

⁵⁹⁶ *ibid* at [66].

⁵⁹⁷ See for example, *Dudgeon v United Kingdom* (1981) 4 EHRR 149 at [61]; *Rees v United Kingdom* (1986) 9 EHRR 56.

⁵⁹⁸ See *Murray*, n 507; *Herbecq v Belgium*, App nos 32200/96 and 32201/96 (ECtHR, 14 January 1998). See also P. De Hert and S. Gutwirth, *Making sense of privacy and data protection* (IPTS-Technical Report Series, 2003) 111-162.

technology) to violate it.⁵⁹⁹ Although the Commission and Court adopted a fairly broad scope for the right to respect for private life in cases at this time, it also made a distinction between personal information that merits protection, and that which does not, and this seemingly had an impact upon the level of scrutiny applied in subsequent assessments of the necessity of the interfering measures considered.⁶⁰⁰

Recalling *Z v Finland*,⁶⁰¹ the ECtHR considered whether the seizure of the applicant's medical records, their inclusion in her husband's investigation file (which was created as part of a criminal process against him), and the subsequent publication of the applicant's identity and medical condition in the domestic Court of Appeal's judgment violated her rights under Article 8. The ECtHR noted at the outset that the protection of such sensitive personal data was of 'fundamental importance' to a person's enjoyment of his or her right to respect for private life.⁶⁰²

Assessing whether the retention and disclosure of the medical information was justified in this case, the court took the position that the infringement caused to the individual's privacy interests through the application of the measures was especially serious due to the stigmatising effect it may have on the applicant, and the effect the breach of patient confidentiality could have on public confidence in the health service.⁶⁰³ In assessing whether the measures were rationally connected to the ends sought, the court determined that the interference was in the 'weighty' public interest of prosecuting the applicant's husband for attempted manslaughter.⁶⁰⁴ The court also examined the domestic law to ensure that there were 'adequate and effective safeguards' against abuse in the collection and retention of the information.⁶⁰⁵ This may have been an early indication of the court's inclination to consider the adequacy

⁵⁹⁹ P. De Hert, 'Balancing Security and Liberty Within the European Human Rights Framework: A Critical Reading of the Court's Case Law in Light of Surveillance and Criminal Law Enforcement Strategies After 9/11' (2005) 1 *Utrecht Law Review* 68-96 at 89.

⁶⁰⁰ *ibid* at 77.

⁶⁰¹ *Z v Finland* (1998) 25 EHRR 371.

⁶⁰² *ibid* at [95].

⁶⁰³ *ibid* at [96]-[97].

⁶⁰⁴ *ibid* at [106].

⁶⁰⁵ *ibid* at [107].

of the safeguards in place as part of a combined analysis of the different clauses in Article 8(2). Taking the above into consideration, the court found that the collection of this information and its inclusion in the investigation file were not in violation of Article 8.

The question of the disclosure of this information in the Court of Appeal's judgment was considered separately. The ECtHR ruled that publishing the applicant's identity and health condition in the Court of Appeal judgment violated her Article 8 rights because '[t]he Court of Appeal had the discretion, firstly, to omit mentioning any names in the judgment permitting the identification of the applicant and, secondly, to keep the full reasoning confidential for a certain period and instead publish an abridged version of the reasoning, the operative part and an indication of the law which it had applied.'⁶⁰⁶ In other words, the fact that less intrusive measures could have been taken, but were not, had a decisive bearing on the court's proportionality assessment.

By way of this intensive proportionality assessment, *Z v Finland* has been said to enhance the effectiveness of Article 8.⁶⁰⁷ This proportionality assessment does not just direct attention to how the relevant interests have been weighted against each other; it also directs attention to the relative weights which are attached to the competing interests under domestic law.⁶⁰⁸ This means that, for the interfering measure to be considered proportionate to the legitimate aim pursued, it must not only fulfil an interest that takes precedence over the individual's enjoyment of his Article 8(1) rights. The domestic court must also give sufficient regard to the protection of the individual's Article 8(1) rights in pursuing those interests.

⁶⁰⁶ *ibid* at [113].

⁶⁰⁷ Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Oxford: Hart Publishing, 2001) 75.

⁶⁰⁸ This, according to Feldman, is one area where the principle of proportionality departs from the *Wednesbury* test employed by judges in England and Wales. See D. Feldman, 'Proportionality and the Human Rights Act 1998' in E. Ellis (ed.) *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart Publishing, 1999) 117-144 at 128.

In *Peck v United Kingdom*,⁶⁰⁹ the ECtHR noted the seriousness of the interference with the applicant's right to respect for private life when public authorities disclosed CCTV images of him in a state of distress to media outlets. It also noted that CCTV systems play an important role in the prevention and detection of crime.⁶¹⁰ In assessing the proportionality of the disclosure, the ECtHR emphasised the fact that the local Council could have achieved its crime prevention objectives through less onerous means:

[t]he Court notes that the Council had other options available to it to allow it to achieve the same objectives. In the first place, it could have identified the applicant through enquiries with the police and thereby obtained his consent prior to disclosure. Alternatively, the Council could have masked the relevant images itself.⁶¹¹

Although the court accepted the Government's argument, that the disclosure of the footage pursued a legitimate aim, sufficient safeguards to ensure its compatibility with Article 8 did not accompany the disclosure, which was to a degree far exceeding what the applicant could have foreseen at the material time. This case marked a turning point in the jurisprudence of the ECtHR for cases concerning the informational privacy of those subject to the criminal justice process. The court considered the proportionality of the measure, incorporating the minimally intrusive means test, in forming the conclusion that the measures had indeed violated the applicant's Article 8 rights. Using this rigorous approach to balancing, the court assessed the necessity of the measure in question without engaging in debates concerning the degree of privacy interference associated with a particular measure.

Returning to *S and Marper v United Kingdom*,⁶¹² the court provided perhaps its clearest example of the application of a necessity test in the criminal justice context when finding that the 'blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples, and DNA profiles of persons suspected but not convicted of offences' constituted a disproportionate interference with the Article 8

⁶⁰⁹ n 519.

⁶¹⁰ *ibid* at [79].

⁶¹¹ *ibid* at [80].

⁶¹² n 524.

rights of the applicants.⁶¹³ The ECtHR began its examination of the necessity of the measures by considering how the laws regulating the collection and retention of DNA samples and profiles and fingerprint data from arrestees compared to other

Contracting States:

In the great majority of the contracting states with functioning DNA databases, samples and DNA profiles derived from those samples are required to be removed or destroyed either immediately or within a certain limited time after acquittal or discharge. A restricted number of exceptions to this principle are allowed by some contracting states.⁶¹⁴

The court held the position of Scotland, as part of the United Kingdom, to be of particular significance, as this legal jurisdiction had much more restrictive policies on the collection and retention of DNA data from non-convicted individuals than the rest of the UK at this time.⁶¹⁵ Here, the court identified the system of indefinite retention in place in England and Wales as an outlier amongst the Contracting States. This deviation from the general consensus amongst Contracting States narrowed the margin of appreciation afforded to the state in this area, and the court put emphasis on this point in its assessment of the necessity of the measures.⁶¹⁶ This fact seems to have underpinned the court's firm rejection of the Government's arguments regarding the proportionality of the measures.

In assessing proportionality, the ECtHR took into account the statistical evidence which, according to the Government, made the impugned measures indispensable in the fight against crime.⁶¹⁷ This led the court to conclude that the retention practices had contributed to the detection of crime to some degree. However, the court was also quick to highlight the limitations of this information, and the fact that this information does not establish that the successful identification and prosecution of offenders could not have been achieved without the permanent and indiscriminate

⁶¹³ *ibid* at [125].

⁶¹⁴ *ibid* at [108].

⁶¹⁵ *ibid* at [109].

⁶¹⁶ Also see *Dickson v United Kingdom* (2007) 44 EHRR 41 at [78].

⁶¹⁷ According to the Government: 'As at September 30, 2005, the National DNA database held 181,000 profiles from individuals who would have been entitled to have those profiles destroyed before the 2001 amendments. 8,251 of those were subsequently linked with crime-scene stains which involved 13,079 offences, including 109 murders, 55 attempted murders, 116 rapes, 67 sexual offences, 105 aggravated burglaries and 126 offences of the supply of controlled drugs.' See n 524 at [92].

retention policies in place.⁶¹⁸ In taking this information into account, the ECtHR went beyond an analysis of the quality of the laws in question and focused on the weight of the different arguments concerning the effectiveness of the legal regime in practice. The lack of a strong evidence base showing that the retention of such information - from individuals who had not been convicted - was necessary to detect and prevent crime swayed the court towards finding a violation of Article 8.

Furthermore, the ECtHR took account of the indiscriminate nature of the power of retention in England and Wales, noting that the material may be retained irrespective of the gravity of the offence in question or the age of the offender, and that the retention is not time limited.⁶¹⁹ This, according to the court, could be especially harmful to minors, and led to an over-representation of ethnic minorities on the database.⁶²⁰ The court also noted the risk of stigmatisation stemming from the fact that the applicants were subject to the same treatment as convicted persons. Finally, the court took account of the fact that the retention policies of England and Wales differentiated the personal information of those subject to the criminal process from those who had voluntarily given DNA samples. The latter group could request that their samples be destroyed under s. 64(3) of the Police and Criminal Evidence Act 1984.⁶²¹

The conclusion of this assessment was a strongly worded judgment that the measures were not 'necessary in a democratic society' and had violated the applicants' Article 8 rights. The in-depth proportionality review surveyed a range of different substantive effects of the retention practices in England and Wales, both on the capability of the police to prevent and detect crime, and on the countervailing privacy related interests of individuals. This is a welcome development for cases

⁶¹⁸ The court emphasises that the statistical information provided by the Government does not reveal the extent to which the supposed 'links' between crime scene stains and profiles resulted in convictions, or the number of convictions that were contingent on the retention of the samples and profiles of non-convicted individuals: *ibid* at [116].

⁶¹⁹ *ibid* at [119].

⁶²⁰ *ibid* at [124].

⁶²¹ *ibid* at [123].

pertaining to the privacy of those subject to the criminal justice process. Such an approach moves the court beyond a 'safe' analysis of the formalistic qualities of legal rules towards a full evaluation of the substantive effects of these rules as they are applied in their social context. Hints that the court may be moving towards a so-called combined approach, embracing a fuller analysis of the substantive effects of an interfering measure, and how these should be balanced against competing interests, can be seen in subsequent cases.⁶²² However, it is noteworthy that in subsequent DNA cases, where the applicants have been convicted of criminal offences and the retention period is not indefinite, the ECtHR has granted a larger margin of appreciation to domestic lawmakers to assess the extent to which retention tariffs are proportionate.⁶²³ This shows that where a public interest justification for an interference is stronger and the Contracting State is not an outlier in the use of an interfering measure, the ECtHR is willing to act deferentially, affording a wider margin of appreciation to domestic legislators.

Conclusions

This chapter has shown that the ECHR framework broadly recognises that measures used against those subject to the criminal justice process can set back their privacy related interests in numerous ways. Article 8(1) has sufficient scope to cover a range of surveillance measures, interrogation techniques, and other forms of personal information collection, processing, and dissemination. The broadening of the scope of Article 8(1) in this area is a welcome development. In consistently determining that the mere storage of information pertaining to an individual's private life interferes with Article 8(1), the court ensures that the retention of such information should only occur if the criteria in Article 8(2) are met by the Contracting State. Whilst this seemingly strengthens the protection offered by Article 8, the ECtHR then seems to

⁶²² See n 558 at [200]; *Brunet v France*, App no 21010/10 (ECtHR, 18 September 2014) at [39]-[41]; *Peruzzo v Germany* (2013) 57 EHRR SE 17 at [39].

⁶²³ See, for example, *W v Netherlands*, App no 20698/08 (ECtHR, 20 January 2009); *Peruzzo, ibid* at [46]-[49].

give with one hand and take with the other, as not all personal information falls within the scope of 'private life'. From here, the manner in which personal information is processed becomes just one factor in determining whether or not the information falls within the scope of Article 8(1). However, in *Perry*, the court indicated that where collected personal information is processed by a public authority, this will usually result in an interference with Article 8(1), even where the information collected – in this case, video footage of the applicant in public space – does not *per se* fall within the scope of 'private life'. In short, whilst the ECtHR, to its detriment, has not fully explored how privacy interests can be set back through the collection of information through surveillance methods that do not involve any subsequent processing or use, the court has demonstrated that it recognises many of the complex ways privacy interests can be set back as part of a criminal process.

Considering the multiplicity of ways in which physical invasion, and the collection, processing, and dissemination of personal information by a public authority can set back individuals' privacy interests in the criminal justice context, it is not clear why the ECtHR has created a distinction between personal information that falls under the protection of Article 8, and that which does not. Whilst, in recent years, the broadening of the scope of Article 8(1) has prevented this distinction from being too narrow to protect the privacy interests of those subject to the criminal justice process in cases brought before the court, it remains to be seen what impact this distinction may have on the police use of newer technologies to collect, process, and disseminate the personal information of those subject to the criminal justice process.

The ECtHR's (increasing) recognition of the various ways in which the collection, processing, and dissemination of personal information can set back privacy related interests enhances the scope of Article 8, which should in turn provide for a higher level of protection for these interests for those subject to the criminal justice process. However, for this broader scope to have real bite it is important that the criteria

under which a Contracting State can interfere with Article 8 are theoretically cogent and applied with sufficient rigour. As part of the 'in accordance with the law' requirement, the court has developed a number of principles for determining whether there exists a legal basis for an interfering measure. The court assesses not only the extent to which a legal basis exists, but also the quality of the legal basis in terms of its foreseeability and compatibility with the rule of law. Consequently, the court has taken a notably strong stance against the police use of surveillance measures over the last quarter century, which has led to the development of a fairly comprehensive legal framework regulating such surveillance measures in England and Wales. However, in these surveillance cases, the court tended to find a violation of Article 8 through a formal analysis of the domestic legal framework in place, without delving into the necessity of the interfering measures. This, according to a number of commentators, led to a situation where the court did not fulfil its so-called 'political' function in assessing how a balance should be struck between the use of modern technologies in the fight against crime, and individual privacy interests.⁶²⁴ In *S and Marper* and *MM*, the court seems to have taken steps to address this misgiving by combining the legality analysis with an analysis of the necessity of the interfering measures in question. The result, particularly in *S and Marper*, was an in-depth review of the necessity of the measures, giving due regard to the substantive effects of the interfering measures in each case. It remains to be seen whether these cases mark a permanent sea-change in the approach of the Strasbourg Court.

The ECtHR has developed a four-part proportionality assessment in its jurisprudence. This structured approach to assessing the proportionality of an interfering measure is a strength of the ECtHR jurisprudence in this area. However, this test has not been applied in a consistent or systematic fashion. The ECtHR affords a wide margin of appreciation to Contracting States to balance the privacy rights of those subject to the criminal process against broader societal interests where it is appropriate to do

⁶²⁴ See n 584; n 576.

so. However, in *S and Marper*, the ECtHR showed that where a Contracting State develops legislation that interferes with such privacy interests to a significant degree, without adequate justification, it will step in to redress the balance between privacy interests and a Government's legitimate crime prevention aims.

Subsequent chapters of this thesis examine the relationship between domestic laws and the ECtHR in terms of the protection such laws afford to the privacy interests of those subject to the criminal justice process. These chapters will consider the extent to which the approach of the ECtHR has influenced the domestic legal framework in the context of contemporary police investigations. Finally, conclusions will be drawn regarding the extent to which these legal frameworks afford adequate protection to the privacy interests of those subject to the criminal justice process. The domestic law will be assessed through an analysis of the following three policing measures, which set back individual privacy interests in different ways: (i) overt police photography; (ii) DNA and fingerprint data retention; and (ii) non-conviction information disclosure as part of an Enhanced Criminal Record Certificate. These will be three 'case-studies' to test the normative framework developed in the first three chapters of this thesis.

4 Overt Photography

This chapter constitutes the first 'case-study'. It serves as an exemplar of the interdisciplinary method for assessing the English legal framework regulating police setbacks to privacy interests occasioned primarily through physical invasion and the collection of personal information. It considers whether the domestic legal framework regulating the collection and retention by the police of photographs of those subject to the criminal justice process affords adequate recognition and protection to privacy related interests. The chapter comprises two parts. Part 1 looks at the development of the legal framework governing such collection and retention in England and Wales. This shows how the domestic courts have interpreted and applied the jurisprudence of the ECtHR in the context of overt police surveillance. Part 2 engages in a discussion of the extent to which the legal framework in England and Wales accords with Article 8 ECHR, and with the philosophical principles on the scope and normative value of privacy covered earlier in this thesis. Recommendations are made regarding how the domestic law *should* develop in this area. Before engaging in this analysis, a brief discussion of the types of measures that will and will not be included in this chapter is in order.

This chapter focuses on taking and retention of photographs of individuals subject to the criminal justice process *by the police*. The taking and retention of such photographs can be distinguished from their processing and from their dissemination. Whilst it is accepted that photographs taken by the police during the course of an investigation may be processed and disseminated, and that the privacy issues pertaining to these activities may overlap, the focus here is exclusively on the law pertaining to the taking and retention of such photographs and any relevant privacy issues which may arise. Moreover, to limit the scope of this analysis to a manageable size, and avoid conflating issues surrounding two very different ways in which the police take photographs of those subject to the criminal process, this analysis focuses on the taking of photographs as individuals occupy publicly accessible spaces for

surveillance or intelligence gathering purposes, and not on the taking and retention of photographs of arrestees for identification purposes, which is governed by a separate legal framework.⁶²⁵ Provisions governing the surveillance of homes and other spaces not readily accessible to members of the public are also excluded. The focus is on the use of such targeted surveillance against individuals as they traverse publicly accessible spaces. Such overt surveillance is often used in the policing of public protests. It is generally a proactive and preventive tool, which is not primarily geared towards criminal prosecution. It is also a hard case. Despite the fact that such overt photography has been challenged numerous times on the grounds that it violates privacy rights, it is not obvious whether this activity, when carried out by the police, sets back the privacy interests of the individual in every case. Consequently, this is an interesting case-study against which we can test the normative model developed in this thesis, and assess the extent to which English law protects the privacy interests of those subject to the criminal process. The judgment of the domestic courts in *R (Wood) v Commissioner of Police of the Metropolis*,⁶²⁶ and the taking of photographs by the police in this and similar contexts, will feature centrally in this chapter.

1. How is Targeted Overt Surveillance Regulated?

There is currently no statutory basis in England and Wales specifically providing for the police to take and retain photographs of individuals who are not under arrest, for the purposes of preventing or detecting crime. Instead, the police have traditionally relied upon common law powers to govern such information gathering and retention activities. In particular, *Rice v Connolly*⁶²⁷ provides:

[I]t is part of the obligations and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting property from criminal injury. There is no exhaustive definition of the powers and obligations of the police, but they are at least those, and they

⁶²⁵ See generally section 64 PACE 1984, as amended by section 116 of the Serious Organised Crime and Police Act 2005.

⁶²⁶ *R (Wood) v Commissioner of Police of the Metropolis* [2010] 1 WLR 123.

⁶²⁷ *Rice v Connolly* [1966] 2 QB 414.

would further include the duty to detect crime and to bring an offender to justice.⁶²⁸

For many years, in this relatively un-litigated area of the law, it was accepted that these implicit powers were sufficient to govern the overt taking of photographs of individuals by the police in order to investigate, prevent, or detect crime.⁶²⁹ However, what might once have been an uncontroversial area of the law has become contested in the wake of advances in technology and changes in police strategies, particularly in relation to public protest. Such changes have resulted in a proliferation of police information gathering and retention, which includes the collection of overtly-taken photographs of individuals as they occupy public space. This has raised questions over whether the implicit common law powers said to permit police overt photography are sufficient to meet the demands of Article 8 ECHR.

This particular practice received a prominent challenge in the case of *R (Wood) v Commissioner of Police of the Metropolis*,⁶³⁰ where the claimant, Wood, a campaigner against the arms trade, was photographed by the police while legitimately attending the Annual General Meeting of a company connected to the arms trade in which he had bought a single share.⁶³¹ The claimant argued that, among other things, the taking and retention of these photographs by the police violated his rights under Article 8 ECHR. The legal framework regulating overt police image collection can be explicated through a detailed examination of this case.

1.1 The *Wood* Case

Wood was a media co-ordinator employed by an unincorporated association known as Campaign Against the Arms Trade (CAAT). Wood had no criminal convictions and a clean criminal record. The defendant Commissioner took the view that there was a

⁶²⁸ *ibid* 419.

⁶²⁹ A.T.H. Smith and N.A. Moreham, 'Privacy – Police Photographs in Public Places' (2009) 68 *Cambridge Law Journal* 20-22 at 20.

⁶³⁰ See *R (Wood) v Commissioner of Police of the Metropolis* [2008] HRLR 34.

⁶³¹ *ibid* at [12].

real possibility of disruption at the AGM of Reed, a company with ties to the arms trade, and that unlawful activity might occur. A number of officers were deployed to the AGM, including an 'Evidence Gathering Team' of three uniformed officers and a civilian police staff photographer.⁶³²

Wood attended the AGM after purchasing a single share in Reed. His purpose was to learn more about Reed's involvement in the arms trade and ask appropriate questions. As the claimant was leaving the meeting, at which his participation was confined to asking one unobjectionable question, the Evidence Gathering Team took photographs of him. The police suggested that the photographs were taken because the claimant was seen standing with other members of CAAT who had been ejected from the AGM for jeering. The collected photographs were retained on the basis of fears of unlawful activity occurring at a subsequent event to be held in September 2005, and because of Wood's association with others who had convictions for unlawful activities at related events. Wood complained that he felt scared and intimidated by the police following him and asking him for his identity. Wood also complained that he felt uncomfortable that information may be kept about him indefinitely and may be used without his knowledge.⁶³³

The claimant sought a declaration that the Commissioner had acted in breach of his Article 8 ECHR rights, an order requiring the destruction of any photographs or photographic records, and a declaration that the current practice overt photographic surveillance practice was unlawful.

In the High Court, McCombe J dismissed the application, ruling that the taking and retention of a person's photograph by the police in a public street did not generally interfere with that person's Article 8(1) rights and that, in any case, an interference would be lawful, proportionate, and necessary for the purposes of Article 8(2) ECHR.

⁶³² *ibid* at [5]-[8].

⁶³³ *ibid* at [9]-[18].

In considering whether the taking of photographs constituted an interference with Article 8(1), McCombe J noted that the House of Lords in *Campbell v MGN Ltd*⁶³⁴ unanimously agreed that the mere taking of photographs, absent any retention, did not amount to an interference with Article 8(1).⁶³⁵ McCombe J also quoted the ECtHR decision in *Von Hannover v Germany*⁶³⁶ at length. This case concerned the collection and publication of photographs of Princess Caroline of Monaco engaged in various activities such as shopping, skiing, and holidaying on a private beach in Monaco. Whilst the ECtHR held that there had been an interference with Article 8(1), this finding hinged on the publication of the photographs, and not their mere collection.⁶³⁷

Furthermore the ECtHR focused in part on whether the applicant could be said to have a 'reasonable' or 'legitimate' expectation of privacy in the circumstances.⁶³⁸ McCombe J relied on *Murray v Express Newspapers plc*,⁶³⁹ to determine that the 'reasonable expectation of privacy' standard is a threshold test for Article 8 engagement. In *Murray*, the applicant, a child of a well-known author, successfully argued through his parents that his Article 8 rights had been violated when photographs of him, taken as he walked down a public street, were published in the Sunday Express.⁶⁴⁰

McCombe J determined that the 'mere taking of a person's photograph in a public street may not generally interfere with that person's right of privacy under Article 8.'⁶⁴¹ Moreover, McCombe J drew on the case of *Gillan*⁶⁴² (where the House of Lords found that whilst the police use of stop and search powers might constitute an interference with Article 8(1), it would not *necessarily* do so)⁶⁴³ which, in his view, indicates that 'not every intrusion even by police, if otherwise lawful, into the

⁶³⁴ *Campbell v MGN Ltd* [2005] 1 WLR 3394.

⁶³⁵ See *ibid* at [73]-[74], [122], and [154].

⁶³⁶ *Von Hannover v Germany* (2005) 40 EHRR 1.

⁶³⁷ *ibid* at [52].

⁶³⁸ *ibid* at [51].

⁶³⁹ *Murray v Express Newspapers Plc* [2009] Ch 481.

⁶⁴⁰ *ibid* 491.

⁶⁴¹ n 630, 829.

⁶⁴² *R (Gillan) v Commissioner of Police of the Metropolis* [2006] 2 AC 307.

⁶⁴³ *ibid* 344.

ordinary comings and goings of persons passing on the street will involve an interference with those persons' rights under Article 8.⁶⁴⁴

According to McCombe J's interpretation, for an intrusion by the police to interfere with an individual's Article 8 rights, the individual must hold a reasonable expectation of privacy, and the intrusion must reach a certain level of seriousness. In applying these principles to the immediate case, McCombe J drew on the ECommHR and ECtHR authority in *X v United Kingdom*,⁶⁴⁵ *Friedl v Austria*,⁶⁴⁶ and *Perry v United Kingdom*.⁶⁴⁷ As has been discussed in previous chapters, these cases generally support the view that where the police take photographs in public places, and where such photographs are used for limited purposes, this will not, generally speaking, pass the requisite threshold for Article 8(1) engagement.⁶⁴⁸ Of the cases mentioned above, only *Perry* held there to be an interference with Article 8(1). McCombe J observed that *Perry* can be distinguished from *Wood*, on the basis that the former case concerned the covert taking of photographs and these were subsequently processed and disseminated at the applicant's trial.⁶⁴⁹ Thus, McCombe J found that the taking of photographs, in the context of the *Wood* case, did not interfere with the claimant's Article 8(1) rights.⁶⁵⁰

However, McCombe J agreed with the claimant to the effect that the circumstances regarding the collection *and* retention must be considered together in assessing whether there has been an interference with Article 8. As there had been no domestic cases dealing with the retention of photographic material by the police at that time, and *S and Marper* had not yet reached the ECtHR, McCombe J relied on the judgment of the House of Lords in *S and Marper v Chief Constable of South Yorkshire Police* in forming the view that there had been no interference with Article 8(1). In *Marper*, the

⁶⁴⁴ n 630, 830.

⁶⁴⁵ *X v United Kingdom*, App no 5877/72 (ECommHR, 22 October 1973).

⁶⁴⁶ *Friedl v Austria* (1996) 21 EHRR 83.

⁶⁴⁷ *Perry v United Kingdom* (2004) 39 EHRR 3.

⁶⁴⁸ Chapter 3, Part 2.1.

⁶⁴⁹ n 647 at [40].

⁶⁵⁰ n 630, 833.

House of Lords inclined to the view that Article 8(1) was not engaged through the indefinite retention of fingerprint, DNA sample, or DNA profile data, and that, if in the alternative there was such an interference, it was 'very modest indeed'.⁶⁵¹ McCombe J also cited early ECommHR judgments⁶⁵² to lend support to his view that the use of lawfully obtained photographs by the police for the purpose of a criminal investigation will not engage Article 8(1). McCombe J's interpretation of prior Strasbourg and domestic authorities led him to conclude that there had been no interference with Article 8.⁶⁵³

McCombe J went on to consider whether an interference would be justified in any event. On the question of whether the measures were 'in accordance with the law', the claimant submitted that the Commissioner's reliance on common law powers permitting the collection of the photographic data was insufficient for the purposes of Article 8(2). This is because existing case law did not define with sufficient precision, clarity, and accessibility the circumstances under which the police may exercise these powers. However, McCombe J took the view that provisions in the Data Protection Act 1998 reinforced the legal basis by providing controls on the taking and retention of data by the police, notwithstanding the fact that these controls are subject to exceptions where the data are collected or retained for the purposes of preventing or detecting crime.⁶⁵⁴ Finally, McCombe J gave short shrift to the question of necessity, once again relying on the House of Lords' ruling in *S and Marper*, in finding that the measures were plainly 'necessary in a democratic society'.⁶⁵⁵

In 2008 the claimant appealed McCombe J's ruling.⁶⁵⁶ The Court of Appeal held that the activities of the police had violated the claimant's Article 8 rights, allowing the claimant's appeal. Laws LJ gave a detailed dissent outlining what he viewed to be the

⁶⁵¹ *R (S and Marper) v Chief Constable of South Yorkshire Police* [2004] UKHL 39 at [31].

⁶⁵² For example, *Lupker v the Netherlands*, App no 18395/91 (EcommHR, 7 December 1992).

⁶⁵³ n 630, 835-836.

⁶⁵⁴ *ibid* 838.

⁶⁵⁵ *ibid* 839.

⁶⁵⁶ n 626, 125-126.

correct interpretation of Article 8(1), and drawing on the cases of *Von Hannover v Germany*, and *S and Marper v United Kingdom*, a judgment that was not available to the High Court in the *Wood* case. Laws LJ persuasively reasoned that any attempt to encapsulate the scope of 'private life' in a single idea 'can only be undertaken at a level of considerable abstraction.'⁶⁵⁷ From here, Laws LJ provided a considered, and what has since proven to be influential,⁶⁵⁸ breakdown of the tests that need to be applied in assessing whether or not there has been an interference with Article 8(1) in particular circumstances.

Laws LJ first described personal autonomy as the central value protected by Article 8(1). According to Laws LJ, personal autonomy 'marches with the presumption of liberty enjoyed in a free polity: a presumption which consists in the principle that every interference with the freedom of the individual stands in need of objective justification.'⁶⁵⁹ However, Laws LJ warned that there exist three safeguards for ensuring that the core values protected by Article 8 are not interpreted so widely that its claims become unreal or unreasonable.⁶⁶⁰ These are as follows: (i) a measure threatening or assaulting the individual's right must attain a 'certain level of seriousness' for Article 8 to be engaged; (ii) the 'touchstone' for Article 8(1)'s engagement is whether the claimant enjoys on the facts a 'reasonable expectation of privacy'; and (iii) the breadth of Article 8(1) may be curtailed by the scope of the justifications available to the state pursuant to Article 8(2).⁶⁶¹ In support of the first of the 'safeguards', Laws LJ cited the following comments of Lord Bingham in the *Gillan* case:

It is true that "private life" has been generously construed to embrace wide rights to personal autonomy. But it is clear Convention jurisprudence that intrusions must reach a certain level of seriousness to engage the operation of the Convention, which is, after all, concerned with human rights and fundamental freedoms, and I incline to the view that an ordinary superficial search of the person and an opening of bags, of the kind to which passengers

⁶⁵⁷ *ibid* 135.

⁶⁵⁸ See, for example, *In re JR38* [2015] UKSC 42.

⁶⁵⁹ n 626 at [21].

⁶⁶⁰ *ibid* 136.

⁶⁶¹ *ibid*.

uncomplainingly submit at airports, for example, can scarcely be said to reach that level.⁶⁶²

For the second safeguard, the 'reasonable expectation of privacy', Laws LJ cited the *Von Hannover* judgment, and domestic authorities in *Campbell v MGN Ltd* and *Murray v Express Newspapers plc*.⁶⁶³ According to Laws LJ's interpretation, these cases suggested that 'while an individual's personal autonomy makes him the master of all those facts about his own identity of which the cases speak, his ownership of them depends by law on there being a reasonable expectation in the particular case that his privacy will be respected.'⁶⁶⁴ Thus, in describing the reasonable expectation standard as a 'touchstone', Laws LJ viewed this as an obligatory condition for Article 8 engagement.

Finally, the third safeguard against too broad an application of Article 8 is, simply put, Article 8(2). Laws LJ noted that Article 8(2) justifications might cut to the quick a broadly applied Article 8(1). In this regard, Laws LJ observed that Article 8(1) should cover a broad range of activities the state might pursue against the individual, but that, equally, the state may have a small hurdle to clear in terms of justifying the pursuit of this activity:

[W]here state action touches the individual's personal autonomy, it should take little to require the state to justify itself, but equally –if (and I repeat, this is critical) the action complained is taken in good faith to further a legitimate aim – a proper justification may be readily at hand.⁶⁶⁵

In applying this interpretation to the present case, Laws LJ began by asserting that, on the instant facts, the distinction between the *taking* and *retention* of the photographs was unhelpful. Nevertheless, he did consider whether Article 8(1) was engaged by the taking of photographs in the context of this case, concluding that, save for any aggravating factors, this would not engage Article 8(1).⁶⁶⁶ Laws LJ drew

⁶⁶² n 642 at [28].

⁶⁶³ See *Campbell v MGN Ltd* [2004] 2 AC 457 at [21]; n 639 at [35]-[36].

⁶⁶⁴ n 626, 137.

⁶⁶⁵ *ibid* at [28].

⁶⁶⁶ *ibid* 140.

on *Campbell v MGN Ltd* to support his position.⁶⁶⁷ The distinguishing feature, according to Laws LJ, between *Campbell* and the immediate case was 'the fact or threat of publication in the media, and not just the snapping of the shutter.'⁶⁶⁸

Laws LJ did accept that the taking of photographs in public may in some circumstances engage Article 8, for example, where the act 'may be intrusive or even violent, conducted by means of hot pursuit, face-to-face confrontation, pushing, shoving, bright lights, barging into the affected person's home.'⁶⁶⁹ However, the immediate case did not involve anything remotely so objectionable, notwithstanding the fact that the pictures were taken by individuals acting on behalf of the state. Thus, for Laws LJ, the real issue in this case concerned whether the taking of pictures, along with any subsequent retention and processing amounted to a violation of Article 8. That is to say, to assess whether or not Article 8(1) is engaged, it is necessary to assess the extent to which the taking and subsequent use of the photographs sets back privacy interests.⁶⁷⁰ In finding that there was in fact an interference with Article 8(1), Laws LJ summarised the activities of the police in the immediate case as follows:

The Metropolitan Police, visibly and with no obvious cause, chose to take and keep photographs of an individual going about his lawful business in the streets of London. This action is a good deal more than the snapping of a shutter. The police are a state authority. And as I have said, the claimant could not and did not know why they were doing it and what use they might make of the pictures.⁶⁷¹

Moreover, Laws LJ asserted that his finding was supported by the judgment of the ECtHR in *S and Marper v United Kingdom*, where it was determined that 'the mere storing of data relating to the private life of the individual amounts to an interference within the meaning of Article 8.'⁶⁷²

⁶⁶⁷ Though unanimous on this point, the court was divided on the outcome of the case taken as a whole: see generally *Campbell*, n 663.

⁶⁶⁸ n 626 at [33].

⁶⁶⁹ *ibid* at [34].

⁶⁷⁰ *ibid* 141.

⁶⁷¹ *ibid* [45].

⁶⁷² *S and Marper v United Kingdom* (2009) 48 EHRR 1169 at [67].

Turning attention to Article 8(2), Laws LJ first judged the interfering measure to be in clear pursuit of a legitimate aim, namely the 'prevention of disorder or crime'. He went on to agree with McCombe J's judgment that the common law powers to detect and prevent crime provided an adequate basis for the interference. This line of reasoning is based on the assertion that the degree of precision required in the law is relative to the degree to which the measure interferes with the Article 8(1) rights of the applicant. As, in the immediate case, Laws LJ viewed the interference as modest, the legality requirement was satisfied by the general common law power.⁶⁷³ Laws LJ observed that it was not necessary to consider whether the legality requirement might be met by other provisions such as those contained in the Data Protection Act 1998.

On the question of whether the measures were 'necessary in a democratic society', Laws LJ distinguished *Wood* from *S and Marper* pinpointing the following factors:

Pictures of the claimant were taken because the police believed that he had contact with EA who had a history of unlawful activity, and there was the possibility that he had been involved in unlawful activity in the meeting from which EA had been ejected. The taking of pictures had in no way been aggressively done. The retention of the pictures was carefully and tightly controlled. The claimant's image was not placed on any searchable database, far less a nationwide database indefinitely retained.⁶⁷⁴

Laws LJ went on to acknowledge a range of factors which weighed in favour of the claimant (any link between the claimant and EA was disputed; the claimant is a person of good character; any suspicion that the claimant was involved in criminal activity must quickly have dissipated after the photographs were taken).⁶⁷⁵ However, Laws LJ ultimately concluded, in dissent, that the continued retention of the images to monitor the claimant's conduct at the upcoming event was proportionate to the legitimate aim pursued.

Dyson LJ agreed with the reasoning of Laws LJ on the question of Article 8(1) engagement. However, Dyson LJ determined that the interference with the claimant's

⁶⁷³ n 626, 147.

⁶⁷⁴ *ibid* at [58].

⁶⁷⁵ *ibid*

Article 8 rights was disproportionate and in violation of Article 8.⁶⁷⁶ In forming this conclusion, Dyson LJ emphasised the weak evidence base for an association between the claimant and EA; and that the police knew the claimant 'had not been ejected from the meeting and ... was not guilty of any misconduct outside the hotel.'⁶⁷⁷

Dyson LJ began his balancing analysis with recognition that, whilst the interference was not of the utmost gravity, it could not be dismissed as inconsequential.⁶⁷⁸ From here, his Lordship held that, whilst the fact that the claimant had been seen briefly in the company of EA after the AGM may have provided a basis for taking and retaining the photographs for a few days after the event, this did not provide a basis for protracted retention.⁶⁷⁹

Dyson LJ concluded the appeal should be allowed. Lord Collins, in agreement, noted the chilling effect that the 'very substantial' police presence at the event would have on the exercise of lawful rights.⁶⁸⁰ Secondly, and unlike the other judges, Lord Collins placed emphasis on the fact that the claimant was followed by a police car, and then questioned by four police officers, before being followed by two officers on foot as they attempted to ascertain his identity.⁶⁸¹ Added to this, Lord Collins focused on the fact that the claimant was of good character and had not been involved in any misconduct at the AGM. Whilst Lord Collins agreed with Laws LJ and Dyson LJ that Article 8(1) was engaged, and the measures taken by the police pursued a legitimate aim, his Lordship sided with Dyson LJ on the issue of proportionality. Like Dyson LJ, Lord Collins expressed no conclusive view on whether the measures were 'in accordance with the law' for the purposes of Article 8(2).

⁶⁷⁶ *ibid* 150.

⁶⁷⁷ *ibid* 152.

⁶⁷⁸ *ibid* at [85].

⁶⁷⁹ *ibid* at [89].

⁶⁸⁰ *ibid* 155.

⁶⁸¹ *ibid* 155.

1.2 Developments Post-Wood

The *Wood* case did not serve as the catalyst for any significant legal or political reform in this area. As Lord Collins indicated at the end of his judgment, the last word had yet to be said on the implications for civil liberties of the taking and retention of images in the 'modern surveillance society'.⁶⁸² One issue that was not conclusively resolved in the *Wood* case was whether or not such an interference, supported solely by implicit common law powers, can be considered 'in accordance with the law'. This will be addressed in the next part. *Wood* was subsequently influential in the application of Article 8 in other cases where individuals are photographed as part of a criminal process. Though these cases do not all directly focus on overt collection and retention of photographs of those subject to the criminal process, taken from public space, they give useful insights into how the domestic law in this area has developed. These judgments form part of an ongoing judicial dialogue concerning the correct interpretation of Article 8 in this area.

In *R (C) v Commissioner of Police for the Metropolis*,⁶⁸³ the claimants complained that the refusal of the defendant Commissioner to delete records, including custody photographs and written information, taken from them after their separate arrests for rape and actual bodily harm, violated their rights under Article 8 ECHR. The court unanimously allowed the claim in relation to the retention of the custody photographs. In the leading judgment, Richards LJ declined to consider whether the taking of the custody photographs engaged Article 8(1) as the taking and retention of the photographs should be considered in the round when assessing the applicability of Article 8.⁶⁸⁴ Drawing heavily on *S and Marper v United Kingdom*, Richards LJ ruled that the retention of photographs, as personal information containing 'external identification features', constituted an interference with the claimants' Article 8

⁶⁸² *ibid* 157.

⁶⁸³ *R (C) v Commissioner of Police for Metropolis* [2012] 1 WLR 3007.

⁶⁸⁴ *ibid* 3022.

rights.⁶⁸⁵ Richards LJ also drew upon *Reklos v Greece*, where the ECtHR stated that 'a person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers.'⁶⁸⁶ Thus, Richards LJ reasoned that recent Strasbourg authority had superseded previous authority in cases such as *Friedl v Austria* and *X v United Kingdom*, which suggested that the retention of such photographs will not in and of itself constitute an interference with Article 8(1).

Richards LJ then considered whether or not the claimant's case was consistent with domestic authority. In considering Laws LJ's dissent in *Wood*, Richards LJ observed that his Lordship's conclusions regarding the status of the reasonable expectation of privacy standard as the 'touchstone' of Article 8's engagement relied on Strasbourg decisions prior to *S and Marper v United Kingdom*. Instead, Richards LJ ruled that, as this was not the specific test applied in *S and Marper*, and the ECtHR judgment in *PG and JH v United Kingdom* made clear that factors beyond the individual's reasonable expectations of privacy in a given situation can come into play,⁶⁸⁷ this test was not determinative of Article 8's engagement.⁶⁸⁸ Nonetheless Richards LJ inclined to the view that, even on the 'reasonable expectation of privacy test', the claimants' Article 8 rights had been engaged.

From here, Richards LJ ruled that the legal basis for the interference, contained in section 64 of the Police and Criminal Evidence Act 1984 and the Management of Police Information Code of Practice, had sufficient clarity to comply with Article 8(2).⁶⁸⁹ However, Richards LJ accepted that there may have been a problem with the accessibility and foreseeability of the Code of Practice as 'there does not appear to be any published statement that the defendant's policy with respect to custody

⁶⁸⁵ *ibid* 3024.

⁶⁸⁶ *Reklos v Greece* [2009] EMLR 16 at [40].

⁶⁸⁷ *PG and JH v United Kingdom* (2008) 46 EHRR 51 at [57].

⁶⁸⁸ n 683, 3026.

⁶⁸⁹ *ibid* 3029.

photographs is simply to follow the Code and guidance.⁶⁹⁰ Following the lead of *S and Marper v United Kingdom*, Richards LJ ruled that the measures did not strike a fair balance between the Article 8(1) rights of the claimants and the legitimate aim of preventing disorder or crime. Richards LJ focused on the absence of any distinction between the retention of photographs for convicted and non-convicted persons; the length of the retention periods; and the age of one of the claimants in reaching this conclusion.⁶⁹¹

Notably for the present discussion, the judgment of Richards LJ challenged Laws LJ's suggestion in *Wood* that 'reasonable expectation of privacy' delineates the scope of Article 8. This issue has significant implications for those subject to the criminal justice process, as subsequent sections of this analysis will show. In *Kinloch v HM Advocate*,⁶⁹² the appellant complained that the police violated his rights under Article 8 ECHR through the unauthorised use of surveillance measures against him as he occupied publicly accessible space. The police covertly monitored the appellant and, after he was observed carrying bags to and from numerous premises and vehicles, searched him. This search revealed large quantities of money on his person.⁶⁹³ Taking a view that seems on the face of it to be somewhat at odds with that of Richards LJ's in the *C* case, Lord Hope ruled that whilst Article 8(1) can cover a 'zone of interaction' in public, this does not apply where 'a person knowingly or intentionally involves himself in activities which may be recorded or reported in public, in circumstances where he does not have a reasonable expectation of privacy.'⁶⁹⁴ Applying these principles to the instant facts, Lord Hope stated:

[I]t could not reasonably be suggested that a police officer who came upon a person who has committed a crime in a public place and simply noted down his observations in his notebook was interfering with the person's right to respect for his private life. The question is whether it makes any difference that notes of his movements in public are kept by the police over a period of hours in a covert manner as part of a planned operation, as happened in this case.

⁶⁹⁰ *ibid* at [46].

⁶⁹¹ *ibid* 3032-3033.

⁶⁹² *Kinloch v HM Advocate* [2012] UKSC 62.

⁶⁹³ *ibid*.

⁶⁹⁴ *ibid* at [19].

I think that the answer to it is to be found by considering whether the appellant had a reasonable expectation of privacy while he was in public view as he moved between his car and the block of flats where he lived and engaged in his other activities that day in places that were open to the public.⁶⁹⁵

The appeal was dismissed. Whilst his Lordship did not categorically state that the existence of such an expectation is the 'touchstone' or determinative issue in deciding whether Article 8 is engaged beyond the facts in *Kinloch*, significant emphasis was placed on this test.

In *Mengesha v Commissioner of Police of the Metropolis*,⁶⁹⁶ the claimant sought judicial review of the decision of the police to require individuals contained by police cordon during the policing of a trade union march to provide their name, address, and to be filmed whilst doing so in order to be released from the containment. In his leading judgment, Moses LJ held that the collection of the information, as a price for leaving the containment, was not lawful. Moses LJ also held that the taking and retention of this information engaged Article 8(1), and could not be justified under Article 8(2) of the ECHR.⁶⁹⁷ In finding that Article 8 had been engaged, Moses LJ held that, even in the absence of a reasonably held expectation of privacy in the circumstances of the containment, Article 8 was engaged because the police collected and retained personal information to be linked with future police use.⁶⁹⁸

Relying on the judgment of Lord Collins in *Wood*, Moses LJ determined that the interference could not be considered 'in accordance with the law' as there was no statutory power to take and retain film of the claimant and no published policy applicable to the interfering measure taken. Thus, there had been a violation of Article 8.⁶⁹⁹ Moses LJ formed the view that this interference, which used overt photography methods, required a legal basis beyond the implicit common law powers to collect information to investigate and detect crime.

⁶⁹⁵ *ibid* at [20]-[21].

⁶⁹⁶ *Mengesha v Commissioner of Police of the Metropolis* [2013] EWHC 1695.

⁶⁹⁷ *ibid* at [20].

⁶⁹⁸ *ibid* at [19].

⁶⁹⁹ *ibid* at [20].

In two cases in 2015, the Supreme Court went some distance towards setting out the general principles for interpreting whether or not the taking and retention of personal information from those subject to the criminal process, as they occupy publicly accessible space, will constitute a violation of Article 8 ECHR. The first decision is *R (Catt) v Commissioner of Police of the Metropolis*,⁷⁰⁰ and the second is *In re JR38*.⁷⁰¹ The *Catt* case concerned the storage by police of electronic data pertaining to the applicants. In different circumstances the two applicants had personal information about their activities noted down and retained by the police as they occupied publicly accessible space. The first applicant, Catt, argued that the retention by police of information about his attendance at several protests against the arms trade, which included written notes of his activities and a photograph, violated his Article 8 rights. The second applicant, T, argued that the retention by the police for twelve years of information relating to allegations made against her for non-violent offences was likewise in violation of her Article 8 rights. Neither applicant suggested that the collection of the information, which was obtained overtly and through non-intrusive means, violated their Article 8 rights. After the Court of Appeal found that the retention practices in both cases were not justified under Article 8(2),⁷⁰² the Commissioner of Police of the Metropolis appealed.

The Supreme Court ruled that whilst the retention practices in each case engaged Article 8(1), they satisfied the criteria in Article 8(2) (with Lord Toulson dissenting on this point in *Catt*). Lord Sumption's answer to the question whether Article 8(1) was engaged, is summarised in the following observations:

In common with other jurisdictions, including the European Court of Human Rights and the Courts of the United States, Canada and New Zealand, the Courts of the United Kingdom have adopted as the test for what constitutes "private life" whether there was a reasonable expectation of privacy in the relevant respect... In one sense this test might be thought to be circular. It begs the question what is the 'privacy' which may be the subject of a reasonable expectation. Given the expanded concept of private life in the jurisprudence of

⁷⁰⁰ *R (Catt) v Commissioner of Police of the Metropolis* [2015] UKSC 9.

⁷⁰¹ n 658.

⁷⁰² See generally, *R (Catt) v Association of Chief Police Officers* [2013] 1 WLR 3305, 3330.

the Convention, the test cannot be limited to cases where a person can be said to have a reasonable expectation about the privacy of his home or personal communications. It must extend to every occasion on which a person has a reasonable expectation that there will be no interference with the broader right to personal autonomy recognised in the case law of the Strasbourg Court. This is consistent with the recognition that there may be some matters about which there is a reasonable expectation of privacy, notwithstanding that they occur in public and are patent to all the world. In this context mere observation cannot, save perhaps in extreme circumstances, engage Article 8, but the systematic retention of information may do.⁷⁰³

Lord Sumption summarised the tendency of recent Strasbourg and domestic authorities, concluding that 'it is clear that the state's systematic collection and storage in retrievable form even of public information about an individual is an interference with private life.'⁷⁰⁴ In considering whether the measures were 'in accordance with the law', Lord Sumption observed that the exercise of common law powers to collect and store information is subject to an 'intensive regime of statutory and administrative regulation' under the Data Protection Act 1998, and various guidance documents on the management of police information provided for in a Code of Practice issued under section 39A of the Police Act 1996.⁷⁰⁵ Briefly, the effect of these provisions is that only as much personal information as is necessary and proportionate to collect for a legitimate policing purpose should be collected, and the same rule applies for the retention of this information.

Catt and *T* relied on the cases of *MM v United Kingdom*⁷⁰⁶ and *R (T) v Chief Constable of Greater Manchester Police*,⁷⁰⁷ which both concerned the disclosure of criminal records information to potential employers. In each case, the principle that an interfering measure cannot be 'in accordance with the law' if the provisions for it contained no safeguards against abuse or arbitrary treatment of individuals was confirmed. However, Lord Sumption distinguished the immediate cases from these authorities on the basis that there was no disclosure to third parties of the

⁷⁰³ n 700 at [4].

⁷⁰⁴ *ibid* at [5].

⁷⁰⁵ Lord Sumption cited principles 1, 2, 3, 5, and 7 listed in Schedule 1 of the Data Protection Act 1998 along with the *Guidance on the Management of Police Information* (2010), which is superseded by a 2014 edition.

⁷⁰⁶ *MM v United Kingdom*, App no 24029/07 (ECtHR, 13 November 2012).

⁷⁰⁷ *R (T) v Chief Constable of Greater Manchester Police* [2015] AC 49.

information collected and stored, and the threat of future disclosure was strictly limited to policing purposes and was subject to internal proportionality review.⁷⁰⁸ Taking into consideration the facts that no intrusive means were used to obtain the information, and the information was not to be disclosed to the public, Lord Sumption characterised the interference with the applicants' rights in both cases as minor. From here, Lord Sumption reasoned that the retention of the information relating to Catt was proportionate. Despite the fact that Catt had no convictions for violent or disorderly behaviour and was generally considered to be of good character, Lord Sumption observed that the retention formed an important piece of the 'jigsaw' of information that police need to manage public protests:

Most intelligence is necessarily acquired in the first instance indiscriminately. Its value can only be judged in hindsight, as subsequent analysis for particular purposes discloses a relevant pattern. The picture which is thus formed is in the nature of things a developing one, and there is not always a particular point of time at which one can say that any one piece of the jigsaw is irrelevant. The most that can be done is to assess whether the value of the material is proportionate to the gravity of the threat to the public... The fact that some of the information in the database relates to people like Mr Catt who have not committed and are not likely to commit offences does not make it irrelevant for legitimate policing purposes.⁷⁰⁹

Lord Toulson rejected this broad 'jigsaw' principle in his dissent on this point, stating:

[T]hat does not explain to my mind why it should be thought necessary to maintain for years after the event information on someone about whom the police have concluded (as they did in July 2010) that he was not known to have acted violently and did not appear to be involved in the coordination of the relevant events or actions.⁷¹⁰

The Supreme Court unanimously held that the retention of personal information in the case of *T* was proportionate as this was subject to a flexible policy of intermittent review, and the information was deleted from police records within a reasonable time-frame.

In the second case, *In re JR38*, a majority of the Supreme Court held that dissemination to local news outlets of the appellant's photograph – taken as he

⁷⁰⁸ n 700 at [15].

⁷⁰⁹ *ibid* at [31].

⁷¹⁰ *ibid* at [65].

participated in sectarian rioting – did not *engage* his rights under Article 8 ECHR. Lord Kerr and Lord Wilson dissented on this point but nonetheless held that any such interference was justified under the criteria in Article 8(2). The appellant was 14 years old at the time of the incident, and the court was divided on whether or not the fact that he could not be said to hold a reasonable expectation of privacy was determinative of whether or not Article 8(1) was engaged.⁷¹¹

Relying mainly on Laws LJ's interpretation of *Von Hannover v Germany* in the *Wood* case, Lord Toulson did not consider that the dissemination constituted an interference with the appellant's Article 8 rights. Lord Toulson observed that the 'touchstone' of Article 8(1) is whether, taking into account all of the circumstances of the case, the individual can be said to hold a reasonable expectation of privacy.⁷¹²

Holding that the test encompasses contextual factors such as the age of the appellant, and the use to which the photographic material will be put, Lord Toulson reasoned that the test was to be applied broadly.⁷¹³ Drawing parallels with the *Kinloch* case, Lord Toulson observed that, when Strasbourg authorities speak of a protected zone of interaction which Article 8 protects, 'they are not referring to interaction in the form of a public riot.'⁷¹⁴ Lord Clarke concurred with Lord Toulson insofar as holding the measures did not engage Article 8(1).⁷¹⁵

Lord Kerr's dissent on this issue is noteworthy for the purposes of this analysis; not least because it provides a contrasting interpretation of many of the authorities cited by Lord Toulson. Lord Kerr did not view the *Von Hannover* judgment as authority for elevating the reasonable expectation of privacy to the status of a 'touchstone' test of Article 8(1) engagement, pointing out that the ECtHR did not rule that, absent such an expectation, there could be no

⁷¹¹ n 658 at [30].

⁷¹² *ibid* at [88].

⁷¹³ *ibid* at [98].

⁷¹⁴ *ibid* at [100].

⁷¹⁵ *ibid* at [112].

engagement of Article 8(1). According to his Lordship, that court did not consider the issue. Rather, it merely highlighted that where such an expectation exists this will be taken into account in assessing whether or not the interfering measure falls within the scope of Article 8(1).⁷¹⁶ Lord Kerr also viewed the *PG and JH v United Kingdom* case as clearly indicating that the reasonable expectation of privacy test is not a necessary precondition of Article 8 engagement. Moreover, his Lordship thought it significant that in the domestic cases of *Campbell v MGM Ltd* and *Murray v Express Newspapers plc* it was not ruled that the reasonable expectation of privacy was 'a sine qua non of Article 8 engagement.'⁷¹⁷ Whilst in *Campbell* Lord Nicholls referred to the test as a 'touchstone', Lord Kerr suggested that this should be understood as 'an expression connoting no more than a means by which the significance of the material to be assessed is considered', and not as an obligatory condition.⁷¹⁸

The status of the reasonable expectation of privacy test in the jurisprudence of the ECtHR is clearly a source of ongoing controversy in the most senior domestic courts. It is important to understand what the significance of the test is, and what it should be, when assessing the extent to which the collection and retention of photographs, taken from those subject to the criminal process as they occupy publicly accessible space, falls within the scope of Article 8. The merits of the arguments on both sides of the debate will be explored in the next section. The development of this area of the law raises numerous interesting questions over how each of the limbs of Article 8 is applied domestically, and the impact this might have on those subject to the criminal process. Such questions will be drawn out and discussed in the remaining sections of this chapter.

⁷¹⁶ *ibid* at [57].

⁷¹⁷ *ibid* at [59].

⁷¹⁸ *ibid* at [59].

2. Discussion

In what follows the legal framework detailed above will be subject to critical scrutiny, drawing on principles emerging from the jurisprudence of the ECtHR and the philosophical literature covered in previous chapters. The focus will be on establishing whether or not the domestic legal framework regulating the taking and retention of photographic images of those subject to the criminal justice process, as they occupy public space, recognises and affords adequate protection to their privacy related interests. The extent to which these interests are recognised turns on a consideration of how the scope of Article 8(1) has been interpreted in this area in domestic courts, and whether or not the scope afforded is broad enough to cover the range of ways in which such information gathering activities can set back privacy interests. This analysis forms the first part of the discussion. The second section will focus on the framework for assessing the extent to which the use of such measures is justifiable in a particular case. This requires consideration of how the domestic courts have interpreted the jurisprudence of the ECtHR relating to Article 8(2) ECHR in cases covering the sorts of police activity considered in this analysis.

2.1 The Overt Photography of Suspects: How should we determine whether Article 8 is engaged?

Can the mere taking of photographic images of those subject to the criminal process by the police, as they occupy publicly accessible space, engage Article 8(1), absent any retention of such information? Is the existence of a 'reasonable expectation of privacy' an obligatory condition of Article 8(1) engagement, or just one factor to consider in assessing whether Article 8(1) is engaged by a particular measure? A logical starting point for formulating answers to these questions is to establish how the taking and retention of such photographs might set back privacy interests in the first place.

2.1.1. How are privacy interests set back through the collection and retention of photographic images?

In 1997 Nissenbaum warned of the dangers to privacy posed by practices of public surveillance, suggesting that these practices had fallen outside the scope of predominant theoretical approaches to privacy.⁷¹⁹ Part of the reason for this neglect, according to Nissenbaum, lies in the fact that the terms 'private' and 'public' are used as a way of demarcating a dichotomy of realms:

In some contexts, for example, the term "private" indicates the realm of familial and other personal or intimate relations, while the term "public" indicates the civic realm or realm of the community outside of this personal one. In some contexts, "public" indicates the realm of government institutions in contrast with the realm of "private" citizens or "private" institutions (such as corporations).⁷²⁰

Thus, privacy applies to areas that are 'private' and not 'public'. The result, according to Nissenbaum, is that the value of privacy in public space is often overlooked. Additionally, the value of privacy in public space may be overlooked because it is not considered as normatively valuable as it is in the private sphere and, therefore, can be easily overridden in favour of other interests.

Rachels, as we saw in Chapter 1, argues that the normative value of privacy lies in its functional use in the development of social relationships.⁷²¹ Privacy, according to this view, is important because it allows us to control access to personal information and more intimate aspects of the self.⁷²² Such a view of the normative value of privacy inevitably depletes the weight of the claim to privacy in public space because, generally speaking, the information about an individual that can be accessed by monitoring public space tends to be more innocuous and less intimate than the information that could be accessed from observing the same individual in his or her home or in a 'private' setting. Thus, it is much easier to morally and legally justify

⁷¹⁹ H. Nissenbaum, 'Protecting Privacy in an Information Age: The Problem of Privacy in Public' (1998) 17 *Law and Philosophy* 559-596 at 564.

⁷²⁰ *ibid* at 567-8.

⁷²¹ Chapter 1, Part 2.1.

⁷²² J. Rachels, 'Why Privacy is Important' (1975) 14 *Philosophy and Public Affairs* 323-333 at 329.

overriding individual privacy interests in favour of other interests when an interference with individual privacy takes place in space demarcated as 'public'.

The protection of privacy can lead to restraints on the freedom of others. This is especially true when protecting the privacy of individuals as they occupy public space. For example, if I choose to enter public space and openly voice my political opinions then it may be unreasonable for me to expect that this information can later be suppressed. After all, such suppression may result in a restriction on the freedom of others to observe, record, or publicly respond to such opinions. Whereas such a restriction might seem reasonable in situations where that individual has intruded upon my private space, it is much more difficult to justify where I have voluntarily disclosed this information in public.

This is not to say that individuals cannot maintain an interest in limiting access to themselves as they occupy publicly accessible space. This becomes more salient as advances in information technologies over the last thirty years have increased the threat posed to privacy interests in public space. Before advances in surveillance technology such as CCTV surveillance, and before the internet age, privacy could perhaps be well enough protected through the protection of private residences and vehicles. A relatively small number of legal prohibitions and social conventions could protect individuals from having their personal and intimate spheres arbitrarily interfered with.⁷²³ However, advances in technology have made it easier to collect personal information about an individual and subject him or her to increasingly intrusive scrutiny as he or she occupies public space.⁷²⁴ Furthermore, individual personal data is more accessible without the need to intrude into the private sphere,

⁷²³ Whilst such social conventions may or may not be recognised in law, there is a depth of sociological literature to suggest that social conventions exist in contemporary western societies, to dictate the etiquette of public life. Such social conventions rule out intrusive curiosity, surreptitious observations, and identification requests of individuals as they go about their business in public space without some trumping justification. See for example, E. Goffman, *Behaviour in Public Places* (New York: Free Press, 1963); T. Nagel, 'Concealment and Exposure' (1998) 27 *Philosophy and Public Affairs* 3-30; B. vS-T. Larsen, *Setting the Watch: Privacy and the Ethics of CCTV Surveillance* (Oxford: Hart Publishing, 2011) 21-36.

⁷²⁴ See, for example, A. von Hirsch, 'The Ethics of Public Television Surveillance' in A. von Hirsch, D. Garland and A. Wakefield (eds.), *Ethical and Social Perspectives on Situational Crime Prevention* (Oxford: Hart Publishing, 2000) 59-77 at 65.

as individual personal data becomes increasingly, and permanently, available online.⁷²⁵

Public CCTV moves the goalposts insofar as privacy in public is concerned, as it allows authorities to subject the individual to quite intensive scrutiny, breaking traditional boundaries and social conventions regarding the extent to which individuals would usually be subject to scrutiny as they pass through public space.⁷²⁶

The actions of the police in the *Wood* case set back the privacy related interests of the claimant. It has been well documented in philosophical literature on privacy that overt observations can have a disruptive effect on an individual's interests in limiting access to him-or herself. As Larsen highlights, whilst people might expect to be the subject of passing observations from others as they occupy publicly accessible space, when such observations are undertaken by an agent of the state, and are carried out in a systematic or targeted manner, this can become more problematic.⁷²⁷ Indeed, in *Wood* the claimant was not photographed as part of a crowd, or, as in the *Friedl* case, to assess the character and manifestation of a public protest.⁷²⁸ Rather, he was the subject of a targeted attempt by the police to identify him through the collection of his photographic image and attempts to follow him down the street.

According to Feldman, individuals in society occupy multiple social spheres, which represent areas marked off from those not included inside the sphere (e.g. the workplace, social clubs, family, and friendship circles).⁷²⁹ Privacy, then, can ensure the maintenance of these different spheres and the extent to which an individual might have a claim to privacy is moderated by the circumstances of a particular case. By extension, although any protection from scrutiny when occupying *public* space is

⁷²⁵ The individual concerned often voluntarily relinquishes such personal information. However, such data may have been made increasingly accessible by another source such as a news agency or private organisation. H. Nys, 'Towards a Human Right 'to Be Forgotten Online'?' (2011) 18 *European Journal of Health Law* 469-475.

⁷²⁶ Larsen, n 723, 41-55.

⁷²⁷ *ibid* 59-60.

⁷²⁸ *Friedl v Austria* (1996) 21 EHRR 83 at [49].

⁷²⁹ D. Feldman, 'Secrecy, Dignity or Autonomy? Views of Privacy as a Civil Liberty' (1994) 47 *Current Legal Problems* 41-71 at 45-48.

reduced (when compared with the protection from such scrutiny an individual should be afforded in the home, for example), this does not mean that Wood opened himself up to the level of scrutiny he actually experienced. The overt and targeted surveillance Wood was subjected to 'carries with it a clearly implied threat that the fruits of the surveillance may be used for purposes adverse to the interests of the person being watched.'⁷³⁰

In support of his finding that the actions of the police in *Wood* did not engage Article 8(1), McCombe J observed that the claimant had been monitored in a public street, in circumstances where a police presence could not have been unexpected.⁷³¹ However, this treatment of Wood's complaint seems to miss how the targeted photography in this case might set back privacy interests to a significant degree. Cohen notes how sustained public observation can threaten privacy interests, by moderating behaviour:

[T]he experience of being watched will constrain, ex ante, the acceptable spectrum of belief and behaviour. Pervasive monitoring of every first move or false start will, at the margin, incline choices toward the bland and the mainstream. The result will be a subtle yet fundamental shift in the content of our character, a blunting and blurring of rough edges and sharp lines. But rough edges and sharp lines have intrinsic, archetypal value within our culture. Their philosophical differences aside, the coolly rational Enlightenment thinker, the unconventional Romantic dissenter, the skeptical pragmatist, and the iconoclastic postmodernist all share a deep-rooted antipathy toward unreflective conformism. The condition of no-privacy threatens not only to chill the expression of eccentric individuality, but also, gradually, to dampen the force of our aspirations to it.⁷³²

Cohen shows how such monitoring can have a corrosive impact on personal autonomy. Where the police, as a state authority, take and retain photographs of a specifically targeted individual or group of individuals it is not difficult to see how this might have a moderating effect on behaviour. The police were there to gather intelligence on a particular group of people connected to a protest movement, and the claimant was monitored and had his personal information collected as a direct

⁷³⁰ *ibid* at 61.

⁷³¹ n 630, 835.

⁷³² J.E. Cohen, 'Examined Lives: Informational Privacy and the Subject as Object' (2000) 52 *Stanford Law Review* 1373-1438 at 1425-1426.

result of his involvement with that group. To be targeted in such a way is, as the claimant complained, likely to be 'unsettling and intimidating'.⁷³³ As Benn puts it, sustained observation of an individual can be objectifying: '[f]inding oneself an object of scrutiny, as the focus of another's attention, brings one to a new consciousness of oneself, as something seen through another's eyes.'⁷³⁴ When the other is the state, such observation and information collection can be coercive.⁷³⁵ In the context of how the police photography and 'evidence gathering' was employed in this particular case, the effect of the police activities is such that it may operate as a form of social control, dissuading the claimant from participating in legitimate and peaceful political activities and protests, or at least wrongly make him uncomfortable in doing so, for fear of being targeted and having intrusive information gathering and processing measures used against him. Lord Collins recognised the effect that such police activity might have on the claimant's political activities: '[w]hen I first read the papers on this appeal, I was struck by the chilling effect on the exercise of lawful rights such a deployment would have.'⁷³⁶ As Dyson LJ observed: '[t]he retention by the police of photographs taken of persons who have not committed an offence, is always a serious matter.'⁷³⁷

In the High Court, McCombe J held, without the benefit of the Strasbourg decision in *S and Marper*, that the collection and retention of the photographs in *Wood* did not interfere with Article 8(1) ECHR. As well as citing a number of Strasbourg and domestic authorities in support of this conclusion,⁷³⁸ McCombe J gave weight to the following factors in support of his position: (i) the claimant was photographed in a public street, in circumstances in which police presence could not have been unexpected; (ii) the images were to be retained, without general disclosure; (iii) the

⁷³³ n 626, 129.

⁷³⁴ S. Benn, 'Privacy, Freedom, and Respect for Persons' in J. Pennock and J. Chapman (eds) *Privacy: Nomos XIII* (New York: Atherton Press, 1971) 1-26 at 7.

⁷³⁵ A. Roberts, 'A Republican Account of the Value of Privacy' (2014) *European Journal of Political Theory* 1-25 at 4-5.

⁷³⁶ n 626 at [92].

⁷³⁷ *ibid* at [85].

⁷³⁸ See *Lupker v Netherlands*, App no 18395/91 (ECommHR, 7 December 1992); n 728; *Perry v United Kingdom* (2004) 39 EHRR 3 at [40]; n 636 at [51].

retention of the images was not part of the compilation of a general dossier of information concerning the claimant.⁷³⁹ The ECtHR approach to determining an interference with Article 8(1) in such cases draws on the following factors: (i) the context in which the photographs are taken (in public using overt photography is less likely to interfere);⁷⁴⁰ (ii) the nature of the information collected (i.e. the extent to which the information collected contains personally identifiable information);⁷⁴¹ and the use to which any information might be put (where information is to be retained for longer periods or processed, it is more likely to occasion an interference).⁷⁴²

At first glance the general ECtHR approach, and the cases cited by McCombe J, seem to support his conclusion that the police did not engage the applicant's Article 8(1) rights. However, aspects of McCombe J's reasoning are problematic. Firstly, with regard to the taking of photographs, McCombe J relies on the judgment of the ECtHR in *Friedl v Austria*. In this case the ECtHR found that the taking and retention of the photographs of the applicant by the police as he participated in a public demonstration did not engage Article 8(1). However, McCombe J overlooked the distinguishing features of the immediate case. For example, McCombe J did not seem to acknowledge that the police in *Wood* went to quite extensive lengths to identify the claimant, unlike the public authorities in *Friedl*.⁷⁴³ Moreover, in *PG and JH v United Kingdom*, a case also cited by McCombe J in support of his conclusion, the ECtHR ruled that once a 'systematic and permanent' record of material pertaining to an individual's activities in public is created, private life considerations may arise.⁷⁴⁴ As Andrew Roberts highlights: '[i]f the creation of a systematic or permanent record of personal information including the identity of the subject constitutes an interference with the subject's art.8 rights, as the European Court's decisions seem to suggest, then as a matter of logic, the taking of such information for the sole

⁷³⁹ n 630, 835-836.

⁷⁴⁰ n 728 at [49].

⁷⁴¹ *S and Marper*, n 672 at [86].

⁷⁴² *Rotaru v Romania* (2000) 8 BHRC 449 at [46].

⁷⁴³ n 728 at [50].

⁷⁴⁴ n 687 at [57].

purpose of compiling this kind of record must also attract the protection of art.8(1).⁷⁴⁵

The ECtHR's ruling in *S and Marper v United Kingdom*, where it was held that the mere storing of data relating to the private life of the individual will engage Article 8(1), put the matter beyond doubt.⁷⁴⁶ Furthermore, the context in which the information was taken seems to exacerbate the interference with the claimant's Article 8 rights. All of this was appropriately recognised in the Court of Appeal. As Laws LJ observed, the action was a good deal more than the snapping of a shutter.⁷⁴⁷ Leaving aside the invasive features that the police followed the claimant down the street and into an underground station to ascertain his identity, the overt photography in this case was of sufficient gravity to constitute at least a moderately serious interference with Article 8(1) because: (i) it was carried out by the police and targeted specifically at the claimant; (ii) the photographic information was to be retained and subject to processing as the police attempted to aggregate the information in the images with details of the claimant's identity; and (iii) the police did not present the applicant with any reason for taking the photographs, a factor which is bound to heighten the applicant's sense of insecurity and intimidation, whilst potentially having a 'chilling effect' on his exercise of his autonomy-based privacy interests. Thus, in answer to Laws LJ's first Article 8(1) safeguard, the overt photography in *Wood* as part of the criminal process did achieve the level of seriousness necessary for Article 8 engagement. Of course, each particular instance of overt police photography is different and, therefore, establishing whether Article 8 is engaged requires careful consideration of the facts of each particular case. However, due to the chilling effects of such overt photography on personal autonomy, this analysis demonstrates that, as a general rule, where the police take photographs of specific subjects as they occupy publicly accessible space, and this

⁷⁴⁵ A. Roberts, 'Taking and Retention of Photographs by Police: Claimant involved in organisation which campaigned against the arms trade' [2009] *Criminal Law Review* 376-380 at 380.

⁷⁴⁶ n 672 at [67].

⁷⁴⁷ n 626 at [45].

results in the creation of a systematic or permanent record of those subjects' personal information (i.e. the photograph is stored or processed), this will expose the individual to a level of official scrutiny such that in every foreseeable case he or she should have the protection of Article 8(1).

2.1.2. Overt photography and the 'reasonable expectation of privacy'

The second safeguard Laws LJ described as ensuring that the core values protected by Article 8 are not interpreted so widely as to render its claims unreal or unreasonable was that the 'touchstone' for Article 8(1)'s engagement is whether the claimant enjoys on the facts a 'reasonable expectation of privacy'.⁷⁴⁸ This has been a controversial point in the domestic case law, as we have seen. However, the dominant approach of the domestic courts, especially in cases where the privacy interests of those subject to the criminal process are at issue, has been that Article 8(1) cannot be engaged absent the existence of a reasonable expectation of privacy. This section considers the extent to which the reasonable expectation of privacy is a 'touchstone' test for Article 8 engagement in the jurisprudence of the ECtHR, and the extent to which it should be. It concludes that, though the ECtHR jurisprudence is admittedly equivocal, the Strasbourg Court does not elevate the reasonable expectation of privacy to the status of a precondition for Article 8 engagement. The dominant domestic interpretation of this aspect of Article 8 consequently unduly narrows the scope of the privacy protection that should properly be afforded to those subject to the criminal process.

In support of the reasonable expectation 'touchstone', Laws LJ relied on *von Hannover v Germany*. In that case, the ECtHR first determines that there is a 'zone of interaction' of a person which, even in a public setting, may fall within the scope of private life.⁷⁴⁹ It then states:

⁷⁴⁸ *ibid* 136.

⁷⁴⁹ n 636 at [50].

The Court has also indicated that, in certain circumstances, a person has a “legitimate expectation” of protection and respect for his or her private life. Accordingly, it has held in a case concerning the interception of telephone calls on business premises that the applicant “would have had a reasonable expectation of privacy for such calls”.⁷⁵⁰

Laws LJ also cited domestic authorities in *Campbell v MGN Ltd*⁷⁵¹ and *Murray v Express Newspapers plc*⁷⁵² in support of this position. In *Murray* Sir Anthony Clarke MR offered further insight into what this test demands:

As we have seen it, the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.⁷⁵³

Thus, any assessment into what entails a ‘reasonable expectation of privacy’ requires a consideration of a range of different factors such as the personal attributes of the claimant and the circumstances under which the intruding measures are employed. Although this test is to be applied broadly, any commitment to Laws LJ’s contention that this test is a precondition of Article 8, is a commitment to narrowing down the scope of Article 8 to protect only those activities and circumstances where an individual, at the time of the interference, holds a reasonable expectation of privacy in those circumstances. In *In re JR38*, where a 14 year-old boy was photographed as he participated in sectarian rioting, this meant that the police did not have to justify as lawful or necessary their decision to publish the boy’s image to local news outlets, irrespective of the consequences the subsequent publication might have on the child’s private life.

The notion that the reasonable expectation of privacy is a precondition of Article 8(1) engagement does not seem satisfactory. First, and perhaps most importantly, the elevation of this test is seemingly at odds with ECtHR jurisprudence. Support for the

⁷⁵⁰ *ibid* at [51].

⁷⁵¹ See n 663 at [21].

⁷⁵² n 639 at [35].

⁷⁵³ *ibid* at [36].

reasonable expectation standard is drawn from the above extract in *Von Hannover v Germany*, which states that 'in certain circumstances', an individual may have a reasonable expectation of privacy.⁷⁵⁴ Indeed, it seems the existence of such an expectation would strengthen an individual's claim to Article 8 protection in some contexts. However, the extract does not appear to suggest, let alone explicitly state, that absent such an expectation, Article 8 cannot be engaged. Moreover, the approach of Laws LJ seems to be at odds with the ECtHR's decision in *PG and JH v United Kingdom*, where the court states:

There are a number of elements relevant to a consideration of whether a person's private life may be concerned by measures effected outside a person's home or private premises. Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor.⁷⁵⁵

Thus, it seems that where an individual's activities are recorded as he or she knowingly involves him or herself in activities in public the question of whether or not the individual holds a reasonable expectation of privacy in the circumstances is not a conclusive factor in assessing whether Article 8 is engaged. In *In re JR38*, Lord Toulson viewed this passage as obscure, and also noted that it pre-dated the *Von Hannover* judgment.⁷⁵⁶ His Lordship also suggested that this passage does not imply that, even in the absence of a reasonable expectation of privacy, Article 8 may be engaged. However, another extract from the *PG and JH* judgment seems to give an example of where this might be the case when it is stated: '[a] person who walks down the street will, inevitably, be visible to any member of the public who is also present. ... Private life considerations may arise, however, once any systematic or permanent record comes into existence of such material from the public domain.'⁷⁵⁷ Moreover, in ECtHR cases since *Von Hannover*, the applicant's reasonable expectations of privacy are seldom mentioned and, where they are, the ECtHR simply declares that such expectations exist rather than using the test as a normative

⁷⁵⁴ n 636 at [51].

⁷⁵⁵ n 687 at [57].

⁷⁵⁶ n 658 at [93].

⁷⁵⁷ n 687 at [57].

standard for the engagement of Article 8.⁷⁵⁸ The prevailing approach in ECtHR jurisprudence seems to focus on the extent to which privacy interests are set back by the particular interfering measure and the nature of the interfering measure in terms of its impact upon the applicant's life, rather than on the applicant's expectations of privacy.⁷⁵⁹

Furthermore, as Lord Kerr observes, the domestic authorities which Lord Toulson and Laws LJ rely on in support of their interpretation of Article 8(1) do not suggest that the reasonable expectation of privacy test is 'an indispensable criterion for the engagement of Article 8.'⁷⁶⁰ Whilst understood in its broadest terms, the reasonable expectation standard can incorporate factors such as the personal attributes of the claimant, it can do so only insofar as such factors might be said to form part of a reasonable expectation of privacy.⁷⁶¹ However, for a number of reasons, any interpretation of Article 8 which relies on the applicant to hold a reasonable expectation of privacy at the time of the interference runs the risk of unduly narrowing the scope of Article 8, particularly for those subject to the criminal justice process.

Firstly, when attempting to assess whether or not Article 8 is engaged by focusing on the applicant's reasonable expectations of privacy, one's focus is shifted from assessing how a measure sets back the individual's privacy interests towards the extent to which it is justifiable to afford Article 8 protection to the particular activity the applicant was engaged in at the time of the interference; a factor better considered as part of the court's Article 8(2) inquiry. Lord Toulson's judgment in *JR38*

⁷⁵⁸ See n 686 at [41]; n 706 at [188].

⁷⁵⁹ A number of academic commentators have previously observed the limited role of the reasonable expectation of privacy test in ECtHR jurisprudence: S. Nouwt, B. Vries, and C. Prins (eds), *Reasonable Expectations of Privacy: Eleven Country Reports on Camera Surveillance and Workplace Privacy* (The Hague: Asser Press, 2005) 334-335; P. De Hert, 'Balancing Security and Liberty Within the European Human Rights Framework: A Critical Reading of the Court's Case Law in the Light of Surveillance and Criminal Law Enforcement Strategies After 9/11' (2005) 1 *Utrecht Law Review* 68-96 at 76; K. Hughes, 'A Behavioural Understanding of Privacy and its Implications for Privacy Law' (2012) 75 *Modern Law Review* 806-836 at 825.

⁷⁶⁰ n 658 at [59].

⁷⁶¹ *ibid* at [61].

illustrates the problem. In support of his conclusion that Article 8(1) was not engaged by disseminating the photograph, Lord Toulson observed that a 'member of a crowd engaged in a violent disturbance in a public place' has no reasonable expectation of protection from the police seeking the help of the public to identify those involved; and the violence occurring at the interface where the sectarian rioting occurred was exposing vulnerable people to fear and risk of injury.⁷⁶² Thus, according to Lord Toulson, the applicant could not expect to keep private his criminal activities. However, this approach pre-empts the question of whether the measures are necessary under Article 8(2), and narrows the scope of Article 8 protection. It focuses on the harms to society and countervailing interests which should properly be balanced against the applicant's privacy interests. These are not factors that give an indication of the effect the measures taken by the police had on the applicant's right to respect for private life.⁷⁶³

Exclusive focus on the extent to which the applicant holds a reasonable expectation of privacy may overshadow other potentially relevant considerations. Whilst such expectations may be an important factor in assessing the extent to which the applicant's privacy interests have been set back by a particular measure, they do not tell the whole story. For instance, let us imagine that in *JR38* the police not only disseminated the images to local news outlets for identification purposes, but also disseminated them to national and international news sources for the purpose of humiliating the applicant. This would surely set back the applicant's privacy interests to such a significant degree that it could not ever be considered proportionate. However, on Lord Toulson's interpretation of Article 8(1), this would not seem to matter as, at the time the pictures were collected, the applicant could not have reasonably expected that his image would not be collected or disseminated due to the public and criminal nature of the activities in which he was engaged. If, as Lord Kerr suggests and Lord Toulson seems not to dispute, the dissemination of the

⁷⁶² *ibid* at [94] and [99].

⁷⁶³ *ibid* at [65].

images set back the applicant's privacy interests to a significant degree, this should engage the applicant's Article 8(1) rights and it should fall to the police to justify the dissemination as lawful and necessary. It is submitted that English law's elevation of the reasonable expectation of privacy test could successfully be challenged and it is hoped that, if it is, the ECtHR clarifies how domestic courts can consistently assess whether a measure is likely to engage Article 8(1).

Laws LJ's third safeguard against too broad an application of Article 8 is that the breadth of Article 8(1) protection may be curtailed by the scope of available justifications under Article 8(2). In other words, the final hurdle for a successful Article 8 claim to overcome is the threefold test for whether or not an interfering measure can be justified by a Contracting State. Attention will now turn to this third safeguard and its application to overt photography.

2.2. When is Targeted Photographic Surveillance Justified?

Once it is established that a measure engages Article 8(1), it falls to the Contracting State to justify its use as (i) in accordance with the law; (ii) in pursuit of a legitimate aim; and (iii) necessary in a democratic society. This section of the analysis considers how each of these requirements is met by the police when justifying the use of overt and public photography against those subject to the criminal process in England and Wales.

2.2.1. *In accordance with the law*

When the *Wood* case reached the Court of Appeal Laws LJ held that the taking and retention of the claimant's photographs was 'in accordance with the law', whilst Lords Collins and Dyson LJ expressed no view on the matter. Laws LJ agreed with McCombe J in the court below that implicit common law powers provided sufficient legal basis for the 'relatively modest' interference with the claimant's right to respect for private life. This conclusion rests on two premises, first, that the intrusion was, as

Laws LJ puts it, 'no more than modest';⁷⁶⁴ and second, that the degree of precision, clarity, and foreseeability required of the domestic law by the Strasbourg Court depends on the nature of the interfering measure, to the effect that more serious intrusions require more clarity and precision whereas 'modest' interferences demand less of the domestic law in this regard.

In support of the second premise, Laws LJ relied on the judgment of Lord Hope in *Gillan v Commissioner of Police of the Metropolis*, where his Lordship stated:

As the concluding words of para 67 of the decision in *Malone v United Kingdom* 7 EHRR 14 indicate, the sufficiency of these measures must be balanced against the nature and degree of the interference with the citizen's Convention rights which is likely to result from the exercise of the power that has been given to the public authority.⁷⁶⁵

In *Malone*, the ECtHR held that the UK Government's interception of the applicant's communications was not 'in accordance with the law'.⁷⁶⁶ However, the ECtHR did acknowledge that, due to the nature of secret surveillance, the requirement of foreseeability cannot mean, as it might in other cases, that the applicant should be able to foresee when he or she is likely to be subject to such measures. This, of course, would defy the point of undertaking such measures in the first place.⁷⁶⁷

According to Laws LJ, the *Malone* judgment supports the notion that the quality of the law in question can vary depending on the particular measure used. Furthermore, Laws LJ cited the decision of the ECtHR in *Murray v United Kingdom*, a case where the taking and retention of photographs of the applicant as part of a criminal process was held to satisfy the legality requirement on the basis of common law powers regulating the interference.⁷⁶⁸ Regarding the extent to which the common law powers met the quality of law requirement in Article 8(2) the Court stated:

The taking and, by implication, also the retention of a photograph of the first applicant without her consent had no statutory basis but, as explained by the trial court judge and the Court of Appeal, were lawful under the common law. The impugned measures thus had a basis in domestic law. The Court discerns

⁷⁶⁴ n 626 at [54].

⁷⁶⁵ n 642, 352.

⁷⁶⁶ *Malone v United Kingdom* (1985) 7 EHRR 14 at [80].

⁷⁶⁷ *ibid* at [67].

⁷⁶⁸ *Murray v United Kingdom* (1995) 19 EHRR 193 at [94]-[95].

no reason, on the material before it, for not concluding that each of the various measures was "in accordance with the law", within the meaning of Article 8(2).⁷⁶⁹

Cumulatively, for Laws LJ, the following factors indicated that the interference in *Wood* was 'in accordance with the law': (i) the modest nature of the interference in the immediate case; (ii) the rulings in *Malone* and other domestic authorities that the quality of law requirement varies in terms of its demands depending on the nature of the interfering measure; and (iii) the ruling in *Murray*, which suggests that implicit common law powers provide sufficient legal basis for an interfering measure of a similar nature to that employed against the claimant in *Wood*.

Mr Wood argued that, whilst the common law powers might provide an outline of a domestic legal basis for the interference, these do not satisfy the requirements of certainty and precision set forth in *Malone* and the case of *Silver v United Kingdom*. He also submitted that, whilst, admittedly, *Murray* post-dates these authorities, this case dealt only with the source of the power to take photographs and not with other established requirements that the law be sufficiently precise, certain, and accessible.⁷⁷⁰

Laws LJ's conclusion relies on his characterisation of the interference as modest. Drawing on philosophical principles and ECtHR jurisprudence, the previous section attempted to demonstrate that the activities of the police were in fact likely to represent quite a serious interference with the claimant's right to respect for private life. If this analysis is correct, then it follows that a more robust legal basis for the interference would be needed to satisfy the legality requirement. However, even if the above analysis is rejected, Laws LJ's conclusions still warrant further investigation. Laws LJ plausibly highlighted how the ECtHR's judgment in *Murray* poses problems for the notion that the actions of the police in *Wood* were not 'in

⁷⁶⁹ *ibid* at [88].

⁷⁷⁰ n 626 at [51]-[52].

accordance with the law'. As Laws LJ observed, in this case the ECtHR not only ruled that common law powers provided an adequate legal basis for the taking and retention of photographs of an individual subject to the criminal process, but also upheld *Malone*, and expressly distinguished the circumstances differentiating the two cases.⁷⁷¹

The ECtHR's judgment in *Murray* seems out of step with more recent ECtHR jurisprudence. In *Rice v Connolly* it was held that there is no exhaustive definition of the powers of the police at common law, but that it is part of their obligations to take all steps necessary for keeping the peace, for preventing crime or property from criminal injury, and to detect crime and bring offenders to justice.⁷⁷² However, in *S and Marper v United Kingdom*, the Strasbourg Court viewed the similarly worded conditions attached to the storing and use of fingerprint data – which notably contain less identifiable data than photographic images – as insufficiently precise.⁷⁷³ Moreover, in *MM v United Kingdom*, the ECtHR criticised the 'generous approach' of domestic courts to the exercise of police powers to retain personal information.⁷⁷⁴ In *MM* the court set out these principles for the retention of such information:

The Court considers it essential, in the context of the recording and communication of criminal record data as in telephone tapping, secret surveillance and covert intelligence-gathering, to have clear, detailed rules governing the scope and application of measures; as well as minimum safeguards concerning, inter alia, duration, storage, usage, access of third parties, procedures for preserving the integrity and confidentiality of data and procedures for their destruction, thus providing sufficient guarantees against the risk of abuse and arbitrariness.⁷⁷⁵

Whilst the ECtHR did not expressly mention the collection and storage of photographic images in the passage above, it is difficult to see how, given the nature of the identifiable information that would inevitably be contained within such images, different rules would apply to the storage of this information. As Lord Sumption

⁷⁷¹ n 768 at [80].

⁷⁷² n 627, 419.

⁷⁷³ The conditions under section 64 of the Police and Criminal Evidence Act 1984 were that the retained samples and fingerprints must only be used for purposes related to the prevention and detection of crime, the investigation of an offence or the conduct of a prosecution: see *S and Marper*, n 672 at [98].

⁷⁷⁴ n 706 at [170].

⁷⁷⁵ *ibid* at [195].

observed in *Catt*, '[t]here is no longer any doubt about the application of Article 8 to the systematic retention of processable personal data, and the test of justification has become more exacting since the decision of the Strasbourg court in *S [and Marper] v United Kingdom* 48 EHRR 1169.⁷⁷⁶

These considerations do not necessarily mean that the interference was not 'in accordance with the law'. Concluding that the interference was in accordance with the law on the basis of the common law power, Laws LJ viewed it as unnecessary to enter into a debate as to whether or not the legality requirement might be met by the provisions of the Data Protection Act 1998.⁷⁷⁷ However, these provisions might provide the precision and certainty that the common law power seems to lack.

In assessing whether or not the collection and retention of photographs of an individual subject to a criminal process is in accordance with the law, Lord Sumption's approach in *Catt* is preferable. Whilst this case concerned the collection and retention of electronic data about the respondents in general (not limited to photographic information), Lord Sumption paid close attention to how the activities of the police accorded with the Data Protection Act 1998, and how these provisions met the demands of Article 8 more generally. Lord Sumption noted the following elements of the domestic legal framework: (i) common law powers granted to the police to obtain and store information for policing purposes; and (ii) statutory and administrative regulations including the Data Protection Act 1998, a Code of Practice, and other guidance documents on the management of police information.⁷⁷⁸ He succinctly summarised the substance of these elements as follows:

So far as they are relevant to the present appeals, the data protection principles are as follows:

Principle 1 is that personal data may not be "processed" at all unless it is necessary for a relevant purpose. In the case of the police, the relevant purposes are the administration of justice and the exercise of any other function of a public nature exercised in the public interest.

⁷⁷⁶ n 700 at [16].

⁷⁷⁷ n 626 at [55].

⁷⁷⁸ n 700 at [7]-[10].

Principle 2 is that personal data may be obtained only for lawful purposes and may not be further “processed” in a manner incompatible with those purposes.

Principle 3 is that the data must be “adequate, relevant and not excessive” for the relevant purpose.

Principle 5 is that the data must not be kept for longer than is necessary for those purposes.

Principle 7 is that proper and proportionate measures must be taken against the unauthorised or unlawful “processing” of the data.⁷⁷⁹

In concluding that English law’s combination of these elements met the legality test under Article 8, Lord Sumption stated:

The Data Protection Principles themselves constitute a comprehensive code corresponding to the requirements of the EU Directive and the Convention. The effect of the first principle, read in conjunction with the requirements of Schedule 2, is that data cannot be obtained, recorded, held, or used by the police unless it is necessary for them to do so for the purpose of the administration of justice or the performance of their other functions. The fifth principle prevents the retention of data for any longer than is necessary for this purpose. These principles are supplemented by a statutory Code of Conduct and administrative Guidance compliance with which is mandatory. The relevant functions of the police are limited to policing functions which are clearly and narrowly defined in para 2.2 of the statutory Code of Practice.⁷⁸⁰

Without delving into an exhaustive analysis of this particular legislative framework, it is plain that the relevant data protection principles cited above are formulated with sufficient precision and certainty and are publicly accessible to the extent necessary to satisfy the legality requirement under Article 8(2). These principles set forth that the police may collect or retain personally identifiable information only when it is strictly necessary to do so for a specified policing purpose. Whether or not in a particular case the activities of the police, in exercising the discretion conferred upon them by this statutory legal framework, are in fact necessary for this legitimate policing purpose falls to a consideration of the remaining two criteria in Article 8(2).

2.2.2. In pursuit of a legitimate aim

The legitimate aim requirement stipulates that an interfering measure may only be applied if it is done so in the pursuit of a particular prescribed purpose listed in Article 8(2). As far as the focus of this chapter is concerned, the legitimate aim requirement

⁷⁷⁹ *ibid* at [8].

⁷⁸⁰ *ibid* at [12].

is not controversial. It is difficult to foresee any circumstance where the police lawfully collect and retain photographic images of an individual from public space where this is not also done in pursuit of a legitimate purpose. Usually, the purpose in question will be the prevention of disorder or crime, or otherwise in the interests of public safety.

2.2.3. *Necessary in a democratic society*

For the interference to meet the final requirement in Article 8(2), it must respond to a 'pressing social need' and be 'proportionate to the legitimate aim pursued'.⁷⁸¹ The former component requires that the reasons advanced in justification are 'relevant and sufficient'.⁷⁸² The latter requires a fair balance between the competing interests at stake, taking into consideration whether the measure is minimally intrusive.⁷⁸³ In England and Wales, a four-part proportionality test has been developed which broadly covers the same sequence of tests that is applied by the ECtHR. The domestic test, outlined in the cases of *Huang v Secretary of State for the Home Department*, *R (Aguilar Quila) v Secretary of State for the Home Department* and *Bank Mellat v HM Treasury*,⁷⁸⁴ comprises the following four questions: (i) is the legislative objective sufficiently important to justify limiting a fundamental right?; (ii) are the measures which have been designed to meet the objective rationally connected to doing so?; (iii) are the measures no more than is necessary to accomplish the objective?; and (iv) do they strike a fair balance between the rights of the individual and the interests of the community?⁷⁸⁵ This test is in accordance with the four-step structure of rights analyses adopted in numerous other jurisdictions.⁷⁸⁶

⁷⁸¹ *Olsson v Sweden* (1989) 11 EHRR 259 at [67].

⁷⁸² See *Ploski v Poland*, App no 26761/95 (ECtHR, 12 November 2002); *Stoll v Switzerland* (2007) 44 EHRR 53 at [101]; jointly dissenting opinion of Judges Sajó, Keller, and Lemmens in *Hämäläinen v Finland*, App no 37359/09 (ECtHR, 16 July 2014) at [12].

⁷⁸³ See *Z v Finland* (1998) 25 EHRR 371 at [96].

⁷⁸⁴ *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, 187; *R (Aguilar Quila) v Secretary of State for the Home Department* [2012] 1 AC 621; *Bank Mellat v HM Treasury* [2014] AC 700.

⁷⁸⁵ *Bank Mellat*, *ibid*, 790.

⁷⁸⁶ M. Klatt and M. Meister, *The Constitutional Structure of Proportionality* (Oxford: Oxford University Press, 2012) 8-10; J. Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 *Cambridge Law Journal* 174-207.

Although the proportionality assessments in the domestic cases detailed above do intermittently allude to aspects of this four-part proportionality analysis in parts, with the exception of Lord Kerr's dissent in *In re JR38*, none follows it in a systematic fashion. This section will identify some of the failings of the proportionality assessment undertaken in *Wood*, before drawing on the four-part proportionality test to indicate how such an analysis should be undertaken in cases where the police overtly take and subsequently retain photographs of individuals in publicly accessible spaces as part of a criminal process.

In *Wood*, McCombe J's proportionality analysis was brief:

It seems quite clear to me that, if there was an interference with the claimant's rights under Art.8, it was entirely proportionate. The police have common law powers and duties to prevent and to investigate crime. Here was a meeting at which genuine fears had arisen as to potential criminal activity. Two of those attending the meeting had been ejected; the precise circumstances were not known. The claimant was seen associating with one of those who had been removed from the meeting. There were also fears of criminal disruption at the DSEi in September 2005. To my mind, it was entirely reasonable and proportionate for the police to photograph persons who, as it might turn out, had been engaged or might be likely to engage in criminal disorder.⁷⁸⁷

From this we can discern that, according to McCombe J, as the circumstances of the case indicated that the claimant *might* have been engaged in criminal disorder, the supposed interference was plainly proportionate. McCombe J does not, in his articulated reasoning, show that he has undertaken any detailed consideration of the four prongs of the proportionality assessment adopted by the ECtHR. This is unsurprising given that earlier in the same judgment McCombe J had ruled that the activities of the police in photographing and retaining photographs of the claimant did not interfere with his Article 8 rights. Commenting on this case, Andrew Roberts questioned the point of this hypothetical and perfunctory analysis:

[t]here is little value in proceeding on the rather vague notion that there might have been "a modest interference" with an applicant's privacy, without having considered the nature of any such interference. A clearly defined public interest consideration will always prevail in these circumstances.⁷⁸⁸

⁷⁸⁷ n 630 at [74]-[75].

⁷⁸⁸ n 745 at 380.

A fuller analysis was undertaken by the Court of Appeal. Laws LJ held that the interference was proportionate. Whilst acknowledging several factors militating in favour of finding a violation, Laws LJ noted that the claimant's photograph was taken in the course of a 'properly controlled operation for perfectly good policing reasons' and was retained for a legitimate reason. Accordingly, the collection and retention must fall within the operational discretion that the police properly possess.⁷⁸⁹ Whilst Laws LJ did acknowledge the interference and give weight to factors favouring the applicant's complaint, he did not explore in much detail how the competing interests interacted with one another, and did not explain how the interfering measures were rationally connected to the legitimate aim pursued by the police. The assessment from Laws LJ set out the interests on either side, as he saw them, and then amounted to what seemed like a peremptory statement of preference rather than an exercise in constitutional rights balancing.

In a more detailed balancing exercise, Dyson LJ began by describing the interference as one that was not of 'the utmost gravity'; but, nonetheless, one that could not be dismissed as inconsequential.⁷⁹⁰ Dyson LJ then commented on the extent to which the measures were rationally connected to the legislative objective:

Within a few days of the annual general meeting the retention of the photographs could not rationally be justified as furthering the aim of detecting the perpetrators of any crime that may have been committed during the meeting. There was no realistic possibility that evidence that a crime had been committed at the meeting would only be obtained weeks or months after the event. The meeting was well attended. There were Reed officers and private security officials present who were on the lookout for troublemakers and who did indeed eject two of them (although there is no evidence that even they committed any offence).⁷⁹¹

Thus, Dyson LJ concluded that any retention beyond a few days could not be rationally connected to the objective of detecting and prosecuting crimes committed at the AGM. Moreover, Dyson LJ reasoned that the retention after this time was not rationally connected to the objective of preventing or detecting future crime at

⁷⁸⁹ n 626 at [59]-[60].

⁷⁹⁰ *ibid* at [85].

⁷⁹¹ *ibid* at [87].

subsequent similar meetings, noting that the claimant's behaviour at the AGM had been beyond reproach, notwithstanding the 'intimidating experience he experienced at the hands of the police.'⁷⁹² This analysis, which Lord Collins agreed with, is sound. Dyson LJ considered both the nature of the interference and the importance of the legitimate aim pursued. Without explicitly referring to the four-part analysis, he focused on how there was nothing on the facts of the immediate case to suggest that the claimant was any more likely to commit an offence than any other citizen of good character who happened to attend the AGM. Thus, the measures were not rationally connected (i.e. there was no evidence base in the circumstances) to the objective of preventing disorder or crime.

Let us now apply the elements of the four-part proportionality test adopted by the ECtHR to cases where the police overtly photograph individuals as part of a criminal process as they occupy public space.

2.2.3.a. The objective of the interference

In answering this question much turns on the particular objective pursued through the use of the interfering measure. As has been discussed, ordinarily, the police will employ overt photography in public spaces in the pursuit of the 'prevention of disorder or crime' or 'in the interests of public safety'. However, due to the vast range of circumstances in which the police might resort to such a measure, and the myriad ends which the police might hope to advance, the question of whether, generally speaking, the police use of overt photography in public pursues a sufficiently important objective to justify an interference with Article 8 is imponderable. One can only assess the importance of the objective pursued on a case-by-case basis.

⁷⁹² *ibid* at [89].

It might seem that this figurative box will be ticked wherever a measure can be said to pursue a stated legitimate aim. However, the domestic courts may, and in all but the most clear-cut cases, *should* further consider at this stage whether or not the specific objective pursued (rather than the broadly stated legitimate aim) is of sufficient importance to the realisation of the stated legitimate aim to warrant the use of the measure. In *Gaughran*,⁷⁹³ where the Supreme Court ruled that the indefinite retention of the applicant's biometric data following conviction for drink driving offences was not in violation of Article 8, Lord Kerr elucidates this distinction in his dissenting opinion:

It is, I believe, necessary to recognise the distinction between the legislative provisions which authorise the retention of samples etc and the policy of using those provisions to retain them indefinitely. The justification of, on the one hand, the enactment of statutory provisions which permit retention and, on the other, the use of those provisions to devise a policy to retain without limit must be considered separately.⁷⁹⁴

Applied to overt photography, whilst common law powers coupled with the Data Protection Act 1998 might provide a general framework for the police to take and retain photographs in pursuit of a legitimate aim, assessment of whether specific uses of a measure are 'sufficiently important' in a particular case is considered as part of the 'necessary in a democratic society' analysis.

This is perhaps the easiest limb of the proportionality requirement for the state to satisfy in justifying its use of an interfering measure. In each of the domestic cases reviewed in this chapter the police taking and retention of photographs has pursued a legitimate aim and was undertaken for a proper policing purpose. In *Wood and Catt*, for example, the two appellants were neither convicted nor formally suspected of any involvement in crime or disorder and the measures pursued by the police had little hope of fulfilling the legitimate aim and objective pursued. Yet this detracts nothing from the fact that the objective of preventing crime and disorder at public demonstrations is an important function of the police; a function that is, by any

⁷⁹³ *Gaughran v Chief Constable of the Police Service in Northern Ireland* [2016] AC 345.

⁷⁹⁴ *ibid* at [62].

plausible account, sufficiently important to provide a basis for interfering with a Convention right. However, this is merely the starting point for the proportionality analysis. Next, the domestic court must consider whether or not there exists a rational connection between the objective pursued by the police and the measures used to achieve this objective.

2.2.3.b. A rational connection between the measure and the objective

As part of its inquiry into the proportionality of the measures, the relevant court should consider whether or not the interfering measure is capable of achieving its objective.⁷⁹⁵ With respect to those subject to police photography in publicly accessible space as part of a criminal process the question becomes: is the collection and retention of photographs in a particular case capable of preventing disorder or crime, or realising another legitimate aim? This test puts a burden on the police to positively establish that the interfering measure is rationally connected to the objective. But what is a rational connection? In *Bank Mellat v HM Treasury*,⁷⁹⁶ Lord Reed JSC quoted the Canadian Supreme Court case of *Lavigne v Ontario Public Service Employees Union*,⁷⁹⁷ where it was stipulated that the 'inquiry into "rational connection" between objectives and means to attain them requires nothing more than showing that the legitimate and important goals of the legislature are logically furthered by the means government has chosen to adopt.'⁷⁹⁸ Lord Reed JSC editorialised:

The words "furthered by" point towards a causal test: a measure is rationally connected to its objective if its implementation can reasonably be expected to contribute towards the achievement of that objective. The manner in which the courts should determine whether that test is satisfied requires careful consideration.⁷⁹⁹

The 'reasonable' standard seems to connote that the courts should assess the extent to which there is an objective basis for suggesting that the measures will further the aims pursued by the police in using them. Lord Kerr's opinion in *Gaughran* supports

⁷⁹⁵ Klatt and Meister, n 786, 8.

⁷⁹⁶ *Bank Mellat*, n 784, 795.

⁷⁹⁷ *Lavigne v Ontario Public Service Employees Union* [1991] 2 SCR 211.

⁷⁹⁸ *ibid* 291.

⁷⁹⁹ *Bank Mellat*, n 784, 795.

this interpretation, and considers how this test might have been applied unsatisfactorily in cases pre-dating *S and Marper v United Kingdom*:

A connection between the aim of a measure and its terms, in order to qualify as rational, must be evidence-based... Mere assertion that there is such a connection will not suffice, much less will speculation or conjecture that the connection exists. The fact that the interference can be characterised as "relatively slight" ... does not diminish the need for the justification to be established positively.⁸⁰⁰

Recalling Laws LJ's judgment in *Wood*, in concluding that the taking and retention of photographs were proportionate, Laws LJ stated that this had been done 'for perfectly good policing reasons' and in pursuit of a legitimate aim, but advanced no basis for suggesting that the taking and retention of photographs of the claimant (a non-convicted person, of good character, who was not suspected of any wrongdoing at the AGM) was rationally connected to the aim of preventing disorder or crime. This cannot be enough to satisfy the rational connection test. Whilst not necessarily requiring the police to demonstrate how the claimant's particular details will assist in preventing or detecting future crime, 'rational connection' does require the police to demonstrate at a minimum that the power to collect and retain such photographs in this and other circumstances can reasonably be expected to further those ends in a significant way.

The facts of *Wood* indicate that there was little to suggest that there existed a rational connection between the interfering measures and the objectives pursued by the police. It can be positively established, on the basis of the claimant's attendance at the AGM combined with his known association with the Campaign Against the Arms Trade, that there was a reasonable likelihood that he was attending the AGM to protest against this group, or at least gather information about the organisation on behalf of the Campaign Against the Arms Trade. He also had a brief conversation with an individual who had been ejected from the event and had been known to create disorder at similar events. However, this information alone does not suggest

⁸⁰⁰ n 793 at [64].

that the claimant (as an individual of good character with no criminal convictions) was reasonably expected to participate in any kind of criminal activity or disorder which could have been detected or prevented by the measures taken by the police. None of the judges in either the High Court or the Court of Appeal gave reasons to suggest that there was such a likelihood. Without some objective evidence base to support the proposition that the interfering measures were reasonably likely to positively assist the police in preventing disorder or crime, singling out the claimant and the use of interfering measures were not justified. That is not to say that there could be no rational connection between the collection and retention of the claimant's photographic information and the legitimate objectives pursued by the police; it is to say that it falls to the state authority in question to show that such a connection exists.

In *Catt*, the police did provide a detailed explanation of the nature of the rational connection between the retention of the personal information of the respondent (a 90-year-old man with no convictions for violence or disorder) and the need to prevent or detect crime. DCS Tudway of the Metropolitan Police set out the reasons as follows:

- (1) [The personal information] is retained in order to enable the police to make a more informed assessment of the risks and threats to public order associated with demonstrations forming part of an identifiable campaign, and the scale and nature of the police response which may be necessary in future.
- (2) It is retained in order to investigate criminal offences where there have been any, and to identify potential witnesses and victims.
- (3) It is retained in order to study the leadership, organisation, tactics and methods of protest groups which have been persistently associated with violence, and other protest groups associated with them. Links between protest groups are potentially important. There is a significant correlation between participation in a group such as Smash EDO and other extremist groups such as animal rights activists. The evidence is that out of 242 smash EDO activists recorded in the database at the time when these proceedings were begun, 42 also had links with animal rights protest groups. There is considerable cross-fertilisation of ideas between different extremist causes on tactics and methods.⁸⁰¹

⁸⁰¹ n 700 at [29].

Lord Sumption highlighted that these were all proper policing functions, and that the evidence that retention of information of the kind involved in the immediate case would help fulfil these functions was, at the least, credible.⁸⁰² Lord Sumption went on to set out how the nature of intelligence-led policing is such that it is difficult to ascertain the value of one 'piece' (namely, Mr Catt's personal information) of the 'jigsaw' of police intelligence at any particular time. Thus, the fact that some of the information recorded in the database relates to people like Mr Catt, who has not committed and is not likely to commit offences, does not make it irrelevant in ascertaining the composition, organisation, and leadership of protest groups who are persistently associated with crime and disorder at public protests – a legitimate aim and sufficiently serious objective to warrant interfering with an individual's Article 8 rights.⁸⁰³

Lord Sumption's judgment and the evidence provided by the police taken together, offer a basis for asserting that the interference in this case is rationally connected to the legitimate aims of the police in preventing and detecting crime. It is difficult to dispute the notion that, in attempting to manage and effectively police public protests undertaken by groups that are known to engage in criminal and disorderly activities at such protests, it might be useful for the police to obtain information not only of those attendees known to participate in such violence, but also of known associates and other attendees. Such intelligence gathering assists the police in understanding the way such groups operate in terms of their patterns and strategies, and to investigate any crimes committed. Essentially, what Lord Sumption describes is the 'intelligence-led' strategy of policing, which has become increasingly popular worldwide as police forces seek to move beyond reacting to incidents without an overarching strategy towards a more systematic and pro-active style of crime investigation and prevention. As Ratcliffe observes:

⁸⁰² *ibid* at [30].

⁸⁰³ *ibid* at [31].

[i]ntelligence-led policing emphasises analysis and intelligence as pivotal to an objective, decision-making framework that prioritises crime hot spots, repeat victims, prolific offenders and criminal groups. It facilitates crime and harm reduction, disruption, and prevention through strategic and tactical management, deployment and enforcement. This definition ... recognises the evolution from whack-a-mole policing that arrests offenders with no overarching strategy, to one that places significant emphasis on data and intelligence analysis as a central component of police strategic thinking.⁸⁰⁴

Button et al outline the important role such policing strategies can have at public protests:

The gathering of accurate intelligence has been one of the most important strategies of the police. Without this police managers do not know if there are going to be a dozen or several hundred protesters turning up to a protest site, or indeed the exact location of it. This clearly has important implications for the accurate and effective deployment of police resources. As a result the police have actively pursued 'intelligence led' policing strategies in dealing with environmental protests, in the first instance to address tactical issues.⁸⁰⁵

It might therefore be concluded that it is rational for the police to collect and retain photographs of individuals in publicly accessible places in a wide range of circumstances, even if such individuals are not involved in, or even suspected of being involved in, offending behaviour. In assessing the extent of a rational connection, much turns on the facts of the particular case considered, and it is for the police to justify any claim or assertion to a rational connection with a reasonable objective evidence base. However, to justify such an interference as 'necessary in a democratic society' all things considered, the police must clear the third and fourth hurdles of the proportionality analysis.

2.2.3.c. Minimally intrusive measures

The third stage of the proportionality assessment requires the court to consider whether or not the interference is to the minimum degree necessary to achieve the legitimate objectives pursued, and no more. In *Bank Mellat v HM Treasury*, Lord Reed JSC described the 'no more than necessary' stage as requiring a test of 'whether a less intrusive measure could have been used without unacceptably compromising the

⁸⁰⁴ J.H. Ratcliffe, *Intelligence-Led Policing* (2nd edn. Oxford: Routledge, 2016) 5.

⁸⁰⁵ M. Button, T. John, and N. Brearley, 'New Challenges in Public Order Policing: The Professionalization of Environmental Protest and the Emergence of the Militant Environmental Activist' (2002) 30 *International Journal of the Sociology of Law* 17-32 at 29.

achievement of the objective'.⁸⁰⁶ Furthermore, his Lordship stipulated that this test demands that the interfering measure must be one that 'it was reasonable for the legislature to impose', and that courts should not 'substitute judicial opinions for legislative ones' as to where the precise line of necessity should be drawn.⁸⁰⁷ This parallels the margin of appreciation that is afforded to allow state authorities appropriate discretion in determining to what extent a measure is minimally intrusive having regard to practicalities and costs at the local level.⁸⁰⁸ A degree of such discretion is necessary to prevent the courts from replacing the well-reasoned view of the legislator or state authority with their own. However, the third limb cannot be satisfied where it is apparent that a less intrusive method of achieving the objective is available to the public authority.

In *In re JR38*, Lord Kerr explained how the actions of the police met the 'no more than necessary test'. The police had explored a number of less intrusive options for identifying the appellant before publishing his images via local media outlets:

The painstaking approach taken by the police service to the objective of identifying young offenders such as the appellant has been explained by Chief Inspector Yates and Superintendent Robinson. Internal police inquiries were made; community leaders and social services were asked whether they could identify those involved; and it is ironical that the appellant and his father were shown the photograph that was later published. Had they identified the appellant, no publication would have occurred.⁸⁰⁹

The police demonstrated that dissemination of the appellant's photographs occurred after a range of other less intrusive steps had been taken. Moreover, it is noteworthy that the images of the appellant were disseminated to local media outlets. Whilst this may have serious repercussions for the appellant and his reputation in the local community, the interference would be more serious and, arguably, more than is necessary, if the images were disseminated to national media, which could publish the appellant's image to a much larger portion of the public.

⁸⁰⁶ *Bank Mellat*, n 784 at [74].

⁸⁰⁷ *ibid* at [75].

⁸⁰⁸ *ibid*.

⁸⁰⁹ n 658 at [77].

In *Catt*, Lord Sumption and Lord Toulson disagreed on the question of whether the retention of photographs and other personal information about the claimant constituted the least onerous means to achieving the objective. Lord Sumption noted the following facts: (i) the material was not usable or disclosable for any purpose other than policing; (ii) the retained material was periodically reviewed for retention or deletion according to rational and proportionate criteria based on an assessment of danger to the public and value for policing purposes; and (iii) the labour involved in sifting the claimant's information from all of the nominal records in which he was included would be excessively burdensome for the police.⁸¹⁰ Lord Toulson saw matters differently, in concluding that the measures had violated the claimant's Article 8 rights:

It was suggested that it would place too great a burden on the police to have to review constantly the information retained on individuals whose names appear in their database to see whether there was sufficient cause to keep the information. As the Court of Appeal observed, there was no evidence from the police that this would be over-burdensome. On the contrary, the thrust of the evidence was that they do carry out regular reviews. As I have said, a review was carried out a few months before these proceedings were begun. The police obviously had to review their information about Mr Catt in deciding whether to retain his photograph. We know what view they formed. There is no evidence from the police to suggest, and I see no basis to conclude, that there would have been any real burden in deleting their historic records of his attendances at protest events.

Lord Toulson suggests that the retention period went beyond the minimum time that would be necessary for the police to fulfil their objectives. Whilst the interference might be rationally connected to legitimate objectives, Lord Toulson suggests that the period of continued retention of the claimant's personal information went beyond what was necessary for the police to fulfil these objectives. This conclusion is based on the ECtHR decision in *MM v United Kingdom* that, as the information recedes into the past, its operational relevance diminishes. Moreover, Lord Toulson rejected the administrative burden argument. Indeed, this argument seems unsubstantiated. Reviews are part and parcel of the process of managing police information, and without presentation of compelling evidence from the police to the contrary, it is

⁸¹⁰ n 700 at [27] and [32].

unclear why it would be justifiable for the police to prolong an interference with the claimant's Article 8 rights beyond the minimum time necessary to fulfil legitimate policing functions.

2.2.3.d. A fair balance?

At the final stage of the proportionality analysis, the courts are required to consider the extent to which the measures strike a fair balance. This involves the following three dimensions: (i) clear and full recognition of the rights of the individual; (ii) the importance of pursuing the objective must be established; and (iii) an assessment must be made as to whether pursuit of the objective strikes a fair balance with respect for the individual's rights.⁸¹¹ An illuminating way of determining the weight of the interference and of the objective pursued is through the use of Alexy's triadic scale, which was discussed in Chapter 2.⁸¹²

Viewed in the abstract, the right to respect for private life and the prevention and detection of crime are of fundamental constitutional importance. There is as little to be gained from living in a society where wanton disorder and criminality are the prevalent norm, as there is from living in a dystopian surveillance society, where the autonomy and dignity of the individual can be compromised at will by state authorities. Thus, the two considerations must compete on equal terms.⁸¹³ In assessing the seriousness of an interference, it is necessary to consider the facts of the particular case. However, some general principles have emerged from the analysis so far. As a threshold matter, whenever the police take photographs of an individual and this results in the generation of a processable image, this will be sufficient to engage Article 8(1). Though not to be mistaken for a trivial matter, let us call this a 'light' interference with Article 8(1). As has been discussed, this interference occurs notwithstanding the fact that the image has been taken from

⁸¹¹ Klatt and Meister, n 786, 157.

⁸¹² The triadic scale consists of the following three stages: light, moderate, and serious. See Chapter 2, Part 3.

⁸¹³ In this respect see *Campbell*, n 663 at [113].

publicly accessible space, and notwithstanding any 'reasonable expectations of privacy' the individual may or may not hold. Other circumstantial factors may increase the seriousness of the interference. If the measures used are secret, or if the measures are overt but invasive of the personal space of the individual, this will increase the seriousness of the interference. Furthermore, increases in the retention, processing and dissemination of any collected information will increase the seriousness of the interference in turn. Thus, whenever the police collect from publicly accessible space photographic images of the individual and then generate a permanent record of such images this will, with certainty, constitute anything from light to serious interference with the individual's Article 8 rights.

The second stage of the exercise requires the relevant court to determine the weight of the objective pursued through the use of the interfering measure. Any measure which pursues one of the legitimate aims stated in Article 8(2) is at least meritorious enough to compete with the weight of an interference in the metaphorical balancing exercise. However, in ascertaining the weight that should properly be attached to a particular objective pursued through the interference, much turns on the facts of a particular case. As with assessments of the weight attached to an interference, two broad factors must be considered: (i) the salience of the objective to achieving the aim; and (ii) the certainty with which the objective will be realised through the use of the measure.

From here, the weight of the interference and the weight of the objective must be balanced. If the interference with the Article 8 right outweighs the need to realise the legislative objective, then the applicant's rights have been violated, and if the importance of achieving the objective outweighs the interference with the individual's rights then the use of the measure is justified. In the event of a tie (for example, where the pursuit of the objective would certainly impose a moderate interference with the individual's right to respect for private life, and the failure to pursue the

objective would certainly cause a moderate set back to the police's aim to prevent disorder or crime), the judiciary has the discretion to determine whether or not the use of the measure strikes a fair balance.⁸¹⁴

Extending this framework to *Wood* we can establish the following: (i) the interference with Wood's right to respect for private life was, at least, slight. He was photographed in public space by the police, the photographs were systematically recorded and retained by the police, and he was followed by police officers as they tried to ascertain his identity. The objective pursued through the interfering measures was 'to gather intelligence, primarily by taking photographs and making notes which may be of subsequent evidential value should offences be committed or disorder break out.'⁸¹⁵ Whilst this is undoubtedly an important objective, and the threat of crime and disorder could also be characterised as moderately serious (a protest breaking out inside the AGM would at least disrupt a lawfully organised meeting, and at worst may foreseeably result in violence or disorder breaking out at the meeting), the targeted measures used against the claimant do not seem to strike a fair balance. His limited association with the protest group and his purchasing of a single share in a company in this context do not seem to provide an adequate basis for suggesting that he, as a man with no previous arrests or convictions, posed anything other than a very slight risk of being involved in disorder or crime at the event. Thus, it is only with a very low level of probability that the police can suggest that the pursuit of the slightly serious interfering measures would in fact help them realise the objective pursued. Thus, the balance must tilt in favour of the Article 8 rights of the claimant. To justify a measure which would, in every foreseeable instance, occasion a slight to moderate interference with the right to respect for private life, the police must show, at the least, that there is a strong possibility that the use of the measure would be of at least slight assistance in preventing or

⁸¹⁴ Klatt and Meister, n 786, 13.

⁸¹⁵ n 626 at [93].

detecting crimes which would have a slight to moderate protective dividend on the rights of those at risk of falling victim.

In *Catt*, the broad operational benefits in preventing and detecting crime at public protests were justified as a basis for the 'relatively slight' interference with the respondent's Article 8 rights. Furthermore, the interference with the respondent's Article 8 rights was seen as striking a fair balance as it would help to 'enable the great majority of public demonstrations which are peaceful and lawful to take place without incident and without an overbearing police presence.'⁸¹⁶ Although not explicated by the court, the balancing exercise of the majority seemed to consist of the following stages: (i) categorising the interfering measure as slight; (ii) establishing that the collection and retention of the respondent's information served 'important' policing functions in the service of preventing disorder and crime; and (iii) finding that the use of the measure for the specified period struck a fair balance between the rights of the respondent and the police need to prevent and detect crime.

If these premises were accurate (despite conclusions to the contrary in the preceding analysis) this is an appropriate approach to the balancing exercise. The slight interference to the individual's Article 8 rights is 'outweighed' by the serious, or to use the court's language, 'important' policing functions served through the use of the measure. The fundamental problem in *Catt* is the accuracy of the premises themselves. The retention of photographic information for such an extended period of time should be considered no less than a moderately serious interference with an individual's right to respect for private life. Furthermore, the police did not put a strong evidence base forward for suggesting that the broad policing objectives were in fact served by the retention of images of non-convicted, peaceful protesters such as the respondent. Moreover, the suggestion that the retention of the respondent's

⁸¹⁶ n 700 at [30].

data would facilitate peaceful protests by limiting the need for an overbearing police presence is unsupported by the facts of the case. As has been discussed above, surveillance measures such as those employed against the respondent can have a chilling effect on legitimate dissent and protest. One need look no further than the facts of the *Wood* case to substantiate this fear. This consequence surely negates any of the benefits such data collection and retention from innocent citizens would have on their participation in a public demonstration.

Conclusions

English law regulating the collection and retention of overtly taken photographs of those subject to the criminal process is increasingly recognising and affording protection to individual privacy interests. Domestic courts are persuaded that overt police photography of individuals occupying public space is sufficiently serious an intrusion into the private sphere of that individual to warrant the protection of Article 8. However, progress in this area does seem to have been hampered by English judges' interpretation of the 'reasonable expectation of privacy' standard, which is sometimes indexed in the ECtHR jurisprudence pertaining to Article 8 cases. The elevation of this standard to a 'touchstone' test of Article 8 has produced an undue narrowing of the scope of Article 8 protection for those subject to the criminal process, particularly as they occupy publicly accessible spaces. The potential consequences of this interpretation of Article 8 are exemplified in the majority judgments in *In re JR38*, where the tunnelled focus on the appellant's reasonable expectations blocked off consideration of whether or not the dissemination by the police of images of a child engaged in criminal activities was lawful and proportionate. This misguided domestic interpretation of the scope of Article 8 - which might have been avoided if pertinent ECtHR jurisprudence was less confusing - unduly narrows the privacy protection available to those subject to the criminal process.

The principles contained within the Data Protection Act 1998 offer the outline of a legal framework which meets the requirements in Article 8(2) pertaining to the clarity and precision of the law. Whilst common law powers also regulate the taking and retention of photographs of those subject to the criminal process, these do not provide sufficient detail as to the scope of the discretion that is conferred upon the police to determine when such photographic images can be produced or for how long they can be retained. In *Wood*, Laws LJ viewed implicit common law powers as providing a sufficient legal basis for the interfering measures used against the claimant. This conclusion cannot be accepted. Any measure that sets back privacy interests to such a degree that Article 8 is engaged is sufficiently serious that the legal basis regulating the police use of the measure must set out, with clarity and precision, the scope of the discretion conferred upon the police to use the measure.

Finally, this chapter has drawn attention to various inconsistencies in the domestic application of the proportionality assessment in the cases considered. The domestic courts do seem to have moved away from the perfunctory exercise of characterising an interference as 'minor' and then concluding that the public interest pursued clearly overrides the individual's rights, without any detailed consideration of how these countervailing interests interact. However, there is no systematic approach to the proportionality analysis. Whilst each of the four prongs of the proportionality assessment are referred to at various points in the case-law, there are notable inconsistencies in the way this assessment is applied. This chapter has drawn attention to some of these inconsistencies and has sought to demonstrate how they might be redressed through a systematic application of the four-pronged proportionality test. The next chapter switches attention to the retention and processing of personal information taken from those subject to the criminal justice process. In particular, issues surrounding the retention of DNA and fingerprint data taken from non-convicted persons will be considered.

5 Retaining and Processing Fingerprint and DNA Data

Over the last quarter of a century, the growing technological and legal capacity of authorities to retain and analyse DNA and fingerprint samples has increased the assistance such materials can offer in the identification, prosecution, and elimination from inquiries of suspected offenders as part of a criminal investigation. However, the retention of such information as part of a criminal process raises principled concerns regarding individual privacy interests. Chapter 5 summarises the development of the legal framework regulating these measures, paying attention to the broader policy context. Questions are then posed and explored regarding the extent to which the current legal framework adequately protects the privacy interests of those subject to the criminal process.

The chapter has two parts. Part 1 presents a brief history of the development of English law's framework for the retention of fingerprint and DNA data taken from those arrested as part of a criminal process. Against this backdrop, in the second part, the disparity between the decisions of domestic judges and the decision of the ECtHR in *S and Marper*⁸¹⁷ will be explored. From here, the domestic legal framework as it has developed in response to the *S and Marper* judgment will be evaluated drawing on the jurisprudential analysis of previous chapters. Finally, conclusions will be drawn regarding the extent to which the current legal framework is ECHR-compatible and normatively cogent in terms of the privacy protection it affords to those subject to the criminal process.

1. The Development of the Legal Framework

As originally enacted, the Police and Criminal Evidence Act 1984 (PACE 1984) distinguished between different types of samples that may be taken from those in police custody in the following way:

⁸¹⁷ *S and Marper v United Kingdom* (2009) 48 EHRR 50.

- Fingerprints – these are prints taken from fingers and palms.⁸¹⁸
- Non-intimate samples – these include samples of hair (other than pubic hair); samples taken from or underneath a nail; swabs taken from any part of a person’s body other than a body orifice; and footprints or similar impressions of any part of a person’s body other than a part of the hand.⁸¹⁹
- Intimate samples – an intimate sample is described as a sample of blood, semen, or any other tissue, fluid, urine, saliva, or pubic hair, or a swab taken from a person’s body orifice.⁸²⁰

PACE 1984 specified that, in the absence of the individual’s consent, his or her fingerprints may be taken if he or she has been charged with a recordable offence, or where an officer of at least the rank of superintendent has reasonable grounds for suspecting the involvement of the person whose fingerprints are taken in a criminal offence and the fingerprints will tend to ‘prove or disprove his involvement’.⁸²¹ Non-intimate samples could be taken only under similar circumstances, except that a superintendent could authorise the taking of such samples only if the person was suspected of being involved in a ‘serious arrestable offence’.⁸²² Intimate samples could only be taken with consent, and if authorised by an officer with the rank of at least superintendent. However, under section 62 PACE 1984, if an individual were to refuse to provide such a sample, adverse inferences could be drawn at trial.⁸²³ This part looks at how laws governing retention expanded post-PACE 1984 before subsequently contracting following the judgment of the ECtHR in *S and Marper*.

1.1 From PACE 1984 to *S and Marper*

Soon after the enactment of PACE 1984, powers to take fingerprints and non-intimate samples (redefined to include mouth swabs that are commonly used to

⁸¹⁸ Section 65 PACE 1984 (as originally enacted).

⁸¹⁹ *ibid.*

⁸²⁰ *ibid.*

⁸²¹ Section 61 PACE 1984 (as originally enacted).

⁸²² Such offences are defined as those likely to cause serious harm, threaten national security or result in substantial financial gain and loss. Examples include murder, robbery or rape. See section 63 PACE 1984.

⁸²³ Section 62 PACE 1984.

extract a DNA sample from an arrestee)⁸²⁴ significantly expanded as the capacity of technology to extract ever-more personal information from such samples increased. Under section 57 of the Criminal Justice and Public Order Act 1994 (CJPOA 1994), following a series of recommendations from The Royal Commission on Criminal Justice,⁸²⁵ PACE 1984 was amended to allow the police to take DNA samples from anyone charged with a recordable offence, irrespective of whether or not DNA evidence was immediately relevant for the offence for which the person was charged.⁸²⁶ Soon after this development, the National DNA Database (NDNAD) was established to store in electronic form the DNA profiles of those who went on to be convicted of recordable offences.⁸²⁷ The rationale underpinning this expansion was to utilise modern technology to its fullest potential in the fight against crime, as the Home Secretary at the time, Michael Howard declared: '[The Government's proposals] help bring the law into line with the capabilities of modern technology. The full force of modern science will be brought to bear upon the modern criminal.'⁸²⁸

Whilst these developments were met with some resistance by human rights organisations, such as Liberty,⁸²⁹ media and public support for the expansion of such technologies in the fight against crime, to which politicians and police forces were only too keen to respond, largely overwhelmed this. Though this section of the analysis is not concerned with explaining the social and contextual factors which may have contributed to the expansion of police powers to collect and retain DNA data, it

⁸²⁴ See the amendments to PACE 1984 detailed in Police and Criminal Evidence Act (Codes of Practice) (No 3) Order 1995, SI 1995/450.

⁸²⁵ See: The Royal Commission on Criminal Justice, *Report of The Royal Commission on Criminal Justice (Cm 2263)* (London: HMSO, 1993) 14-16.

⁸²⁶ Sections 55 and 57 CJPOA 1994 (as originally enacted).

⁸²⁷ DNA samples contain biological matter taken from the individual, often in the form of a mouth swab. The coding regions of the sample contain all of the individual's genetic information including information about racial indicators, medical predispositions, and physical attributes. DNA profiles are derived from the non-coding regions of the DNA sample. The profile is essentially a number identifying the sample from which it is derived. This can be uploaded to the NDNAD and subsequently matched to other samples from the individual, such as samples recovered from a crime scene. It is generally accepted that these contain less personally identifiable information than DNA samples. Fingerprints are usually scanned electronically from an arrestee. These are said to contain the least identifiable information out of the three types of data considered. Fingerprints reveal no information about the individual beyond the unique pattern of his or her skin on the body part (usually a finger or palm) from which the "print" is derived: see D. Wilson, *Genetics, Crime and Justice* (Cheltenham: Edwin Elgar, 2015) 24-27; P. Hughes, *DNA Fingerprinting Research Paper 96/44* (House of Commons Library: 27 March 1996) 24.

⁸²⁸ HC Deb, 3 November 1994, c1335.

⁸²⁹ Hughes, n 827, 25.

is noteworthy that these developments emerged in the midst of what sociological commentators have described as the 'punitive turn', where crime control is said to have been politicised and, in response to public demand, political parties clamoured to be seen as 'tough on crime'.⁸³⁰ Despite legislative amendments, fingerprints and DNA samples taken from those subject to the criminal process were still to be destroyed (subject to certain exceptions) as soon as practicable after the finalisation of proceedings in which the individual was cleared. The legal position concerning police powers to retain DNA samples from those subject to the criminal process after the establishment of the NDNAD was clarified by then Home Secretary, David Maclean:

Samples taken from people who are acquitted or not proceeded against will be retained if another person from whom a sample has been taken in the same investigation is convicted of an offence. These samples may be needed for further comparative analysis if it is subsequently suggested that there has been a miscarriage of justice. DNA profiles will be retained in a searchable form on the DNA database only if the suspect is convicted of or cautioned for a recordable offence or if action against that individual is ongoing.⁸³¹

Thus, the position of the Government and the law was clear: but for very specific and limited exceptions, the police were to destroy any DNA samples and delete any profiles derived from such samples if, at the conclusion of their investigation, the individual was subject to any disposal other than a criminal conviction or caution. Over the next ten years the Government's approach to the retention of non-convicted persons' DNA and fingerprint data would change considerably.

Two legislative developments, the Criminal Procedure and Investigations Act 1996 and the Criminal Evidence Act 1997, extended the powers of the police to search profiles across the United Kingdom, and to take without consent non-intimate samples from prisoners convicted of certain serious offences. In July 1999, in an attempt to bring legislation up-to-date with advances in fingerprint and DNA

⁸³⁰ These social and contextual factors were surveyed in the introduction. See generally: A. Bottoms, 'The Philosophy and Politics of Punishment and Sentencing' in C. Clarkson and R. Morgan (eds.) *The Politics of Sentencing Reform* (Oxford: Clarendon Press, 1995) 17-50; D. Garland, *The Culture of Control* (Oxford: Oxford University Press, 2001).

⁸³¹ HC Deb, 31 October 1995, vol 265 c166W.

technology, the Home Office published a consultation document, *Proposals for Revising Legislative Measures on Fingerprints, Footprints and DNA Samples*.⁸³² Among the many proposals that were made in this document were suggestions that PACE 1984 should be amended to provide powers to take fingerprints without consent at any location;⁸³³ and that officers of inspector rank or above should be permitted to give authorisation to take fingerprints or samples without consent.⁸³⁴

Though such proposals would have had the effect of expanding police powers to collect and retain DNA and fingerprint data, the document is written in terms which seem to address practical issues rather than pursuing an expansionist agenda.⁸³⁵ Then two legal challenges to the use of the DNA of non-convicted persons at trial put the expansion of powers to retain DNA and fingerprint data on the domestic political agenda. In *R v Weir*,⁸³⁶ the appellant challenged his conviction of murder. The appellant was first arrested for drugs-related offences and had a DNA sample taken from him and submitted for DNA profiling. The case against him was subsequently discontinued and all charges were dropped. At this stage, under section 64(1) of PACE 1984, the sample should have been destroyed and the profile deleted as soon as practicable after that date. However, crucially, the profile was not deleted. The following year the appellant's DNA profile was matched against a DNA sample taken from the scene of a murder and, on this basis, the appellant was arrested and eventually convicted of murder.⁸³⁷ However, the Court of Appeal quashed the appellant's conviction on the grounds that his DNA profile should not have been retained by the police, and therefore, the subsequent evidence derived from it should not have been admitted at trial.⁸³⁸ In the second case, *Attorney General's Reference (No.3 of 1999)*,⁸³⁹ the House of Lords overruled a decision in the Court of Appeal in

⁸³² Home Office, *Proposals for Revising Legislative Measures on Fingerprints, Footprints and DNA Samples* (London: The National Archives, 31 July 1999).

⁸³³ *ibid* 4.

⁸³⁴ *ibid* 5.

⁸³⁵ *ibid* 11.

⁸³⁶ *R v Weir* (2000) 97 LSG 37.

⁸³⁷ *ibid* at [2].

⁸³⁸ *ibid* at [6].

⁸³⁹ *Attorney General's Reference (No 3 of 1999)* [2001] 2 AC 91.

which it was held that improperly obtained DNA evidence was inadmissible.⁸⁴⁰ The defendant in this case was first acquitted of burglary in August 1998 but the DNA profile taken upon his arrest, which should have been deleted under PACE 1984, was retained on the NDNAD. In October 1998, a DNA profile obtained from swabs taken from an elderly victim of rape and assault was found to match the retained DNA profile of the defendant. Thus, the House of Lords considered whether, in cases where a prosecution is based on such DNA evidence, the trial judge has the discretion to permit a prosecution to proceed, notwithstanding the terms of PACE 1984.⁸⁴¹ In his leading judgment, Lord Steyn held that the Court of Appeal's rulings in the immediate case and in *Weir* were incorrect.⁸⁴² Furthermore, in considering whether the use in the trial of the sample, which should have been destroyed, constituted a violation of the appellants' Article 8 ECHR rights, Lord Steyn stated:

If the construction I have adopted is correct "the interference" is "in accordance with law", the critical point being that admissibility is governed by judicial discretion under section 78. And "the interference", so qualified, is plainly necessary in a democratic society to ensure the investigation and prosecution of serious crime. There is plainly no breach of Article 8.⁸⁴³

Whilst in this case there was no detailed consideration of the extent to which arrestee DNA retention is compatible with Article 8 ECHR, Lord Steyn's comments encouraged the New Labour Government to begin legislating new powers for the police to retain the DNA and fingerprint data of individuals subject to the criminal process who did not go on to be convicted of an offence. A month after *Attorney General's Reference (No.3 of 1999)*, then Home Secretary Jack Straw presented the Criminal Justice and Police Bill to the House of Commons, which set forth the Government's plans to extend police powers to retain DNA and fingerprint data.⁸⁴⁴ The Home Secretary's comments when introducing the Bill in the House of Commons contextualise the Government's rationale for extending these powers. He stated:

⁸⁴⁰ *ibid* 91.

⁸⁴¹ *ibid* 93.

⁸⁴² *ibid* 120.

⁸⁴³ *ibid* 119.

⁸⁴⁴ See Criminal Justice and Police Bill (2000-2001) (House of Commons, 18 January 2001).

DNA profiling is a very powerful tool—an objective form of evidence. Its value lies as much, if not more, in its ability to exclude the innocent as in its ability to convict the guilty. When the police investigate a case, if they do not proceed with a prosecution or the suspect is acquitted, they routinely retain all the records of the investigation, including the notes of interviews with suspects and other interviewees. That has always been the case. The police would not dream of throwing away their memory on the off chance that the offender may or may not commit a further offence. Yet the law requires that the most objective and powerful forms of evidence—fingerprints and DNA—have to be destroyed if a conviction does not follow from the taking of the sample in question.

This has already led to serious miscarriages of justice. In two recent cases, *R. v B* and *R. v Weir*, compelling DNA evidence that linked one suspect to a rape and the other to a murder could not be used, and neither suspect could be convicted, because it turned out that at the time when the matches were made, the defendants had either been acquitted of another crime, or a decision had been made not to proceed with the offences for which the DNA profiles were originally taken. Under the existing provisions, the profiles should have been destroyed.⁸⁴⁵

These comments are indicative of the New Labour Government's stance, which emphasised the probative benefits of the expansion of the NDNAD, whilst simultaneously giving scant regard to the privacy interests which may be set back by the retention of this biometric information. However, the Bill was not met with cross party support. Liberal Democrat MP, Simon Hughes, voiced concerns that the Bill had been brought before Parliament with little debate over the competing issues at stake.⁸⁴⁶ Hughes also objected that the Bill seemed to distinguish non-convicted persons who are subject to criminal proceedings from the rest of society on an arbitrary basis:

The Liberal Democrats have never signed up to people who have not consented having their DNA held after being found not guilty or when a case does not proceed. Doing so represents a big step forward—in my view, a dangerous step forward in civil liberty terms. Of course DNA is helpful, but if the Government think that it would help if everybody's DNA was held, let them say, "When a baby is registered, a sample has to be supplied to the registrar of births, marriages and deaths." That, effectively, is what the Bill suggests.⁸⁴⁷

Further concerns, that the retention policies represented an unjustified interference with the Article 8 rights of those subject to the criminal process and that the policies were an outlier among other Council of Europe Member States, were raised in the

⁸⁴⁵ HC Debate, 29 January 2001, vol 362 c42.

⁸⁴⁶ *ibid* c70.

⁸⁴⁷ HC Debate, 29 January 2001, vol 362 cc72-73.

House of Lords debates.⁸⁴⁸ Notwithstanding these arguments, the Bill was passed. Section 64 of PACE 1984 was amended by section 82 of the Criminal Justice and Police Act 2001 (CJPA 2001), which provides that fingerprints or samples taken from a person in connection with the investigation of an offence may be retained and used for purposes related to the prevention or detection of crime, the investigation of an offence, or the conduct of a prosecution.⁸⁴⁹

Shortly afterwards the amendments to PACE 1984 were challenged on the basis that they were incompatible with Article 8 ECHR. As we have seen in Chapter 3, in the case of *S and Marper* the ECtHR would eventually determine that the domestic DNA and fingerprint data retention regime under PACE 1984 violated the applicants' rights under Article 8 of the ECHR.⁸⁵⁰ However, in the Divisional Court, Leveson J had trouble finding that the retention of DNA and fingerprint samples engaged Article 8 in any form.⁸⁵¹ In any event, the Divisional Court was in no doubt that the measures did not violate Article 8.⁸⁵² This decision was affirmed in the Court of Appeal, where Lord Woolf CJ put the Divisional Court's doubts about the applicability of Article 8 to rest in finding that the retention of personal information in this context constituted a minor interference with Article 8(1).⁸⁵³ On one hand, Lord Woolf CJ held that because fingerprint and DNA samples are materials that contain personal information, the retention of such materials requires legal justification.⁸⁵⁴ This broad interpretation of the scope of Article 8 seems to go beyond the jurisprudence of the ECtHR to include any personal information within the scope of Article 8 protection. On the other hand, in characterising the interference as minor and insubstantial, Lord Woolf CJ seemed to downplay the impact such broad and extensive retention policies under the PACE 1984 regime could have on individual privacy interests.

⁸⁴⁸ See generally, HL Debate, 02 April 2001. vol 624 cc655-716.

⁸⁴⁹ See section 82 Criminal Justice and Police Act 2001.

⁸⁵⁰ n 817.

⁸⁵¹ *R (S and Marper) v Chief Constable of South Yorkshire Police* [2002] EWHC 478 (Admin) [21].

⁸⁵² *ibid* at [49]-[51].

⁸⁵³ *R (S and Marper) v Chief Constable of South Yorkshire Police* [2002] EWCA Civ 1275 at [33].

⁸⁵⁴ *ibid* at [32].

Approaching the question of justification for the interference, Lord Woolf CJ agreed with the Divisional Court, giving weight to the limited purpose for which the DNA and fingerprint samples could be used, and the consequences of the domestic retention policies prior to the enactment of the CIPA 2001.⁸⁵⁵ With regard to the question of whether Article 14 ECHR had been violated, Lord Woolf CJ held that the DNA retention policies did not discriminate against any individuals, and dismissed the appeals.

Waller LJ agreed with Lord Woolf CJ, further remarking on the issue raised by Liberty as intervenors that the retention of DNA *samples* as well as profiles ought to constitute a violation of Article 8 because of the greater risk of future abuses of this information. In finding that the interference was proportionate to the legitimate aim, Waller LJ stated:

First the retention of samples permits (a) the checking of the integrity and future utility of the DNA database system; (b) a reanalysis for the upgrading of DNA profiles where new technology can improve the discriminating power of the DNA matching process; (c) reanalysis and thus an ability to extract other DNA markers and thus offer benefits in terms of speed, sensitivity and cost of searches to the database; (d) further analysis in investigations of alleged miscarriages of justice; and (e) further analysis so as to be able to identify any analytical or process errors. It is these benefits that must be balanced against the risks identified by Liberty.⁸⁵⁶

Sedley LJ added that the rule of law would prevent an opening of a 'Pandora's box' of unknown uses of DNA samples as technology advances.⁸⁵⁷ However, Sedley LJ departed from the majority in concluding that the Chief Constable should be required to consider in each case whether the individual from whom samples are retained is free of 'any taint of suspicion' and in that case delete his or her profile.

This judgment seemed to bolster the Government's expansionist aims with regard to the collection and retention of DNA and fingerprint data, and the Criminal Justice Act 2003 subsequently gave the police the power to collect and retain such data from

⁸⁵⁵ *ibid* at [40].

⁸⁵⁶ *ibid* at [61].

⁸⁵⁷ *ibid* at [78].

anybody arrested for a recordable offence in England and Wales.⁸⁵⁸ When introducing the proposals for this legislative change in the House of Commons, then Under-Secretary for the Home Department, Bob Ainsworth, cited the Court of Appeal judgment in *S and Marper* to assuage concerns about civil liberties.⁸⁵⁹

At the second reading of the Criminal Justice Bill in the House of Lords, Lord Thomas of Gresford issued a prescient warning of the dangers of expanding police powers to collect and retain DNA and fingerprint data on the back of the judgment in *S and Marper*, because this case was likely to be challenged.⁸⁶⁰ However, the challenge in domestic proceedings was once again to prove unsuccessful. The House of Lords dismissed the claimants' final appeal in *S and Marper*, making the following findings:

- (i) Article 8(1) ECHR was not engaged by the retention of the DNA or fingerprint samples and profiles (Baroness Hale dissenting);
- (ii) Insofar as the retention of fingerprints and samples under section 64(1A) of PACE 1984 constituted an interference with the applicants' Article 8(1) rights, such interference was modest and objectively justified under Article 8(2) as being necessary for the prevention and detection of crime;
- (iii) That the difference in treatment between the applicants and those who had not been required to provide fingerprint or DNA samples did not violate Article 14 of the ECHR; and
- (iv) The retention policies in place were lawful.⁸⁶¹

Lord Steyn 'inclined' to the view that the retention of the fingerprints and DNA samples did not interfere with Article 8(1), considering that, if there was an interference, it was 'very modest indeed.'⁸⁶² In coming to this conclusion, Lord Steyn relied on the opinion of Leveson J in the Divisional Court, the witness statement of Dr Bramley explaining how such DNA and fingerprint samples are retained and used by

⁸⁵⁸ Sections 9 and 10 Criminal Justice Act 2003 (as enacted).

⁸⁵⁹ HC Debate, 19 May 2003, vol 405 c699.

⁸⁶⁰ HL Debate, 30 June 2003, vol 650 c711.

⁸⁶¹ *R (S and Marper) v Chief Constable of South Yorkshire Police* [2004] UKHL 39.

⁸⁶² *ibid* at [31].

the police, and the findings of the European Commission on Human Rights (ECommHR) in the cases of *McVeigh, O'Neill and Evans v United Kingdom*⁸⁶³ and *Kinnunen v Finland*.⁸⁶⁴

In a dissenting opinion, Baroness Hale focused on the fundamental impact that this form of retention can have on privacy related interests:

If the taking and use of the information is an interference, it is difficult to see why the retention, storage or keeping of that information is not also an interference. Storing information almost inevitably involves someone else knowing it. It is an interference with privacy for someone to know or have access to private information even if they make no other use of it. The mere fact that someone has read my private correspondence or seen my bank accounts is an interference with my privacy even if that person tells no one else what he has seen.⁸⁶⁵

This is a nuanced point, recognising privacy interests which may be set back in ways unrelated to an individual's freedom to exercise his or her personal autonomy. Baroness Hale seemed to focus on the deleterious impact privacy intrusions might have on the dignity of the individual, 'injuring the individual in his very humanity'.⁸⁶⁶

Despite 'inclining' to the view that there was no interference with Article 8(1), Lord Steyn considered the question of whether or not the retention of the samples was justified under Article 8(2). Lord Steyn concluded that the powers and discretion conferred on the Chief Constable under section 64 of PACE provided an adequate legal basis for interference for the legitimate aim of preventing or detecting crime.⁸⁶⁷ Turning to the question of proportionality, Lord Steyn concluded that, cumulatively, the following factors qualified the retention of DNA and fingerprint samples and profiles as proportionate in effect:

(i) the fingerprints and samples are kept only for the limited purpose of detection, investigation, and prosecution of crime; (ii) the fingerprints and samples are not of any use without a comparator fingerprint or sample from the crime scene; (iii) the fingerprints and samples will not be made public; (iv) a person is not identifiable to the untutored eye simply from the profile on the

⁸⁶³ *McVeigh, O'Neill and Evans v United Kingdom* (1981) 5 EHRR 71.

⁸⁶⁴ *Kinnunen v Finland*, App no 24950/94, (ECommHR, 15 May 1996).

⁸⁶⁵ n 861 at [73].

⁸⁶⁶ C. Fried, 'Privacy' (1968) 77 *Yale Law Journal* 475-493 at 475.

⁸⁶⁷ n 861 at [36].

database, any interference represented by the retention being minimal; (v) and, on the other hand, the resultant expansion of the database by the retention confers enormous advantages in the fight against serious crime.⁸⁶⁸

Lord Steyn then addressed Sedley LJ's dissenting judgment, in the court below, that the data of those freed from 'any taint of suspicion'⁸⁶⁹ should be destroyed. Lord Steyn thought that this would involve the police in 'interminable and invidious disputes' and that such considerations are 'apposite to the question whether there are less intrusive but realistic means available to achieve the legislative purpose.'⁸⁷⁰ In finding that the policies were proportionate, Baroness Hale stated that: 'The whole community, as well as the individuals whose samples are collected, benefits from there being as large a database as it is possible to have'⁸⁷¹ and, in a similar vein, Lord Carswell observed that, 'the larger the database, the less call there will be to round up the usual suspects. Instead, those amongst the usual suspects who are innocent will at once be exonerated.'⁸⁷²

Further amendments to PACE 1984 were introduced as part of the Serious Organised Crime and Police Act 2005.⁸⁷³ This led to a situation where (save for a number of limited exceptions) the police were empowered to retain fingerprints, footwear impressions, samples and data derived from such samples, taken from an individual subject to a criminal process irrespective of whether the individual went on to be convicted of any offence, and irrespective of whether the individual was arrested for a serious or minor offence, provided that this was done for purposes related to the prevention or detection of crime, the conduct of a prosecution, or the identification of a deceased person.⁸⁷⁴ As noted, this expansive regime was once again challenged, this time successfully, when *S and Marper* reached the Grand Chamber of the

⁸⁶⁸ *ibid* at [38].

⁸⁶⁹ n 853 at [94].

⁸⁷⁰ n 861 at [39].

⁸⁷¹ *ibid* at [78].

⁸⁷² *ibid* at [88].

⁸⁷³ Sections 117 and 118 Serious Organised Crime and Police Act 2005.

⁸⁷⁴ See section 64(1A) PACE 1984 (as amended). For a full discussion see E. Cape, 'The Protection of Freedoms Act 2012: The Retention and Use of Biometric Data Provisions' [2013] *Criminal Law Review* 23-37 at 25.

ECtHR.⁸⁷⁵ The Strasbourg Court unequivocally found that the retention of DNA and fingerprint samples and profiles *did* constitute an interference with Article 8(1) of the ECHR.⁸⁷⁶ Furthermore, the ECtHR found that the 'blanket and indiscriminate' nature of the retention policies under the PACE 1984 regime could not be considered 'necessary in a democratic society' and accordingly violated the applicants' Article 8 rights.⁸⁷⁷

1.2 Developments Post-*S and Marper v United Kingdom*: Proportionality or pushing the boundary?

In response to the judgment from the Strasbourg Court, the New Labour Government issued a consultation paper, *Keeping the Right People on the DNA Database*.⁸⁷⁸ In it, the then Home Secretary, Jacqui Smith, expressed her commitment to comply with the ECtHR ruling in *S and Marper*, whilst still maintaining the fullest public protection benefits of the NDNAD.⁸⁷⁹ The consultation paper proposed the destruction of all DNA samples taken from a suspect arrested for a criminal offence after a DNA profile had been made or after a maximum of six months, depending on which came first.⁸⁸⁰ The Government also suggested that, for all but serious violent, sexual, or terrorism-related offences, those arrested but not subsequently convicted of a recordable offence would have their profiles automatically deleted after six years.⁸⁸¹ Furthermore, the paper addressed the concerns of the Strasbourg Court relating to the retention of DNA samples, profiles, and fingerprint data of children, outlining a six-year period for the retention of such non-conviction data where it is taken from

⁸⁷⁵ n 817.

⁸⁷⁶ *ibid* at [73].

⁸⁷⁷ *ibid* at [125].

⁸⁷⁸ Home Office, *Keeping the Right People on the DNA Database: Science and Public Protection* (London: The Stationary Office, 2009).

⁸⁷⁹ *ibid* at [2.2].

⁸⁸⁰ *ibid* at [2.4].

⁸⁸¹ Those who are arrested but not convicted of the more serious offences detailed would have their DNA profiles automatically deleted after twelve years and those providing DNA samples voluntarily would not have their profiles stored on the National DNA Database. See *ibid* at [2.4].

children.⁸⁸² In all cases, parallel limitations would apply to the retention of fingerprint data as to the retention of DNA profiles.

These proposals were amended as part of the Crime and Security Bill so that no distinction would be made between the retention periods based on the offence for which an individual was arrested. In the case of children convicted of criminal offences, the retention period was reduced to three years.⁸⁸³ Despite these amendments, the proposals were met with intense criticism when put before the House of Commons on the grounds that the retention powers were still too broad to respect the Article 8 rights of those subject to the criminal justice process.⁸⁸⁴ In a report scrutinising the Bill, the Parliamentary Joint Committee on Human Rights expressed concern that the Government's approach stretched the ECtHR's decision in *S and Marper* to its limit.⁸⁸⁵ Among other things, the Committee criticised the Government's proposals on the grounds that the six-year retention period for those not convicted or charged with an offence was disproportionate and potentially arbitrary, and the proposals were said to discount the stigmatising effect of the inclusion of the samples of innocent people on the National DNA Database.⁸⁸⁶

Despite the shortcomings identified by the Committee, the Crime and Security Bill was enacted, with some minor amendments, as the Crime and Security Act 2010. However, the new DNA and fingerprint retention provisions were not brought into effect following a change of Government in the 2010 General Election.⁸⁸⁷ Instead, the Conservative-led Coalition Government introduced the Protection of Freedoms Bill, which sought to address the ECtHR decision in *S and Marper*. In another report, the

⁸⁸² *ibid* at [6.18]-[6.19].

⁸⁸³ Crime and Security Bill (Bill No. 3 of 2009-2010).

⁸⁸⁴ MPs called into question the lack of external review for retention, the periods of retention for DNA profiles taken from those not subsequently convicted of any offence, and the strength of the evidence base upon which the new proposals were based. See generally HC Deb, 18 January 2010, vol.504, cc32-36.

⁸⁸⁵ Joint Committee on Human Rights, *Legislative Scrutiny: Crime and Security Bill; Children, Schools and Families Bill* (HMSO 2010) HL Paper No.67 (Session 2009-10); *House of Commons Public Bill Committee*, January 26, 2010, c71.

⁸⁸⁶ Joint Committee on Human Rights, *ibid* 3.

⁸⁸⁷ GeneWatch, 'Crime and Security Act 2010', <http://www.genewatch.org/sub-565677> [Accessed September 15, 2016].

Joint Committee on Human Rights welcomed the new Bill for its enhancement of the legal protection of human rights and civil liberties.⁸⁸⁸ In particular, the Committee endorsed the Government's view that the proposals in the Protection of Freedoms Bill were more in line with the Scottish model of DNA and fingerprint data retention (which is much more restrictive in its non-conviction retention policies) and, consequently, were more likely to be ECHR-compatible than the proposals in the Crime and Security Act 2010.⁸⁸⁹ However, the Committee did suggest that without fuller statistical information on the operation of the NDNAD it would not be possible for it to confirm the proportionality of the proposed measures.⁸⁹⁰

The Protection of Freedoms Act 2012 (PoFA 2012) received Royal Assent in May 2012. The PoFA 2012 made extensive changes to the retention regime set forth in PACE 1984 amending sections 63F to 63H. The effect of the (somewhat complicated) new provisions is that, where an arrestee does not go on to be convicted of an offence, any fingerprints or DNA profiles taken from that individual (section 63D material)⁸⁹¹ must be destroyed no later than the conclusion of the investigation or, if the individual is charged, at the conclusion of any criminal proceedings.⁸⁹² The section 63D material can be speculatively searched against national databases upon its collection. This does engage privacy interests, but is not the focus of this chapter. However, there are several complex provisions that effectively make it possible for the police to retain such data at the conclusion of criminal proceedings in the following, specified circumstances:

1.2.1. Individuals arrested for or charged with 'qualifying offences', but not subsequently convicted

⁸⁸⁸ Joint Committee on Human Rights, n 885, 3.

⁸⁸⁹ Joint Committee on Human Rights, *Legislative Scrutiny: Protection of Freedoms Bill*, (HMSO 2011) HL Paper No.195 (Session 2010-2012) 10.

⁸⁹⁰ *ibid*, 3.

⁸⁹¹ The relevant material under PACE 1984 section 63D (as amended) includes fingerprints taken under any power conferred by PACE 1984 Pt V, and any DNA profile derived from a sample taken in the same circumstances as for fingerprints. Notably, DNA samples are not included in the section 63D definition.

⁸⁹² See PACE 1984 sections 63F-63H (as amended).

If the section 63D material is taken from an individual in connection with a 'qualifying offence',⁸⁹³ but the individual is not subsequently convicted, then the material can be retained indefinitely only if the individual has a previous conviction for a recordable offence.⁸⁹⁴ If the individual does not have a previous conviction, then the retention period will differ according to whether the individual was charged with the qualifying offence or only arrested. In the case of the former, the police can retain the section 63D material for three years. However, if the individual is arrested but not subsequently charged, then the police can still retain the material for three years but only with the consent of the Commissioner for the Retention and Use of Biometric Material (a role created under PoFA 2012, section 20).⁸⁹⁵

1.2.2. Individuals arrested for or charged with minor offences, but not subsequently convicted

PoFA 2012 section 4 inserts section 63H into PACE 1984. This provides that where an individual is arrested or charged with, but not convicted of, a minor offence,⁸⁹⁶ any collected section 63D material must be destroyed, unless the individual has been previously convicted of a recordable offence that is not an 'excluded offence'.⁸⁹⁷ In such cases, where the individual has a previous conviction for a non-excluded

⁸⁹³ Such offences include murder, manslaughter, false imprisonment, and certain other serious offences detailed in PACE 1984 section 65. Some amendments to the current retention regime are contained in clauses 71 and 72 of the Policing and Crime Bill. The effect of these amendments is to expand the definitions of 'recordable offence' and 'qualifying offence' to include offences under the law of a country or territory outside of England and Wales where the act constituting the offence would be a recordable or qualifying offence if committed in England and Wales. These amendments aim to address the issue of having to relocate and re-take samples from a person following an arrest in this country, where it subsequently emerges that the person has previous convictions for serious offences committed in other countries. See: Policing and Crime Bill (Bill No. 118 of 2016-17).

⁸⁹⁴ PACE 1984 section 63F (as amended).

⁸⁹⁵ The effect of these provisions is described in a House of Commons Research Briefing as follows: 'The police may apply to the Commissioner to retain such data if the victim of the alleged offence was (at the time of the offence) under the age of 18, a vulnerable adult or in a close personal relationship with the arrested person. The police may also apply where they consider that retention is necessary for the prevention or detection of crime. Notice of any application to the Commissioner must also be given to the person from whom the data was taken, and that person may make representations to the Commissioner in respect of the application. If the Commissioner does not give his consent then the data cannot be retained.' See: *House of Commons Library Research Paper 4049*, November, 25, 2015, 3.

⁸⁹⁶ Minor offences are recordable offences that are not 'qualifying offences'. See Protection of Freedoms Act 2012, Explanatory Note at [90].

⁸⁹⁷ 'Excluded offence' means a recordable offence which: (i) is not a 'qualifying offence'; (ii) is the only recordable offence of which a person has been convicted, and (iii) was committed when the person was under 18, and for which the person convicted of the offence was not given a custodial sentence of 5 years or more. See PACE 1984 section 63H (as amended).

offence, section 63D material may be retained indefinitely.⁸⁹⁸ There are further provisions for those who are subject to the criminal process. If, for instance, an individual receives a Penalty Notice for Disorder, the police are empowered to retain any section 63D material for two years.⁸⁹⁹ Furthermore, such materials can be retained for two years (with the possibility of renewal), where they would otherwise be destroyed, if a responsible chief officer of police deems that such retention is necessary in the interests of national security.⁹⁰⁰

The retention of biological DNA samples is subject to separate retention provisions. PoFA 2012 section 14 inserts section 63R into PACE 1984, which governs the retention, use, and destruction of physical DNA samples. Like section 63D material (including DNA profiles), DNA samples must be destroyed where it appears to a chief police officer that they have been taken unlawfully or as a result of mistaken identity. In addition, DNA samples must be destroyed once a DNA profile has been derived from the sample, or six months after the sample has been collected (if this date comes before a profile is created).⁹⁰¹ This period can be extended if a chief police officer applies to a District Judge to retain the sample for a longer period on the grounds that the sample may be needed for use in a subsequent trial.⁹⁰² Any DNA sample retained under these provisions may only be used for purposes related to the proceedings for which the sample was taken, though a speculative search of the National DNA Database is permitted.⁹⁰³

2. Justifying Non-Conviction Retention

Various justifications have been advanced for the collection and retention of DNA and fingerprint information from those subject to the criminal process. Arguments for curtailing the rapid expansion of the National DNA Database have similarly multiplied

⁸⁹⁸ PoFA 2012 section 4.

⁸⁹⁹ *ibid* section 8.

⁹⁰⁰ *ibid* section 9.

⁹⁰¹ *ibid* Explanatory Note, [100].

⁹⁰² PACE 1984 section 63R (as amended).

⁹⁰³ *ibid*.

over the last twenty years. This section considers how, unfortunately, the rationality of arguments has not always prevailed over political and legal influence in this area.

When addressing the justifiability of the interferences with Article 8(1) in *S and Marper*, the domestic courts found that the interference in question was 'in accordance with the law' and 'in pursuit of a legitimate aim' for the purposes of Article 8(2). To an extent, the ECtHR concurred with this view in finding that the retention of the applicants' fingerprint and DNA records had a clear basis in domestic law, and that the law was not 'insufficiently certain' to comply with Article 8 ECHR.⁹⁰⁴ If anything, the new PoFA 2012 provisions only increase this certainty, outlining the length of retention dependent on the offence and disposal. The provisions also outline the scope of the discretion conferred upon the Biometrics Commissioner to determine the length of retention in certain specified circumstances. That retention pursues the legitimate aims of preventing disorder or crime and/or ensuring public safety is also an uncontroversial point. The greatest area of divergence between the analyses of the domestic courts and that of the ECtHR was on the final criterion in Article 8(2): whether the interference was 'necessary in a democratic society'. This requires that the interfering measures respond to a 'pressing social need' and are 'proportionate' to the legitimate aim pursued.⁹⁰⁵ The balance of this chapter highlights the differences between the domestic courts and the ECtHR in confronting these issues, before assessing the extent to which the PoFA 2012 regime surmounts the final hurdle of Article 8(2).

As a starting point in assessing the proportionality and necessity of the measures, it is instructive to have a clear view on how, and to what degree, such retention sets back privacy interests generally. From here, the current retention regime can be assessed drawing on the structured proportionality test developed in the domestic

⁹⁰⁴ n 817 at [97].

⁹⁰⁵ *Olsson v Sweden* (1988) 11 EHRR 259 at [67].

cases of *Quila*⁹⁰⁶ and *Bank Mellat*.⁹⁰⁷ This test, as discussed in Chapter 2, consists of four limbs, which are broadly followed in the jurisprudence of the ECtHR and a range of other domestic jurisdictions as a method of adjudicating competing rights.⁹⁰⁸

The following analysis is divided into three sections. The first two sections demonstrate how the domestic courts in *S and Marper* betrayed a fundamental misunderstanding of the normative value of privacy. This seeming lack of understanding, along with different approaches to interpreting Article 8(2) criteria, produced a stark contrast between the decisions of the domestic courts and that of the ECtHR. The third section considers whether or not the proposals in PoFA 2012 pertaining to the retention of arrestees' DNA and fingerprint data go far enough to redress the balance between state power and the privacy interests of those subject to the criminal process to satisfy the requirements of liberal legality and the ECHR.

2.1 Article 8(1): To what extent does non-conviction retention set back privacy interests?

In the Divisional Court, Leveson J made the following observations which were central to his conclusion that the retention of such samples did not engage Article 8: (i) 'a person can only be identified by fingerprint or DNA sample either by an expert or with the use of sophisticated equipment or both; in either event it is essential to have some sample with which to compare the retained data'⁹⁰⁹; (ii) in the context of the retention in *S and Marper*, 'the material stored says nothing about the physical makeup, characteristics or life of the person to whom they belong';⁹¹⁰ and (iii) in *Kinnunen v Finland*,⁹¹¹ the ECommHR had observed that the retention by the police of personal information about the applicant (including fingerprints and photographs

⁹⁰⁶ *R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45 at [45].

⁹⁰⁷ *Bank Mellat v HM Treasury (No. 2)* [2013] UKSC 39.

⁹⁰⁸ See Chapter 2, Part 3.

⁹⁰⁹ n 851 at [19].

⁹¹⁰ *ibid* at [19].

⁹¹¹ *Kinnunen v Finland*, App no 24950/94 (ECommHR, 15 May 1996).

of the applicant) after his acquittal in a criminal matter 'did not constitute an intrusion in [the applicant's] privacy.'⁹¹²

Whilst Leveson J's arguments have merit, they overlook many important factors which should be considered when assessing whether the retention of such personal information engages Article 8(1). First, although the retention of such information, separate from its collection, involves no interference with the physical privacy interests of the individual (i.e. it does not involve any form of disruption to bodily integrity), it does interfere with informational privacy interests.

When assessing the extent to which individual privacy interests are set back by the retention of personal information, much depends upon the nature of the personal information that is retained. Leveson J observed that, in the context of the case, the retained material did not reveal anything related to the private lives of the individuals from which it originated.⁹¹³ However, this observation conflates details regarding the nature of the information and details concerning the context in which such information is used. The samples retained contain information that is personally identifiable to applicants (to varying degrees) notwithstanding the context in which they are stored or used, or how they might be used in the future. As Baroness Hale highlighted:

They are not kept for their intrinsic value as mouthswabs, hairs, or whatever. They are kept because they contain the individual's unique genetic code within them. They are kept as information about that person and nothing else.⁹¹⁴

Even fingerprints, which contain less identifiable information than DNA samples and profiles, are undoubtedly personal information. The data taken from the individual can subsequently be linked back to the individual in a wide range of circumstances, albeit with the assistance of sophisticated technology. From here it is useful to consider whether the retention of personal information in itself sets back privacy

⁹¹² *ibid* 4.

⁹¹³ n 851 at [19].

⁹¹⁴ n 861 at [67].

related interests. The ECtHR held that the retention of DNA samples *per se* was sufficient to engage Article 8(1), but did not go this far when it came to fingerprints and DNA profiles.

However, the philosophical analysis developed in previous chapters suggests that such retention does set back privacy related interests.⁹¹⁵ Informational privacy interests broadly protect the individual from the use, misuse, and fear of use and misuse of any personally identifiable information.⁹¹⁶ These are the interests the individual holds in limiting the access others (persons, private, or public bodies) have to information about him or her. Such interests are diverse and may also be compromised through security breaches and the loss of personal information.⁹¹⁷ Where an individual's informational privacy interests are respected, the individual can expect a degree of control over how his or her personal information will be used by others.⁹¹⁸ Therefore, by maintaining a system of mandatory retention of such personal information, the Government discounted the applicants' personal choices regarding the use of the information in question and accordingly failed to respect the privacy related interests of the applicants insofar as these interests facilitate autonomous decision making.⁹¹⁹ Such informational privacy interests can be set back notwithstanding the subjective preferences of the applicants. As Hughes argues:

As privacy plays a fundamental role in facilitating social interaction, any invasion of privacy is inherently harmful and X does not need to establish that he or she has suffered any particular harm for Y's act to constitute an invasion of privacy.⁹²⁰

This amounts to an exercise of control over the individual on behalf of the state. The individual's preferences for whether the state can store his or her personal

⁹¹⁵ Chapter 3, Part 1.3.

⁹¹⁶ C. Fried, 'Privacy' (1968) 77 *Yale Law Journal* 475-493 at 482; J. W. DeCew, *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology* (Ithaca: Cornell University Press, 1997) 75.

⁹¹⁷ See generally Wilson, n 827; D. Solove, *Understanding Privacy* (Massachusetts: Harvard University Press, 2008) 117-136.

⁹¹⁸ However, as discussed in Chapter 1 of the thesis, the control-over-information view of privacy is too narrow, focusing exclusively on individual choice: Chapter 1, Part 1.3. See also, Solove, *ibid* 29.

⁹¹⁹ This much has since been determined by the ECtHR in the case of *Bouchacourt v France*, where it was held that: 'the mere storing by a public authority of data relating to the private life of an individual' constituted an interference with Article 8(1): see *Bouchacourt v France*, App no 5335/06 (ECtHR, 17 December 2009) at [57].

⁹²⁰ K. Hughes, 'A Behavioural Understanding of Privacy and its Implications for Privacy Law' (2012) 75 *Modern Law Review* 806-836 at 821.

information are disregarded. Thus, in principle, the storing of X's personally identifiable information by Y sets back X's privacy related interests, wherever X is the Government storing such information in the context of criminal proceedings.

If this principle is accepted, as it has been by the ECtHR, the next step is to consider the degree to which the storing of DNA and fingerprint information, in the context of a criminal process, sets back privacy related interests. One further objection to non-conviction information retention relates to the potential ways such information might be used against the individual in the future. As technology has advanced, it has increased the extent to which personal information about genetic traits and familial history can be gleaned from such biometric information.⁹²¹ In the House of Lords, Lord Steyn observed that any concerns about this potential for future processing were not relevant as judicial decisions about future scientific developments and uses of DNA samples can be made when the need arises.⁹²² However, the ECtHR thought otherwise:

In the Court's view, the DNA profiles' capacity to provide a means of identifying genetic relationships between individuals ... is in itself sufficient to conclude that their retention interferes with the right to the private life of the individuals concerned. The frequency of familial searches, the safeguards attached thereto and the likelihood of detriment in a particular case are immaterial in this respect.⁹²³

The court is referring to the potential for the information to be processed in future as relevant in determining the applicability of Article 8(1), irrespective of the safeguards that are currently in place to prevent such abuses.⁹²⁴ This approach focuses on the effect that the retention of an individual's personal information has on the individual regarding his or her concerns and fears about how this information can be used and might be used in the future, rather than solely focusing on the objective risk that

⁹²¹ Wilson, n 827, 24-70.

⁹²² n 861 at [29].

⁹²³ n 817 at [75].

⁹²⁴ There have been a number of cases brought before domestic courts regarding the use of profiles on the National DNA Database for purposes other than the prevention and detection of crime. In a recent case before the Court of Appeal, the applicant successfully argued that his Article 8 rights had been violated when his DNA information, which was stored on the NDNAD, was used for a paternity test as part of a local authority's child care proceedings. Police took the DNA sample from the crime scene of his wife's murder; a crime for which the applicant was tried and convicted. See: *In re Z (Children)* [2015] 1 WLR 2501.

such information may be used to offset the individual's privacy related interests. Such retention is a form of permanent surveillance, which puts power over intimate information about the individual into the hands of the police, irrespective of how that individual wishes such information to be used. The issue with Lord Steyn's 'we can cross that bridge when we come to it' fig leaf is that it overlooks the extent to which the mere existence of such a potential from the retention of DNA samples can produce an inhibiting effect in the individual, even if such fears of information misuse are misplaced, as is argued by Roberts and Taylor:

It is the *effect* on the individual of the *risk* arising from the action taken by the state that constitutes the interference with his private life ... If widespread storing of DNA samples can engender such anxiety in the population at large, presumably that anxiety is heightened in those whose DNA samples are stored.⁹²⁵

These presumptive anxieties echo what Lyon describes as the setbacks to privacy related interests brought about through the 'function creep' of an individual's personal information, where 'subsequent novel uses are devised for existing technical systems, which are added to the original panoply of functions.'⁹²⁶ The potential for other uses of the personal information collected is significant, especially in the case of DNA samples and profiles. Hypothetically speaking, information stored on the NDNAD, which can already identify behavioural genetic predispositions in an individual, could potentially be used by a future authoritarian Government to subject individuals to oppressive crime-control or eugenic orientated measures. This potential alone may cause feelings of anxiety, powerlessness, and vulnerability in the individual.⁹²⁷ Whilst it might be the case that the existence of such anxieties is worthy of consideration when assessing the extent of an interference with Article 8(1) (and I think it is), this begs the empirical question: do such anxieties exist in the first place?

⁹²⁵ A. Roberts and N. Taylor, 'Privacy and the DNA Database' (2005) 4 *European Human Rights Law Review* 373-186 at 384 (emphasis in original).

⁹²⁶ D. Lyon, 'The Border is Everywhere: ID Cards, Surveillance, and the Other' in E. Zureik and M. Salter (eds.) *Global Surveillance and Policing: Borders, Security, Identity* (Cullompton: Willan Publishing, 2005) 66-82 at 67.

⁹²⁷ Chapter 3, Part 1.3.4.

In the Court of Appeal in *S and Marper*, Lord Woolf determined that the extent to which the retention of relevant materials interfered with individual privacy interests depended to a significant degree on the 'cultural traditions of a particular state.'⁹²⁸

According to Lord Woolf:

[A]t least for a substantial proportion of the public there is a strong objection to the state storing information relating to an individual unless there is some objective justification for this happening. The objection to the storage is reflected in the appreciative public response to novels such as Aldous Huxley's *Brave New World* and George Orwell's *1984*.⁹²⁹

In the House of Lords, Lord Rodger questioned the notion that there was a greater cultural resistance in Britain than in other European states towards the collection and retention of personal information:

I am doubtful whether the reaction of the educated public at the time to novels published many years ago can be taken as an accurate reflection of British public opinion in the very different conditions of today. Recent press reaction to the failure of police and other bodies to store information about those suspected of sexual offences might well point to a rather different attitude.⁹³⁰

In any case, Lord Rodger stated, the public attitude to the retention would not be decisive.⁹³¹ Neither line of reasoning is particularly instructive when attempting to ascertain the extent to which privacy interests are set back by the retention of personal information. Generally speaking the public are concerned about privacy *and* security. The landscape of public opinion in this area is surely more complicated than the reasoning above would suggest. Lord Steyn did not subscribe to Lord Woolf's interpretation either, observing that the ECHR is an international instrument and, as such, only the ECtHR should authoritatively expound its authentic interpretation.⁹³² However, Lord Steyn did concede that cultural traditions might be a relevant factor when assessing the proportionality of the measures and whether they fall within the margin of appreciation that is afforded to Contracting States.⁹³³ Leaving aside the myriad methodological problems that would inevitably arise if one were to attempt to gauge existing social norms of privacy using some form of empirical analysis, it is

⁹²⁸ n 853 at [32].

⁹²⁹ *ibid* at [34] (emphasis in original).

⁹³⁰ n 861 at [64].

⁹³¹ *ibid* at [65].

⁹³² *ibid* at [27].

⁹³³ *ibid* at [27].

submitted that this is irrelevant when assessing whether or not the applicants' privacy related interests were set back in this case. Accordingly, prevailing cultural preferences should not be a significant factor in determining the scope of Article 8.

Whilst it is true that privacy norms vary temporally and geographically,⁹³⁴ the view that human rights protections such as those conferred in Article 8(1) should only extend so far as to reflect existing privacy norms in a particular country is problematic because such a conception of the scope of the right to respect for private life would contain no normative component.⁹³⁵ This is essential in developing a right which protects not only the interests which social norms dictate are acceptable, but also what a minority of the population *should* be able to expect in terms of respect for their private lives (recalling that human rights are often invoked to protect the interests of minority groups being overridden by majority interests).⁹³⁶

On one view, the sharpest challenge to the state retention of DNA lies in the avoidance of stigmatisation. According to Campbell,⁹³⁷ the most pernicious effect of non-conviction DNA and fingerprint retention is that it amounts to an expression of a lingering suspicion on behalf of the state, through the differential treatment of those subject to the criminal process.⁹³⁸ Campbell goes on to suggest that, notwithstanding the fact that such information is not published by the state, the individual internalises the stigmatisation by virtue of the state treating him or her differently on the basis of potential guilt or risk of offending.⁹³⁹ Indeed, there exists a body of criminological literature which suggests that such 'labelling' of the individual by the state can be detrimental to his or her functioning and flourishing in society by narrowing available

⁹³⁴ For example see J. Whitman, 'The Two Western Cultures of Privacy: Dignity Versus Liberty' (2004) 113 *Yale Law Journal* 1151-1196.

⁹³⁵ Chapter 4, Part 2.1.2.

⁹³⁶ n 920.

⁹³⁷ L. Campbell, 'A Rights-based Analysis of DNA Retention: "non-conviction" databases and the liberal state' [2010] 12 *Criminal Law Review* 889-906 at 905.

⁹³⁸ *ibid.*

⁹³⁹ *ibid* at 903.

life opportunities and adversely effecting his or her reputation and self-esteem.⁹⁴⁰ One resolution to this particular problem might be to create a population-wide database, which holds DNA and fingerprint data for everybody and consequently does not have any discriminatory or stigmatising effects.⁹⁴¹ This is levelling down, plain and simple. Whilst such a response may address the stigmatisation point, it would also entail a grossly disproportionate interference with the privacy interests of citizens at large, and represent a seismic shift away from the political principles of limited state intervention and respect for personal autonomy, which are prevalent in the criminal justice system and the ECHR.⁹⁴² As Campbell highlights, concerns about stigmatisation are more appropriately dealt with by 'limiting rather than expanding the scope of the database.'⁹⁴³

Taken together, the potentially stigmatising effect of retention, the inhibiting effect it may have on the individual, and the setbacks such retention will inevitably cause to information-based privacy interests are certainly significant considerations. The extent of their significance will depend upon the circumstances of each particular case. For example, where an individual is a child, retention of private information may be particularly stigmatising, as the ECtHR ruled in *S and Marper*. The length of time such information is retained and the quality of this information (in terms of the extent of what it reveals about the individual) are also relevant variables. This analysis indicates that where such DNA or fingerprint information is retained on the basis that the individual has been subject to a criminal process, but not convicted, this will set back the individual's privacy interests to such a degree that it engages Article 8(1) and, thus, must satisfy the criteria in Article 8(2). The remaining sections of this chapter consider the extent to which the PoFA 2012 provisions governing non-

⁹⁴⁰ See E. Lemert, *Human Deviance, Social Problems and Social Control* (Englewood, NJ: Prentice-Hall, 1967); D. Downes, P. Rock, and E. McLaughlin, *Understanding Deviance* (7th edn. Oxford: Oxford University Press, 2016) 160-184.

⁹⁴¹ See D.H. Kaye and M. Smith, 'DNA Databases for Law Enforcement: The Coverage Question and the Case for a Population-Wide Database' in D. Lazer (ed.) *DNA and the Criminal Justice System: The Technology of Justice* (Cambridge, MA: MIT. Press, 2004) 247-284 at 283.

⁹⁴² n 937 at 905.

⁹⁴³ *ibid.*

conviction retention are proportionate, drawing on the standard four-limbed proportionality analysis.

2.2 Article 8(2): Are the new tariffs proportionate?

One feature common to most of the domestic rulings in *S and Marper* was that the interference constituted by the retention of the personal information was characterised as 'minor', if it existed at all. From here, any value in the protection and detection of crime deriving from its retention was ruled to comfortably override any interference with the Article 8(1) rights of the applicants. The judgment of Lord Brown encapsulates this sentiment:

In short, it seems to me that the benefits of the larger database ... are so manifest and the objections to it so threadbare that the cause of human rights generally (including the better protection of society against the scourge of crime which dreadfully afflicts the lives of so many of its victims) would inevitably be better served by the database's expansion than by its proposed contraction.⁹⁴⁴

On this view, the community benefits, encompassing benefits to the applicants themselves, trump the supposed set back to the applicants' privacy related interests, and as a result there is no violation of Article 8. This conclusion rests on the following three premises: (i) any interference with the applicants' Article 8(1) rights is minor; (ii) this interference is outweighed or trumped by the benefits of the interference; and (iii) these two factors combined serve as a basis for the justification of the measures.

Regarding the first premise, as we have seen, the domestic courts, particularly in the House of Lords, did not take full account of the extent to which the retention of the samples and profiles containing the personal information of the applicants could set back their privacy related interests. This has ramifications when assessing the proportionality of the measures as it decreases the weight that will be attributed to the concerns of the applicants in any subsequent proportionality assessment.

⁹⁴⁴ n 861 at [88].

However, even with a full understanding of the extent to which the retention of such personal information sets back privacy related interests, the task of establishing whether the interfering measures were justified requires the consideration of a number of factors which interact with one another in complex ways. First, the retention of DNA and fingerprint data can secure the human rights of those from whom the data are taken, as Lord Carswell and Baroness Hale highlighted in the House of Lords.⁹⁴⁵ If it is true, as Baroness Hale suggests it is, that the whole community benefits from there being 'as large a database as it is possible to have',⁹⁴⁶ this suggests that the proportionality question cannot be reduced to a balancing exercise between the personal privacy interests of the applicants and the community interests in preventing and detecting crime, as these two sets of interests are interwoven.

In his leading opinion, Lord Steyn determined that the limited purposes for which the stored samples were used and the benefits conferred by the expansion of the NDNAD, taken together, meant that the retention policies at the time were proportionate.⁹⁴⁷ By contrast, the Strasbourg Court focused on the fact that the retention system in England and Wales was an outlier among other Contracting States,⁹⁴⁸ that there was a lack of empirical support for the extensive reach of the measures,⁹⁴⁹ the indiscriminate nature of the retention system;⁹⁵⁰ and the stigmatising effect of retention.⁹⁵¹ Consequently, the House of Lords and the ECtHR came to strikingly different conclusions on the extent to which the measures were proportionate to the legitimate aim they sought to achieve. Part of the reason for this divergence can be attributed to the majority in the House of Lords' failure to recognise the extent to which the retention of the materials sets back the privacy

⁹⁴⁵ *ibid* at [78] and [88].

⁹⁴⁶ *ibid* at [78].

⁹⁴⁷ *ibid* at [38].

⁹⁴⁸ n 817 at [108].

⁹⁴⁹ *ibid* at [116].

⁹⁵⁰ *ibid* at [119].

⁹⁵¹ *ibid* at [123].

interests of those subject to the criminal process. However, this is clearly not the sole factor leading to the disparity in the respective judgments.

The domestic courts consistently found that the retention of the samples of all arrestees was indispensable to the prevention and detection of crime.⁹⁵² However, drawing upon a report published by the *Nuffield Council on Bioethics*,⁹⁵³ the ECtHR highlighted the limitations of this empirical evidence base, which was said to justify the retention practices:

The figures do not reveal the extent to which this “link” with crime scenes resulted in the convictions of persons concerned or the number of convictions that were contingent on the retention of the samples of unconvicted persons.⁹⁵⁴

In the Report, the Nuffield Council on Bioethics observed that such statistics ‘give no indication of the significance of the DNA in the police investigation’ and concluded: ‘if there is no further, more detailed evidence that retaining the bioinformation of arrestees will achieve improvements in crime control, the interference with individuals’ liberty cannot be justified.’⁹⁵⁵ Furthermore, the statistical evidence cited in support of the indefinite retention did not show that the indefinite retention of this information, instead of time-limited retention, was necessary for the prevention or detection of crime. In view of the philosophical analysis demonstrating the extent to which the retention of personal information interferes with Article 8(1), the lack of an empirical foundation to support the indefinite retention of this information posed significant problems for any claims that the measure was proportionate. It has not been established that the objectives of the retention could not be achieved through less intrusive means, such as the imposition of time limits on the period of retention.

⁹⁵² *ibid* at [92]; See: Chapter 3, Part 2.3.

⁹⁵³ An independent body composed of clinicians, lawyers, philosophers, and geneticists established by the Nuffield Council.

⁹⁵⁴ n 817 at [116].

⁹⁵⁵ Nuffield Council on Bioethics, *The Forensic Use of Bioinformation: Ethical Issues* (Cambridge, Cambridge Publishers Ltd, 2007) 43-44.

The ECtHR also took issue with the fact that the retention powers were exercised indiscriminately in England and Wales.⁹⁵⁶ The indefinite retention of the samples of *all* arrestees implies that no distinctions are drawn which recognise the differences between those subject to the criminal justice process. This concern was also raised by Sedley LJ in the Court of Appeal:

Of those who come lawfully into the hands of the police in the course of investigation but are not convicted, there will inevitably be some who ought never to have been suspected, much less charged; and others who ought without doubt to have been convicted but for one reason or another have not been.⁹⁵⁷

In the House of Lords, Lord Steyn observed that any attempt to restrict the retention powers of the police based on the nature of the offence, the age of the offender, or the degree of suspicion would 'not confer the benefits of a greatly extended database and would involve the police in interminable and invidious disputes about offences of which the individual had been acquitted.'⁹⁵⁸ However, this observation does little to demonstrate the proportionality of the retention policies. The notion that, because a greatly extended database benefits the aims of accurate and efficient law enforcement it is necessary to retain the samples of *all* arrestees *indefinitely*, seems opportunistic. No attempt is made to strike a fair balance between the privacy interests of arrestees and the law enforcement benefits of retaining their biometric material. This is presumably why the ECtHR gave short shrift to this line of argument.

One might suggest, as Leveson J did in the Divisional Court, that such a policy does not arbitrarily single out arrestees, and that there is a qualitative difference between compelling members of the public to provide fingerprints and bodily samples merely because the police would find them useful on the one hand, and not requiring the police to give up such data which they have lawfully obtained as part of a criminal process on the other.⁹⁵⁹ However, as the ECtHR pointed out, the same indefinite retention policies do not apply to DNA and fingerprint data collected by the police

⁹⁵⁶ n 817 at [119].

⁹⁵⁷ n 853 at [84].

⁹⁵⁸ n 861 at [39].

⁹⁵⁹ n 853 at [31].

from those not suspected of committing an offence (for example, those who volunteer to provide a DNA sample as part of a DNA dragnet).⁹⁶⁰ In such cases, the police have always been required to destroy the biometric data after they had been speculatively searched against other profiles on the NDNAD.

2.3 Non-Conviction Retention Post-*S and Marper*: Rational, minimally intrusive, and fair?

The decision of the ECtHR in *S and Marper v United Kingdom* has had a considerable impact on the domestic law regulating the retention of arrestees' DNA and fingerprint data. In the subsequent cases of *R (GC) v Commissioner of Police of the Metropolis*,⁹⁶¹ and *Re Gaughran's Application for Judicial Review*,⁹⁶² which examined conviction retention, the issue of whether the retention of DNA samples, profiles and fingerprints engages Article 8(1) is put beyond dispute. As we have seen, the legislative responses of both the New Labour Government, in the Crime and Security Act 2010, and the Coalition Government in the Protection of Freedoms Act 2012 sought to address the ECtHR's findings regarding the proportionality of the measures.

The new retention periods for samples and profiles generated from those arrested or charged but not subsequently convicted of any criminal offence represent a significant step forward in bringing the retention regime into compliance with Article 8, affording adequate privacy protection to those subject to the criminal justice process and addressing the concerns raised by the ECtHR in *S and Marper*. Limits on the retention of arrestees' samples have been introduced, taking account of the seriousness of the offence in respect of which they were taken, criminal record, and the age of the suspected offender.⁹⁶³ However, the introduction of such limits on the

⁹⁶⁰ A DNA dragnet is an investigation technique whereby a subset of a local population is identified on the basis that their physical characteristics (race, sex etc.) match those of a DNA sample taken from a crime scene in the locality. From here, each member of the subset is asked to provide a sample of DNA voluntarily for elimination purposes. See Wilson, n 827, 24-34.

⁹⁶¹ *R (GC) v Commissioner of Police of the Metropolis* [2011] UKSC 21.

⁹⁶² *Re Gaughran's Application for Judicial Review* [2015] UKSC 29.

⁹⁶³ See sections 3 and 5, Protection of Freedoms Act 2012.

retention of this biometric material does not in itself equate to proportionality. This section assesses the proportionality of the measures in view of the preceding analysis on the extent to which such retention sets back privacy interests, drawing on the four-limbed proportionality test mentioned above.⁹⁶⁴

2.3.1. The objective of the interference

The first limb of the proportionality analysis is the easiest to clear. It requires the Government to show that the objective pursued through the interfering measure is sufficiently important to justify limiting the fundamental right in question. That the objective of the prevention of disorder or crime is sufficiently important to justify the retention of the DNA and fingerprint data of *some* of those arrested or charged in connection with a criminal offence for a *certain* amount of time was accepted in *S and Marper v United Kingdom*.⁹⁶⁵ Whilst this limb is not a mere formality, the objective of preventing and detecting future crimes through increasing the expediency with which those who pose a threat to the public can be processed through the criminal justice system is clearly sufficiently important to provide the basis for an interference.

2.3.2. The existence of a rational connection between the objective and the means

To qualify as rational and avoid arbitrariness, the link between the measure and its aims should be evidence-based.⁹⁶⁶ The crucial question in the immediate case is: can the retention of DNA and fingerprint data from persons arrested or charged with, but not subsequently convicted of, a 'qualifying offence' reasonably be expected to contribute to the prevention and detection of crime? Whilst it is tempting to assume that the more biometric data the police hold, the greater will be their chances of

⁹⁶⁴ See *R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45 at [45]; *Bank Mellat v HM Treasury (No. 2)* [2013] UKSC 39. See Chapter 2, Part 2.3.

⁹⁶⁵ n 817 at [105].

⁹⁶⁶ See *Bank Mellat*, n 964 at [92]; N. Taylor, 'Case Note: *Re Gaughran's Application for Judicial Review*' [2015] 10 *Criminal Law Review* 809-811 at 811.

identifying offenders in the future, there is a lack of evidence to support the claim that non-conviction retention will make such a contribution in any significant way. As Lord Kerr highlighted in his dissenting opinion in *Gaughran*, where the DNA retention of convicted persons was at issue:

The usefulness of the assembly of a pool of personal data to assist with the detection of crime was rejected in *S and Marper* as justification for interference with the article 8 right and should also be in this case. Without proof as to the likelihood of reoffending, there is no obvious, or rational, connection between the current policy and reducing crime.⁹⁶⁷

The retention tariffs seem to operate on the assumption that those suspected, but not convicted, of committing more serious offences are more likely than other non-convicted persons to commit offences for which DNA and fingerprint data has probative value in the future. However, there is no evidence base to support this assumption. In its legislative scrutiny of the Protection of Freedoms Bill, the Joint Committee on Human Rights expressed its concern that 'accurate statistical information about the operation of the National DNA Database does not appear to have been routinely gathered.'⁹⁶⁸ Furthermore, the Committee recommended that the Government should be required to gather information about the proposals in the Protection of Freedoms Bill and regularly publish information and statistics on the different categories of biometric information retained.⁹⁶⁹ PoFA 2012 requires the NDNAD Strategy Board to publish its governance rules, a statistical breakdown of the NDNAD, and guidance to police forces on the early deletion of records from the NDNAD.⁹⁷⁰ However, so far, this statistical breakdown of the utility of the NDNAD tends to summarise the number of crimes solved using searches on the NDNAD as a whole, giving no indication of how many crimes are solved through the storage of non-conviction DNA and fingerprint data. Whilst, in one sense, any retention must at least marginally increase the chances of future detection, the 'rational connection' limb requires more than a *de minimis* furtherance of the legitimate aim. It requires an empirical basis supporting the inclusion of some portions of the non-convicted

⁹⁶⁷ *Re Gaughran's Application for Judicial Review*, n 962 at [67].

⁹⁶⁸ Joint Committee on Human Rights, *Legislative Scrutiny: Protection of Freedoms Bill*, (HMSO 2011) HL Paper No.195 (Session 2010-2012) 37.

⁹⁶⁹ *ibid.*

⁹⁷⁰ Home Office, *National DNA Database Strategy Board Annual Report 2013-14* (London: HMSO, 2014).

population on the National DNDA Database for extended periods of time, and the exclusion of others.

Research has also cast doubt on the Government's approach in limiting the period of retention based on the seriousness of the offence for which the individual was first arrested. For example, Townsley, Smith, and Pease found that criminal careers are not homogeneous, and that there is a lack of evidence to suggest that the offence an individual is first arrested or charged in connection with is in any way a useful measure of the offences she is likely to go on to commit.⁹⁷¹ Drawing on a longitudinal study of males from a working class area of London, research from Kazemian, Pease, and Farrington suggests that the deletion of DNA profiles of younger offenders may be particularly detrimental for subsequent serious crime detection rates.⁹⁷² This research supported the earlier findings of Townsley, Smith and Pease that criminal careers tend to be heterogeneous and, consequently, retention policies based on the seriousness of the offence for which an individual is first arrested are not supported.⁹⁷³ In a comparison of the performance of DNA databases in European countries, research by Santos, Machado, and Silva suggested that the inclusiveness of a country's policies with regard to the retention of DNA from non-convicted arrestees does not necessarily translate into greater output in terms of person-stain matches.⁹⁷⁴ Whilst these studies give some indication of the potential shortcomings of the PoFA 2012 categories of retention periods for arrestees' DNA and fingerprint data, none claim to have provided a sufficiently robust empirical basis to support or oppose the proportionality of the Government's retention policies. Each of the studies discussed draws attention to the lack of a systematic empirical research base supporting existing retention periods. Without such a basis providing a rational link

⁹⁷¹ M. Townsley, C. Smith and K. Pease, *Using DNA to Catch Offenders Quicker: Serious Detections Arising from Criminal Justice Samples* (London: Jill Dando Institute of Crime Science, 2005) 10.

⁹⁷² L. Kazemian, K. Pease, and D. Farrington, 'DNA Retention Policies: The Potential Contribution of Criminal Career Research' (2011) 8 *European Journal of Criminology* 48-64 at 60.

⁹⁷³ *ibid* at 60.

⁹⁷⁴ A person-stain match occurs where a person's stored DNA profile is matched with a subsequently created DNA profile. The subsequently created profile may be derived from a DNA sample collected from a crime-scene, an object, another individual, or any other source from which a DNA sample can be collected. See: F. Santos, H. Machado, and S. Silva, 'Forensic DNA Databases in European Countries: Is Size Linked to Performance?' (2013) 9 *Life Sciences, Society and Policy* 12-25 at 12.

between the measures and their objective, it is difficult to ascertain whether or not the DNA and fingerprint data taken from non-convicted persons subject to a criminal process has any more or less probative value than that of other non-convicted persons, or the population at large. Consequently, the Government has not established that the aim of preventing and detecting crime is significantly furthered through the retention tariffs in the PoFA 2012.

2.3.3. Minimally intrusive means

The new retention provisions are much less intrusive than both the provisions in section 64 of PACE 1984, as amended by the Criminal Justice and Police Act 2001, and the proposed provisions under the Crime and Security Act 2010. However, this is not sufficient to satisfy the 'minimally intrusive means' limb of the proportionality analysis. To do so, the measures must impair the right as little as is necessary to achieve the legislative objective. Though there are ongoing academic disputes over what is required of the public authority at this stage,⁹⁷⁵ even on a conservative interpretation that 'the claimant bears the evidential and persuasive burden of showing that at least one alternative measure is at least equally effective and less intrusive',⁹⁷⁶ the PoFA 2012 provisions fail. A less intrusive but more effective retention policy would selectively retain such non-conviction information taking into consideration not only the offence which initiated proceedings against the individual, age, and previous arrests, but also the certainty with which we might say the individual is likely to have committed the offence for which the information is processed. This can only be assessed on a case-by-case basis. Retention is not as stigmatising or harmful as a criminal conviction. Thus, the criminal burden of proof would be too high a threshold for public authorities to pass before retention can be justified. However, any minimally intrusive retention policy must place some burden

⁹⁷⁵ See C. Chan, 'Proportionality and Invariable Baseline Intensity of Review' (2013) 33 *Legal Studies* 1-21; A. Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012) 449-451; J. Rivers, 'The Presumption of Proportionality' (2014) 77 *Modern Law Review* 409-433 at 427.

⁹⁷⁶ Rivers, *ibid* at 427.

on a public authority to filter out those who have been caught up in a criminal process and are not even likely to have committed any offence.

A policy based on this principle recognises that criminal investigations and prosecutions are inherently messy. They are human processes. Each case is different from the next. The fact that an individual has been charged indicates that, at a particular time, there existed sufficient evidence to provide a reasonable prospect of prosecution (assuming the decision to charge was sound).⁹⁷⁷ However, between the charging of an individual and a non-conviction disposal of the case, many things can happen. At one end of the spectrum, irrefutable evidence could come to light putting the individual's innocence beyond question. At the other end, a charged person might be acquitted in the face of overwhelming evidence against him or her, due to some procedural impropriety. Whilst in circumstances such as the latter the risk posed by the individual might be sufficient to justify biometric data retention for the periods that are set out in PoFA 2012 tariffs, in the case of the former, any retention would rightly be viewed as an opportunistic and arbitrary interference with the individual's Article 8 rights. The current tariffs remain broad and indiscriminate, just less so than previously. Thus, it is submitted, the tariffs set out cannot be considered minimally intrusive. They still authorise data retention based on general categories of offence, without having sufficient regard to the credibility of the information surrounding the individual's arrest or charge to justify retaining the biometric data. Without a strong evidence base, such assessments of the individual's risk can only be made with any modicum of accuracy through a case-by-case analysis. However, in light of the ECtHR's judgment in *Animal Defenders International v United Kingdom*,⁹⁷⁸ which lowered the burden on Contracting States for showing that a measure is minimally

⁹⁷⁷ A recent report from HMIC/HMCPSP showed that in 91.9% of the cases examined, the decision to charge an individual was in compliance with the Code for Crown Prosecutors. The report also showed that in 34.3% of cases where the decision to charge was taken by the police, it should have been referred to the CPS. See: HMIC/HMCPSP, *Joint Inspection of the Provision of Charging Decisions* (2015), 27.

⁹⁷⁸ *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21 at [109].

intrusive, it is unclear whether the PoFA 2012 provisions could be successfully challenged on this ground alone.⁹⁷⁹

An alternative regime, which could accommodate the certainty variable, might mirror the framework regulating the disclosure of non-conviction information as part of an Enhanced Criminal Record Certificate (ECRC). ECRCs are often sought by employers to vet prospective employees who will be tasked with working in contact with children or other vulnerable groups. As part of an ECRC a relevant chief police officer can disclose non-conviction information (allegations, failed prosecutions, known criminal associates etc.) about an applicant where it is 'reasonably believed that the information is relevant' and the information 'ought to be included' in the certificate.⁹⁸⁰ Before making such a disclosure, the chief police officer 'must have regard' to the Statutory Disclosure Guidance, which outlines ten principles a relevant officer should adhere to on each occasion.⁹⁸¹ Thus, in making a decision to disclose, relevant decision makers must consider the seriousness of the alleged offence, currency, and credibility of any information and balance these considerations against the risk to the public.⁹⁸² Moreover, the decision maker must consider giving the individual subject to the criminal process an opportunity to make representations where possible. Crucially, this Guidance requires relevant chief police officers to demonstrate that the disclosure satisfies Article 8 ECHR on a case-by-case basis.⁹⁸³ Such a system avoids the arbitrariness of the PoFA 2012 tariffs whilst still ensuring that biometric information can be retained from non-convicted persons where such retention corresponds to a pressing social need and is proportionate to protect the public.

One possible objection to this case-by-case approach is that it would be impractical and overburdensome on the resources of the police. Leaving aside arguments over whether such an objection constitutes an appropriate basis for upholding a retention

⁹⁷⁹ See Chapter 2, Part 2.3.

⁹⁸⁰ See PoFA 2012 section 82.

⁹⁸¹ Home Office, *Statutory Disclosure Guidance* (2nd edn, London: HMSO, 2015).

⁹⁸² *ibid* 3-4.

⁹⁸³ *ibid*.

system which unjustifiably interferes with the fundamental human rights of non-convicted persons, it is difficult to see such considerations representing a significant obstacle to the implementation of a framework which uses a case-by-case approach. Whilst an exhaustive costing of such an approach falls beyond the scope of this chapter, it is unlikely that it could be any more resource intensive to implement than the ECRC disclosure system. The total number of ECRC applications per year is typically between 3-4 million, with approximately 1.1-1.2 million of these applications matching against local police records.⁹⁸⁴ Where such a match is made, a relevant Chief Police Officer (or staff member acting on his or her behalf) is tasked with determining whether it would be proportionate to disclose the relevant information. In comparison, the total number of people arrested from March 2015-April 2016 was 869,209.⁹⁸⁵ Given that the latter figure includes arrests of those individuals who already have their personal information retained on the NDNAD, and those who go on to be convicted of the offence for which they have been arrested, the number of proportionality assessments the police would be required to undertake seems entirely manageable.

2.3.4. A fair balance between the objective and the interference

The PoFA 2012 policies have intuitive appeal. The retention periods adjust according to the seriousness of the offence for which an individual is arrested, the previous convictions of the arrestee, the age of the arrestee (i.e. whether the arrestee is a minor), and the type of biometric material in question (e.g. DNA samples are retained for less time than DNA profiles and fingerprints). Taken at face value, these measures might seem proportionate and necessary. They give significantly more consideration to the privacy interests of those subject to the criminal process than the expansionist policies pursued prior to the *S and Marper v United Kingdom*

⁹⁸⁴ See: <https://www.gov.uk/government/statistics/dbs-dataset-1-disclosure-progress-information-disclosed-and-update-service-subscriptions> and <http://hub.unlock.org.uk/knowledgebase/local-policeinformation-2/>.

⁹⁸⁵ Home Office, *Police Powers and Procedures, England and Wales: Statistical Bulletin 15/16* (London, HMSO, 2016) 9.

judgment.⁹⁸⁶ At the fourth limb of the proportionality analysis, the courts are required to consider the extent to which the measures strike a fair balance between the Government's objectives and the privacy interests of the individual. As discussed in previous chapters, this involves a clear and full recognition of the rights of the individual; the recognition of the importance of pursuing the objective; and an assessment as to whether the pursuit of the objective can justify limiting the individual's rights.⁹⁸⁷

First, wherever the police retain the DNA or fingerprint data of an individual as part of a criminal process this will be sufficient to engage Article 8(1). This baseline measure is at least a 'light' interference with Article 8(1). Other circumstantial factors may increase the seriousness of the interference. The length of the retention and the age of the arrested or charged person at the time the data is collected are significant variables, amongst others. Thus, whilst any non-conviction retention can be said to constitute at least a 'light' interference with Article 8(1), the extent of this interference may increase based on the circumstances of a particular case.

The second stage of the exercise requires the supervising court to determine the weight of the objective pursued through the use of the interfering measure. Any measure which pursues one of the legitimate aims stated in Article 8(2) is at least serious enough to compete with the weight of an interference in the metaphorical balancing exercise. However, in ascertaining the weight that should properly be attached to a particular objective pursued through the interference, much turns on the facts of a particular case and a determination of the risk of future offending posed by the non-convicted person, which might be prevented or detected through DNA or fingerprint retention. Complementary to assessments of the weight attached to an interference, two broad factors must be considered: the importance of the

⁹⁸⁶ C. McCartney, 'The DNA Expansion Programme and Criminal Investigation' (2006) 46 *British Journal of Criminology* 175-192.

⁹⁸⁷ M. Klatt and M. Meister, *The Constitutional Structure of Proportionality* (Oxford: Oxford University Press, 2012) 157.

objective to achieving the aim, and the certainty with which the objective will be realised through the use of the measure. As the proposals in PoFA 2012 do not provide for an assessment of the latter in each case where the police seek to retain such data, and as there are demonstrably cases where, absent such an assessment, non-convicted arrested or charged persons who pose no more risk than other non-convicted citizens will arbitrarily have their DNA or fingerprint data retained for long periods of time,⁹⁸⁸ the measures cannot be said to strike a fair balance between the need to prevent crime and the Article 8 rights of non-convicted persons.

Conclusions

The expansion of the National DNA Database was driven by several overlapping, and mutually reinforcing policy drivers: over-estimation of DNA evidence as the all-encompassing crime prevention tool of the future;⁹⁸⁹ lack of recognition, politically and among domestic judges, of the manner and extent to which the retention of DNA and fingerprint data can set back the privacy related interests of those subject to the criminal justice process; and the political climate from the early 1990s-late 2000s when recorded crime was falling but when fear of crime was increasing.⁹⁹⁰

This thesis has developed a normative model for assessing whether the privacy interests of those subject to a criminal process are afforded adequate protection in England and Wales. This chapter's discussion is illuminating in several respects. First, it has shown that, in the area of non-conviction arrestee DNA retention, domestic judges consistently failed to recognise the impact that such DNA retention can have on the privacy related interests of those subject to the criminal justice process. As S

⁹⁸⁸ It does not take a great imaginative leap to conceive of situations arising where the innocence of an individual charged with a qualifying serious offence is subsequently put beyond dispute. For example, where an individual's alibi is confirmed post-charge, or where it is conclusively found that a false allegation has been made.

⁹⁸⁹ See C. McCartney, n 986; R. Williams and P. Johnson, *Genetic Policing: The Use of DNA in Criminal Investigations* (Cullompton: Willan Publishing, 2008); R. Williams, 'DNA Databases and the Forensic Imaginary' in R. Hindmarsh and B. Prainsack (eds.) *Genetic Suspects: Global Governance of Forensic DNA Profiling and Databasing* (Cambridge: Cambridge University Press, 2010) 131-152.

⁹⁹⁰ D. Skinner, 'The NDNAD Has No Ability in Itself to be Discriminatory': Ethnicity and the Governance of the UK National DNA Database' (2013) 47 *Sociology* 976-992 at 978.

and Marper progressed through the domestic courts, it seemed all too easy for judges to characterise the interference with privacy interests constituted by DNA and fingerprint retention as minor, paying minimal attention to exactly how such retention can set back individual privacy interests. Even in the Court of Appeal, where an interference with Article 8(1) was recognised, the court's reasoning betrayed a lack of understanding of the normative value of privacy. Given the parlous state of the law governing the privacy protection afforded to arrestees' biometric information, the ECtHR's judgment in *S and Marper* has been transformative not only in bringing domestic law into alignment with other Contracting States in this area, but also by requiring domestic judges to pay more detailed attention to privacy interests.

This second case-study highlights the significant role the ECtHR plays in interpreting the scope of Article 8 ECHR and how this has served to enhance the privacy protections for those subject to the criminal justice process in England and Wales. The chapter demonstrated, however, that, as far as the development of a proportionate legal framework regulating DNA and fingerprint retention is concerned, we are not yet out of the woods. The PoFA 2012 provisions have undoubtedly increased the level of privacy protection afforded to those subject to the criminal process. The question of whether DNA and fingerprint retention engages Article 8(1) has been answered resoundingly in the affirmative in English law. Moreover, these provisions restrict the extent to which such data can be retained from young persons and those arrested or charged with minor offences. However, blanket retention in cases where an individual is arrested or charged but *not* convicted is neither rational, minimally intrusive, nor fair. The Statutory Disclosure Guidance regulating ECRC disclosure offers a potentially superior model or template for how decisions to retain personal information from arrestees or charged persons should be made, not only having regard to the age of the individual subject to the criminal process and the seriousness of the alleged offence, but also to the likelihood that the circumstances

surrounding a particular case indicate that retention may make a significant contribution to the prevention or detection of crime. This chapter has argued that the PoFA 2012 tariffs are incompatible with English law on its own terms. The current risk-averse approach of domestic legislators does not afford adequate privacy protection to innocent individuals, adding further pains to an already coercive process without adequate justification.

6 Non-Conviction Information Disclosure as Part of an Enhanced Criminal Record Certificate

Does the legal framework regulating the dissemination of personal information as part of an Enhanced Criminal Records Certificate (ECRC) recognise, and afford adequate protection to, the privacy related interests of those who have been subject to the criminal justice process? Dissemination occurs when personal information about the individual is revealed.⁹⁹¹ This can set back privacy related interests in a number of ways. However, the dissemination of personal information linking an individual to a criminal investigation or prosecution can have particularly pernicious effects. As many commentators have noted, such dissemination can stigmatise or disqualify the individual.⁹⁹²

This chapter focuses on the dissemination of such non-conviction information as part of an Enhanced Criminal Records Certificate (ECRC). For the purposes of this chapter 'non-conviction' information refers to any personal information that may be disclosed by the police on an Enhanced Criminal Record Certificate, which does not directly pertain to any criminal convictions or cautions the applicant might have. The certificates are often sought by employers where a job applicant or volunteer seeks to work in a position of trust which requires frequent contact with children or other vulnerable groups. Concerns are raised regarding the extent to which the framework regulating the disclosure of non-conviction information as part of an ECRC strikes a fair balance between privacy interests and countervailing interests such as public safety and the prevention of crime.

⁹⁹¹ D. Solove, 'A Taxonomy of Privacy' (2006) 154 *University of Pennsylvania Law Review* 477-560 at 523.

⁹⁹² T. Nagel, 'Concealment and Exposure' (1998) 27 *Philosophy and Public Affairs* 3-30 at 3; D. Solove, *Understanding Privacy* (Massachusetts: Harvard University Press, 2008) 101-171; P. Rumney and R. Fenton, 'Rape, Defendant Anonymity and Evidence-Based Policy Making' (2013) 76 *Modern Law Review* 109-133 at 127.

1. The Development of the Legal Framework

The Police National Computer (PNC) holds around 10 million nominal records. These are created when an individual is arrested, cautioned, convicted, reprimanded, or warned in respect of a recordable offence or certain other minor offences.⁹⁹³ The Police National Database (PND) stores 'soft' or non-conviction intelligence about individuals. This includes details of investigations and allegations which do not lead to an arrest or one of the disposals listed above. Information on the PND is usually held for six years but may be held for longer for investigations into serious crime.⁹⁹⁴ The police provide non-conviction information to the Disclosure and Barring Service (DBS) when it is requested for a criminal record check, provided that the police deem the information to be *relevant* and *proportionate*.

The DBS carries out criminal record checks for specific positions, professions, employment, offices, works, and licences included in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 and the Police Act 1997.⁹⁹⁵ The three main levels of criminal record check are as follows:

- (i) *Basic Check* – peculiarly, individuals in England and Wales can apply to Disclosure Scotland for a basic check. These are normally used for employment positions not exempted from the Rehabilitation of Offenders Act 1974 (ROA 1974) and contain information regarding unspent convictions.⁹⁹⁶
- (ii) *Standard Criminal Record Certificate (SCRC)* – this criminal records check reveals information about an individual's 'spent' and 'unspent' criminal

⁹⁹³ Home Office, 'Nominal Criminal Records on the Police National Computer - GOV.UK' (2015) <<https://www.gov.uk/government/publications/nominal-criminal-records-on-the-police-national-computer/nominal-criminal-records-on-the-police-national-computer>> accessed 29 December 2015.

⁹⁹⁴ NPIA, *Code of Practice: on the operation and use of the Police National Database* (London: The Stationary Office, 2015).

⁹⁹⁵ Disclosure and Barring Service, *A Guide to Eligibility for DBS Checks* (London: OGL, 2015) 1.

⁹⁹⁶ 'Spent' convictions do not have to be disclosed by the individual when applying for most jobs or in other situations such as when applying for a mortgage. When a conviction becomes spent depends upon a range of factors including the age of the offender at the time of the conviction, and the seriousness of the offence committed.

convictions, cautions, reprimands, and warnings, unless these have been 'filtered' under new filtering rules.⁹⁹⁷

- (iii) *Enhanced Criminal Records Certificate (ECRC)* – the ECRC contains all the information contained on a SCRC, and can additionally list any relevant information held on local police records such as 'soft intelligence' and other non-conviction information. This level of check is used for certain positions included in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 and prescribed in section 113B, of the Police Act 1997.⁹⁹⁸ The majority of positions for which a job applicant will undergo an ECRC require the applicant to work in close contact with children or vulnerable adults.

Thus, it is only where an individual is the subject of an ECRC that the DBS may disseminate information pertaining to his or her involvement in a criminal process that did not result in a finding or admission of guilt.⁹⁹⁹

1.1 A Brief History of Legal and Political Developments in Non-Conviction Disclosure

In 1954 a working party of chief officers of police outlined some of the fundamental principles which have underpinned the development of criminal records disclosure policy since that time:

It has been a fundamental rule that police information should not be used except for the purposes for which it was acquired, and therefore that it should not be disclosed to persons in authority, however responsible, other than those concerned with police functions, unless the consideration of public interest is sufficiently weighty to justify departure from this general rule.¹⁰⁰⁰

⁹⁹⁷ In May 2013, the Government introduced new filtering rules which remove certain convictions and cautions from DBS checks automatically. Eligible offences are normally minor and can be filtered after an amount of time up to 11 years depending on the age of the offender at the time of the offence, and the type of disposal received (i.e. caution or conviction). For further information see: Disclosure and Barring Service, *DBS Filtering Guide* (London: Ministry of Justice, 2013).

⁹⁹⁸ *Statutory Disclosure Guidance* (2nd edn. London: Home Office, 2015).

⁹⁹⁹ This analysis is not focused on the regulation of other forms of criminal record check, such as those that might be carried out as part of national security vetting for certain government positions. See Ministry of Defence, 'National Security Vetting' (2012) <<https://www.gov.uk/guidance/security-vetting-and-clearance>> accessed 9 January 2016.

¹⁰⁰⁰ See Home Office, *Disclosure of Criminal Records for Employment Vetting Purposes, Cm 2319* (London: HMSO, 1993) 4.

This suggests that (from at least this time) there has been a consistent recognition that criminal records disclosure can have a detrimental impact upon the individual's life, and such disclosures should only be made where the interests of the individual are outweighed by the public interest. At common law, there is a presumption that any personal information, which is not generally available to the public and comes into the possession of a public body during the course of performing its public duties, ought not to be disclosed except where disclosure is judged necessary for the protection of the public.¹⁰⁰¹ Thus, it has long been recognised that a blanket policy of disclosure cannot be justified at common law.¹⁰⁰² Unlike the expansion of powers to retain DNA in the 1990s, the movement towards a new legislative framework for the regulation of criminal records disclosure took place against the background of a clear recognition that such dissemination is potentially deleterious to privacy interests. However, the increasing demand for criminal records disclosure as part of the employment recruitment process was driven at least in part by popular concern about crime. In 1983 a four-year-old child was sexually assaulted and murdered by a man who had been able to obtain work as a baby-sitter, despite previously being convicted of several serious sex offences against children.¹⁰⁰³ In response to this crime (and the public reaction which followed) the Government issued a circular, which suggested that where an individual would have substantial access to children as part of a particular role, disclosures should include details of cautions, bind-overs and detected cases.¹⁰⁰⁴ A further Home Office Circular in 1988 extended such disclosures to include 'acquittals or decisions not to prosecute where the circumstances of the case give cause for concern.'¹⁰⁰⁵

The increased demands these changes put on the systems for criminal records keeping and disclosure, which were then still only partially computerised, propelled

¹⁰⁰¹ See *R v Devon County Council, Ex parte L* [1991] 2 FLR 541.

¹⁰⁰² See, for example, *R v Chief Constable of the North Wales Police, Ex parte AB* [1999] QB 396, 428.

¹⁰⁰³ n 1000, 4.

¹⁰⁰⁴ HOC 45/1986.

¹⁰⁰⁵ HOC 102/1988.

the case for the reform of criminal records disclosure. In 1990, a Home Affairs Committee inquiry into the maintenance and use of criminal records proposed that the police should be relieved of the burden of disclosing criminal records to eliminate disparities between the policies of different forces.¹⁰⁰⁶ The Committee proposed the establishment of an independent agency to maintain and disclose criminal records. Notably, it also proposed that only records relating to recordable offences should be made available for vetting purposes.¹⁰⁰⁷ However, following an Efficiency Scrutiny of the proposals, this limitation was dropped in cases where child protection concerns existed.¹⁰⁰⁸ In 1993, the Home Office issued a consultation paper, *Disclosure of Criminal Records for Employment Vetting Purposes*, which proposed legislation to establish a central vetting body, define the criteria for vetting, and define the type of information that should properly be disclosed in various contexts.¹⁰⁰⁹

In response, the Government produced a White Paper in June 1996.¹⁰¹⁰ This accepted the proposals for the establishment of an independent criminal records agency and proposed three levels of criminal record check that are broadly similar to the current Basic Check, SCRC, and ECRC. The proposed enhanced check would give details of minor convictions, cautions and non-conviction information in addition to any information disclosable on a standard check. This would be available where prospective employees or volunteers may have unsupervised contact with children and young people under 18, as well as for gaming and lottery licensing.¹⁰¹¹

Later in 1996, the Police Bill¹⁰¹² was published. Part V of the Bill implemented the criminal records proposals set out in the White Paper. Regarding ECRCs, the Bill proposed that these would be issued on joint application between the individual and

¹⁰⁰⁶ See Home Affairs Committee Third Report, session 1989-1990 (London: HMSO, 1990).

¹⁰⁰⁷ Generally, recordable offences are imprisonable offences; they could attract a sentence of imprisonment. However, some non-imprisonable offences are also classed as recordable: *ibid* at [41].

¹⁰⁰⁸ Home Office, *The National Collection of Criminal Records: Report of an Efficiency Scrutiny* (1991).

¹⁰⁰⁹ Home Office, n 1000, 20.

¹⁰¹⁰ Home Office, *On the Record: the Government's proposals for access to criminal records for employment and related purposes in England and Wales, Cm 3308* (London: HMSO, 1996).

¹⁰¹¹ *ibid*.

¹⁰¹² HL Bill 10 1996/1997.

the registered body seeking the check. The Bill also stipulated that non-conviction information would only be supplied as part of an ECRC where such information is deemed relevant to the interests of the prevention and detection of crime.¹⁰¹³ At the Bill's second reading in the House of Lords, concerns were raised that untested and inaccurate personal information might have an injurious effect on an individual's pursuit of certain careers.¹⁰¹⁴

At the same reading, Baroness Hilton questioned whether ECRCs should be extended to include vulnerable groups other than children.¹⁰¹⁵ At the Committee stage a number of amendments were debated. An amendment to require the publication of guidelines for chief police officers on which factors might properly be taken into account, and which should be ignored, as part of an ECRC was not accepted.¹⁰¹⁶ Baroness Blatch did not see a need to legislate in this area as the White Paper made it clear that information disclosed as part of an ECRC may include 'details about known associates where the association gives rise to concern', decisions not to prosecute, and acquittals where the circumstances of the case give rise to concern, but may not include details of allegations which cannot be substantiated.¹⁰¹⁷ Baroness Hilton maintained, however, that the information contained in the White Paper was not adequate. Such information does not form part of regulations and does not constitute a formal guideline. Furthermore, the guidance in the White Paper allowed for acquittals to be disclosed as part of an ECRC:

Acquittals are surely matters for the judicial system of the country and cannot be used as part of someone's criminal record. I do not believe that it is a matter for the opinion of the chief officer, however compelling the Police Service may consider the evidence. If a court has found that someone is not guilty, to all intents and purposes that person has been found innocent of that charge. I do not understand that that can be a matter of opinion for the police.¹⁰¹⁸

¹⁰¹³ *ibid.*

¹⁰¹⁴ HL Debate 11, November 1996, c820.

¹⁰¹⁵ *ibid* c829.

¹⁰¹⁶ HL Debate, 2 December 1996, cc544-547.

¹⁰¹⁷ *ibid* c545.

¹⁰¹⁸ *ibid* c546.

The Government extended ECRCs to those working in certain capacities with vulnerable adults.¹⁰¹⁹ There was cross-party recognition that the disclosure of non-conviction information as part of an enhanced check could significantly set back the privacy interests of the individual. Nonetheless, the Police Act 1997 was enacted on 21 March 1997, and sections 115 and 116 provided for ECRCs. The disclosure of ECRCs was confined to those regularly caring for, training, supervising, or being in sole charge of persons aged under 18, or vulnerable adults, to sensitive areas of licensing, and the appointment of the judiciary.¹⁰²⁰ Section 115(7) set out that the chief officer of every relevant police force should provide, as part of an ECRC, any information which in his or her opinion 'might be relevant' and 'ought to be included in the certificate.'¹⁰²¹

Soon after its enactment, the Police Act 1997 was inherited by the New Labour Government. In 1998, the Government announced that it would implement the Police Act 1997 and would introduce a new criminal records agency, the Criminal Records Bureau.¹⁰²² The programme to establish the Criminal Records Bureau (CRB) was initiated in 1999. However, due to various administrative delays, the service did not become operational until March 2002.¹⁰²³ The CRB had a bumpy beginning due to problems caused by a high demand for disclosure, an unanticipated preference for paper-based applications from employers, and employers favouring enhanced criminal records checks (which were available for the same price as standard checks).¹⁰²⁴

The murder of two schoolchildren, Holly Wells and Jessica Chapman, (commonly known as the Soham murders) would bring the issue of vetting and enhanced

¹⁰¹⁹ HL Deb 20 January 1997, c533.

¹⁰²⁰ See sections 115(3)-(5), Police Act 1997.

¹⁰²¹ Section 115(7), Police Act 1997.

¹⁰²² See Home Office, *Criminal Records Bureau to Strengthen Child Protection Safeguards* (Press Release, 14 December 1998); T. Thomas, 'Employment Screening and the Criminal Records Bureau' (2002) 31 *Industrial Law Journal* 55-70 at 65.

¹⁰²³ National Audit Office, *Criminal Records Bureau: Delivering Safer Recruitment* (London: The Stationary Office, 2004) 1.

¹⁰²⁴ *ibid.*

criminal records disclosure into mainstream political discourse. On 17 December 2003, Ian Huntley, who had previously been investigated by the police in relation to eight separate sexual offences from 1995 to 1999, was convicted of the murders. This caused 'widespread public disquiet' when it came to light that Huntley's previous dealings with the police were not disclosed as part of the vetting process carried out by Cambridgeshire Constabulary at the time of Huntley's appointment as a school caretaker at the primary school attended by his victims.¹⁰²⁵ Home Secretary David Blunkett set up the Bichard Inquiry, which would assess the effectiveness of intelligence-based record keeping, vetting practices, and information sharing between different agencies.¹⁰²⁶ Before the findings of the Inquiry were published, Baroness Walmsley captured the public mood regarding the importance of sharing and disclosing non-conviction information to protect children:

While caution must be applied ... to protect the human rights of applicants, the children's charities support the use of soft details because of the simple fact that as many as 90 per cent of paedophiles are never convicted... We must recognise that those who offend against children are often clever and devious people who will exploit any loophole that exists. We must address that with the utmost priority because they are clever fish who will find any little hole in our net and slither through it.¹⁰²⁷

The Bichard Inquiry duly recommended a number of 'net-repairing' measures including the extension of the enhanced disclosure regime to cover *all* posts that involve working with children and vulnerable adults;¹⁰²⁸ the clarification of registered bodies' precise responsibilities for checking the identity of applicants;¹⁰²⁹ and the extension of databases that are accessed by the CRB.¹⁰³⁰ One of the main failings of the authorities in the case of Ian Huntley was the failure of Humberside Police, which had previously investigated Huntley for sex offences on several occasions, to pass this intelligence on to Cambridgeshire Constabulary, which conducted the vetting of Huntley on behalf of the school. This failing and the aftermath of the Bichard Inquiry would eventually lead to the creation of the Police National Database (PND). This

¹⁰²⁵ M. Bichard, *The Bichard Inquiry Report HC 653* (London: The Stationary Office, 2004).

¹⁰²⁶ *ibid* 1.

¹⁰²⁷ HL Debate 2 March 2004, cc 625-626.

¹⁰²⁸ n 1025, 144.

¹⁰²⁹ *ibid* 145.

¹⁰³⁰ *ibid* 147.

database operates at the national level, allowing police forces across the United Kingdom to share information with one another immediately.¹⁰³¹

Against the backdrop of these political and legal developments, the enhanced disclosure regime under section 115 of the Police Act 1997 was challenged in *R (X) v Chief Constable of West Midlands Police*.¹⁰³² The claimant was applying for a position as a social worker, which involved caring for and supervising persons under the age of 18. His potential employer sought information about him from the Criminal Records Bureau and the claimant duly applied for an ECRC. The claimant sought judicial review of the defendant Chief Constable's decision to include as part of this ECRC information that he had previously been charged with, but not subsequently convicted of, two counts of indecent exposure.¹⁰³³

Under the 'Other Relevant Information' section of the ECRC, the Chief Constable disclosed information about the prior allegations, the claimant's response in a police interview that he 'did not think' he had committed the offences but could not remember, and that the case was discontinued.¹⁰³⁴ The claimant challenged the ECRC on the grounds that it was incompatible with his rights under Article 8 ECHR.¹⁰³⁵ Providing further support to the notion that the privacy interests at stake in this area are consistently recognised, Wall J held that there was an interference with Article 8(1) on the facts of the case; this was common ground between counsel and not elaborated on.¹⁰³⁶ Regarding the question of justification for the interference, Wall J noted that section 115(7) 'gives a very wide and apparently subjective discretion to the Chief Constable.'¹⁰³⁷

¹⁰³¹ See National Policing Improvement Agency, *Code of Practice on the Operation and Use of the Police National Database* (London: The Stationary Office, 2010).

¹⁰³² *R (X) v Chief Constable of the West Midlands Police* [2004] 1 WLR 1518.

¹⁰³³ *ibid* 1520.

¹⁰³⁴ *ibid* 1521.

¹⁰³⁵ *ibid* 1521.

¹⁰³⁶ *ibid* 1530.

¹⁰³⁷ *ibid* 1536.

Wall J observed that the common law principles governing disclosure in that case would:

[n]eed to be applied all the more stringently (a) when one is dealing with information about a person who has not been either convicted of a criminal offence or found on the balance of probabilities to have committed an act of indecency by a judge in civil proceedings; and (b) where the identity of the person who is alleged to have committed the act details of which it is intended to disclose is in issue.¹⁰³⁸

Wall J also noted that the disclosure must respond to a pressing social need, the nature and extent of which depending upon the facts of each case. This requires a rigorous balancing exercise in accordance with Article 8 and relevant common law principles.¹⁰³⁹ Wall J also observed that 'the Chief Constable should form his opinion that the information is relevant and should be disclosed because, viewed objectively, it is, taken as a whole, reliable.'¹⁰⁴⁰ Wall J turned to the facts of the immediate case, observing that the opinions of the relevant chief police officer, the officers investigating the initial allegations against the claimant, and the CRB staff member referred to as S regarding the guilt of the claimant weighed far too heavily in the decision to disclose the non-conviction information as part of the ECRC.¹⁰⁴¹ Wall J allowed the claim and refused leave to appeal, citing the fact that his decision depended heavily on the facts of the case and that the applicable law was not essentially in dispute among his reasons. Notwithstanding Wall J's ruling, Kennedy LJ granted leave to appeal on 24 March 2004.¹⁰⁴²

The Court of Appeal unanimously allowed the Chief Constable's appeal. Lord Woolf CJ ruled that, whilst the disclosure of personal information as part of an ECRC may engage Article 8(1) - notwithstanding the fact that it was the claimant who applied for the ECRC - section 115 of the Police Act 1997 does not in principle contravene Article 8.¹⁰⁴³

¹⁰³⁸ *ibid* 1535.

¹⁰³⁹ *ibid* 1536.

¹⁰⁴⁰ *ibid* 1538.

¹⁰⁴¹ *ibid* 1539.

¹⁰⁴² *R (X) v Chief Constable of the West Midlands Police* [2005] 1 WLR 65, 69.

¹⁰⁴³ *ibid* 72.

Turning to the immediate case, Lord Woolf CJ observed that the transcript from the police interview was unfavourable to the claimant's case as X did not emphatically or promptly deny the accusation. Thus, in Lord Woolf CJ's judgment, it was not unreasonable for the police to conclude that the claimant had been correctly identified as the perpetrator of the indecent exposure.¹⁰⁴⁴ Lord Woolf CJ also determined that a requirement for the Chief Constable to give the claimant opportunities to make representations would impose too heavy a burden on the police, especially having regard to the language of section 115, which he interpreted as putting the Chief Constable under a duty to disclose any information which might be relevant unless there was a good reason not to do so.¹⁰⁴⁵

From this standpoint, Lord Woolf CJ had little trouble finding the disclosure satisfied Article 8(2) as well:

[A]s long as the Chief Constable was entitled to form the opinion that the information disclosed might be relevant, then absent any untoward circumstance which is not present here, it is difficult to see that there can be any reason why the information that "might be relevant", ought not be included in the certificate.¹⁰⁴⁶

Lord Woolf CJ took no issue with the lack of detail or explanation in the balancing exercise undertaken by the relevant chief officer. Whilst conceding that it would be regrettable if the information disclosed did not relate to the claimant, Lord Woolf CJ suggested that the claimant's position would be no worse than if the prospective employer had asked the claimant whether he had been charged with a criminal offence.¹⁰⁴⁷ Concurring, Mummery LJ emphasised the prospective employer's rights and freedoms, and the rights and freedoms of the vulnerable persons the claimant may come into contact with through his chosen career.¹⁰⁴⁸ Furthermore, Mummery LJ observed that since there had been no arguments on whether the disclosure engaged

¹⁰⁴⁴ *ibid* 76.

¹⁰⁴⁵ *ibid* 81.

¹⁰⁴⁶ *ibid* 82.

¹⁰⁴⁷ *ibid* 83.

¹⁰⁴⁸ *ibid* 84.

Article 8(1) he must not be interpreted as accepting that Article 8(1) was applicable in the case.

This judgment set a low threshold for non-conviction disclosure as part of an ECRC. The extent to which the threshold harmonises with adequate protection of privacy interests will be discussed later in this chapter. Subsequent cases confirmed this approach,¹⁰⁴⁹ and, following reports in January 2006 that a number of convicted child sex offenders were working in schools, the powers to disclose non-conviction information were expanded.¹⁰⁵⁰ On 5 April 2005 the Department of Health published a consultation document, *Making Safeguarding Everybody's Business: A Post-Bichard Vetting Scheme*.¹⁰⁵¹ The proposals within this document aimed to build on the existing barring lists and Criminal Record Bureau services to provide a comprehensive and centralised vetting system.¹⁰⁵² This would involve the expansion of the eligibility criteria for enhanced disclosure as part of employment vetting to include all staff who work in child or vulnerable adult-related settings;¹⁰⁵³ the creation of a two-tier barred list based on the degree of contact a potential employee might have with children or vulnerable groups;¹⁰⁵⁴ and the establishment of the Independent Barring Board, which would become known as the Independent Safeguarding Authority (ISA).¹⁰⁵⁵ These changes would be implemented under the Safeguarding Vulnerable Groups Act 2006. However, these provisions do not need close scrutiny for our purposes as the ECRC system was ultimately to be retained and would remain the main mechanism through which non-conviction information would be disclosed in the employment context.

¹⁰⁴⁹ See *R (B) v Secretary of State for the Home Department* [2006] EWHC 579 (Admin) at [55]; *R (Pinnington) v Chief Constable of Thames Valley Police* [2008] EWHC 1870 (Admin); *R (SL) v Commissioner of Police for the Metropolis* [2008] EWHC 1442 (Admin) at [13]. Whilst in the latter case, Laws LJ quashed the ECRC, he did so applying the standard in *R (X)*. The detailed scrutiny of the justification for disclosure in this case was more exacting than others post-*R (X)*, which may have been indicative of a softening stance towards applicants on behalf of the judiciary: see C. Baldwin, 'Necessary Intrusion or Criminalising the Innocent? An exploration of modern criminal vetting' (2012) 76 *Journal of Criminal Law* 140-163 at 151.

¹⁰⁵⁰ HC Debate 12 January 2006, cc 435-436.

¹⁰⁵¹ M. Hodge and S. Ladyman *Making Safeguarding Everybody's Business: A Post-Bichard Vetting Scheme* (Department of Health, 2005).

¹⁰⁵² *ibid* 3.

¹⁰⁵³ *ibid* 5.

¹⁰⁵⁴ Section 2, Safeguarding Vulnerable Groups Bill 2006 [HL].

¹⁰⁵⁵ Sched 1, Safeguarding Vulnerable Groups Bill 2006 [HL].

1.2 *R (L) v Commissioner of Police of the Metropolis*: Bringing the law to 'common sense' levels?

In October 2009, the Supreme Court in *R (L) v Commissioner of Police of the Metropolis* dismissed a challenge to the enhanced criminal records disclosure scheme under section 115 of the Police Act 1997.¹⁰⁵⁶ As in *R (X) v Chief Constable of the West Midlands Police*, the case concerned the disclosure of non-conviction information as part of an ECRC. In dismissing the appeal, the Supreme Court provided clarification of the law governing ECRCs. The claimant (referred to as "L"), underwent criminal records checking as part of her employment by an agency, which provided staff for schools. Through the agency, the claimant worked as a midday assistant in a secondary school, supervising children at lunchtimes.¹⁰⁵⁷ The ECRC, which was disclosed to the agency, showed that the claimant had no previous convictions or cautions. However, the Chief Constable provided details of the claimant's son's (referred to as "X") listing on a child protection register due to the claimant's alleged lack of ability to care for him; the claimant's refusal to cooperate with social services; and information that X had a previous conviction for robbery.¹⁰⁵⁸

In his leading judgment, Lord Hope considered whether or not the scheme under section 115 of the Police Act 1997 interferes with Article 8(1). The defendant Commissioner submitted that there was no interference with Article 8(1), first, because some of the information disclosed in the ECRC was in the public domain anyway; and second, because the claimant had herself applied for the certificate. Lord Hope found that, as Article 8 comprises the right to establish and maintain relationships with others and because the enhanced disclosure involved sharing information about the claimant, which had been collected and stored by the police,

¹⁰⁵⁶ *R (L) v Commissioner of Police of the Metropolis* [2010] 1 AC 410.

¹⁰⁵⁷ *ibid* 410.

¹⁰⁵⁸ *ibid* 411.

such disclosure is likely to engage Article 8 in virtually every case.¹⁰⁵⁹ Lord Neuberger also found that Article 8(1) was engaged through the disclosure, as an adverse ECRC will often shut off employment opportunities for the applicant in a large number of different fields:

[E]ven where the ECRC records a conviction (or caution) for a relatively minor, or questionably relevant, offence, a prospective employer may well feel it safer, particularly in the present culture, which, at least in its historical context, can be said to be unusually risk-averse and judgmental, to reject the applicant.¹⁰⁶⁰

Regarding the argument that Article 8(1) is not applicable because the claimant herself applied for the ECRC, Lord Hope accepted that applicants consent to ECRC disclosure, 'but only on the basis that their right to private life is respected.'¹⁰⁶¹ Dissenting on this point, Lord Scott took the view that Article 8(1) could not be engaged as the claimant 'invited the exercise by the chief police officer of the statutory duty imposed by section 115(7).'¹⁰⁶² Thus, according to his Lordship, Lord Hope's proposition was an impossible one because the 'any information' to which section 115(7) refers is bound to include information pertaining to the private life of the individual making the application.¹⁰⁶³ Lord Neuberger was unimpressed by this interpretation, observing that it could circumvent Convention rights across the board.¹⁰⁶⁴

Turning attention to Article 8(2), Lord Hope determined that the decision to disclose non-conviction information under section 115 of the Police Act 1997 boiled down to a question of proportionality.¹⁰⁶⁵ Thus, given the fact that disclosure in almost all cases will interfere with Article 8(1), and that the regime set forth in section 115 is not incompatible with Article 8, the question of whether or not a decision to disclose under this framework is justified falls to an analysis of the final limb of Article 8(2),

¹⁰⁵⁹ *ibid* 423.

¹⁰⁶⁰ *ibid* 438.

¹⁰⁶¹ *ibid* 433.

¹⁰⁶² *ibid* 436.

¹⁰⁶³ *ibid* 436.

¹⁰⁶⁴ *ibid* 439-440.

¹⁰⁶⁵ *ibid* 432.

which requires courts to consider whether or not the measure is proportionate to its aim, and necessary.

The majority of the Supreme Court (Lord Scott dissenting) determined that the decision in *R (X) v Chief Constable of the West Midlands Police* put the rights of vulnerable groups above the privacy interests of job applicants. Lord Hope cited guidelines given to chief police officers to assist them in making an enhanced disclosure which explicitly put the interests of vulnerable groups above the interests of ECRC applicants in support of his conclusion.¹⁰⁶⁶ Furthermore, Lord Hope noted that the use of the ECRC scheme had substantially increased since the establishment of the CRB, thus increasing the weight of the interference caused by the scheme.¹⁰⁶⁷ According to Lord Hope, the interpretation of section 115(7) in *R (X) v Chief Constable of the West Midlands Police*, that any information a chief police officer reasonably believes 'might be relevant' for the ECRC should be disclosed unless there is good reason not to disclose it, is inconsistent with the language of the Police Act 1997, which in itself affords wide discretion to Chief Police Officers.¹⁰⁶⁸

For the majority, where the disruption to applicants' private lives is as great as, or greater than, the risk posed to vulnerable groups, careful consideration is required before disclosure. The majority ruled that in cases of doubt applicants should be given the opportunity to make representations. However, in the immediate case, due to the relevance and accuracy of the information in question, and the potential risk to children, the disclosure struck a fair balance.

R (L) v Commissioner of Police of the Metropolis established that, as all enhanced disclosures are likely to interfere with an individual's rights under Article 8(1), the police should consider two issues when determining whether to disclose non-

¹⁰⁶⁶ *ibid* 427-429.

¹⁰⁶⁷ 'The number of disclosures of information by means of ECRCs has exceeded 200,000 for each of the last two years (215,640 for 2007/2008; 274,877 for 2008/2009). Not far short of 10% of these disclosures have had section 115(7) information on them (17,560 for 2007/2008; 21,045 for 2008/2009).' *ibid* 432.

¹⁰⁶⁸ *ibid* 433.

conviction information. First, whether the information is reliable and relevant; and second, whether it is proportionate to disclose the information.¹⁰⁶⁹

On 15 June 2010 the new Coalition Government announced its plans to halt the expansion of the vetting and barring scheme and bring criminal records and barring checks 'back to common-sense levels.'¹⁰⁷⁰ The Government undertook a review of criminal record information disclosure, which was conducted by the Independent Advisor for Criminality Information Management, Sunita Mason. The first phase of the review, published in February 2011,¹⁰⁷¹ recommended the restriction of individual eligibility for enhanced criminal record checks to those working unsupervised or in regular contact with children or vulnerable adults, and the introduction of a filter to remove, where appropriate, old and minor conviction information.¹⁰⁷² With regard to non-conviction information, Mason made the following recommendations to make the non-conviction disclosure regime simpler and fairer:

- (i) the test used by Chief Officers to make disclosure decisions is amended from "might be relevant" to "reasonably believes to be relevant";¹⁰⁷³
- (ii) 'the development of a statutory code of practice for police to use when deciding what information should be disclosed',¹⁰⁷⁴
- (iii) 'the development and use of a common template to ensure that a consistent level of information is disclosed to the individual with clearly set out reasons for that decision';¹⁰⁷⁵ and
- (iv) the development of an open and transparent representations process overseen by an independent expert rather than by the police.¹⁰⁷⁶

¹⁰⁶⁹ J. Beard and S. Lipscombe, *The Retention and Disclosure of Criminal Records* (House of Commons Library Briefing Paper CBP6441, 12 August 2015) 8.

¹⁰⁷⁰ HC Debate 15 June 2010, cc 46-47.

¹⁰⁷¹ S. Mason, *A Common Sense Approach: A review of the criminal records regime in England and Wales – Report on Phase 1*. 11 February 2011.

¹⁰⁷² *ibid* 28.

¹⁰⁷³ *ibid* 33.

¹⁰⁷⁴ *ibid* 34.

¹⁰⁷⁵ *ibid* 35.

¹⁰⁷⁶ *ibid* 41.

The Government implemented the review's recommendations in section 82 of the Protection of Freedoms Act 2012 (PoFA 2012).¹⁰⁷⁷ The Government also published detailed guidance to assist the police in decisions regarding the disclosure of non-conviction information as part of an ECRC. A Quality Assurance Framework (QAF), published jointly by the DBS and the National Police Chiefs' Council (NPCC),¹⁰⁷⁸ set out the general approach whereby a chief police officer should consider the gravity, reliability, and relevance of the information, and the period of time that has elapsed since the relevant events took place.¹⁰⁷⁹ Alongside the QAF, the Home Office published the *Statutory Disclosure Guidance* for providing information as part of an enhanced disclosure.¹⁰⁸⁰ This guidance detailed the following principles among others to be applied in determining whether or not information should be included as part of an ECRC:

- (i) There should be no presumption either in favour of or against providing a specific item or category of information.
- (ii) Information must only be provided if the chief officer reasonably believes it to be relevant for the prescribed purpose.
- (iii) Information should only be provided if, in the chief officer's opinion, it ought to be included in the certificate (having regard to Article 8 ECHR).
- (iv) The chief officer should consider whether the applicant should be afforded the opportunity to make representations.¹⁰⁸¹

Both the QAF and the statutory guidance are documents to which a relevant Chief Police Officer must have regard under section 113B(4) of the Police Act 1997, as amended by the Protection of Freedoms Act 2012.

¹⁰⁷⁷ Protection of Freedoms Act 2012, Explanatory Notes, section 82.

¹⁰⁷⁸ Then named the Association of Chief Police Officers (ACPO)

¹⁰⁷⁹ *Officers Quality Assurance Framework (version 9)* (London: Disclosure and Barring Service-Association of Chief Police, 22 January 2014).

¹⁰⁸⁰ n 998.

¹⁰⁸¹ *ibid.*

2. Assessing Non-Conviction Disclosure

That the dissemination of information concerning an individual's involvement in a criminal justice process to his or her potential employer can - and in most cases, will - set back his or her privacy related interests has been relatively uncontroversial among domestic judges and politicians. However, the reasons for this recognition are varied. Replicating the structure of the preceding two chapters, the following discussion first focuses on the merits and limitations of the reasoning of judges pertaining to this coverage question (i.e. why, and to what extent, does disclosure set back privacy related interests?), before moving on to consider whether, and to what extent, the disclosure of such information can be justified in principle.

At the outset we can see that the framework regulating non-conviction information disclosure in this context is more exacting than the framework regulating DNA and fingerprint data retention. It offers a higher threshold for the police to pass before an interfering measure can lawfully be taken. The following analysis explores this apparent discrepancy.

2.1 Article 8(1): To what extent does non-conviction disclosure set back privacy interests?

One of the reasons for which the disclosure of personal information as part of an ECRC is considered a serious interference with the right to respect for private life might, somewhat unexpectedly, have more to do with the principle in criminal procedure law that one should be presumed innocent until proven guilty, than relating to privacy concerns. Throughout the development of law and policy in this area, there has been an intuitive recognition that the disclosure of non-conviction information bears upon the presumption of innocence. The argument surfaced in *R*

(X) v *Chief Constable of the West Midlands Police*,¹⁰⁸² and again in Mason's review of non-conviction disclosure.¹⁰⁸³

The presumption of innocence is a component of the right to a fair trial, which is a higher order human right than the right to respect for private life in the jurisprudence of the ECtHR.¹⁰⁸⁴ While vetting checks as part of an employment process are not a trial, it is easy to see how the sharing of information about allegations or other soft intelligence stored in police records might be construed as an affront to the presumption of innocence. From the employer's perspective, the aim of obtaining this non-conviction information is, ultimately, to draw inferences about, or assess the character of, the individual concerned, and to assess the risks he or she might pose to the interests of the employer's company or organisation. Where the information sought does not relate to convictions but rather to allegations, failed prosecutions, or police intelligence, its dissemination to those who are making assessments of an individual, and are in a position to restrict his or her life choices, is more problematic. This is not least because it is unclear that the information made available is true. Notwithstanding any affront to the presumption of innocence occasioned, the central concern, as will be demonstrated, is that the dissemination of such information interferes with the private life of the individual. This point is perhaps best demonstrated in the facts of *R (L) v Commissioner of Police of the Metropolis*, where, despite the truth of the information concerned being beyond dispute, its disclosure was held to interfere with Article 8(1) ECHR. However, a closer analysis of the presumption of innocence is needed to comprehend the relationship between this principle, which is frequently invoked as an objection to non-conviction disclosure, and privacy interests.

¹⁰⁸² n 1032, 1535.

¹⁰⁸³ S. Mason, *A Balanced Approach: Safeguarding the public through the fair and proportionate use of accurate criminal record information* (London: Home Office, 2010) 26.

¹⁰⁸⁴ The right to a fair trial (Article 6) enjoys the status of a 'strong' right, meaning that it cannot, in theory, be limited or trumped by other competing interests, whereas the right to respect for private life (Article 8) is a 'qualified' human right, which has much weaker status in comparison. See: A. Ashworth, 'The Exclusion of Evidence Obtained by Violating a Fundamental Right: Pragmatism Before Principle in the Strasbourg Jurisprudence' in P. Roberts and J. Hunter, *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Oxford: Hart Publishing, 2012) 146-161 at 147.

In its narrow sense, the presumption of innocence is a principle in criminal procedure which puts the burden of proof on the prosecution to prove the guilt of the accused. This narrowly formulated understanding of the presumption of innocence, which has roots at common law,¹⁰⁸⁵ has two components: (i) a rule requiring the state to bear the burden of proof and (ii) a rule requiring that the burden will be discharged when guilt has been proven beyond reasonable doubt.¹⁰⁸⁶ However, the presumption can be understood in a broader sense, as a fundamental principle of political morality, carrying robust implications for procedural fairness generally.¹⁰⁸⁷ The former understanding of the presumption of innocence is plainly irrelevant to the process of disclosing non-conviction information. The enhanced disclosure process is not a criminal trial seeking to determine guilt. It is simply a process whereby relevant organisations can obtain information held by a public authority with a view to making informed decisions about the suitability of an individual for a particular post. However, such disclosures might be understood as an affront to the presumption of innocence, particularly when this principle is understood as a general presumption that the treatment of an individual should be consistent with his or her innocence.¹⁰⁸⁸ In *R (AR) v Chief Constable of Greater Manchester Police*,¹⁰⁸⁹ Raynor J held that the disclosure of rape allegations made against a taxi driver ("AR") as part of an ECRC did not breach the presumption of innocence under Article 6(2) ECHR. The defendant Chief Constable disclosed the information on the basis that, in his opinion, it was 'more likely to be true than false' and '[a]lthough the applicant was found not guilty

¹⁰⁸⁵ See *Woolmington v DPP* [1935] AC 462, 481-482.

¹⁰⁸⁶ P.J. Schwikkard, *Presumption of Innocence* (Kenwyn, SA: Juta, 1999) 29.

¹⁰⁸⁷ Understood in this broader sense, the presumption of innocence can be regarded as reinforcing other fundamental human rights, such as the right to liberty, fair trial rights, and the right to respect for private life. See, for example: R. Munday, 'Name Suppression: An Adjunct to the Presumption of Innocence and to Mitigation of Sentence' [1991] *Criminal Law Review* 680-753 at 757; P. Roberts and A. Zuckerman, *Criminal Evidence* (2nd ed. Oxford: Oxford University Press, 2010) 223; H.L. Ho, 'The Presumption of Innocence as a Human Right' in P. Roberts and J. Hunter (eds.), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Oxford: Hart, 2012) 259-283; L. Campbell, 'Criminal Labels, the European Convention on Human Rights and the Presumption of Innocence' (2013) 76 *Modern Law Review* 681-707 at 690.

¹⁰⁸⁸ This is described by Stumer as a 'second facet' of the presumption of innocence (see A. Stumer, *The Presumption of Innocence: Evidential and Human Rights Perspectives* (Oxford: Hart, 2010) 38), though, arguably to the detriment of his analysis, he does not address this facet of the presumption of innocence in detail. See P. Roberts, 'Loss of Innocence in Common Law Presumptions' (2014) 8 *Criminal Law and Philosophy* 317-336 at 322.

¹⁰⁸⁹ *R (AR) v Chief Constable of Greater Manchester Police* [2013] EWHC 2721 (Admin).

by the jury, the test for criminal conviction is beyond all reasonable doubt, which is higher than that required for CRB disclosure purposes.¹⁰⁹⁰

AR relied on the decisions of *Hrdalo v Croatia*,¹⁰⁹¹ and *Allen v United Kingdom*,¹⁰⁹² in submitting that, in disclosing the acquittal, the authorities treated the individual as if he were guilty.¹⁰⁹³ Raynor J dismissed the argument, observing first that the information disclosed did not, as AR had suggested, imply he was guilty. Rather it suggested that, notwithstanding the acquittal, he may have committed the offences in question.¹⁰⁹⁴ Consequently, Raynor J held that the presumption of innocence had not been breached.¹⁰⁹⁵ This is a fine line. However, the present discussion will not probe deeply into debates concerning the scope and normative value of the presumption of innocence. For this analysis, it is sufficient to say that arguments that the disclosure of non-conviction information poses a threat to the presumption of innocence are rooted in a broad interpretation of the presumption, broader than that recognised under Article 6(2) ECHR.¹⁰⁹⁶ Even if the disclosure of contested non-conviction information with the insinuation that the individual concerned may have committed a crime does not offend against the presumption of innocence, it certainly is more problematic than the disclosure of verifiably true information.

¹⁰⁹⁰ *ibid* at [13].

¹⁰⁹¹ *Hrdalo v Croatia*, App no 23272/07 (ECtHR, 27 September 2011) at [54].

¹⁰⁹² According to the ECtHR '[i]n keeping with the need to ensure that the right guaranteed by Article 6 § 2 is practical and effective, the presumption of innocence also has another aspect. Its general aim, in this second aspect, is to protect individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been discontinued, from being treated by public officials and authorities as though they are in fact guilty of the offence charged. In these cases, the presumption of innocence has already operated, through the application at trial of the various requirements inherent in the procedural guarantee it affords, to prevent an unfair criminal conviction being imposed. Without protection to ensure respect for the acquittal or the discontinuation decision in any other proceedings, the fair trial guarantees of Article 6 § 2 could risk becoming theoretical and illusory. What is also at stake once the criminal proceedings have concluded is the person's reputation and the way in which that person is perceived by the public. To a certain extent, the protection afforded under Article 6 § 2 in this respect may overlap with the protection afforded by Article 8.' See *Allen v United Kingdom*, App no 25424/09 (ECtHR, 12 July 2013) at [94].

¹⁰⁹³ n 1089 at [50].

¹⁰⁹⁴ *ibid* at [55].

¹⁰⁹⁵ The Court of Appeal recently affirmed Raynor J's decision. The appellate court ruled that, as the statements on the ECRC were limited and cast no aspersion on the correctness of the acquittal, there was no violation of Article 6(2). See *R (AR) v Chief Constable of Greater Manchester Police* [2016] 1 WLR 4125.

¹⁰⁹⁶ The scope of Article 6(2) ECHR is limited to those 'charged' with a criminal offence (i.e. those specifically investigated by the police). Moreover, the 'voicing of suspicions regarding an accused's innocence' can fall outside the scope of Article 6(2): *Sekanina v Austria* (1994) 17 EHRR 221 at [29]. For a comprehensive discussion of the scope of Article 6(2) see: Campbell, n 1087 at 682-688.

It is reasonable to suggest that, in merely providing personal information to a third party so that the third party can assess the suitability of an individual for particular forms of employment, a public authority is not treating an individual as though he or she is guilty of an offence, or expressing a belief in the guilt of the individual. After all, it is not the police determining the suitability of the applicant or imposing restrictions on his or her employment prospects.¹⁰⁹⁷ This suggests that non-conviction ECRC disclosure would not typically offend against Article 6(2) unless an opinion is expressed that the individual is guilty of an offence.¹⁰⁹⁸ However, it is important not to rest on the assumption that the police and the DBS adopt a passive role in creating the information that is disclosed, and in determining which information should be disclosed and how it should be presented. Such an assumption overlooks not only the role of the Chief Police Officer in making such disclosures, but also the potential for such records to be tainted with the biases exhibited by police officers and other actors at the point of creation. One need look no further than the case of *R (X) v Chief Constable of West Midlands Police*¹⁰⁹⁹ for an illustration of this problem. The Chief Constable respondent had disclosed the following comments in the 'Other Relevant Information' section of the claimant's ECRC:

It is alleged that on 11 December 2001 [the claimant] indecently exposed himself to a female petrol station attendant. It is further alleged that this was repeated on 7 May 2002. [The claimant] was arrested and interviewed whereby he stated that he did not think that he had committed the offence but that he was suffering from stress and anxiety at the time. [The claimant], who was employed by a child care company at the time of the alleged offences, was charged with two counts of indecent exposure, however the alleged victim failed to identify the suspect during a covert identification parade, and the case was subsequently discontinued.¹¹⁰⁰

The information presents an unfavourable image of the applicant. As Wall J noted, the information is partial and 'carries with it an implication that the claimant was guilty, or at the very least the author of the summary believed him to be guilty.'¹¹⁰¹

¹⁰⁹⁷ This view is expressed by Campbell: '[t]hough some members of the public may be induced to view the person as risky through the information revealed in [an ECRC], the absence of any official expression as to guilt means that the presumption is not relevant in this instance.' See Campbell, *ibid* at 700.

¹⁰⁹⁸ *Allen v United Kingdom*, App no 25424/09 (ECtHR, 12 July 2013).

¹⁰⁹⁹ n 1032.

¹¹⁰⁰ *ibid* 1521.

¹¹⁰¹ *ibid* 1527.

This interpretation is supported by the fact that the summary omits crucial details of the investigation which are more favourable to the claimant. For example, the summary of the police interview provided above gives a limited and skewed picture of conversations that took place between the claimant and investigating officers. In the initial police interview, the claimant is asked by officers if he remembers the incidents in question, to which he replies that he cannot. Wall J drew attention to the leading nature of this line of questioning:

Any question about any incident which begins with the words: "Do you remember doing X?" contains within it the implication that the person questioned has something to remember, and was, accordingly, the person who committed the act about which he or she is being questioned. In my judgment it is unsafe then to treat the answer "No" or "I can't remember" as incredible and to give it the same implication.¹¹⁰²

Taken together, both the line of questioning pursued by the investigating officers and the summary of the interview led to a particular interpretation of the facts being disclosed in the ECRC, which suggests the claimant gave eyebrow-raising responses in the interview. The Chief Constable omitted four occasions in the police interview where the claimant categorically denied that he had committed the acts of indecent exposure in question. Moreover, the ECRC makes no mention of the fact that the complainant stated she was '100% certain' she could identify the perpetrator of the indecent exposure, before failing to identify the claimant in an identity parade.¹¹⁰³ Thus the information has been cherry-picked in such a way that is difficult to reconcile with a general presumption that the treatment of an individual should be consistent with his or her innocence. Whilst such disclosure *might* not raise problems under Article 6 ECHR (owing to the fact that it does not explicitly undermine the legal status of the individual), any insinuation, bias, or omission in the presentation of information as part of an ECRC, which might be said to offend against the presumption of innocence (understood in broad terms), does (at least) seem to increase or aggravate the interference with the claimant's right to respect for private life.

¹¹⁰² *ibid* 1527.

¹¹⁰³ *ibid* 1540.

Even in the absence of insinuation, omission, or bias on the part of the police, the disclosure of non-conviction information pursuant to an ECRC still constitutes a serious setback to privacy related interests. This is because the dissemination of personal information, particularly of the sensitive type that might be included as part of an ECRC, is fundamentally offensive to privacy interests. Recalling the arguments developed in previous chapters¹¹⁰⁴ it is clear that, for a number of reasons, dissemination can create significant disruptions to the individual's private life.

Rössler argues that the reason the protection of informational privacy matters to people is that it is 'an intrinsic part of their self-understanding as autonomous individuals (within familiar limits) to have *control over their self-presentation*'.¹¹⁰⁵ Thus, privacy's value stems from the protection it affords an individual to assert control over how he or she presents him or herself to the world, which is said to be instrumental to various ends. Other accounts discussed in Chapter 1 provide similar conceptions of privacy.¹¹⁰⁶ These basic insights are useful in developing our understanding of how the disclosure of non-conviction information as part of an ECRC might represent a significant setback to an individual's privacy related interests. Adequate privacy protection must afford a space to which others have limited access. Limits on who can access personal information about the individual, under what circumstances, and for what reasons are necessary for protecting various privacy interests. For example, Gavison argues that when privacy is understood as limited access to the self it is valuable in buttressing liberty, autonomy, and freedom.¹¹⁰⁷ Equally, in the context of criminal records, the limiting of access to such personal information protects the individual's reputation. Moreover, such limited access can forestall any stigmatisation which might result if the fact that an individual has been

¹¹⁰⁴ See Chapter 3, Part 2 above.

¹¹⁰⁵ B. Rössler, *The Value of Privacy* (Cambridge: Polity Press, 2005) 116 (emphasis in original).

¹¹⁰⁶ See, for example Nagel, n 992; A. von Hirsch, 'The Ethics of Public Television Surveillance' in A. von Hirsch, D. Garland and A. Wakefield (eds.), *Ethical and Social Perspectives on Situational Crime Prevention* (Oxford: Hart Publishing, 2000) 59-77; B. von Silva-Tarouca Larsen, *Setting the Watch: Privacy and the Ethics of CCTV Surveillance* (Oxford: Hart, 2011); A. Marmor, 'What is the Right to Privacy' (2015) 43 *Philosophy and Public Affairs* 3-26. Chapter 1, Part 1.3.

¹¹⁰⁷ R. Gavison, 'Privacy and the Limits of Law' (1980) 89 *Yale Law Journal* 421-471 at 426.

excluded from employment were to become widely known.¹¹⁰⁸ Even in the absence of such information becoming widely known in the individual's community, ECRC disclosure can be stigmatising in the same way that DNA retention is stigmatising; it amounts to the state treating the individual differently on the basis of potential guilt or a perceived increased risk of causing harm to others.¹¹⁰⁹

Protection against the disclosure of non-conviction information as part of an ECRC will guard against irrational judgments based on stereotypes and misinformation in the criminal record checking process. It also guards against individuals becoming 'prisoners of their past' through the dissemination of personal information beyond anticipated boundaries.¹¹¹⁰ It is for these reasons that the ECtHR recognises that exclusion from employment can interfere with Article 8(1).¹¹¹¹ In *Sidabras v Lithuania*,¹¹¹² a case where the applicants, as former Lithuanian KGB officers, were banned from seeking employment in a range of private and public sector positions, the ECtHR held that the ban constituted an interference with Article 8(1) as it affected 'to a very significant degree' the applicants' ability to develop relationships with the outside world and earn a living.¹¹¹³ Furthermore, a line of Strasbourg jurisprudence suggests that an interference with Article 8(1) can occur where information pertaining to an individual's criminal conviction is disseminated.¹¹¹⁴

It is submitted that the disclosure by police of personal information, which is likely to have a significantly adverse impact upon the employment prospects of the individual,

¹¹⁰⁸ *R (Wright) v Secretary of State for Health* [2009] 1 AC 739, 754.

¹¹⁰⁹ L. Campbell, 'A Rights-based Analysis of DNA Retention: "non-conviction" databases and the liberal state' [2010] 12 *Criminal Law Review* 889-906 at 905.

¹¹¹⁰ Solove, n 992, 144-145.

¹¹¹¹ *Niemietz v Germany* (1993) 16 EHRR 97 at [29]; *Sidabras v Lithuania* (2006) 42 EHRR 6.

¹¹¹² *Sidabras*, *ibid*.

¹¹¹³ *ibid* at [48].

¹¹¹⁴ See generally *Leander v Sweden* (1987) 9 EHRR 433 at [48]; *Rotaru v Romania* (2000) 8 BHRC 449. In *Segerstedt-Wiberg v Sweden*, the ECtHR also found that public information can fall within the scope of private life where it is systematically collected and stored in files held by public authorities, irrespective of any subsequent dissemination: *Segerstedt-Wiberg v Sweden* (2006) 44 EHRR 14 at [72]. Furthermore, in *MM v United Kingdom*, the ECtHR determined that information pertaining to a caution issued by police as a disposal for a criminal offence will fall within the scope of the private life if it is disclosed to third parties thereafter. However, in this decision the ECtHR found an interference with the caveat that the caution becomes part of the individual's private life only once it 'recedes into the past': *MM v United Kingdom*, App no 24029/07 (ECtHR, 13 November 2012) at [189].

will set back the individual's privacy interests to the point that the protection of Article 8 is warranted. Given the numerous ways in which such disclosures can set back an individual's privacy related interests, the interference with Article 8(1) posed by the disclosure of such sensitive information about an individual's past dealings with public authorities is a serious one. Whilst, generally speaking, domestic judges ruling on cases pertaining to ECRCs have accepted this point, some have expressed reservations.

In *R (X) v Chief Constable of the West Midlands Police*,¹¹¹⁵ Mummery LJ betrayed hints of scepticism towards the notion that non-conviction disclosures interfered with Article 8(1) rights:

Good practice would normally require a prospective employer, who is responsible for appointments to positions covered by section 115, to make inquiries about criminal charges, as well as about criminal convictions, as they "might" be relevant to the decision whether or not to make an appointment. Common sense also suggests that a suitable applicant for such a position would, in any case, take the precaution of volunteering information about such matters to a prospective employer. There is nothing to prevent the applicant from also making full representations to the prospective employer about why the matters disclosed are, in fact, irrelevant, should be disregarded and do not affect his suitability for the position for which he has applied.¹¹¹⁶

Mummery LJ emphasised that he should not be understood as agreeing that Article 8(1) was engaged on the instant facts as he had not heard full arguments on the point. However, it is clear from the quoted extract that his Lordship was underestimating the importance of protection from such disclosures for privacy related interests. Granted, a job applicant could take the precaution of volunteering information of his or her involvement in a criminal process to a prospective employer and hope that the information would be assessed impartially, giving appropriate weight to the interests of the vulnerable persons in question and the interests of the applicant. Yet, a non-conviction disclosure regime operating under such hopes is surely unrealistic and unfair. Employers working closely with children and vulnerable groups are charged with a duty to protect those groups from harm. This is their

¹¹¹⁵ n 1042.

¹¹¹⁶ *ibid* 83.

primary interest. Accordingly, employers are bound to take a risk-averse approach when making decisions to employ people who will come into regular contact with the children or vulnerable persons under their care. Unlike chief constables, once the non-conviction information is disclosed on an ECRC, employers are under no duty to assess the proportionality of any interference with a job applicant's Article 8 rights occasioned by the disclosure. For this reason, Lord Neuberger recognised that an adverse ECRC would represent something close to a 'killer blow' to applicants' prospects of gaining employment in a field requiring such certificates.¹¹¹⁷ Given that in all likelihood such disclosure will significantly reduce the chances of the applicant gaining employment, it is difficult to imagine how, in the absence of such frank disclosure against self-interest, individuals should not be afforded the protection of Article 8 to ensure that any information subsequently disclosed by the police is lawful and proportionate. Any non-conviction disclosure system operating with such unrealistic assumptions regarding what a job applicant will and should share in terms of his or her life history and previous contact with the authorities is bound to be unbalanced, and consequently unjust.

Lord Scott, in *R (L) v Commissioner of Police of the Metropolis*,¹¹¹⁸ raised a second objection to the notion that such disclosures interfere with Article 8(1). It was suggested that Article 8 was not engaged because the applicant, 'in making the application for an ECRC, invited the exercise by the chief police officer of the statutory duty imposed by section 115(7).'¹¹¹⁹ Consequently, the argument runs, as the applicant consented to the disclosure and applied for it, she cannot complain that it interferes with her Article 8 rights. In dealing with this objection it is important to remember that, whilst it is true that applicants do technically apply for the disclosure of non-conviction information as part of an ECRC; they do so in the knowledge that

¹¹¹⁷ n 1056, 440. Even if the term 'killer blow' is overselling the impact of an adverse ECRC, it is well documented in the case law that information disclosed on an ECRC is highly likely to jeopardise an individual's job application: see the opinion of Lord Wilson in *R (T) v Secretary of State for the Home Department* [2014] UKSC 35 at [16]-[21].

¹¹¹⁸ *R (L)*, *ibid.*

¹¹¹⁹ *ibid* 436.

this is a pre-requisite of gaining the employment in question. As Lord Neuberger highlights, section 115(7) imposes something of a statutory fetter on applicants in the selection process whereby, under Lord Scott's interpretation, they sign away their Article 8 rights in applying for positions eligible for enhanced disclosure.¹¹²⁰ The disclosure of non-conviction information as part of an ECRC involves the dissemination of sensitive personal information about the applicant. Thus it is imperative that any such disclosure satisfies the demands of Article 8(2), irrespective of whether the applicant has consented to the disclosure, otherwise legislation such as section 115(7) could too easily be used to circumvent Convention rights.¹¹²¹ As Lord Brown more reasonably states: 'applicants are consenting to the disclosure of relevant information to the extent that this is proportionate to the damage this will cause to their interests in privacy but no more'.¹¹²²

When assessing the degree of the interference occasioned by such disclosure much turns on the facts of a particular case. For example, where the disclosed information might represent an affront to the presumption of innocence, due to biases in its presentation, this will increase the seriousness of the interference with the applicant's Article 8 rights as it is likely to increase the extent to which the disclosure will stigmatise and disqualify the applicant. It is difficult to see how any such disclosure could satisfy Article 8(2). However, it is important to note that all disclosures of this kind are likely to constitute a serious interference. When compared with the retention of such information, the dissemination of personal information of this nature will usually have a more detrimental impact on one's ability to pursue a chosen career, and thus develop valuable personal relationships. It remains to assess the extent to which the disclosure of non-conviction information as part of an ECRC can be justified under Article 8(2) ECHR.

¹¹²⁰ *ibid* 440. The ECtHR has subsequently held that 'voluntary' disclosure in similar circumstances will engage Article 8: *MM*, n 1114 at [189].

¹¹²¹ n 1056, 438.

¹¹²² *ibid*.

2.2 Article 8(2): When is non-conviction disclosure justified?

2.2.1. Disclosure 'in accordance with the law'

The disclosure of non-conviction information as part of an ECRC has a basis in domestic law in section 115(7) of the Police Act 1997. For the ECRC disclosure regime to meet the legality test, section 115(7) must meet the quality of law requirement set forth in the ECtHR jurisprudence.¹¹²³ As previously discussed, this means the law must be adequately accessible and foreseeable, and must indicate, with sufficient clarity, the scope of the discretion conferred upon a public authority.¹¹²⁴

In *R (X) v Chief Constable of the West Midlands Police*,¹¹²⁵ Lord Woolf CJ found that section 115(7) did not *per se* contravene Article 8(2).¹¹²⁶ This view was endorsed by a majority of the Supreme Court in *R (L) v Commissioner of Police of the Metropolis*.¹¹²⁷ However, in both cases, this conclusion was arrived at without a detailed consideration of whether or not section 115 of the Police Act 1997 was 'in accordance with the law'. Instead, the cases focused on whether or not the legislation had been applied in such a manner that could be considered 'necessary in a democratic society'. In previous chapters, the potential for overlap between the two requirements in Article 8(2) has been discussed,¹¹²⁸ and some commentators warn against eclipsing the necessity test through an overly rigorous legality analysis.¹¹²⁹ However, in omitting to engage in any substantial way with the question of whether the regime under the Police Act 1997 is 'in accordance with the law', the two leading domestic authorities in this area may have missed an opportunity to clarify what a Convention compliant framework for ECRC disclosure *should* look like. This section

¹¹²³ See, for example, *Lambert v France* (2000) 30 EHRR 346 at [23].

¹¹²⁴ *Gillan v United Kingdom* (2010) 50 EHRR 1105 at [76]-[77].

¹¹²⁵ n 1042.

¹¹²⁶ *ibid* 71.

¹¹²⁷ See the opinion of Lord Hope: n 1056, 432.

¹¹²⁸ Chapter 3, Part 3.

¹¹²⁹ M.H. Murphy, 'A Shift in the Approach of the European Court of Human Rights in Surveillance Cases: A Rejuvenation of Necessity?' (2014) 5 *European Human Rights Law Review* 507-518.

will fill the gap, and in doing so will show that PoFA 2012's provisions and the accompanying guidance meets the demands of lawfulness under Article 8(2).

The domestic courts' approach is contrary to the one taken in *MM v United Kingdom*,¹¹³⁰ where the ECtHR subjected sections 113A and 113B of the Police Act 1997 to exacting scrutiny in determining that the disclosure of the applicant's police caution to her prospective employer was not 'in accordance with the law'.¹¹³¹ The ECtHR held that, much like in cases involving telephone tapping and other direct forms of surveillance, measures pertaining to the storage and use of criminal record data must have clear and detailed rules concerning their scope; minimum safeguards governing the duration, storage, usage, procedures for preserving integrity, and confidentiality of data; and must provide sufficient guarantees against the risk of abuse and arbitrariness.¹¹³² Assessing the regime for the disclosure of caution information under the Police Act 1997, the ECtHR observed:

No distinction is made based on the seriousness or the circumstances of the offence, the time which has elapsed since the offence was committed and whether the caution is spent. In short, there appears to be no scope for the exercise of any discretion in the disclosure exercise. Nor, as a consequence of the mandatory nature of the disclosure, is there any provision for the making of prior representations by the data subject to prevent the data being disclosed either generally or in a specific case.¹¹³³

In light of the cumulative effect of these shortcomings, the court concluded that the regime regulating the disclosure of caution data was not 'in accordance with the law'. This judgment is relevant to the disclosure of non-conviction information under section 115(7) of the Police Act 1997 as this, too, involves the disclosure of personal information held in police records which is likely to land something like a 'killer blow' on the career prospects of applicants for criminal record certificates.¹¹³⁴

¹¹³⁰ *MM*, n 1114.

¹¹³¹ *ibid* at [207].

¹¹³² *ibid* at [195].

¹¹³³ *ibid* at [204].

¹¹³⁴ Notably, in *MM v United Kingdom*, the ECtHR referred to passages in *R (L)* to describe the impact of criminal record disclosure on the applicant in *MM*: *ibid* at [189].

MM raised further issues regarding how the overlap between the 'in accordance with the law' and the 'necessary in a democratic society' requirements should be managed. These questions were taken up again at the domestic level in *R (T) v Chief Constable of Greater Manchester Police*,¹¹³⁵ a case pertaining to the disclosure of caution information under Part V of the Police Act 1997; the same framework held to be unlawful in *MM*. Lord Reed, in the majority, ruled that, in light of the judgment in *MM*, the disclosures were not 'in accordance with the law'. Dissenting on this point alone (the court was unanimous in finding a violation of Article 8), Lord Wilson suggested that the judgment in *MM* eroded the distinction between the legality requirement and the necessity requirement to an unacceptable degree. According to his Lordship, marginalising the latter closes off the margin of appreciation afforded to Contracting States when determining whether a measure is necessary and proportionate.¹¹³⁶

Lord Wilson rightly observed that the question of whether or not there are adequate safeguards requires the consideration of issues which might more appropriately form part of a proportionality analysis. However, his Lordship's argument that its 'seepage' into the legality analysis is to be resisted and, consequently, that the framework regulating the disclosure of caution information was 'in accordance with the law' is unconvincing. Lord Reed noted that the approach adopted by the ECtHR in *MM*, which took account of safeguards (or lack thereof) in the domestic legal framework in its legality analysis, was based on settled case law.¹¹³⁷ Moreover, Lord Reed convincingly explained the reasons why the ECtHR considers the adequacy of safeguards as part of the legality analysis and not only as criteria of proportionality:

[I]n order for the interference to be "in accordance with the law", there must be safeguards which have the effect of enabling the proportionality of the interference to be adequately examined. Whether the interference in a given

¹¹³⁵ *R (T) v Chief Constable of Greater Manchester Police* [2015] AC 49.

¹¹³⁶ *ibid* 73.

¹¹³⁷ *ibid* 94. Indeed, in surveillance cases the ECtHR has held that an interference with Article 8(1) must be based on sufficiently precise law which contains safeguards against abuse: *Kopp v Switzerland* (1998) 27 EHRR 91 at [72]. Furthermore, in *Rotaru v Romania* the court held that, due to lack of adequate safeguards in the national framework, the use of the applicant's criminal record was not 'in accordance with the law': *Rotaru*, n 1114.

case was in fact proportionate is a separate question. The criticism that the court [ECtHR] in *MM* did not allow for any margin of appreciation is therefore misplaced. Whether a system provides adequate safeguards against arbitrary treatment, and is therefore “in accordance with the law” within the meaning of the Convention, is not a question of proportionality, and is therefore not a matter in relation to which the court allows national authorities a margin of appreciation.¹¹³⁸

A proportionality analysis assesses the extent to which there exists a reasonable relationship between the objective of an interference and the means used to achieve that objective. It weighs this against the seriousness of the interference caused to the competing interest. As discussed in Chapter 2, an analysis of proportionality is separate from an assessment of the quality of law regulating the measure (and any component safeguards against abuse).¹¹³⁹ Thus, while the existence of adequate and effective safeguards might be relevant to the proportionality analysis (particularly in considering whether the means are minimally intrusive to achieve the objective of the interference) it is not central. However, as is plain in the jurisprudence of the ECtHR, a measure regulated by a legal framework which lacks adequate safeguards to protect against abuses of power cannot be said to meet the independent quality of law requirement and thus cannot be considered ‘in accordance with the law’, irrespective of whether or not the use of the measure is proportionate and necessary.

Beyond this doctrinal clarification, the cases of *MM* and *R (T) v Chief Constable of Greater Manchester Police* provide a basis for comparison when considering whether or not the framework regulating the disclosure of non-conviction information under section 115(7) is of sufficient clarity and quality to be considered ‘in accordance with the law’. In each case, the ‘cumulative effect’ of the failure to draw a distinction on the basis of the nature of the offence for which a caution was administered; the time since the offence took place; the relevance of the information to the employment; and the absence of mechanisms for independent review, was judged to be

¹¹³⁸ n 1135, 95.

¹¹³⁹ See M. Klatt and M. Meister, *The Constitutional Structure of Proportionality* (Oxford: Oxford University Press, 2012) 8. Chapter 2, Part 3.

unacceptable.¹¹⁴⁰ In basing its conclusions on the cumulative effect of the shortcomings, the ECtHR introduced an element of uncertainty as we do not have any guidance on the particular significance of each aspect of the regime in constituting an adequate legal basis for interference. Nonetheless, the current framework regulating the disclosure of non-conviction information should be less vulnerable to Article 8 attack on the grounds of legality than the framework considered in *R (T) v Chief Constable of Greater Manchester Police*.

In response to the Mason reviews, the Government amended section 115 of the Police Act 1997. The amendments replaced the 'might be relevant' test with the stricter 'reasonably believes to be relevant test'. The Government also provided for individuals to raise disputes before an independent body and set forth that relevant decision makers must have regard to new statutory guidance. These two changes directly address safeguarding standards mentioned in *MM*. New statutory guidance additionally provides safeguards of the sort mentioned in *MM*. For instance, the Statutory Disclosure Guidance addresses the nature and currency of the offence as relevant considerations:

Information should be sufficiently current:

The age of the information, coupled with the age of the applicant at the time and their conduct in the intervening period, are factors which should be taken into account. The older the information the more difficult it will be to form a reasonable belief that it is relevant. However, there are other factors, especially seriousness, which may mean that even very old information may reasonably be believed to be relevant. The currency of information should be considered together with the applicant's specific circumstances.¹¹⁴¹

It might be argued that the guidance is vague. After all, it gives little indication of exactly how, in assessing whether or not information should be disclosed, relevant chief police officers should strike a balance between seriousness and currency of the information. But this is not decisive when assessing whether disclosure is 'in accordance with the law'. If we accept Lord Reed's assertion that for any interference to be 'in accordance with the law' there must exist safeguards, which have the effect

¹¹⁴⁰ n 1135, 96.

¹¹⁴¹ See n 998, 3.

of enabling an adequate proportionality analysis, then the safeguards in the form of the guidance quoted above comfortably meet this threshold. The guidance directs that such factors be considered in any subsequent proportionality analysis. It does not encroach too far into the proportionality analysis by fettering the Chief Police Officer's discretion in assessing the exact weight to be attributed to different factors, including age, time, and offence seriousness in the circumstances of the particular case. Rather, it points to these as variables to be considered, providing some (limited) guidance over how they might be prioritised in a proportionality analysis.¹¹⁴² In the two statutory documents to be used by relevant chief police officers, guidance is given for all of the safeguarding points mentioned in *MM* and *R (T)*.¹¹⁴³ The law has therefore been reformed to provide adequate safeguards against abuse, meeting the quality of law requirement for compliance with Article 8(2).

2.2.2. *Disclosure in pursuit of a legitimate aim?*

Some formulations of the proportionality analysis involve a four-stage test in which the establishment of a legitimate aim forms part of the analysis.¹¹⁴⁴ Others entail a three-stage test, which takes the establishment of a legitimate aim as the basis for the proportionality test rather than being integral to it.¹¹⁴⁵ The latter is the approach adopted by the ECtHR, but the difference between the two approaches seems merely semantic and of little practical relevance.¹¹⁴⁶ In any case it is not foreseeable that such disclosure, done in accordance with the law, would struggle to clear the legitimate aim hurdle. Where a relevant chief police officer has followed the legislative provisions contained in Part V of the Police Act 1997 and its accompanying

¹¹⁴² In this sense comparisons might be drawn between this guidance and the structured discretion relating to the admissibility of bad character evidence in section 101 of the Criminal Justice Act 2003: see C. Tapper, *Criminal Justice Act 2003: Part 3: Evidence of Bad Character* [2004] *Criminal Law Review* 533-555.

¹¹⁴³ See generally: *Quality Assurance Framework (version 9)* (London: Disclosure and Barring Service-Association of Chief Police, 22 January 2014); n 998.

¹¹⁴⁴ J. Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 *Cambridge Law Journal* 174-207 at 181; M. Kumm, 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement' in G. Pavlakos (ed.) *Law, Rights and Discourse: Themes from the Legal Philosophy of Robert Alexy* (Oxford: Hart, 2007) 131-167; Klatt and Meister, n 1139, 8.

¹¹⁴⁵ D. Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 *University of Toronto Law Journal* 838-397; S. Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2010) 7 *International Journal of Constitutional Law* 468-493 at 471.

¹¹⁴⁶ Grimm, *ibid* at 388-389.

statutory guidance, such disclosure will be made to prevent crime and/or in the interests of public safety, since the Chief Police Officer must hold a reasonable belief that the information disclosed is relevant for the employer to make decisions regarding the risks the applicant might pose to the public.

2.2.3. Disclosure as necessary in a democratic society

2.2.3.a. Is the legislative objective sufficiently important to justify limiting a fundamental right?

The first question involves balancing in the abstract the weight of the competing principles. This requires a judgment on whether or not the legislative objective (namely the prevention of crime caused by failing to provide information about potentially 'risky' persons to employers) is sufficiently important to justify limiting the fundamental right (the job applicant's privacy rights). The prevention of crime and the protection of the public are self-evidently important objectives. One need look no further than the Soham murders to ascertain exactly how high the stakes can be when the police fail to adequately manage and disclose so called 'soft' intelligence. Thus, the aim of the legislation, which accords with at least two of the stated 'legitimate aims' in Article 8(2), is plainly of sufficient importance to provide a basis for limiting the right to respect for private life. On the other side of the scales, the disclosure of non-conviction information as part of an ECRC can represent a serious interference with the individual's right to respect for his or her private life. Such disclosure can be stigmatising for the individual and is highly likely to have a significant adverse impact on the individual's pursuit of his or her chosen career. Furthermore, as this information often relates to unproven or untested intelligence, such as unsubstantiated allegations, its disclosure can be particularly unfairly stigmatising.

Whilst, considered in the abstract, these legitimate aims provide a sound basis for justifying an interference with the right to respect for private life, this does not necessarily mean that the prevention of crime and public safety merit heavier weighting than the right to respect to private life. It merely establishes, as a threshold matter, that the aims are sufficiently important as a potential basis for justifying an interference with the right to respect for private life. In *R (L)* the Supreme Court came to a different conclusion to the Court of Appeal in *R (X)* regarding the abstract weight of the rights at stake. The approach in *R (X)* gave priority to the interests of children and vulnerable groups over the interests of job applicants. This can be seen in Lord Woolf CJ's comments regarding the role of Article 8(2) where the rights of job applicants collide with those of children or vulnerable groups:

[A]s long as the Chief Constable was entitled to form the opinion that the information disclosed might be relevant, then absent any untoward circumstance which is not present here, it is difficult to see that there can be any reason why the information that "might be relevant", ought not be included in the certificate [ECRC].¹¹⁴⁷

This approach clearly puts the rights of vulnerable groups and children above those of job applicants. To suggest that non-conviction information, so long as it might be relevant to the position applied for, should automatically be included in an ECRC (save for any untoward circumstances) is to eliminate any need for a detailed balancing exercise. The only real threshold to be overcome in most cases is that the information concerned is (or rather, might be) relevant for the position. In *R (L)* Lord Hope described how this had led to a system which systematically favoured the rights of children and vulnerable groups over job applicants, with reference to a rating table in the guidelines used by chief police officers to determine whether or not non-conviction information should be disclosed post-*R(X)*:

A striking feature of the rating table is that a tick [which indicates that information will be disclosed] appears in every cell where it is said that a failure to disclose would cause a severe risk to the vulnerable intersects with a human rights category, however severe the disruption that disclosure in that category would cause to the private life of anyone. Where the risk that a failure to

¹¹⁴⁷ n 1042, 81.

disclose would cause is moderate, careful consideration [over whether or not to disclose] is only required if the disruption to the private life of anyone would be one grade higher: severe. It is only where the risk that a failure to disclose would cause little quantifiable risk to the vulnerable group that careful consideration is required if the corresponding human rights category of little disruption to private life applies. In all other cases the corresponding human rights category is trumped by an equivalent risk category.¹¹⁴⁸

The table described above directly prioritises the rights of vulnerable groups and children over the rights of job applicants. Where the risk to each is equal, in all but one case it puts the rights of children and vulnerable groups above job applicants. The court in *R (L)* ultimately determined that such prioritisation was unjust and '[t]he correct approach ... is that neither consideration has precedence over the other.'¹¹⁴⁹

Indeed, this is surely the correct approach. Often, when privacy interests collide with other societal interests, such as the prevention of crime, they are deemed to be of marginal importance, selfish, or even anti-social¹¹⁵⁰ and as such are easily overridden when pitted against competing interests. The self-evident interest in protecting children and vulnerable groups from harm is a prime example. Pitted against such viscerally compelling consequences as those that would result from a vulnerable person falling victim to crime it is easy to overlook setbacks to interests deriving from such a slippery and ill-defined concept as privacy. Even if the individual privacy interests at stake are fully appreciated, these can easily be marginalised as less urgent or significant than other interests. Surely – the argument might run – it is more important to prevent children coming to harm than to protect a job applicant's personal information? Thus, where privacy 'gets in the way' of measures to protect children, its value is heavily discounted.

¹¹⁴⁸ n 1056, 428.

¹¹⁴⁹ In forming this conclusion, Lord Hope relied on the judgment of Lord Nicholls in *Campbell v MGN Ltd*, a case where there was a clash between the Article 8 rights of the applicant and Article 10 ECHR: *Campbell v MGN Ltd* [2004] 2 AC 457, 464.

¹¹⁵⁰ Criticisms of the right to privacy which run along these lines have come from a number of different angles: see C. A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1989) 187; A. Etzioni, *The Limits of Privacy* (New York: Basic Books, 1999).

However, such a line of argument overlooks the significance of privacy not only as an individual right but also as a political and social value. Understood in this way, privacy underwrites other democratic values such as the freedom of expression and, indeed, security. It is also useful in tempering the power of the state by establishing limits on intrusions into the lives of its citizens.¹¹⁵¹ As Goold states: 'in order for democracy to flourish, individuals must feel free to choose whom they associate with, whom they speak to, and who hears what they say, safe in the knowledge that such choices are free from routine scrutiny by the state.'¹¹⁵² Understood in this broader sense, the trade off between privacy, on the one hand, and security and crime control, on the other, is no longer one where the individual's personal and *possibly* reprehensible desire to conceal aspects of his or her self is competing against the common welfare of all of society. Rather it becomes two aspects of the common good competing against one another. For privacy interests to be taken seriously, they must be recognised as being fundamentally important. After all, little is contributed, overall, to a defensible conception of the common good if, in the process of preventing crimes against one portion of society, we arbitrarily and unfairly impose restrictions and pains on other groups.¹¹⁵³ Thus, for the right to respect for private life to be fully respected its abstract weight must be considered equal to the prevention of crime and disorder. In relation to the chapter's topical focus, this sentiment is perhaps best encapsulated in the first principle of the Statutory Disclosure Guidance:

Principle 1 – There should be no presumption either in favour of or against providing a specific item or category of information.¹¹⁵⁴

¹¹⁵¹ The view that privacy's value transcends its utility as an individual protection has been expressed by a number of academic commentators: P. Regan, *Legislating Privacy: Technology, Social Values, and Public Policy* (2nd edn. Chapel Hill: The University of North Carolina Press, 2009); B. Goold, 'Surveillance and the Political Value of Privacy' (2009) 1 *Amsterdam Law Forum* 3-6 at 5; A. Roberts, 'A Republican Account of the Value of Privacy' (2014) *European Journal of Political Theory* 1-25 at 8.

¹¹⁵² Goold, *ibid* at 5.

¹¹⁵³ B. Goold, 'How Much Surveillance is Too Much? Some Thoughts on Surveillance, Democracy and the Political Value of Privacy' in D. Scharf (ed.), *Overvaaking i en Rettstat: Surveillance in a Constitutional Government* (Fagbokforlaget, 2010) 38-48, 46.

¹¹⁵⁴ n 998, 3.

2.2.3.b. Is there a rational connection between the means and the objective?

This stage of the proportionality analysis requires an examination of whether the legislative measure is capable of achieving the legislative objective.¹¹⁵⁵ In the case of non-conviction disclosure the question may be restated: 'is there a rational connection between the disclosure of non-conviction information as part of an ECRC and the prevention of crime?' The answer depends upon the nature of the information disclosed and the circumstances under which it might be disclosable. However, as a general principle, the disclosure of relevant and credible non-conviction information is likely to help prevent crime and protect vulnerable groups from coming to harm. This is because, even if an individual has not been convicted of an offence, there may be circumstances where the disclosure of non-conviction information pertaining to that individual's ECRC application will plainly reduce the risk of harm to children or other vulnerable groups who might otherwise be exposed to dangerous individuals. In the case of Ian Huntley, at the time of applying for employment as a caretaker in his victims' school, he had been investigated by the police in four separate rape enquiries and one enquiry relating to the indecent assault of a child. While he was not convicted of any of these offences, the details of these investigations taken together clearly demonstrated that Huntley posed a considerable risk to children.¹¹⁵⁶ Even if an individual such as Huntley does not work at a school or other child-centred institution, he may still gain access to vulnerable groups. However, the ECRC system, if implemented properly, can certainly block off lines of unaccompanied access to such groups.

Non-conviction information need not even pertain directly to the individual making the application. For example, if an individual is seeking to set up a childminding business from home, and it comes to light that his or her co-habiting partner has a string of serious and recent convictions for child sex offences, this will present a clear

¹¹⁵⁵ Klatt and Meister, n 1139, 8.

¹¹⁵⁶ These details included the fact that Huntley was in a relationship with a 15 year old girl at the age of 21, and numerous allegations from unrelated complainants all describing Huntley as the attacker but, due to the modus operandi of his attacks, proving unreliable witnesses: see n 1025, 24-51.

and significant risk to any children that might be cared for by the applicant. This is true notwithstanding the fact that disclosure of non-conviction information may infringe the individual's right to respect for private life.

The original 'might be relevant' standard not only puts the rights of children and vulnerable groups above the rights of job applicants, it also requires chief police officers to disclose information that is not rationally connected to the legislative objective, at least in some cases. If a chief police officer is afforded the discretion to disclose any information which, *in his or her opinion*, might be relevant then essentially the chief police officer is afforded the discretion to disclose information which is not actually relevant at all. Several vignettes in the Mason review illustrate the inconsistencies produced by this system of disclosure:

Example 3: A 16 year old required an enhanced criminal records check in order to complete an external work placement as part of her studies. Police information was disclosed that she had been arrested aged 13 on suspicion of assault. She was never identified as the offender and the Crown Prosecution Service advised that no further action would be taken against her. However, the information was still disclosed. ...

Example 4: A manager of a care home was arrested following an allegation against him by a resident. The police conducted a full investigation and closed the matter the following month as no evidence was found. He subsequently lost his job as a manager of another care home when this allegation was disclosed through police information in an enhanced criminal records check. ...

During my consultation I was also told about a case where a teacher applied for an enhanced criminal records check in which police information disclosed that he had received a Penalty Notice for Disorder for 'excessive standing' at a football match.¹¹⁵⁷

Without further information about the facts of each case it is impossible to know how the relevant chief police officer formed the opinion that the disclosures 'might be relevant'. However, any rational connection between the nature of the (alleged) offence committed, the manner in which proceedings were concluded, and the extent to which the information bears upon the applicant's ability to perform the role applied for, seems tenuous. Furthermore, Wall J's interpretation that that information which the chief police officer deems might be relevant must be included 'unless there is some good reason' against disclosure is inconsistent not only with Article 8, but also

¹¹⁵⁷ n 1071, 30-32.

with the language of Part V of the Police Act 1997. The Act states that such information must only be disclosed if, in the chief police officer's opinion, it might be relevant and 'ought to be included'.

Fortunately, this minimalist threshold has been raised after *R (L)*. The new, stricter standard requires the chief police officer to disclose any information he or she 'reasonably believes to be relevant for the prescribed purpose', having regard to the nature of the information, the time elapsed since its generation, and the credibility of the information.¹¹⁵⁸ At paragraph 13, the Statutory Disclosure Guidance sets forth how the new standard ensures a rational connection between the information and the objective to be achieved:

Information must only be provided if the chief officer reasonably believes it to be relevant. It should not be disclosed on the basis that, although there is no apparent reason to believe that it is relevant, it could conceivably turn out to be. Forming a reasonable belief that information is relevant is a higher hurdle than merely considering that it might be or could possibly be relevant.¹¹⁵⁹

The Guidance suggests that the 'ought to be included' standard requires the chief police officer to consider the impact that disclosure might have on the applicant and other third parties, and to justify disclosure accordingly.¹¹⁶⁰ Under the new statutory regime, it is mandated that only information rationally connected to the prevention of crime and ensuring public safety can lawfully be disclosed (though of course empirical realities may belie the normative standard).

2.2.3.c. Are the measures no more than is necessary to accomplish the objective?

The third question in the proportionality analysis covers some of the same ground as the second. The 'in the chief police officer's opinion, might be relevant' standard is a low threshold which leaves room for the disclosure of information that is not rationally connected to the legislative objective. In doing so, it also leaves room for the disclosure of more information than is necessary to achieve the legislative

¹¹⁵⁸ n 998, 2-3.

¹¹⁵⁹ *ibid* 2.

¹¹⁶⁰ *ibid* 3.

objective, i.e. more information than is required for the employer to assess the risk that an applicant (or third parties close to the applicant) might pose to children or other vulnerable groups.

The 'unless there is good reason not to disclose' gloss introduced in *R (X)*, which fostered a presumption in favour of disclosure in subsequent cases, further compounded the disclosure of more information than is necessary for the relevant decision maker to assess the risk the applicant - in taking up the specified employment - poses to children and vulnerable groups. In one of Mason's examples, quoted above, she describes how information regarding a Penalty Notice for Disorder (PND) was disclosed as part of an ECRC. The PND was issued for 'excessive standing' at a football match. Taken at face value (and without knowing contextual details), this appears to be a striking example of where more information has been disclosed than is necessary. Whilst the behaviour in question may indicate undesirable traits of character (e.g. that the applicant may be overzealous in his cheering when watching football at the weekend), such information does not bear directly on the legislative objectives of protecting children or other vulnerable groups from harm and/or criminal victimisation.

The Statutory Disclosure Guidance requires relevant chief police officers to consider whether the legislative objective could be achieved through less intrusive means. After establishing a legitimate aim for disclosure, the next step for relevant chief officers is to 'consider whether there are any other realistic and practical options to pursue that aim' and to ensure that the decision to disclose is 'no more than necessary to achieve the legitimate aim'.¹¹⁶¹ Whilst the Guidance does not stipulate exactly what other options a chief police officer might consider, it does stipulate that the information disclosed should be fact-based and devoid of assumption,

¹¹⁶¹ *ibid* 3.

supposition, or opinion.¹¹⁶² Furthermore, both the Statutory Disclosure Guidance and the Quality Assurance Framework require that the relevant chief police officer considers whether an opportunity should be afforded for the applicant to make representations before a disclosure occurs. This procedural safeguard limits the extent to which disclosure might offend against the presumption of innocence.

In summary, non-conviction disclosure should only occur where it is reasonably thought to be relevant and proportionate to disclose the information. Furthermore, such disclosure will only be minimally intrusive where relevant facts are disclosed and, in cases where the accuracy of those facts is disputed, applicants should be given the opportunity to make representations to correct inaccuracies.

2.2.3.d. Do the measures strike a fair balance?

To recap, the fourth stage of the proportionality analysis requires that the loss to the individual resulting from the infringement of the right must be proportional to the gains in terms of pursuing the legislative objective.¹¹⁶³ In the abstract, the right to respect for private life and the aims of preventing crime and ensuring public safety are both of fundamental importance, before taking account of the facts and circumstances of any particular case. Regarding the disclosure of non-conviction information, there is some degree of variance in the gravity of disclosure depending on the nature of the information disclosed and how it is presented. Under the current regulatory framework, limits are set on the information that can be disclosed and on its presentation as part of an ECRC, which restrict the extent to which disclosure might be said to offend against the presumption of innocence. However, as a general principle, the disclosure of non-conviction personal information stored in police records has to be considered a significant interference with the rights of job applicants owing to the devastating impact such disclosure is likely to have on the

¹¹⁶² *Ibid* 5.

¹¹⁶³ This is sometimes termed proportionality *stricto sensu*: see I. Porat, 'Mapping the American Debate over Balancing' in G. Huscroft, B.W. Miller, and G. Webber (eds.) *Proportionality and the Rule of Law: Rights, Justification and Reasoning* (Cambridge: Cambridge University Press, 2014) 397-416, 398.

individual's autonomy and reputation based privacy interests. Any information stored in police records which is reasonably believed relevant for ECRC disclosure is highly likely to be adverse, and to have a detrimental impact on the applicant's employment prospects. Even if, hypothetically, such information could be interpreted as neutral, or somehow even strengthening an application, its disclosure by the police would still engage the Article 8(1) rights of the applicant as it deprives the applicant of the ability to exercise control over the flow of information about him-or herself. Accordingly, it is reasonable to assume that such disclosure at a minimum constitutes an interference of moderate seriousness, and could conceivably constitute a serious interference with the Article 8(1) rights of the individual. Where a particular ECRC disclosure will fall on this spectrum depends upon the nature of the information, its presentation on the ECRC, and the circumstances of the particular case.

Given the legitimate priorities of decision makers with a responsibility for protecting children and vulnerable groups from harm, and owing to the nature of non-conviction information stored in police records (often pertaining to allegations, arrests, acquittals, convictions of known associates and other factors which are, justly or unjustly, likely to cast a shadow of suspicion over the applicant), it is highly likely that the disclosure of such information on an ECRC will constitute a serious interference with the applicant's Article 8(1) rights. The likelihood that the disclosure of non-conviction information will seriously interfere with the Article 8(1) rights of the applicant in a particular case is high.

The next stage in assessing the existence of a fair balance in the legislative provisions requires an assessment of the importance of pursuing the legitimate aims through the disclosure of non-conviction information. So, what is the instrumental value of non-conviction disclosure in the fight against crime? The purpose of section 115(7) of the Police Act 1997 is to protect the vulnerable. The non-conviction information provided as part of an ECRC can enable employers to make a decision as

to the suitability of the individual being employed to work with children and vulnerable groups. As has been established, this is a consideration which is of fundamental importance. Furthermore, in principle, there is a rational connection between safeguarding vulnerable groups from harm and the disclosure of non-conviction information which is relevant to particular job applications. However, even where the principles in the Statutory Disclosure Guidance are followed, this is not a guarantee that, in a particular case, the disclosure will have protected an individual from harm. This is because it is difficult to predict how an individual will behave once employed. Non-conviction information can only provide information indicative of the *risk* that an individual, or third parties close to the individual, might pose to children or vulnerable groups. It cannot indicate with certainty whether the employment of an individual in a particular position will result in avoidable harm to children or vulnerable groups.

For example, in the case of *R (L)*, whilst the Supreme Court overturned the decision in *R (X)*, it declined the appellant's request for the quashing of the decision to disclose non-conviction information as part of an ECRC. Lord Hope explained his decision:

There is no doubt that the information that was disclosed about [the appellant] was relevant for the purpose for which the ECRC was being required. As for the question whether it ought to have been disclosed, insufficient weight was given to the appellant's right to respect for private life. But there is no doubt that the facts that were narrated were true. It was also information that bore directly on the question whether she was a person who could safely be entrusted with the job of supervising children in a school canteen or in the playground. It was for the employer to decide what to make of this information, but it is not at all surprising that the decision was that her employment should be terminated. The consequences that disclosure will have for her private life are regrettable. But I can see no escape from the conclusion that the risk to the children must, in her case, be held to outweigh the prejudicial effects that disclosure will give rise to.¹¹⁶⁴

The information disclosed, that the appellant's son was convicted of serious criminal offences whilst in her care and she was involved in proceedings alleging neglect of her son, was both true and bore direct relevance to the question of whether she

¹¹⁶⁴ n 1056, 434.

could be entrusted to look after children. The nature of the information suggested that the applicant might be a poor choice for employment as a lunchtime supervisor. However, it does not suggest that she is a danger to children or that she might cause them physical or sexual harm. Thus, on a generous estimate, we might weight the risk of harm to children and vulnerable groups as moderate. That is to say, if the applicant is employed and behaves in a manner consistent with the information documented in police records, she may not provide adequate supervision to the children in her care, which could potentially expose them to harm. This information is far from conclusive as to the risk the appellant posed to children when working as a lunchtime supervisor. It might plausibly be the case that the appellant has deep regrets about the breakdown in her relationship with her son and would, if given the opportunity, work exceptionally well as a lunchtime supervisor. She would be working as part of a team, and would presumably receive training in the role. Accordingly, it is reasonable to conclude that there exists a significant degree of uncertainty about whether the disclosure would in fact achieve the legislative aim.

Lord Hope viewed these considerations as sufficient for deferring the risk assessment to the applicant's employer and, in doing so, his Lordship deferred the assessment of the extent to which the disclosure is important in pursuing the legitimate aim to the prospective employer. As Lord Hope accepted, the consequence is that the applicant's Article 8(1) rights will almost certainly be overridden as the employer has a primary interest in preventing harm to vulnerable people, and is not directly concerned with protecting the Article 8 rights of the prospective employee. This approach seems more precautionary than proportionate.¹¹⁶⁵ When we assess the degree of interference with the applicant's rights, disclosure will likely constitute a moderate to serious interference. In losing her employment and being effectively cut off from her chosen career, the employee's ability to form social relationships with others will be restricted. Furthermore, this disclosure, if word were to get around,

¹¹⁶⁵ See further: C. Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge: Cambridge University Press, 2005).

could well be disqualifying and stigmatising for the employee. However, the degree of the interference in this particular case was mitigated by the fact that the information was true and relatively recent.

We can see that the interference with the right to respect for private life caused by the disclosure is moderate to serious, and we can conclude with a high degree of probability that this interference will occur. On the other side of the equation, on the basis of the non-conviction information stored in police records, it is reasonable to believe that the applicant might cause a moderate interference with the rights of the children under her care through neglect, and there is a low-moderate likelihood whether this interference will come to fruition. Thus the disclosure of the non-conviction information in this case might well not strike a fair balance between the rights of the applicant and the legitimate aim pursued. This is not to say that the rights of the applicant will win out in every case. However, for disclosure to be justified, the severity of the risk to children and vulnerable groups coupled with the epistemic premises underpinning that forecast must outweigh the severity of foreseeable harm to the applicant's privacy interests.

3. Challenges to the Non-Conviction Disclosure Regime

Post-R (L)

In *R (C) v Secretary of State for the Home Department*,¹¹⁶⁶ the Court of Appeal unanimously rejected an appeal from the Chief Constable of Greater Manchester Police that a judge's decision to quash a job applicant's ECRC was unlawful. C applied for a job as a college lecturer teaching children over the age of 16. As part of C's ECRC, the appellant Chief Constable included information about an allegation of sexual abuse made against C, along with information that the CPS had concluded 'whilst there was no reason to disbelieve the female's account, there was insufficient

¹¹⁶⁶ *R (C) v Secretary of State for the Home Department* [2011] EWCA Civ 175.

evidence to provide a realistic prospect of conviction.¹¹⁶⁷ Lord Neuberger distinguished the facts in the immediate case from the facts in *R (L)*, and concluded:

First, the information relates to an allegation of impropriety some 15 years before the certificate. Secondly, the accuracy of the information is challenged, and the challenge receives some support from the fact that the allegation was withdrawn, although it is right to say it was renewed. Thirdly, for reasons given by the judge, the allegation was arguably not relevant.¹¹⁶⁸

From this analysis, it is clear that disclosure could not be justified, as the certainty of causing a moderate-to-serious interference with the Article 8(1) rights of the applicant could not be overcome by the need to disclose information of questionable accuracy. Though the allegation was of an offence of a sexual nature (implying that the applicant may have posed a risk of causing serious harm to children and vulnerable groups), the degree of uncertainty surrounding the risk posed by the applicant based on this information is far too great to justify the disclosure. The court reached the correct conclusion, in terms of the principles elucidated in this thesis.

Later in 2011, in *R (B) v Chief Constable of Derbyshire*,¹¹⁶⁹ the claimant (B) complained that the disclosure of non-conviction information relating to allegations made against him as part of an ECRC was disproportionate and in violation of Article 8. The allegations were made a year before the ECRC was disclosed and related to an incident, occurring a month before the allegations were made, where B was alleged to have stabbed a man in the chest and attempted to stab the same man's teenage child with a samurai sword, after consuming alcohol. B's alleged victims had no injuries at the time of making the allegation and, after receiving a number of witness statements which contradicted the complainant's version of events, the CPS dropped the case against B, concluding that there was no realistic prospect of mounting a successful prosecution against him.¹¹⁷⁰ During a search of B's house as part of this investigation, the police found a number of weapons that he lawfully owned, although some ammunition which was found was not stored correctly. In deciding to disclose

¹¹⁶⁷ *ibid* at [6].

¹¹⁶⁸ *ibid* at [31].

¹¹⁶⁹ *R (B) v Chief Constable of Derbyshire* [2011] EWHC 2363 (Admin).

¹¹⁷⁰ *ibid* at [19].

this information, the police determined that the 'non disclosure of the information would be of a higher risk to children and vulnerable adults than the detriment that would be caused to the applicant by disclosure and that therefore, disclosure would be a proportionate step to take.¹¹⁷¹

Munby LJ gave the leading judgment in the High Court, ruling that there had been no violation of Article 8. His Lordship stated that the Chief Constable had not erred in his judgment to disclose: details of the allegations made against the applicant; details of him allegedly being under the influence of alcohol at the time of the alleged offence; or information pertaining to his incorrect storage of firearms.¹¹⁷² Munby LJ viewed the nature of B's prospective employment, working as a consultant at a Mental Health Trust, to be of central significance. Taking the above into account, Munby LJ concluded:

A Mental Health Trust in its position as the claimant's employer would surely want to be made aware of the very disturbing picture presented by the material of which the police were aware – a picture, moreover, which the Trust could evaluate only if it was given the *full* picture. For what, surely, was potentially disturbing was not just what was alleged to have happened on Boxing Day 2009 but the fact that it was, or might be, part of a much wider picture involving, in addition to the sword allegedly used on that occasion, the claimant's access to firearms which were being stored in breach of the requirements of his firearms licence and material suggesting that he also had an alcohol problem.

One can perhaps test the matter in this way. Suppose that none of this information had been included in the Certificate, and suppose that the claimant had then appeared for work under the influence of alcohol and brandishing a sword or a gun in front of one of his patients. Would not both the patient and the Trust have been justifiably angered – to use no stronger word – if they had then discovered what the police had been aware of but had chosen not to reveal? The answer is obvious.¹¹⁷³

To take the worst case scenario of what could foreseeably happen *if* the allegations were true and not disclosed and then work backwards is an arbitrary and, with respect, bizarre way of approaching a proportionality assessment of this kind. The rhetorical question posited by Munby LJ could equally be reversed: if the allegations against B were not true, and suppose as a result of the disclosure the applicant was

¹¹⁷¹ *ibid* at [25].

¹¹⁷² *ibid* at [84].

¹¹⁷³ *ibid* at [84]-[85] (emphasis in original).

blocked off from his chosen career and stigmatised in his local community, would not the applicant have been justifiably angered? Granted, the information about B's incorrect storage of firearms in his possession was true. However, this fact alone does not seem to have a direct bearing on the applicant's suitability for working with children or vulnerable groups. The remaining allegations in the ECRC were not proven. Furthermore, the evidence which brought into question the credibility of the allegations was not mentioned as part of the disclosure. In this case, the proportionality analysis of Munby LJ fails to account for the degree of certainty with which we know that the competing privacy interests of the applicant and the interests of the vulnerable groups are in peril. The allegations of violence and alcohol abuse were recent and directly relevant to the position for which the applicant applied. If true, it would be reasonable to conclude that in exhibiting this behaviour in his recent past, the applicant, taking up his position in a Mental Health Trust, would pose a risk of serious harm to children. However, that is a big 'if'. The allegations were unproven and were based on insufficient evidence for the CPS to mount a prosecution against B. Thus, due to the significant level of uncertainty regarding whether or not the applicant had behaved in the manner described in the ECRC, the disclosure of this information, which would certainly constitute a serious interference with B's Article 8(1) rights, cannot be said to strike a fair balance.

Fortunately the reasoning of Munby LJ is something of an outlier among the post *R (L)* challenges to non-conviction disclosure. In the subsequent cases,¹¹⁷⁴ a more exacting proportionality analysis was conducted. *R (L) v Chief Constable of Kent Police* also drew attention to a potential problem regarding the inconsistency with which such proportionality analyses are applied across different police forces. In this case, the Chief Constable of Kent Police disclosed information about historic sex abuse allegations made against the applicant (L). These allegations were part of a failed prosecution launched against the applicant. Andrews J noted a disparity

¹¹⁷⁴ *R (L) v Chief Constable of Kent Police* [2014] EWHC 463 (Admin); *R (P) v Chief Constable of Thames Valley Police* [2014] EWHC 1436 (Admin); *R (SD) v Chief Constable of North Yorkshire Police* [2015] EWHC 2085 (Admin); *R (BW) v Chief Constable of Cambridgeshire Police* [2015] EWHC 4095 (Admin).

between the proportionality analyses of Kent Police and Hertfordshire Police when L had previously been in contact with the latter regarding an ECRC certificate. Hertfordshire Police determined that the same information regarding the allegations should *not be* disclosed. Whilst the allegations related to serious sexual assault, they were historic, had no corroborating evidence, and stood in isolation as the applicant had not come into contact with police either before or since they were made.¹¹⁷⁵ Based on this information, it is abundantly clear that Hertfordshire Police struck the correct balance. However, the disparity in this and other cases does seem to indicate that the Statutory Disclosure Guidance, to which relevant chief police officers must have regard, may be in need of clarification in terms of exactly how a fair balance between the rights of the applicant and the rights of children and vulnerable groups should be struck, taking into account not only the seriousness of the harm that could potentially be caused to children or vulnerable groups but also the likelihood of harm based on the probative value of the information in question. The Statutory Disclosure Guidance and the QAF encompass all of these principles and should be commended for doing so. However, the law currently affords too much discretion to chief constables to make decisions regarding the importance of these principles and the extent to which the applicant's right to respect for private life should be overridden in favour of the competing legitimate aims of disclosure. If police officers are to continue to make decisions regarding the disclosure of non-conviction information, it is imperative that they fully recognise the nature and weight of the privacy interests at stake and the (often high) probability that these interests will be interfered with, before weighting these factors accordingly.

Conclusions

The law regulating the disclosure of non-conviction information as part of an ECRC is complex. This doctrinal complexity reflects broader debates about where the line between privacy and countervailing interests should be drawn in the context of

¹¹⁷⁵ *R (L) v Chief Constable of Kent Police*, *ibid* at [17].

criminal records disclosure. These debates become more complicated, and arguments on either side become more entrenched, when the privacy interests at stake tend to belong to those who are suspected of wrongdoing, but not convicted; or where the wrongdoing in question is confirmed but is not a crime. In contrast to the topics of the previous chapters, the seriousness of what is at stake in terms of privacy interests has long been acknowledged in domestic law. This, at least in part, is due to the intuitive sense that it is fundamentally unjust for the state to treat those who are legally innocent as if they are guilty of an offence.

Dissemination of personal information which has the potential to stigmatise and cut off certain courses of action also seems more tangibly offensive to privacy interests than the mere retention of similar information. It is perhaps for this reason that Article 8(1) has consistently been engaged where non-conviction information is disclosed as part of an ECRC. However, the development of the legal framework in this area does bear resemblances to that regulating the retention of arrestees' DNA and fingerprint data. The combination of technological advances, which allowed for more systematic and intrusive retention and subsequent disclosure of such information, and public disquiet in the aftermath of the Soham murders fostered a presumption in favour of disclosure, confirmed in the *R(X)* case. This disclosure framework, which was clearly disproportionate, was redressed not by the ECtHR as had been the case in *S and Marper* in relation to DNA and fingerprint data retention, but by the UK Supreme Court and Parliament.

The new statutory regime under which chief police officers may disclose non-conviction information as part of an ECRC represents a significant step forward in protecting the privacy interests of those who have been subject to the criminal justice process. Indeed, the Statutory Disclosure Guidance and the QAF offer much better privacy protection than the reforms to the retention of arrestee DNA and fingerprint data under the Protection of Freedoms Act 2012. Relevant chief police

officers must now carefully consider whether the disclosure of non-conviction information corresponds to a pressing social need and is proportionate. Furthermore, the disclosed material itself must be presented in an impartial and balanced way.

However, repeated legal challenges to the disclosure of such information since these reforms were implemented indicate that there remains an alarming lack of consistency in the application of these provisions amongst not only chief police officers, but also domestic judges. There seems to be a lack of clarity in exactly how a fair balance should be struck between the privacy interests at stake and the competing legitimate aims. In particular, domestic judges and chief police officers alike often fail to acknowledge or appropriately manage the epistemic deficit which is bound to exist when assessments of the risk an individual poses to children and vulnerable groups are made based on partial, untested, and often contested personal information. One solution to this lack of rigour and consistency in the proportionality analysis might be to transfer the power to make such non-conviction disclosure decisions to an independent body, which might be in a better position than the police to view the information objectively. A full analysis of the implications of such an approach is beyond the scope of this thesis. As it stands, this chapter has demonstrated that, whilst recent legislative reforms have to some extent redressed the unjust system of non-conviction disclosure under *R (X)*, renewed efforts are needed to ensure that the privacy interests of those subject to this process are adequately and consistently protected.

Conclusion

This thesis considered the question: to what extent are the privacy interests of those subject to a criminal process recognised and afforded adequate protection in England and Wales? One of the underpinning premises motivating this thesis was that whilst criminological literature has indicated that crime control has become an increasingly proactive, pre-emptive, and preventive pursuit, this theorising cannot generate a defensible normative model for assessing the impact of such developments on the privacy interests of those subject to the criminal process. Thus, the task was to develop such a normative model which can identify where privacy interests are set back as part of a criminal process, and to evaluate whether or not these interests are afforded adequate protection against the legitimate exercise of police power.

The first stage in developing this normative model required us to clarify the basic concepts and establish the theoretical foundations of privacy. A survey of the philosophical literature on privacy shows that the concept is difficult to define. No attempt to find a common denominator between privacy related interests seems entirely satisfactory because privacy is a term used to describe numerous distinct, yet related, interests. However, the reductionist claim that privacy is merely derivative of other concepts (and, consequently, is not a concept worthy of elucidation) can be rejected because privacy tracks dimensions of human experience that cannot be captured through discussions of other, overlapping concepts. Conceptions of privacy as a control of realms are also rejected as these unduly limit the scope of the concept. Such conceptions tend to conflate questions concerning the scope of privacy with questions concerning its value. They also fail to account for situations where privacy exists beyond the control of the individual.¹¹⁷⁶ Instead, our conclusion is that privacy is best understood as a condition of limited access. One exists in a condition of privacy to the extent that others do not access one, and this

¹¹⁷⁶ See W.A. Parent, 'Privacy, Morality and the Law' (1983) 12 *Philosophy and Public Affairs* 269-288 at 273.

access can take many forms. From this precept, we can assess whether privacy interests are engaged in a particular case having regard to the manner in which an individual is accessed, and the degree to which an individual is accessed by a particular intrusion or interaction. If a particular intrusion accesses the individual in such a way that is more than *de minimis*, then the individual might plausibly suggest that his or her privacy has been breached.

Why is the protection of privacy important? Because privacy is valuable in furthering dignity and autonomy related interests the individual might hold in different contexts. However, it would be misleading to suggest that privacy is valuable only as an individualistic right, in conflict with the interests of society. Rather, privacy has pro-social value as an aspect of the common good.¹¹⁷⁷ The protection of privacy is a vital element for a functioning liberal democratic society, as it affords the individual the space within society to form moral judgments and express political preferences free from scrutiny. Communitarian arguments - which posit that privacy protections must be curtailed as the liberal conception of privacy ignores the demands of public health and social responsibility¹¹⁷⁸ - are rejected. Such curtailments would put the individual at risk of being sacrificed for the interests of the community. Moreover, such communitarian arguments tend to downplay the importance of privacy in serving collective purposes. Similarly, feminist arguments that privacy protections reinforce gender inequality in society tend to overlook circumstances where privacy protection may be in the collective interests of women. Whilst feminist and communitarian perspectives have added appreciated nuance to debates on the moral and political value of privacy, the broad and contextual conception of privacy advanced in this thesis helps us to see ways in which privacy interests can be viewed through a lens

¹¹⁷⁷ P. Regan, *Legislating Privacy: Technology, Social Values, and Public Policy* (2nd edn. Chapel Hill: The University of North Carolina Press, 2009); B. Goold, 'How Much Surveillance is Too Much: Some Thoughts on Surveillance, Democracy and the Political Value of Privacy' in D. Schartz (ed.), *Overvaaking i en Rettstat: Surveillance in a Constitutional Government* (Fagbokforlaget, 2010) 38-48.

¹¹⁷⁸ A. Etzioni, *The Limits of Privacy* (New York: Basic Books, 1999) 215.

of appropriate norms of behaviour, and other important social goals.¹¹⁷⁹ Chapter 1 demonstrated that, on any account of political morality which views human flourishing as a central concern, *some* degree of privacy in *certain* situations is important for various ends.

The next stage in developing a normatively defensible model for assessing English law involved an analysis of the framework for protecting privacy interests expounded in Article 8 ECHR and the relevant jurisprudence of the ECtHR. In its judgments, the ECtHR has interpreted the scope of the application of Article 8 appropriately broadly. The purposive and evolutive approach to the interpretation of the scope of Article 8 has enabled this right to cover a broad array of interests. It recognises that privacy can advance many of the autonomy and dignity related interests of the individual, which are discussed in privacy scholarship. The ECtHR's approach of recognising that privacy interests are broad and pluralistic, and eschewing a restrictive definition of the 'private life', is welcomed. However, in setting limits on the scope of Article 8(1), the ECtHR has not adopted a consistent threshold test for the application of Article 8. Instead the ECtHR has haphazardly referred to the existence of a 'direct link' between the measure and the applicant's private life, and to 'reasonable expectations of privacy'. This approach does little to guide domestic lawmakers in applying Article 8 in various contexts, nor to address legitimate concerns that Article 8 is too indefinite to be of much use as a human right. Finally, the court does not in its jurisprudence elucidate the political value of privacy. Whilst it is implicit in the reasoning of the ECtHR that Article 8 holds pro-social value, the importance of privacy protections beyond the benefits they afford the individual is seldom articulated in the reasoning of the ECtHR.

Article 8(2) offers the outline of an appropriate and coherent structure for assessing whether a breach of Article 8(1) is justified in a particular instance. Interfering

¹¹⁷⁹ J.W. DeCew, 'The Feminist Critique of Privacy: Past Arguments and New Social Understandings' in B. Röessler and D. Mokrosinska (eds.), *Social Dimensions of Privacy* (Cambridge: Cambridge University Press, 2015) 85-103, 101.

measures must be regulated 'in accordance with the law'. Here, the ECtHR takes an active role in assessing the quality of domestic provisions in Contracting States, considering the foreseeability and accessibility of a domestic provision. Interferences are also limited to the public interest aims stated in Article 8(2) (though these are interpreted expansively). After these two hurdles are cleared, the final criterion in Article 8(2) involves an analysis by the court of whether the interfering measure is 'necessary in a democratic society'. This inevitably requires a balance to be struck between the public interest or human right pursued and the Article 8 rights of the applicant. Here, the court broadly follows the same four-part proportionality analysis developed in a number of legal jurisdictions.¹¹⁸⁰ Whilst the principle of proportionality has received trenchant criticism from some constitutional law theorists, it is submitted that the four-part analysis provides a structured approach for resolving tensions between competing rights and public interests. However, the ECtHR's approach to this balancing exercise, which does not systematically follow the four-part analysis in every case, might face legitimate criticisms for being too impressionistic and reducing the balancing exercise to a mere statement of intuitive preference. Moreover, the ECtHR's interpretation of the 'minimally intrusive means' limb of the proportionality analysis seems too expansive, permitting domestic lawmakers to enact broad right-interfering provisions which are not the least intrusive means by which to achieve the legitimate aim in question.¹¹⁸¹

Chapter 3 extended the normative model for assessing English law by focusing specifically on how privacy interests are set back as part of a criminal process, and on the ECtHR framework for protecting such interests contained in Article 8. Drawing on other attempts at developing a taxonomy of privacy setbacks, the chapter showed that those subject to the criminal process can have their privacy related interests set back in numerous ways that are not typically acknowledged in legal provisions and

¹¹⁸⁰ D. Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 *University of Toronto Law Journal* 383-397.

¹¹⁸¹ T. Lewis, 'Animal Defenders International v United Kingdom: Sensible Dialogue or a Bad Case of Strasbourg Jitters?' (2014) 77 *Modern Law Review* 460-474.

principles aimed at ensuring procedural fairness. The ECtHR has confirmed that Article 8 can be engaged where information is collected, processed, or disseminated, or where an individual has his or her physical space invaded as part of a criminal process. The Strasbourg Court has repeatedly given sympathetic treatment to concerns that privacy interfering measures are typically more damaging for the individual where they are used in the context of a police investigation or operation. In this setting such measures can be particularly stigmatising or chilling for the individual. To its detriment, the ECtHR has not fully explored how the collection of personal information from public space, even in the absence of any processing or subsequent storage, will set back privacy interests. Moreover, the ECtHR has paid little attention to the political value of privacy, which stretches beyond its utility for the individual, in the context of a criminal investigation.

The ECtHR's approach to interpreting the requirements in Article 8(2) can be laconic. Prior to *S and Marper v United Kingdom*,¹¹⁸² in cases pertaining to those subject to the criminal process the ECtHR would often find a violation of Article 8 on the basis that an interference was not 'in accordance with the law', without going on to consider questions of proportionality and necessity. This had the positive effect of prompting domestic legislators to create an adequate legal basis regulating the use of such interfering measures in the criminal justice context, particularly in surveillance cases. However, the lack of detailed attention to the second and third requirements ('in pursuit of a legitimate aim' and 'necessary in a democratic society') seems to have contributed to a lack of consistency in the approach of domestic judges in interpreting these requirements.

These first three chapters of the thesis provided a working theoretical model for an assessment of English law regulating three activities where police routinely set back the privacy interests of those subject to the criminal process. We have seen that

¹¹⁸² *S and Marper v United Kingdom* (2009) 48 EHRR 50.

policing measures can set back privacy interests in numerous ways, which, unless adequately regulated, can be detrimental not only to the targeted individual, but also to society. From this precept it follows that Article 8 should be interpreted broadly to cover situations where police remove an individual from a condition of limited access to any significant degree. For the privacy interests of those subject to the criminal process to be adequately protected it is also important that any interfering measure is lawful and only pursued to further one of the legitimate aims from Article 8(2). Moreover, when assessing whether a measure is 'necessary in a democratic society', domestic courts and the ECtHR should consider whether a measure is proportionate and necessary through a rigorous application of the four-part proportionality test.

The second half of the thesis turned from developing a theoretical model of privacy interests in the context of criminal proceedings to testing its practical application in three concrete areas of policing activity. Chapters 4, 5, and 6 assessed English law's approach to protecting privacy interests in selected 'hard cases', where privacy interests are set back as part of a criminal process. Each of these chapters covered a different type of privacy interference in an effort to assess the extent to which English law has recognised that privacy interests are diverse, and that policing measures can set back privacy interests in numerous, often subtle, ways. These chapters highlighted various deficiencies in English law's approach to recognising and protecting the privacy interests of those subject to the criminal process. They also demonstrated that the jurisprudence of the Strasbourg Court has had something of a transformative impact in this area, forcing domestic legislators and public authorities to take privacy interests more seriously.

In Chapter 4, we saw how domestic judges have grappled with a hard case where privacy interests are set back through overt police photography. Domestic courts have recognised that such photography may engage Article 8(1) where, for example, this is accompanied by intrusive or violent conduct. However, these courts have not

consistently explained what is wrong with such photography in the absence of additional invasive conduct.¹¹⁸³ Drawing on the normative model developed in previous chapters, Chapter 4 showed how, in the context of a criminal process, such overt photography can have a particularly chilling effect.¹¹⁸⁴ Overt police photography moves the goalposts insofar as privacy in public is concerned, breaking traditional boundaries regarding the extent to which individuals would usually be subject to scrutiny as they pass through public space.¹¹⁸⁵ Consequently, as a general rule, where the police take photographs of an individual as he or she occupies publicly accessible space, this will expose the individual to a level of scrutiny such that in every foreseeable case he or she should have the protection of Article 8(1). Moreover, the domestic courts have narrowed the scope of Article 8 in overt surveillance cases by making the question of whether the applicant held a reasonable expectation of privacy at the time the measures were employed against him or her the litmus test for Article 8 engagement. This approach is not consistent with the ECtHR's interpretation of the scope of Article 8, which has occasionally taken the applicant's reasonable expectations of privacy into account, but does not make the existence of such an expectation a precondition for the protection of Article 8. In *In re JR38*, this focus on the 'reasonable expectations' of the applicant blocked off consideration of how the dissemination by the police of the applicant's image set back his privacy related interests.¹¹⁸⁶ The domestic courts seldom acknowledge the political value of privacy to a functioning democratic society and the detrimental effects such surveillance measures can have in this regard.

The 'in accordance with the law' limb of Article 8(2) was not discussed in detail in *Wood*, where the domestic courts gave short shrift to the claimant's argument that implicit common law powers provided an inadequate legal basis for the

¹¹⁸³ See Chapter 4, Part 2.1.1.

¹¹⁸⁴ J.E. Cohen, 'Examined Lives: Informational Privacy and the Subject as Object' (2000) 52 *Stanford Law Review* 1373-1438 at 1425-1426.

¹¹⁸⁵ B. vS-T. Larsen, *Setting the Watch: Privacy and the Ethics of CCTV Surveillance* (Oxford: Hart Publishing, 2011) 21-36.

¹¹⁸⁶ *In re JR38* [2015] UKSC 42 at [100].

interference.¹¹⁸⁷ However, this analysis has shown that these decisions were based on an underestimation of the extent of the interference occasioned through overt photography. The decisions were also based on Strasbourg case-law predating *S and Marper v United Kingdom*, where a rigorous legality analysis for the retention of fingerprint data was applied, notwithstanding that the retention of this information was held to constitute only a minor interference by the ECtHR.¹¹⁸⁸ Chapter 4 also drew attention to how the four-part proportionality analysis in Article 8(2) is not systematically or consistently applied by domestic courts in this context. Here, concerns were raised that domestic judges have tended to apply a low intensity review of whether interfering measures are proportionate, which suggests that Article 8 will not be violated as long as the police can establish a general furtherance of the legitimate aim pursued through the use of overt photography. Such an approach seems to downplay the potentially deleterious effect of such photography in the criminal justice context.

Chapter 5 provided us with the best example of how the ECtHR, through its Article 8 jurisprudence, has positively affected English law regulating the use of privacy interfering measures against those subject to a criminal process. The ECtHR's judgment in *S and Marper v United Kingdom*,¹¹⁸⁹ had a transformative impact on English law by unequivocally confirming that the retention of arrestee DNA and fingerprint information will engage Article 8, and must only be done where the criteria in Article 8(2) are met. This landmark judgment seemed to change the domestic courts' approach to interpreting the scope of Article 8 in the criminal justice context. Whereas previously judges tended to participate in a perfunctory analysis of whether Article 8(1) is engaged, before quickly concluding that any interference that might have occurred is easily trumped by the need to prevent or detect crime, more recent cases tend to engage in a detailed analysis of how privacy interests might be

¹¹⁸⁷ *R (Wood) v Commissioner of Police of the Metropolis* [2010] 1 WLR 123 at [54].

¹¹⁸⁸ *S and Marper v United Kingdom* (2009) 48 EHRR 50.

¹¹⁸⁹ *ibid* at [92].

set back by information retention or processing.¹¹⁹⁰ Drawing on the normative model described above, Chapter 5 established that privacy interests are set back through non-conviction DNA and fingerprint retention. Such retention undermines the individual's personal autonomy by depriving him or her of control over how this personal information is used by others.¹¹⁹¹ Retention is also inhibiting for the individual as it creates uncertainty concerning how such information can be used or might be used in the future.¹¹⁹² Finally, retention sets back privacy interests in this context as it is stigmatising, amounting to an expression of lingering suspicion on behalf of the state, through the differential treatment of those subject to a criminal process.¹¹⁹³ The domestic courts now recognise that such retention engages Article 8(1), and this is a welcome development.

The legislative response to the *S and Marper* case, contained in the PoFA 2012 provisions, does not go far enough to ensure that non-conviction biometric information is only retained for as long as such retention is a proportionate means of preventing crime or ensuring public safety. The retention tariffs for those arrested or charged with an offence are automatically applied and allow for retention for long time periods even in cases where questions of an individual's innocence are put beyond any plausible doubt. The PoFA 2012 provisions seem to be based on the assumption that the biometric information of those arrested for, but not convicted of, a serious offence is of more value in the fight against crime than such information taken from those arrested for less serious offences. However, empirical research on this issue suggests that criminal careers are not homogenous in the way these provisions assume.¹¹⁹⁴ Moreover the current retention tariffs are not minimally intrusive. They fail to adequately allow for a consideration of the credibility of the

¹¹⁹⁰ *R (Catt) v Commissioner of Police of the Metropolis* [2015] UKSC 9; *R (GC) v Commissioner of Police for the Metropolis* [2011] UKSC 21.

¹¹⁹¹ D. Solove, *Understanding Privacy* (Massachusetts: Harvard University Press, 2008) 117-136.

¹¹⁹² A. Roberts and N. Taylor, 'Privacy and the DNA Database' (2005) 4 *European Human Rights Law Review* 373-186 at 384.

¹¹⁹³ L. Campbell, 'A Rights-based Analysis of DNA Retention: "non-conviction" databases and the liberal state' [2010] 12 *Criminal Law Review* 889-906 at 905.

¹¹⁹⁴ L. Kazemian, K. Pease, and D. Farrington, 'DNA Retention Policies: The Potential Contribution of Criminal Career Research' (2011) 8 *European Journal of Criminology* 48-64 at 60.

suspicious or evidential considerations that led to the individual being subject to a criminal process. Without a strong evidence base supporting non-conviction retention, fair assessments of the individual's risk can only be made on a case-by-case basis. Consequently, the PoFA 2012 provisions do not strike a fair balance between privacy rights and countervailing public interests.

The final case-study focused on the dissemination of information about those who have been subject to a criminal process as part of an ECRC. In contrast to overt photography and biometric information retention, domestic lawmakers have generally recognised that such dissemination will set back individual privacy interests, at least to some extent. This increased recognition could be attributed to the type of privacy setback in this context. It seems that non-conviction information dissemination is likely to have a more tangible and immediate effect on the personal autonomy of the individual, compared to the privacy setbacks at issue in the other two case-studies. Overt surveillance and DNA retention interfere with the psychological integrity of the individual, but are arguably less disruptive to the exercise of his or her personal autonomy. ECRC disclosure can involve insinuation or bias by the police, which may lead members of the public to view the individual as suspicious. Whilst such disclosure does not currently breach the presumption of innocence recognised in Article 6(2) ECHR,¹¹⁹⁵ this does (at least) aggravate the interference with an individual's right to respect for private life. Even in the absence of such insinuation or bias, ECRC disclosure constitutes a serious interference with Article 8(1), owing to the damaging effect such disclosure is very likely to have on the reputation of the individual.¹¹⁹⁶ Disclosure is likely to stigmatise the individual and effectively cut off the path to his or her chosen career. Consequently, such disclosure is likely to significantly set back the privacy interests of job applicants.

¹¹⁹⁵ *Sekanina v Austria* (1994) 17 EHRR 221 at [29]

¹¹⁹⁶ B. Röessler, *The Value of Privacy* (Cambridge: Polity Press, 2005) 116. Chapter 6, Part 2.1.

The development of the legal framework regulating ECRC disclosure also bears resemblance to the development of that regulating the retention of arrestees' DNA and fingerprint data. A combination of technological advances and public disquiet seemed to influence the expansion of police powers to set back privacy related interests, which was later curtailed through judicial review. Notwithstanding the increased recognition domestically of how privacy interests can be set back through such non-conviction dissemination, the law in this area took an expansive turn after the Soham murders, permitting disclosure even in instances where the non-conviction information disclosed was not reasonably considered relevant to the position for which the job applicant had applied.¹¹⁹⁷ The new Statutory Disclosure Guidance and the PoFA 2012 reforms set out safeguards against abuse and direct chief police officers towards relevant factors that should be considered as part of a proportionality analysis. The law governing ECRC disclosure has therefore been reformed to provide adequate safeguards against abuse, meeting the quality of law requirement for compliance with Article 8(2). However, the domestic courts have not consistently applied the four-part proportionality analysis when resolving conflicts between the privacy interests of job applicants and the legitimate aims pursued through non-conviction disclosure as part of an ECRC. *Post-R (L) v Commissioner of Police of the Metropolis*,¹¹⁹⁸ repeated challenges to non-conviction disclosure have indicated that there remains a lack of consistency in the application of the new provisions not only among police officers, but also domestic judges. Whilst some judges and chief police officers have favoured a strong presumption against disclosure, others have permitted disclosure in cases where there is an alarming lack of certainty over whether the individual has committed any offence. Whilst the PoFA 2012 reforms have to some extent redressed the balance between privacy rights and countervailing public interests, the balance often tilts too far in favour of crime prevention at the expense of the fundamental rights of those subject to the criminal process.

¹¹⁹⁷ S. Mason, *A Common Sense Approach: A review of the criminal records regime in England and Wales – Report on Phase I*, 11 February 2011.

¹¹⁹⁸ *R (L) v Commissioner of Police of the Metropolis* [2010] 1 AC 410.

Whilst considerable strides have been made to recognise the privacy interests of those subject to the criminal process (gone are the days when domestic judges dismissed such interferences as minor or inconsequential), these interests are still sometimes downplayed. However, the full extent to which the use of privacy interfering measures may undermine the dignity and autonomy based interests of the individual is not always fully acknowledged in the domestic courts. The following specific themes are recurrent in the domestic law reviewed in this thesis. First, domestic lawmakers consistently overlook or misunderstand the value of privacy. In each of the case studies considered, there has been at least a partial failure amongst domestic lawmakers to acknowledge the extent of the socially and individually detrimental impact that privacy interfering measures can have when used in the context of a criminal process. The first theme provides some explanation for the second, which is that the domestic courts' approach to balancing privacy interests against the aims of the police in this context, tends to favour law and order and seldom replicates, in full, the four-limbed proportionality test which is implicitly, though inconsistently, followed in the jurisprudence of the ECtHR.

In each of the three areas of domestic application considered in this thesis, the approach of the courts to assessing whether or not the police have exercised their powers proportionately has been unsystematic and inconsistent. Moreover, this thesis has raised concerns that such inconsistencies may also exist across police forces responsible for authorising these privacy interfering measures. In discussing *R (L) v Chief Constable of Kent Police*,¹¹⁹⁹ for example, we saw how chief constables of two different police forces came to radically different conclusions as to whether to disclose the same non-conviction information. Whilst this is only a single instance, the preceding doctrinal analysis has shown that on numerous occasions police forces, following the example of domestic courts, do not consistently have proper regard for

¹¹⁹⁹ *R (L) v Chief Constable of Kent Police* [2014] EWHC (Admin) 463 at [17].

the proportionality requirement in Article 8 before authorising the use of privacy interfering measures against those subject to the criminal justice process.

This analysis suggests the need for further research focussing on how the privacy interests of those subject to the criminal process can be afforded adequate protection. A future research agenda might be divided into two strands. The first could build on the normative analysis developed in this thesis. I have focused on only three policing measures that interfere with the privacy interests of those subject to the criminal process. However, as technological developments continue to emerge it is important for normative legal scholarship to keep pace. This thesis offers a general normative framework, which might be extended to consider how the use of such technologies might (or might not) be squared with the demand that the human rights of those subject to the criminal process are afforded adequate protection.

The second strand, lending itself to empirical research, might examine the features of the decision-making processes in authorising such privacy interfering measures in practice. This thesis aimed to answer questions concerning the extent to which the privacy interests of those subject to the criminal process are afforded adequate protection in the law of England and Wales. However, it is also important to assess the extent to which the law is being properly applied by those responsible for implementing privacy interfering measures against those subject to the criminal process.

This thesis began by briefly summarising a body of criminological scholarship suggesting that the non-adjudicatory management of individuals through the criminal process will often have pernicious effects on privacy. Detailed illustrations have been given throughout the thesis. We have also seen numerous cases in which public disquiet about risky groups - usually prompted by a particularly heinous (and rare)

crime (cf. *R v Weir*¹²⁰⁰ in Chapter 5, and the Soham murders in Chapter 6) - is met with heightened demands for crime control politically and judicially, at the expense of privacy related interests. This experience lends support to criminological theorising. We have, it seems, slowly been moving towards a risk-averse society, which circumvents due process in an attempt to manage *potentially* threatening individuals and groups. This trend, coupled with advances in policing technology, seems to have shifted the balance between state power and individual and collective privacy interests in favour of the former in the criminal justice context. The extent to which recent indications of increased judicial and political recognition and protection of privacy interests mark the beginning of a new policy direction in this area remains to be seen. You cannot do proper law reform without understanding the real value of privacy, in general and specifically in relation to policing those subject to the criminal process. And it is precisely this better understanding of privacy in the context of a criminal process that this thesis has tried to articulate.

¹²⁰⁰ *R v Weir* (2000) 97 LSG 37.

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