

THE PUBLIC FIGURE DOCTRINE AND THE RIGHT TO PRIVACY

KIRSTY HUGHES*

ABSTRACT. *This article argues that the public figure doctrine is doctrinally problematic and conceptually and normatively flawed. Doctrinal uncertainty surrounds who is affected and how rights are affected. Conceptually it raises challenges for universality, the non-hierarchical relationship between Articles 8 and 10 ECHR, the process of resolving rights conflicts, and the relationship between domestic law and the Convention. All of which necessitate a strong normative justification for the distinction. Yet there is no compelling rationale. The values underpinning the right to privacy of public figures are no different from those of other persons and there are other better mechanisms of accounting for freedom of expression. We should therefore reject the idea that public figures have fewer or weaker privacy rights or that the process of dealing with their rights is different and instead focus squarely upon the relative importance of the rights, and the degree of intrusion into those rights.*

KEYWORDS: *privacy, public figure doctrine, freedom of expression, Article 8 ECHR, Article 10 ECHR, misuse of private information, European Convention on Human Rights.*

I. INTRODUCTION

The fact that public figures have a right to privacy is highly controversial and the courts often face a backlash from the press, politicians and the public when they uphold the right to privacy.¹ The press lambasts what it regards as oppressive judicial decisions with provocative newspaper headlines such as “Why the Law is an ASS”² and “The Day Free Speech

* University Lecturer, University of Cambridge. I am grateful to Professor David Feldman Q.C., Jelena Gligorićević and Professor Gavin Phillipson for their invaluable comments as well as the anonymous reviewers. Earlier versions were presented at the Privacy Forum (Sorbonne, Paris) and the Amsterdam Privacy Law Conference, and I am indebted to Paul Wragg and Tom Bennett, the organisers and participants for their thought-provoking discussion. Any remaining errors are my own.

¹ For example the reaction to the damages awarded to Cliff Richard following the broadcast of a police search of his home, *Richard v BBC* [2018] EWHC 1837 (Ch).

² Front page of the *Daily Mail*, 6 April 2016, <<https://www.dailymail.co.uk/news/article-3526916/American-publication-report-known-celebrity-extra-marital-threesome.html>>.

Drowned in a Paddling Pool of Olive Oil”,³ whilst Members of Parliament have taken it upon themselves to unravel court injunctions by invoking parliamentary privilege.⁴ Yet the notion that public figures should not be entitled to the same protection is not only political or moral invocation; it also forms the crux of legal doctrine. The European Court of Human Rights states that:

a distinction has to be made between private individuals and persons acting in a public context, as political figures or public figures. Accordingly, whilst a private individual unknown to the public may claim particular protection of his or her right to private life, the same is not true of public figures.⁵

This article analyses the role of this doctrine in a legal framework where privacy is a universally applicable right, which sits in a non-hierarchical relationship with freedom of expression. It argues that the distinction in privacy law is doctrinally problematic and conceptually and normatively flawed. Doctrinal uncertainty surrounds who is affected and how the doctrine affects rights, with the Court offering limited insight into the perceived rationale for different standards of protection. Conceptually it raises challenges for important elements of human rights reasoning, including: universality; the non-hierarchical relationship between Articles 8 and 10 ECHR; the process of resolving rights conflicts; and the relationship between domestic law and the Convention jurisprudence. All of which require a strong normative justification for the distinction. Yet on close analysis there is no compelling rationale. The values underpinning the right to privacy of public figures are no different from those of other persons and there are other better mechanisms of accounting for societal interests in freedom of expression. We should therefore reject the idea that public figures have fewer or weaker privacy rights or that the process of dealing with their rights is different. This does not mean that public figures will automatically have their right to privacy vindicated; in many cases freedom of expression may outweigh the right to privacy, but the process of reasoning should focus squarely upon the relative importance of each of the rights, and the degree of intrusion into those rights; not the “status” of the individual affected.

II. DOCTRINAL UNCERTAINTY

The origins of the public figure doctrine in the European Convention on Human Rights can be traced to *Lingens v Austria* where it formed part of

³ Front page of *The Sun*, 19 May 2016, <<https://www.thesun.co.uk/archives/news/1207485/the-day-free-speech-drowned-in-a-paddling-pool-of-olive-oil-outrage-at-celeb-threesome-gagging-verdict/>>.

⁴ K. Hughes, “Parliament Reports on Privacy and Injunctions” (2012) 4(1) J.M.L. 17.

⁵ *Von Hannover v Germany (No.2)* (2012) 55 EHRR 15, at [110]. Cited and applied in *Richard* [2018] EWHC 1837 (Ch), at [276].

a move to protect freedom of expression from the risk of elected officials stifling the press with defamation law.⁶ At that time reputation had not been identified as a Convention right, thus when the Court expounded the distinction it was not assessing two rights of equal status, it was considering whether an interference with Article 10 ECHR could be justified, and as reputation was a mere legitimate aim prioritising freedom of expression was not only compatible with, but was essential to that framework. Since *Lingens* the Strasbourg court has recognised both reputation⁷ and privacy vis-à-vis the press,⁸ as human rights protected by Article 8 ECHR. Under this framework reputation and privacy are not mere exceptions, but rights that must be balanced against freedom of expression with neither automatically taking priority over the other.⁹ This is very different from the earlier case law, which as Judge Loucaides acknowledged in *Lindon v France*, was calibrated to protect freedom of expression.¹⁰ Indeed Judge Loucaides argued in *Lindon* that the principle “that there is more latitude in the exercise of freedom of expression . . . in the cases of criticism of politicians . . . should not be interpreted as meaning that the reputation of politicians is not entitled to the same legal protection as that of any other individual”, as reputation “is a sacred value for every person including politicians and is safeguarded as a human right under the Convention for the benefit of every individual without exception”.¹¹ The Court nevertheless continues to state that public figures are not entitled to the same level of protection; whilst the public figure doctrine has migrated across privacy,¹² insulting speech,¹³ hate speech,¹⁴ inciting violence,¹⁵ as well as data-protection law including the “right to be forgotten”.¹⁶

If we turn to consider how the Court approaches public figure privacy cases it is apparent that there are numerous problems. First, although the

⁶ *Lingens v Austria* (1986) 8 EHRR 407.

⁷ See *Chauvy v France* (2005) 41 EHRR 29; and *Radio France v France* (2005) 40 EHRR 29.

⁸ *Von Hannover v Germany* (2005) 40 EHRR 1.

⁹ The Court’s general stance is that Arts. 8 and 10 are of presumptive equal value and that they should be balanced using the *Von Hannover (No.2)* (2012) 55 EHRR 15 criteria. See also the declaration in *Couderc and Hachette Filipacchi Associés v France* [2016] EMLR 19, at [91] that the rights “deserve equal respect”.

¹⁰ *Lindon v France* (2008) 46 EHRR 35 Concurring Opinion.

¹¹ *Ibid.*

¹² *Von Hannover* (2005) 40 EHRR 1; *Von Hannover (No.2)* (2012) 55 EHRR 15; *Axel Springer v Germany* (2012) 55 EHRR 6; *Couderc* [2016] EMLR 19.

¹³ *Grebneva and Alistimchik v Russia* (Application no. 8918/05) 22 November 2016; *Milislavljivic v Serbia* (Application no. 50123/06) 4 April 2017; *Genner v Austria* (Application no. 55495/08) 12 January 2016; *Borozic and Vujin v Serbia* (Application no. 38435/05) 26 June 2009.

¹⁴ *Savva Terentyev v Russia* (Application no. 10692/09) 28 August 2018.

¹⁵ *Dmitriyevskiy v Russia* (Application no. 42168/06) October 2017.

¹⁶ *ML and WW v Germany* (Application no. 60798/10 and 65599/10) 28 June 2018. See also *NT1 and NT2 v Google* [2018] EWHC 799 (QB), at [137]–[140]. The notion of different standards for those that play a “role in public life” also appears in Case C-131/12, *Google Spain SL and Google Spain Inc v Agencia Española de Protección de Datos and Mario Costeja González*, at [81]. Strasbourg reasoning was also employed in the Art. 29 Data Protection Working Party Guidelines on the Implementation of the Court of Justice of the European Union Judgment on *Google Spain and Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, C-131/12.

Court distinguishes between public and private figures the category of public figures has grown so broad that it is difficult to predict. Second, within the category of persons that the Court designates as public figures, it appears that there are subcategories subject to different standards, but the operation of this is uncertain. Third, there is confusion as to the analytical stage at which “public figure” status is relevant, with the doctrine affecting the application of rights in at least three different ways. The net result is that neither the rationale for the Court’s approach, nor its operation, is sufficiently transparent.

A. *Who Is a Public Figure?*

Whilst a degree of uncertainty is often prevalent in the Convention jurisprudence, if a concept purports to determine who is entitled to protection we might expect to know who is affected. Indeed the Strasbourg Court famously rejected the German *par excellence* approach (which distinguished between figures of contemporary society “par excellence” and “relatively” public figures) on the basis that the criteria “were not sufficient to protect the applicant’s private life effectively”.¹⁷ Although initially the Court limited the public figure concept to those exercising official functions,¹⁸ the Court has subsequently vastly expanded public figures contradicting its stance on the need for clarity and rendering the concept increasingly laden with moralistic determinations. The doctrine now extends far beyond elected officials and even celebrities to include businessmen,¹⁹ journalists and lawyers,²⁰ well-known academics,²¹ as well as other persons who have a “position in society”²² or have “entered the public scene”²³ rendering the scope of its application difficult to predict.

The initial shift was evident in the trajectory of the *Von Hannover* proceedings. In several cases Princess Caroline von Hannover has argued that

¹⁷ *Von Hannover* (2005) 40 EHHR 1, at [74].

¹⁸ *Von Hannover* (2005) 40 EHHR 1.

¹⁹ *Verlagsgruppe News GmbH v Austria* (No. 2) [2007] EMLR 13, at [36]; *Goodwin v NGN* [2011] EWHC 1437 (QB), [2011] EMLR 27, at [103].

²⁰ *Zybertowicz v Poland* (Application no. 59138/10) (available on HUDOC); *Zybertowicz v Poland* (No.2) (Application no. 65937/11) available on HUDOC; *Kucharczyk v Poland* (Application no. 72966/13) (available on HUDOC); *Verlagsgruppe* (No. 2) [2007] EMLR 13; *Verlagsgruppe News GmbH and Bobi v Austria* (Application no. 59631/09) (available on HUDOC).

²¹ *Hasan Yazici v Turkey* (Application no. 40877/07) 15 April 2014; *Mengi v Turkey* (Application no. 13471/05 38787/07) 27 November 2012. Although note in a case concerning possible incitement of violence against academics, *Kaboglu and Oran v Turkey* (Application no. 1759/08, 50766/10 and 50782/10) 30 October 2018, the Court declined to equate academics with politicians.

²² *Verlagsgruppe* (No. 2) [2007] EMLR 13.

²³ *Standard Verlags GmbH v Austria* (No.3) (Application no. 34702/07) (available on HUDOC), at [37]; *News Verlags GmbH & Co.KG v Austria* (Application no. 31457/96) (2001) 31 EHRR 8, at [54]; *Verlagsgruppe* (No. 2) [2007] EMLR 13, at [36]; *Egeland and Hanseid v Norway* (Application no. 34438/04) (2010) 50 EHRR 2 at [60]; *Flinkkilä v Finland* (Application no. 25576/04) (available on HUDOC), at [83]; *Eerikäinen and Others* (Application no. 3514/02) (available on HUDOC), at [66]; *Krone Verlag GmbH v Austria* (Application no. 27306/07) (available on HUDOC); and *Kurier Zeitungsverlag und Druckerei GmbH v Austria* (No.2) (Application no. 1593/06) (available on HUDOC).

the publication of photographs of her in public places violates her right to respect for private life. Her first application was upheld and the Court drew a “fundamental distinction” between reporting facts relating to “politicians in the exercise of their functions” and reporting details of the private life of an individual, such as the Princess, who “does not exercise official functions”.²⁴ The Court emphasised that while “in the former case the press exercises its vital role of ‘watchdog’ in a democracy by contributing to impart[ing] information and ideas on matters of public interest . . . it does not do so in the latter case”.²⁵ This was criticised on the basis that the Court failed to consider an appropriate degree of protection for “intermediate figures” such as the Princess who do not perform any formal state functions, but enjoy a sufficiently high public profile to be of interest to the public.²⁶ The Grand Chamber revisited its approach when it considered her second application, on that occasion it refused to limit public figures to those exercising official functions and instead held that the relevant criterion is the extent to which the person is “well known to the public”.²⁷ In applying this to Von Hannover and her husband the Court determined “that irrespective of the question whether and to what extent the first applicant assumes official functions on behalf of the Principality of Monaco, it cannot be claimed that the applicants, who are undeniably very well known, are ordinary private individuals. They must, on the contrary, be regarded as public figures”.²⁸ In the simultaneously determined *Axel Springer* the Grand Chamber found that a television actor was also a public figure.²⁹

Since then the Court has held that others who are “well known to the public” (what it sometimes refers to as the “notoriety” criterion) are public figures. Thus in addition to those exercising official functions (such as heads of state,³⁰ politicians³¹ and a high-ranking local civil servant)³²; the Court has determined that a filmmaker,³³ musicians and actors³⁴ are all public figures.

A further expansion of the doctrine came in the form of recognising those who have a “position in society” such as businessmen as public

²⁴ *Von Hannover* (2005) 40 EHRR 1.

²⁵ *Ibid.*, at para. [63].

²⁶ M.A. Sanderson, “Is *Von Hannover v Germany* a Step Backward for the Substantive Analysis of Speech and Privacy Interests?” [2004] EHRLR 631, at 637.

²⁷ *Von Hannover (No.2)* (2012) 55 EHRR 15.

²⁸ *Ibid.*, at para. [120].

²⁹ *Axel Springer* (2012) 55 EHRR 6.

³⁰ *Couderc* [2016] EMLR 19.

³¹ *Gunnarsson v Iceland* (Application no. 4591/04); *Sokolowski v Poland* (Application no. 75955/01); *Rodivilov v Ukraine* (Application no. 49876/07); *Garaudy v France* (Application no. 65831/01); *Petrov v Bulgaria* (Application no. 15197/02) (all available on HUDOC).

³² *Timciuc v Romania* (Application no. 28999/03) (available on HUDOC).

³³ *Middelburg, Van der Zee and Het Parool B.B. v The Netherlands* (Application no. 28202/95) (1999) 27 EHRR CD111.

³⁴ *Axel Springer* (2012) 55 EHRR 6; *Lillo-Stenberg and Sæther v Norway* (Application no. 13258/09) (available on HUDOC).

figures. The Court employed this approach in *Verlagsgruppe News GmbH v Austria (no. 2)* when it determined that “[e]ven if [a businessman] has not sought to appear on the public scene . . . a business magnate, who owns and manages one of the country’s most prestigious enterprises, is *by his very position in society* a public figure”.³⁵ This has also taken root in the domestic courts, where it was held that “whatever limits there may be to the legal concept of a public figure the Chief Executive of one of the largest publicly quoted companies in the United Kingdom is clearly a public figure”.³⁶ The idea that those who have a “position in society” are public figures was given a more explicit moral slant in *McLaren v News Group Newspapers Ltd.* where a former football manager was held to be a public figure on the basis that public figures include those “from whom the public could reasonably expect a higher standard of conduct”.³⁷

The doctrine has also been extended to persons who, although not public figures, have “consciously and intentionally submitted to the public scene”. There is little insight into what constitutes the “public scene” or how one submits to it, but this approach has begun to populate the Court’s reputation cases (the Court has indicated that it also applies in privacy cases),³⁸ to include individuals suspected of involvement in crime,³⁹ or journalists and lawyers acting in high profile cases.⁴⁰ The Strasbourg Court has reasoned that whilst it “vigorously defend[s] the privacy rights of individuals who have not consciously and intentionally submitted themselves to public scrutiny . . . [t]he same degree of protection is not afforded to public figures”.⁴¹ Consequently although children involved in high profile custody battles, have not chosen to step into the public sphere,⁴² those who have affairs with married politicians and engage in public disturbances have chosen to enter the public scene.⁴³ The application of the doctrine here thus distinguishes a category of rights-holders based upon normative assumptions about the attribution of conduct and the relevance of such conduct

³⁵ *Verlagsgruppe (No. 2)* [2007] EMLR 13, at [36], emphasis added.

³⁶ *Goodwin* [2011] EWHC 1437 (QB), [2011] EMLR 27.

³⁷ *McLaren v News Group Newspapers Ltd.* [2012] EWHC 2466 (QB), at [34]. It was later suggested that higher standards of conduct may also be expected from “headmasters and clergymen”, as well as “politicians, senior civil servants, surgeons and journalists”, *McKennitt v Ash* [2006] EWCA Civ 1714, at [65].

³⁸ See *Krone* (Application no. 27306/07); and *Kurier (No.2)* (Application no. 1593/06), although on the facts the Court held that the child had not “entered the public scene” merely by being the subject of a high profile custody battle.

³⁹ *Standard Verlags (No.3)* (Application no. 34702/07), at [37]; *News Verlags* (Application no. 31457/96) (2001) 31 EHRR 8, at [54]; *Verlagsgruppe (No. 2)* [2007] EMLR 13, at [36]; *Egeland* (Application no. 34438/04) (2010) 50 EHRR 2, at [60]; *Flinkkilä* (Application no. 25576/04), at [83]; and *Eerikäinen* (Application no. 3514/02), at [66].

⁴⁰ *Zybertowicz* (Application no. 59138/10); *Zybertowicz (No.2)* (Application no. 65937/11); *Kucharczyk* (Application no. 72966/13); *Verlagsgruppe News GmbH and Bobi* (Application no. 59631/09).

⁴¹ *Mitkus v Latvia* (Application no. 7259/03) (available on HUDOC), at [132].

⁴² *Krone* (Application no. 27306/07), at [57]; and *Kurier (No.2)* (Application no. 1593/06), at [59].

⁴³ *Flinkkilä* (Application no. 25576/04), at [83].

to public life. This begs the question as to whether the concept is necessary given that these factors are already accounted for elsewhere.⁴⁴

A further grey area concerns those associated with a public figure. Although the courts have held that spouses and children of public figures are not necessarily public figures themselves,⁴⁵ in *Trimingham*⁴⁶ and *Goodwin*⁴⁷ it was suggested that those who have affairs with powerful businessmen or politicians may no longer be purely private persons. Whilst in *Murray* and *AAA* the courts examined “the position of the child’s parents and the way in which the child’s life as part of that family has been conducted” to determine the scope of the child’s right to privacy.⁴⁸

The introduction of different subcategories of public figures obviously means that a broader group of persons may be affected, but the operation of these categories remain uncertain; decisions are fact specific and the Court usually states its finding without indicating how and why it reached its conclusion. We are therefore left with a broad conception of a public figure with a number of areas of uncertainty. Indeed whilst it may be relatively easy to identify elected officials and celebrities as public figures, we do not know what sort of official functions are relevant,⁴⁹ how well known someone needs to be, which societal positions are relevant, whether public figure status is permanent,⁵⁰ nor when the courts will determine that someone has elected to enter to public scene. There is thus a broader category of persons, such as prominent academics,⁵¹ where it may be difficult to state with certainty whether or not they are public figures for these purposes.

In many ways a broad malleable approach reflects societal understandings of public figures, and definitional difficulties are not surprising.⁵² Indeed part of the difficulty is that the societal concept of a public figure has evolved. Historically, public figures in the sixteenth century were men with notable positions of power, including important and revered

⁴⁴ Both of which are factors in the *Von Hannover (No.2)* balancing criteria discussed further below.

⁴⁵ *RocknRoll v News Group Newspapers Ltd.* [2013] EWHC 24 (Ch.); and *Weller & Ors v Associated Newspapers Ltd.* [2015] EWCA Civ 1176.

⁴⁶ *Trimingham v Associated Newspapers Ltd.* [2012] EWHC 1296 (QB).

⁴⁷ *Goodwin* [2011] EWHC 1437 (QB), [2011] EMLR 27, at [103].

⁴⁸ *Murray v Big Pictures Ltd.* [2008] EWCA 446, [2008] 3 W.L.R. 1360, at [37] approved Patten J. in *Murray v Express Newspapers Plc & Anor* [2007] EWHC 1908 (Ch.); and *AAA v Associated Newspapers* [2013] EWCA Civ 554 and [2012] EWHC 2103 (QB).

⁴⁹ See *Timciuc* (Application no. 28999/03), where the Court did not explain why a civil servant was a public figure, simply declaring that “in his capacity as a high-ranking local civil servant, the applicant was a public figure”.

⁵⁰ It seems that certain individuals will always be public figures (even following death); see *Dzhugashvili v Russia* (2015) 61 EHRR SE9 (Stalin); and *Edition Plons v France* (2006) 42 EHRR 36 (President Mitterand). The Court has yet to consider less prominent individuals, or cases where an individual has sought to withdraw from public life.

⁵¹ *Hasan Yazici* (Application no. 40877/07); *Mengi* (Application no. 13471/05 38787/07). Although note a distinction in a case concerning possible incitement of violence against academics in *Kaboglu and Oran* (Application no. 1759/08, 50766/10 and 50782/10), where the Court declined to equate such persons with politicians. *Verlagsgruppe (No. 2)* [2007] EMLR 13.

⁵² The process of defining public figures was famously described in *Rosanova v Playboy Ents., Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976) as “much like trying to nail a jellyfish to the wall”.

public roles such as the scholar and the cleric. Portraits were an important form of immortalising the man in the context of his profession; for example, a banker would be depicted with coins, a scholar with a quill and public figure status was very much connected to societal functions; these men were revered for what they did for society, and it was this that led to great interest in them. That vision of public figures is similar to the Court's focus upon "official functions" and those who occupy a "position in society". In later centuries, however, the rise of mass-circulation newspapers expanded interest beyond those with public roles to include the glamorous and the famous. People became revered not just for what they did for society, but for how they looked and the lifestyle they led. This was satiated by details, and in particular towards the end of the nineteenth century by the inclusion of photographs.⁵³ Thus the classical notion of a public figure as someone exercising a particular public role expanded to those who were famous, or in the Court's terminology those who were "well known to the public". Today the societal concept of "public figure" is extremely difficult to pin down. Although in the past one's office or profession may have borne some correlation to the extent to which one was known to the public, these features have diverged radically such that those who are famous includes some who hold public office, but many more who do not. Both traditional and social media are full of news stories and images of people who are seemingly famous for being famous. The extent to which fame is transitory raises further difficulties for identifying who is and who is not a public figure.

Yet the broader the legal concept of a public figure the more it becomes embroiled with subjective moralistic determinations, which prejudice the extent to which information is private and the extent to which there is a public interest in disclosure.⁵⁴ The Court's rhetoric of "consciously and intentionally", "submitted" and "public scene" are premised upon unspoken normative assumptions about the attribution of conduct and the relevance of such conduct to public life which involves conflating a constructed binary distinction between public and private persons with other binary distinctions between public and private life (or domain), and between voluntary and involuntary acts. Distinctions that are contestable and problematic to apply, and at their core rest upon unspoken normative determinations as to the nature of the right and what is or is not in the public interest, matters that are better confronted directly rather than hiding behind these binary labels. The legitimacy of this in a framework based upon human rights is

⁵³ F. Inglis, *A Short History of Celebrity* (2010, Princeton).

⁵⁴ As Frederick Schauer explains: "[t]he question whether the private lives of public figures should be open to newspaper reporting is so close to self-answering as to be an unhelpful characterisation. Too much of the normative and conceptual work is elided by the terms 'public' and 'private,' which turn out to have the attributes of normative conclusions masquerading as descriptions or analytic tools", F. Schauer, "Can Public Figures Have Private Lives?" (2000) *Soc.Phil.& Pol'y.* 293, at 294.

thus contingent upon the manner in which it operates and the rationale for the doctrine, matters, which are themselves unclear.

B. What Is the Relevance of Public Figure Status?

Clearly, the doctrine does not deprive public figures of all privacy rights as the courts have upheld the rights of members of royal families, heads of state and celebrities such as supermodels and footballers.⁵⁵ The case law instead suggests a sliding scale: those that exercise official functions receive the lowest level of protection; whilst other public figures receive less protection than private individuals, but more than those with official functions. This is evident in the Court's determination that "the right of public figures to keep their private life secret is, in principle, wider where they do not hold any official functions (even if, as members of a ruling family, they represent that family at certain events) and is more restricted where they do hold such a function".⁵⁶ These nuances are, however, somewhat lost in the broader uncertainty as to how public figure status affects rights.

Conceptually public figure status may come into play in a human rights framework at two stages. The first is in the determination of the scope of the right. The second is in the determination of the weight accorded to the two competing rights. Whilst the domestic courts have used both approaches, the Strasbourg case law suggests that public figure status only comes into play at the latter stage.

1. The Scope of the Right to Privacy

Although in *Craxi v Italy (No.2)* the Court stated that "public figures are entitled to the enjoyment of the guarantees set out in Article 8 of the Convention on the same basis as every other person"⁵⁷ this is undermined by other elements of the Court's general principles. In particular the Court regularly asserts (1) that it is only in certain circumstances that a public figure can "rely on a 'legitimate expectation' of protection of and respect for his or her private life"⁵⁸ and (2) that the "status as an ordinary person enlarges the zone of interaction which may fall within the scope of private life".⁵⁹ These statements invoke an image of rights of varying breadth and thus the possibility that public figure status bites to determine the parameters of those rights. In practice, however, the European Court of Human Rights does not assess whether or not a public figure had a

⁵⁵ See e.g. *Editions Plons* (2006) 42 EHRR 36; *Von Hannover* (2005) 40 EHRR 1; *Campbell v MGN* (2004) UKHL 22; *Mosley v News Group Newspapers* [2008] EWHC 1777, [2008] EMLR 20; *PJS v News Group Newspapers* [2016] UKSC 26; *Richard* [2018] EWHC 1837; *CTB v Thomas* [2011] EWHC 1326.

⁵⁶ *Couderc* [2016] EMLR 19, at [119].

⁵⁷ *Craxi v Italy (No.2)* (Application no. 25337/94), at [65].

⁵⁸ *Ibid.*

⁵⁹ *Ageyevy v Russia* (Application no. 7075/10), at [221]; and *Mitkus* (Application no. 7259/03), at [132].

legitimate or reasonable expectation in determining whether Article 8(1) ECHR applies. On the contrary, there is rarely any analysis of whether Article 8(1) ECHR applies. See for example, *Von Hannover (No.2)* where the Grand Chamber provided five paragraphs of general principles relating to the right to private life, but at no point questioned, considered or explained why Article 8(1) ECHR applied; and, when it came to examining the particulars of the case it went straight to the balancing criteria.⁶⁰ This is representative of the Court's approach. Indeed there is no evidence that the Court uses public figure status as part of a threshold reasonable expectation of privacy test and there are no cases in which the Court has determined that a public figure is unable to rely upon Article 8(1) ECHR.

This is different from the position taken in domestic law where the right is contingent upon the applicant demonstrating that he or she had a reasonable expectation of privacy.⁶¹ Indeed there are cases in which the domestic courts have considered public figure status even where the information itself would typically be classified as of a type that is obviously private, such as medical information. An example of this is *Spelman* where it was held that a boy who had played rugby for England in the under 16 team faced a "diminution of the reasonable expectation of privacy"⁶² and that there was "no, or at best a low, expectation of privacy if an issue of health relates to the ability of the person to participate in the very public activity of national and international sport".⁶³ The Court also held in *Goodwin* that Goodwin's role as Chief Executive of RBS "presents an obstacle" to the claimants establishing they have an expectation of privacy.⁶⁴ In other cases the domestic courts have been less inclined to regard public figure status as part of the threshold test. For example in *Ferdinand* even though the Court relied heavily upon public figure status, it accepted that he had a reasonable expectation of privacy, finding that these matters were instead relevant to the balance struck between privacy and freedom of expression.⁶⁵ The judicial position remains, however, ambiguous, as seen in *Richard v BBC* where the Court held that "a public figure is not by virtue of that quality, necessarily deprived of his or her legitimate expectations of privacy"; thus leaving open the possibility that public figure status may curtail expectations of privacy.⁶⁶

The legitimacy of incorporating public figure status into a threshold reasonable expectation of privacy test depends upon the underlying normative rationale for the doctrine. At this first stage the courts are purportedly

⁶⁰ *Von Hannover (No.2)* (2012) 55 EHRR 15, at [95]–[99], [108]ff.

⁶¹ N. Moreham, "Unpacking the Reasonable Expectation of Privacy Test" (2018) 134 L.Q.R. 651.

⁶² *Spelman v Express Newspapers* [2012] EWHC 355 (QB), at [70].

⁶³ *Ibid.*, at para. [69]. Compare this with *McKennitt* [2006] EWCA Civ 1714, at [23], "a person's health is in any event a private matter".

⁶⁴ *Verlagsgruppe (No. 2)* [2007] EMLR 13, at [101]–[104].

⁶⁵ *Ferdinand v MGN Ltd.* [2011] EWHC 2454 (QB), at [56].

⁶⁶ *Richard* [2018] EWHC 1837, at [256], emphasis added.

determining the scope of the privacy right in isolation from any consideration of competing rights. On this premise the courts should only use a public figure doctrine if the normative justification is that the information is “not private”. If the reason for invoking public figure status is based upon the public interest in publication then it should not form part of a threshold test, but should instead be part of the second stage process of evaluating competing rights. Whether we follow the approach of the domestic courts or the Strasbourg Court or reject both, is thus contingent upon the normative rationale for the doctrine.

2. *The Weight Accorded to the Rights to Privacy and Freedom of Expression*

Public figure status may also be relevant to the *weight* accorded to the rights. The general stance is that articles 8 and 10 ECHR are of presumptive equal value and that the two rights should be balanced using the *Von Hannover (No.2)* criteria.⁶⁷ Those criteria are: (1) whether the publication constitutes a contribution to a debate of general interest; (2) how well known is the person concerned and what is the subject of the report (the “notoriety” criterion); (3) prior conduct of the person concerned; (4) content, form and consequences of the publication; and (5) circumstances in which the photographs were taken.⁶⁸ If we examine those criteria it is evident that public figure status comes into play not only in the notoriety criterion which examines “how well known is the person concerned”, but also when determining whether (1) the publication constitutes a contribution to a debate of general interest and (2) the prior conduct of the person concerned. The balancing criteria thus allow public figure status to curtail and/or weaken the weight accorded to Article 8 ECHR, whilst simultaneously enhancing the weight accorded to Article 10 ECHR on multiple criteria.

Couderc and Hachette Filipacchi Associés v France is an example of this.⁶⁹ The proceedings related to newspaper coverage of Prince Albert of Monaco’s secret son. The Grand Chamber first considered the Prince’s public figure status when considering whether the publication contributed to a debate of general interest.⁷⁰ As it would have been impossible for the Grand Chamber to assess whether the publication contributed to a debate of general interest without considering the Prince’s role, status and conduct it was entirely appropriate for it to consider this as part of its evaluation of the significance of Article 10 ECHR. Yet the Grand Chamber traversed the same ground when contemplating the Prince’s “notoriety”; analysis that it subheaded – the “consequences of the classification as a ‘public

⁶⁷ *Von Hannover (No.2)* (2012) 55 EHRR 15; *Couderc* [2016] EMLR 19.

⁶⁸ *Von Hannover (No.2)* (2012) 55 EHRR 15, at [108]–[113].

⁶⁹ *Couderc* [2016] EMLR 19.

⁷⁰ *Ibid.*, at paras. [99]–[101], [108]–[116].

figure”.⁷¹ At this juncture it asserted that “the role or function of the person concerned . . . constitute another important criterion to be taken into consideration” and that “[t]he extent to which an individual has a public profile or is well-known influences the protection that may be afforded to his or her private life” as the “public [i]s entitled to be informed about certain aspects of the private life of public figures”.⁷² This led it to direct that “a fundamental distinction needs to be made between reporting details of the private life of an individual and reporting facts capable of contributing to a debate in a democratic society, relating to politicians in the exercise of their official functions”.⁷³ A similar approach can be seen in *Axel Springer v Germany* where the Court determined that the fact that a public figure was well known “reinforces the public’s interest in being informed”.⁷⁴ Yet if the notoriety criterion is intended to give weight to Article 10 ECHR it reproduces analysis that has already been carried out when considering whether the publication contributes to a debate of general interest, whilst if it is intended to restrict the weight accorded to Article 8 ECHR then we need to know what the normative argument is for limiting the right to privacy.

Of course courts often look at a range of factors in deciding whether a restriction is justified such that similar considerations may arise when considering both rights. For example, a court could perhaps conclude that there is little public interest to justify the inclusion of a particularly intrusive fact in an article thus weakening the Article 10 ECHR claim, and also find that the inclusion of that fact resulted in a greater infringement of Article 8 ECHR on the basis that the gratuitous inclusion of private information made the intrusion particularly egregious. Yet this is only justifiable where a particular factor tells us something about the weight that should be accorded to a given right. If the press probe into someone’s private life for salacious gossip then this might be regarded as a greater interference with the dignity that underpins the right to privacy, whilst at the same time there may be limited weight to accord to the values that underpin freedom of expression such as democracy. The problem with employing public figure status to do this work vis-à-vis both rights is that whilst public figure status may be closely connected on a particular set of facts to the question of whether a particular disclosure is in the public interest, it is questionable whether it assists in determining the extent to which an interference with privacy is intrusive. If the rationale is that less weight is to be accorded to Article 8 ECHR because public figure status means that the information is “newsworthy” then it is not a matter for Article 8 ECHR

⁷¹ *Ibid.*, at paras. [117]–[125].

⁷² *Ibid.*, at para. [117].

⁷³ *Ibid.*, at para. [118].

⁷⁴ *Ibid.*, at paras. [97]–[100].

at all, but is instead a matter for Article 10 ECHR, one that is already covered by “debate of general interest”. If instead the reasoning is that the applicant’s prior conduct means that the interference is less intrusive, then it is covered by the criterion that tackles that element directly. It is not, however, clear that there is any rationale for determining that public figure status in the form of “notoriety” means that a person’s right to privacy should be accorded less weight than that of an ordinary private individual. We will return to this when we consider potential normative rationales for the distinction, but at this stage it is sufficient to state that without a clear indication of how the notoriety criterion assists in assessing the Article 8 ECHR right or what it adds to the analysis of Article 10 ECHR that is carried out under the “debate of general interest” criterion it should be rejected.

There are also signs that public figure status may crystallise into distinct standards of protection that tilt the scales in favour of freedom of expression. In *Couderc*, the Court declared that:

although the publication of news about the private life of public figures is generally for the purposes of entertainment rather than education, it contributes to the variety of information available to the public and undoubtedly benefits from the protection of Article 10 of the Convention. However, such protection may cede to the requirements of Article 8 where the information at stake is of a private and intimate nature and there is no public interest in its dissemination.⁷⁵

This suggests that the the rules are redrawn for public figures such that Article 10 ECHR only has to “cede” when the information is private and there is *no* public interest in dissemination; a significant shift in favour of Article 10 ECHR. It is important to note, however, that this was taken directly from *Mosley v United Kingdom*, where it was held that there was no public interest in the publication of photographs and details of Max Mosley’s sex life.⁷⁶ Thus the scope of the distinction is contingent upon what the Court is willing to recognise as a “public interest”. Yet even if the Court is willing to refuse to recognise the publication of salacious gossip as in the public interest, this still renders the balancing process in public figure cases entirely contingent upon the Court’s interpretation of public interest, without any scope for evaluating this against the intrusion into privacy. This has implications for the purported hierarchical nature of the rights and the process of resolving conflicts of rights; as such it too requires a strong normative justification.

We have thus seen how the public figure doctrine may affect rights by: (1) curtailing the scope of the right to privacy, (2) affecting the weight accorded to the rights or (3) recalibrating the balance struck between the rights via a rule that freedom of expression will only cede to privacy

⁷⁵ *Ibid.*, at para. [89].

⁷⁶ *Mosley v United Kingdom* (2011) 53 EHRR 30.

where there is no public interest in publication. We will now turn to consider the conceptual problems that this raises.

III. CONCEPTUAL PROBLEMS

The ill-defined nature of the doctrine prompts consideration of deeper conceptual problems. First, whether the idea that public figures have different rights can be reconciled with the universality of rights. Second, whether altering the balance between the rights can be reconciled with the non-hierarchical relationship between the two rights. Third, whether the differences between the domestic courts and the Strasbourg Court are compatible with our obligations under Article 8 ECHR and the way in which rights have been embedded in domestic law. Fourth, whether the Strasbourg Court's use of the doctrine to delimit the scope of rights at the second stage is compatible with its purported process of balancing rights.

A. Implications for Universality

It would seem to follow from the existence of a right to privacy that we are all equally entitled to it by virtue of our status as human beings. This is reflected in Article 1 ECHR, which states that the parties “shall secure to *everyone* within their jurisdiction the rights and freedom defined in Section 1 of this Convention” (emphasis added). In practice, we know that the courts sometimes apply different rights to different categories of persons, and allow for varying levels of protection or for interferences to be more readily justified in relation to some groups. Prisoners and migrants are often subject to different rights or receive less protection: the lawful detention of a person following conviction by a competent court is excluded from the scope of Article 5 ECHR; at least some prisoners may be denied the right to vote⁷⁷; and Article 16 ECHR expressly limits migrants' rights to freedom of political expression.⁷⁸ The doctrine of the margin of appreciation also results in persons subject to one state receiving different rights or protection when compared with those subject to other contracting states.⁷⁹ It is therefore not unprecedented for the Strasbourg Court to enable differences in the protection of rights. This does not, however, mean that the Court can, or should, endorse different rights, or varying levels of protection, without justifying how this is compatible with the Convention, and why it is necessary. Indeed universality and Article 1

⁷⁷ After a 12-year stand-off the UK Government proposed to allow a very limited class of prisoners (those on day release) to vote. This was accepted by the Committee of Ministers in December 2017, CM/Del/Dec(2017)1302/H46-39, 7 December 2017.

⁷⁸ The Court has never applied Art. 16 ECHR but the distinction continues to exist, see *Perincek v Switzerland* (Application no. 27510/08) Grand Chamber (available on HUDOC), at [118]–[123].

⁷⁹ Lord Hoffmann, “The Universality of Human Rights” (2009) L.Q.R. 416; R. Spano, “Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity” (2014) H.R.L.Rev. 487.

ECHR necessitate a rational justification. When it comes to prisoners and migrants (whether or not one agrees with the distinction) there is a clear textual basis under Articles 5 and 16 ECHR, and the Court has engaged with the values underpinning the Convention in determining the legality of restrictions on prisoners' right to vote.⁸⁰ Whilst, of course, the Court is not outright *denying* public figures a right to privacy the fact that the rights of a class of persons are only *limited* or *weakened* does not, and should not, mean that no rational justification is required. This is supported by the fact that the text of Article 8 ECHR makes no reference to a distinction in status and Article 14 ECHR precludes discrimination on any ground, expressly including social origin, birth or "other status", which the Court has interpreted as meaning an "identifiable characteristic, or 'status'".⁸¹ Thus the application of different rules to landowners based upon the size of the land they own has been held to engage the "status" element of Article 14 ECHR.⁸² Direct discrimination on the basis of status is permissible under Article 14 ECHR where it is justified as necessary and proportionate, however, a difference is discriminatory if it "has no objective and reasonable justification", that is if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'.⁸³ Thus to be compatible with non-discrimination any limitation of the rights on account of "status" also necessitates a compelling normative justification.

B. Balance Between the Convention Rights

The second problem is the role of the doctrine in seeking to deviate from a position in which privacy and freedom of expression are presumptively equal rights. In principle there is nothing wrong with the courts recognising that some interests within a particular right are more important than others. Indeed the Strasbourg Court often seeks to identify the core of a right, meaning those interests that are most important, for the purposes of determining the scope of a state's margin of appreciation. The Court has also sought to identify a hierarchy of expression within Article 10 ECHR in which political expression is accorded the greatest protection and commercial expression the lowest level of protection⁸⁴; a process that is flawed, but is at least premised upon a perception of the importance of the interest to the exercise of the right. Yet here the distinctions appear to derive from a hierarchy of *rights-holders* rather than the nature of the right itself, we

⁸⁰ *Hirst v United Kingdom (No.2)* (2006) 42 EHRR 41.

⁸¹ *Hode v United Kingdom* (Application no. 22341/09) (2013) 56 EHRR 27.

⁸² *Chassagnou v France* (Application no. 25088/94 28331/95 28443/95) (1999) 29 EHRR 615.

⁸³ *Ibid.*, at para. [91].

⁸⁴ *Mouvement raelien suisse v Switzerland* (2013) 56 EHRR 14, at [61]; *Animal Defenders v United Kingdom* (2013) 57 EHRR 21, at [102].

thus need to consider whether there is anything inherent in privacy or freedom of expression that justifies this hierarchy.

C. Differences in Judicial Approach to Scope of the Right

A third conceptual matter stems from differences between the domestic courts and the European Court of Human Rights analysis of the scope of the right. Whilst the domestic courts have been more willing to include public figure status in a threshold reasonable expectation of privacy test, under the Convention public figure status is applied at the second stage when evaluating rights. In principle, this means that the scope of the privacy right accorded by domestic law may be more limited than that afforded by the Convention. Whether or not this is problematic from a Convention perspective is unclear. Certainly the Strasbourg Court usually gives states considerable scope as to how to implement positive obligations, and the Court has indicated that it will need strong reasons to intervene where a domestic court applies an approach that is compatible with the balancing exercise set out in *Von Hannover (No.2)*.⁸⁵ This suggests considerable scope for pragmatism. Thus unless a domestic court limits the scope of the right to privacy to such an extent that a claim fails in a scenario in which, had it made to the balancing stage the right to privacy would have triumphed the difference between the domestic courts and the Strasbourg Court may be non-consequential. Scenarios in which such differences could arise, however, include (1) where children are accorded more restricted rights as a consequence of their public figure status,⁸⁶ (2) where children have a reduced expectation of privacy as a result of parental conduct⁸⁷ or (3) if our domestic courts conclude that photographs of adult public figures engaged in everyday activities in “public places” do not engage the right.⁸⁸

Moreover, from a domestic perspective any disconnect raises the thorny question of the extent to which the law of misuse of private information is a direct application of the Convention rights, or whether the courts have the capacity to apply a more limited form of privacy. An extensive body of academic literature has been devoted to this issue and the intention is not to add to it here, however, given the extent to which the courts purport to embed the values of the Convention rights in misuse of private information

⁸⁵ As emphasised in *Couderc* [2016] EMLR 19, at [92].

⁸⁶ *Spelman* [2012] EWHC 355 (QB).

⁸⁷ *AAA* [2013] EWCA Civ 554.

⁸⁸ In *Campbell* (2004) UKHL 22, it was suggested that the courts would not regard such photographs as private. Since *Von Hannover* (2005) 40 EHRR 1, it has been evident that the Strasbourg Court takes a different approach. Our domestic courts have upheld the rights of children in such circumstances, see *Weller v Associated Newspapers* [2014] EWHC 1163 (QB), but it is unclear whether they would find that adult celebrities have a reasonable expectation of privacy in such circumstances. For discussion, see K. Hughes, “Publishing Photographs Without Consent” (2014) 6(2) J.M.L. 180.

law we might expect a strong normative justification for deviating from this and limiting the scope of the right.⁸⁹

D. Process of Resolving Conflicts of Rights – Delineation or Balancing?

A final issue is the lack of clarity surrounding the process of evaluating rights. We have already encountered one version of this in the form of the disconnect between the domestic courts willingness to limit the scope of Article 8(1) ECHR and the Strasbourg Court's focus on the balancing process. Further uncertainty surrounds the Strasbourg Court's own "balancing criteria". The Court's repeated emphasis upon "balancing" indicates that the second stage is intended to be a process of according *weight* to the competing rights.⁹⁰ Yet some aspects of the Court's analysis under the auspices of the public figure doctrine show signs of a delineation approach (which rather than according weight to the right seeks to define their parameters). Indeed it is within the balancing criteria that the Court declares that:

depending on whether or not he or she is vested with official functions, an individual will enjoy a *more or less restricted* right to his or her intimacy: in this regard, the right of public figures to keep their private life secret is, in principle, *wider* where they do not hold any official functions...and is *more restricted* where they do hold such a function (emphasis added).⁹¹

This language ("restricted" and "wider") suggests a delineation of the right.⁹² Yet if the Court intends to balance rights there is no justification for shrinking the *scope* of Article 8(1) ECHR once the Court has determined that the right is engaged. The implication of this can be seen in *Couderc* where the Court commanded France to reintroduce a binary configuration of which elements of the Prince's life fall within the "strictly private domain" and those that "fall within the public sphere".⁹³ This goes far

⁸⁹ On horizontal effect and the law of privacy see T. Bennett, "Horizontality's New Horizons: Re-Examining Horizontal Effect: Privacy, Defamation and the Human Rights Act: Part I" (2010) Ent.L.R. 96; T. Bennett, "Horizontality's New Horizons: Re-Examining Horizontal Effect: Privacy, Defamation and the Human Rights Act: Part II" (2010) Ent.L.R. 145; K. Hughes, "Horizontal Privacy" (2009) L.Q.R. 244; N. Moreham, "Privacy and Horizontality: Relegating the Common Law" (2007) 123 L.Q.R. 373; G. Phillipson, "Privacy: The Development of Breach of Confidence: The Clearest Case of Horizontal Effect" in D. Hoffmann (ed.), *The Impact of the UK Human Rights Act on Private Law* (2011, Cambridge). H. Fenwick, G. Phillipson, R. Masterman (eds.) *Judicial Reasoning under the UK Human Rights Act* (2007, Cambridge); G. Phillipson, "The Human Rights Act, the Common law and Horizontal Effect: A Bang or a Whimper" (1999) 62(6) MLR 824. Note this is also contingent upon the extent to which the domestic courts are required to follow Strasbourg case law. The Supreme Court's recent judgment in *Hallam v Secretary of State* [2019] UKSC 2 suggests that there may now be greater scope to depart from Strasbourg case law than had previously been recognised.

⁹⁰ See the Court's numerous references to the need to "balance" the rights in *Von Hannover (No.2)* (2012) 55 EHRR 15 and *Axel Springer* (2012) 55 EHRR 6.

⁹¹ *Couderc* [2016] EMLR 19, at [119].

⁹² For consideration of similar issues in the law of misuse of private information see P. Wragg, "The Benefits of Privacy-Invasive Expression" (2013) 64(2) NILQ 187.

⁹³ *Couderc* [2016] EMLR 19, at [125], emphasis added.

beyond the weighing of the two rights, and leads us back to a process of seeking to draw a sharp public/private divide to delimit the rights. The merging of these two approaches through the public figure doctrine creates further confusion as to the parameters of the rights and the process of resolving rights conflicts.⁹⁴

Let us turn then to consider whether there is a strong normative rationale for the doctrine that justifies persevering with the doctrine.

IV. NORMATIVE JUSTIFICATION

We might seek to justify a public figure doctrine on one of the following bases: (1) that public figures are not entitled to human rights; (2) that they are entitled to human rights, but the scope of their right to privacy is more limited as some of their interests are simply not private; (3) that they have a right to privacy, but their right should be accorded less weight than the right of a private individual; (4) that they have a right to privacy but they have waived aspects of that right; or (5) that although public figures have a right to privacy freedom of expression is particularly weighty in such cases.⁹⁵ On close inspection, however, it transpires that none of these arguments necessitates a public figure doctrine.

A. No Right to Privacy

If public figures were not entitled to a right to privacy *at all* the difference could be premised upon *who is entitled to rights*. For example, one might try to argue that public figures are a distinct category of potential *rights-holder*, that given their public role they are akin to the state and not entitled to rely upon human rights in that role. This would require a considerable narrowing down of the definition of a public figure. It is, however, clear that public figures, including heads of state and elected officials, have a right to privacy, hence we need an explanation in which the right exists, but public figure status curtails its scope or weight. We thus need to consider what privacy is and why it is important to determine whether any limitations arise from within *privacy* itself.

⁹⁴ Jelena Gligorijevic is developing some excellent doctoral work on how to resolve rights conflicts and I have found her contributions to be illuminating.

⁹⁵ The Strasbourg Court has not offered any detailed insight but it has drawn upon a consent rationale for limiting a public figure's right to privacy based upon prior conduct, see *Axel Springer* (2012) 55 EHRR 6, at [101] and has emphasised the democratic watchdog function of the press in connection with the criteria "debate of general interest" and "notoriety" see *Von Hannover (No.2)* (2012) 55 EHRR 15, at [110]–[111]. For discussion of the public figure doctrine and the public interest, see G. Phillipson, "Press Freedom, the Public Interest and Privacy" in A. Kenyon (ed.), *Comparative Defamation and Privacy Law* (2016, Cambridge); and Wragg, "The Benefits".

B. Narrower Right to Privacy

In order to justify public figure status limiting the scope of the right via the reasonable expectation of privacy test we need a rationale for why a public figure's right to privacy is more limited. An attempt is often made to define privacy by placing it in opposition to that which is public, for example, "public/private figures", "public/private information", "public/private activities" or "public/private decisions"; binaries that are fraught given that within each configuration neither concept lends itself to a clear definition. I have argued elsewhere that the question "what is private?" cannot be exhaustively answered in this way and that privacy is best understood as an important part of social interaction.⁹⁶ Some of the difficulties with using a public figure doctrine to determine the scope arise precisely because of their connection to these problematic binary configurations. Indeed when applied to public figures we often conflate these concepts such that information, activities or decisions relating to such persons are rendered "public".⁹⁷ Equally, we seek to define who is a public figure by reference to information, activities and decisions that we regard as public; such that it is the perceived public nature of those matters that renders the person a "public" one. Yet in the absence of fixed points this process is circular and subjective. Moreover, as privacy is an important part of social interaction there is no intrinsic reason why such persons should be entitled to the protection of fewer privacy interests based solely upon the nature of *privacy* itself. The designation of public figures interests as "not private" is thus a subjective normative determination, which is premised upon the perceived public interest in disclosure rather than anything inherent in privacy itself.

C. Less Weight Accorded to Right to Privacy

In order to justify reducing the weight accorded to the right (i.e. the notoriety criterion) we need a rationale for why a public figure's right is less worthy of protection. Certainly courts often seek to identify interests that fall within the core of the right, and those that are closer to the periphery. Interests closer to the core receive greater protection and the capacity of states to interfere is correspondingly reduced. Yet if we turn to consider why privacy is important we see that it is difficult to make a case for public figures receiving less protection based upon the value of privacy. There are various explanations for why we need privacy, including that it facilitates autonomy, dignity, respite, solitude and intimacy.⁹⁸ That it provides the

⁹⁶ K. Hughes, "A Behavioural Understanding of Privacy and its Implications for Privacy Law" (2012) 75 (5) MLR 806.

⁹⁷ Woodrow Hartzog is researching different notions of "public" in the US context as presented at the Amsterdam Privacy Law Conference 2018.

⁹⁸ A. Westin, *Privacy and Freedom* (New York 1967); D. Solove, *Understanding Privacy* (2010, Cambridge, Massachusetts); B. Rössler, *The Value of Privacy* (2005, Cambridge); J. Cohen, "What Is Privacy For?" (2013) 126 Harv.L.Rev. 194.

space in which to develop thoughts and ideas and to communicate those thoughts and ideas to others.⁹⁹ That it is vital for developing relationships¹⁰⁰ and trust.¹⁰¹ Research also indicates that when an individual suffers a loss of privacy it can lead to distress, frustration, anger and compound other problems and difficulties such as grief.¹⁰² There is nothing intrinsically different about public figures, which leads to the conclusion that their rights are different. Indeed, the Leveson inquiry and the phone-hacking cases offer insight into the deep impact that press intrusion can have on public figures.¹⁰³ Moreover, privacy also plays an important role in society by fostering democracy, intellectual development and social relations.¹⁰⁴ Thus whilst there are other competing freedom of expression interests that need to be considered we should reject the notion that we should reduce the weight accorded to privacy by reference to public figure status.

D. Right to Privacy Waived

An alternative possibility is to argue that whilst everyone has the right to privacy, public figures have often waived aspects of those rights as a consequence of their *role* or *past conduct*. The idea that a person's *role* curtails the scope of the right is implicit in the argument that as public figures benefit from publicity, less privacy is the *quid pro quo*,¹⁰⁵ or the claim that public figures are role models.¹⁰⁶ Whilst the notion that a public figure's *conduct* curtails the scope of the right is implicit in claims that where information has been published this aspect of the person's life is no longer "private". Such assertions are premised upon questionable assumptions that rights can be waived in this way. It is worth noting, however, that even if rights can be waived this can only justify including public figure status in a threshold test, or reducing the weight accorded to the privacy right, if it is the person's *role* that leads to a waiver of the right. If the right is waived as a consequence of *conduct* then any mechanism for

⁹⁹ N. Richards, *Intellectual Privacy* (2015, New York).

¹⁰⁰ J. Inness, *Privacy, Intimacy and Isolation* (1992, New York); J. Rachels, "Why Privacy Is Important" (1975) 4 *Phil. & Pub. Aff.* 323; R. Gerstein, "Intimacy and Privacy" (1978) 89 *Ethics* 76.

¹⁰¹ A.E. Waldman, *Privacy as Trust: Information Privacy for an Information Age* (2018, New York).

¹⁰² N. Moreham and Y. Tinsley, "Grief Journalism, Physical Intrusion, and Loss: The Pike River Coal Mine Disaster" in Kenyon, *Comparative Defamation*.

¹⁰³ Leveson Report (2012, London), *An Inquiry into the Culture, Practices and Ethics of the Press*, vol. II, ch. 5 (2012); *Gulati v MGN* [2015] EWHC 1482 (Ch).

¹⁰⁴ K. Hughes, "The Social Value of Privacy, the Value of Privacy to Society and Human Rights Discourse" in B. Roessler (ed.), *Social Dimensions of Privacy* (2015, Cambridge); Priscilla Regan *Legislating Privacy* (Chapel Hill 1995).

¹⁰⁵ Lord Woolf stated in *A v B* [2002] EWCA Civ 337, 11(xi), that an individual "should recognise that because of his public position he must expect and accept that his actions will be more closely scrutinised by the media".

¹⁰⁶ Lord Woolf stated in *A v B* [2002] EWCA Civ 337, 11(xi), that a "public figure may hold a position where higher standards of conduct can rightly be expected by the public. The public figure may be a role model whose conduct could well be emulated by others".

reducing the scope or weight accorded to the right should focus upon that conduct, and not on the person's status as a public figure per se.

1. Role

The notion that a person's role determines the scope of the right to privacy arises in the idea that public figures consent to more limited rights as they benefit from publicity and less privacy is the *quid pro quo*. It assumes that public figures have chosen to take on such roles, that they have chosen to limit their rights, and that a human right can be traded in this manner for some ill-defined notion of personal gain. All of which is contestable and none of which is necessary, given that if there is a sufficiently compelling public interest in disclosure then publication could be justified on that basis. Indeed, as the real impetus is a presumed public interest in disclosure this should be addressed at the balancing stage, without seeking to crudely recalibrate the scope of the right to privacy. The *quid pro quo* approach thus offers a weak foundation on which to build a public figure doctrine.

A further possibility is that as public figures are role models, higher standards are expected of them and they cannot expect the same protection.¹⁰⁷ We see this type of reasoning advanced to argue that as people look up to public figures we must expose morally questionable or unlawful behaviour.¹⁰⁸ Some go even further and argue that we must expose immoral conduct to prevent fans from emulating that behaviour, an illogical stance that conveniently ignores the fact that publicity may well encourage such conduct. The ancient Greeks recognised this when Herostratus destroyed the Temple of Artemis, fearing that this would encourage others, mention of his name was forbidden on punishment of death. Yet even if we accept the role model premise the underlying normative rationale is not a conceptual difference vis-à-vis the privacy of this category of rights-holders, but rather an assumption that there is a greater societal interest in holding such persons to account. As such we cannot rely upon the role model argument to justify using a public figure doctrine as part of a threshold test as this entails employing an assumption about the societal interest in publication to pre-emptively curtail rights. Moreover, there is no need to do this as any societal interest falls squarely within the parameters of the "debate of public interest" analysis at the balancing stage.

2. Conduct

The argument that a public figure has waived the right by virtue of his or her *conduct* often arises where he or she has allowed the press to publish

¹⁰⁷ *McLaren* [2012] EWHC 2466 (QB).

¹⁰⁸ *Ibid.*; *Axel Springer* (2012) 55 EHRR 6. See G. Phillipson "Press Freedom, the Public Interest and Privacy" pp.155-156.

some information in the past. The courts have rejected the idea that where personal information has been published that particular area of a person's life is no longer private.¹⁰⁹ The courts have however, held on to the idea that where the public figure has "courted publicity" that this may affect the application of the rights. We see this in the Strasbourg case law where the Court states that where a person has "actively sought the limelight . . . his 'legitimate expectation' that his private life would be effectively protected was henceforth reduced".¹¹⁰ Equally it was stated in *Richard v BBC* that a public figure may waive "at least a degree of privacy by courting publicity, or adopting a public stance which would be at odds with the privacy rights claimed".¹¹¹ This also arises in the suggestion that children may have reduced expectations of privacy where their parents have placed them in the limelight.¹¹² Yet the idea that seeking publicity can deny us the capacity to seek privacy contradicts the ways in which we experience privacy, which is never all or nothing, but is always a process of interaction and withdrawal.¹¹³ Whilst the notion that rights can be waived in this way is also incompatible with the nature of rights. According to Hohfeld if one has a claim-right it includes the power to waive that claim-right, but this refers to a particular act such as granting permission to someone to use one's property.¹¹⁴ A public figure may thus waive a particular aspect of his or her right to privacy by disclosing particular information about him or herself in an interview. This does not, however, mean that where a person allows the press to access a particular aspect of his or her life on one occasion that he or she waives the right to prevent access to that aspect of his or her life in the future. Furthermore, there is nothing inherent in the framing of the Convention to indicate that rights can be waived or limited in this manner. This is evident if we think about how it would play out in other contexts. We would not accept that an individual that engages in consensual sado-masochistic conduct has waived his or her right not to be subject to treatment contrary to Article 3 ECHR, nor that an individual that consented to have sex with a partner has waived his or her right to refuse to have sex. The closest analogy is perhaps the Article 9 ECHR cases where the House of Lords came close to accepting that where an applicant attended a school which prohibited the jilbab that there was no interference with the applicant's right if, when she later decided that she wanted to wear the jilbab, the school refused to amend its policy.

¹⁰⁹ The position has become more nuanced than Lord Woolf's declaration in *A v B* [2002] EWCA Civ 337, 11(xi), that "if you have courted public attention then you have less ground to object to the intrusion which follows". See *McKennitt* [2006] EWCA Civ 1714, at [25]; and *KGM v News Group Newspapers Ltd.* [2010] EWHC 3145 (QB), at [38].

¹¹⁰ *Axel Springer* (2012) 55 EHR 6, at [101]. For discussion, see Phillipson, "Press Freedom", pp. 150–1.

¹¹¹ *Richard* [2018] EWHC 1837, at [256].

¹¹² *Murray* [2008] EWCA 446, [2008] 3 W.L.R. 1360, at [23].

¹¹³ Hughes, "A Behavioural Understanding".

¹¹⁴ W.N. Hohfeld, *Fundamental Legal Conceptions* (2001, Oxford).

However, the argument in *R. (on the application of Begum) v Denbigh High School* was not that the applicant had waived her right to religious freedom in general such that she could never wear the jilbab at all, on the contrary all the parties agreed that she held a religious belief that was protected under Article 9(1) ECHR even if her belief had changed, but rather whether she could object to this particular school policy given that she had enrolled in that school knowing its policy and that she could move schools.¹¹⁵ *Begum* was thus not a general proposition that prior conduct justifies curtailing rights, indeed in *Begum* there was (allegedly albeit questionable) a means of restoring the full right by moving schools. In any event the reasoning in *Begum* is no longer good law following the determination in *Eweida v United Kingdom*.¹¹⁶

A further problem with using the conduct/waiver analysis to support a public figure doctrine is that it is not necessary to do this. Indeed whilst it may be more likely that conduct which leads to the waiving of an aspect of a right arises in relation to a public figure, conceptually there is nothing distinct about the claim that prior conduct affects privacy rights that is unique to public figures. Thus if we wish to examine conduct as part of the reasonable expectation of privacy test, or as part of the balancing exercise, we can look at those matters directly; in fact we already have mechanisms for doing so.¹¹⁷

Arguments based upon hypocrisy raise similar issues. This reasoning was implicit in the concession in *Campbell v MGN* that once Naomi Campbell had made statements that she did not take drugs she could not rely upon the right to privacy to prevent the press from correcting this.¹¹⁸ It was also suggested in *Richard v BBC* that rights may be waived where the person has “adopt[ed] a public stance which would be at odds with the privacy rights claimed”.¹¹⁹ The need to combat hypocrisy does not, however, justify examining public figure status as part of the reasonable expectation of privacy test, nor under the notoriety criterion. First, there is nothing about hypocrisy that is unique to public figures, thus if we want to tackle hypocrisy we should do so directly and make it a criterion that is applicable to all. We should also consider what amounts to hypocrisy, in particular whether it is contingent upon an individual *actively* seeking to present him or herself in a particular light, and when we should be concerned about it, no one acts consistently all of the time so when is inconsistency a problem and why?¹²⁰ Second, the possibility of hypocrisy

¹¹⁵ *R. (on the application of Begum) v Denbigh High School* [2006] UKHL 15.

¹¹⁶ *Eweida v United Kingdom* (2013) 57 EHRR 8.

¹¹⁷ Within the reasonable expectation of privacy test the courts are already directed to consider “the absence of consent and whether it was known or could be inferred” and within the balancing criterion “prior conduct” forms a separate criterion.

¹¹⁸ *Campbell* [2004] UKHL 22.

¹¹⁹ *Richard* [2018] EWHC 1837, at [256].

¹²⁰ E. Goffmann, *Presentation of the Self in Everyday Life* (1990, London).

tells us nothing about whether a matter is private or not, on the contrary one may well feel compelled to act hypocritically precisely because a matter is very private. Consequently if hypocrisy is of concern it is not because the information is not private per se, but rather because hypocrisy may adversely affect societal interests in access to accurate information. Thus if and when hypocrisy needs to be addressed it should be as part of our analysis of the weight to be accorded to the competing rights and not through a reasonable expectation of privacy test.

As there is no compelling case that the interests of public figures are *not private, less private* or that aspects of the rights have been *waived* in some way, none of these arguments justify including public figure status in the reasonable expectations of privacy, nor reducing the weight accorded to the right through the notoriety criterion.

E. Weight Accorded to Freedom of Expression

An alternative possibility is that the doctrine is justified because of the importance of freedom of expression. It may therefore be argued that whilst there is no rationale for limiting or weakening the protection afforded to the right to privacy, the need to prioritise freedom of expression justifies developing a rule that favours freedom of expression (such as the position suggested in *Couderc*). We thus need to consider whether the public interest in freedom of expression provides a convincing rationale for the doctrine. Freedom of expression is linked to various higher-order values such as the pursuit of truth, democracy or self-fulfilment and autonomy, some of which are implicated in assertions that public figures are different.¹²¹

I. Truth

The pursuit of truth and the risk that limits on freedom of expression pose to that quest is one of the principal arguments against restrictions on freedom of expression.¹²² In the context of public figures the search for *truth* is implicit in proclamations that the public has a “right to know”,¹²³ as well as more specific role model arguments¹²⁴ and claims of hypocrisy,¹²⁵ all of which assume that the public has an interest in knowing “the truth” about a public figure. The difficulties associated with the truth rationale are well known¹²⁶; it is questionable whether there is such a thing as “the truth”, and this is evidently problematic when it is used in an essentialist way vis-à-vis an individual’s identity. When it is claimed that we need

¹²¹ E. Barendt, *Freedom of Speech*, 2nd ed. (2005, Oxford).

¹²² J. Milton (2014, London), *Areopagitica: A Speech for the Liberty of Unlicensed Printing* (1644); J.S. Mill (2015, Oxford), *On Liberty* (1859).

¹²³ *Couderc* [2016] EMLR 19.

¹²⁴ *Campbell* [2004] UKHL 22.

¹²⁵ *Ibid.*; *Ferdinand* [2011] EWHC 2454 (QB).

¹²⁶ For discussion, see Barendt, *Freedom of Speech*.

access to information about a public figure that is behaving in a hypocritical way, or has presented him or herself in a false light, this is premised upon assumptions that there is a true persona of the public figure and that the public needs to know what that persona is, both of which are assumptions that we might wish to challenge. Undoubtedly, there are factual scenarios in which the public's perception needs to be corrected, but this can be addressed by examining whether publication contributes to a debate of general interest. Moreover, there are two further reasons why the truth rationale cannot justify a rule that freedom of expression should only cede where there is no public interest in publication. The first is that a truth rationale would assume that there is always a public interest in freedom of expression, thus rendering the distinction redundant. The second is that the truth rationale applies equally to the personal information of private individuals, hence it does not support altering the rules only in cases concerning public figures.¹²⁷

2. *Democracy*

We are on potentially stronger ground if we seek to premise the doctrine on the importance of freedom of expression to democracy. The *democratic* argument asserts that knowing what our elected officials are up to is a vital part of democracy. Yet whilst we probably all agree that we need to know what officials are doing when their activities affect their public office, it is likely that there will be considerable disagreement as to when conduct is relevant to public office. Frederick Schauer argues that it is precisely because we will disagree on this that “we cannot predetermine what information the voting public should consider relevant to choosing their elected officials”.¹²⁸ Thus even if we consider sexual orientation irrelevant to whether someone is suitable for public office, it is undemocratic to deprive the electorate of making a decision based upon criteria with which we disagree.¹²⁹ Others dispute this on the basis that we are committed to a tolerant liberal model and allowing “citizens to appeal to material that is dysfunctional to liberal politics . . . violates the liberal commitment to equal liberty”.¹³⁰ Let us assume, however, that we accept Schauer's argument that the public has a democratic interest in access to an elected official's personal information, does this justify the public figure doctrine?

An obvious challenge in seeking to justify the doctrine with the democratic argument is that the democratic argument only extends to elected officials not to the broad range of persons captured by the Court's current

¹²⁷ See all G. Phillipson *‘Press Freedom, Public Interest and Privacy’* p.157.

¹²⁸ Schauer, “Can Public Figures Have Private Lives?”, p. 303.

¹²⁹ *Ibid.*, at pp. 300–6.

¹³⁰ D. Mokrosinska, “How Much Privacy for Public Officials?” in B. Rössler and D. Mokrosinska (eds.), *Social Dimensions of Privacy: Interdisciplinary Perspectives* (2015, Cambridge).

approach, although we could overcome that by restricting the definition of a public figure. A more fundamental problem is that we already accommodate the democratic interest when considering whether disclosure contributes to a debate of general interest and thus do not need a public figure doctrine for these purposes. This is evident in the Court's reasoning under the "debate of general interest" criterion which emphasises that "the public has a right to be informed", and that "this is an essential right in a democratic society which, in certain special circumstances, can even extend to aspects of the private life of public figures".¹³¹ Thus whilst Schauer's reasoning may support giving greater weight to the "debate of general interest" criterion it does not justify the position in *Couderc*. Indeed there are two further problems with using the democratic argument to justify that approach. The first is that Schauer accepts that the democratic argument must be evaluated against other competing interests and does not argue that it trumps other issues.¹³² This includes the right to privacy; a right that is also important in a democratic society.¹³³ This provides an important counter-weight to any notion that we should presumptively tilt the balance towards freedom of expression. The second problem with using the democratic argument to justify the position in *Couderc* is that Schauer's argument hinges upon the notion that there is always a public interest in access to personal information about elected officials. On this premise the position in *Couderc* would be redundant as there could never be a situation in which there is no public interest in disseminating information about elected officials and thus freedom of expression would always triumph, leaving no scope for considering the importance of the right to privacy at stake.

A further variation of the democratic argument is the idea that the press performs an important vital watchdog function in a democracy and that we must therefore strive to preserve the press. This may arise in the guise of concerns that the commercial viability of the press depends upon publishing information about public figures¹³⁴ or in the notion that rights have a chilling effect on press freedom. As Gavin Phillipson has argued in the absence of clear evidence it is questionable whether the commercial viability of the press really depends upon publishing information about public figures.¹³⁵ It is also questionable whether privacy rights have a chilling effect on press freedom. The chilling effect argument has taken root in defamation law, but it is important to consider why this is not directly applicable to privacy law. One of the rationales for the doctrine in defamation law, as most

¹³¹ *Couderc* [2016] EMLR 19, at [100].

¹³² Schauer, "Can Public Figures Have Private Lives?", p. 308.

¹³³ R. Gavison, "Privacy and the Limits of the Law" (1980) 89 Yale L.J. 421, at 455.

¹³⁴ See the dicta of Baroness Hale in *Campbell* [2004] UKHL 22, at [143]; and Lord Woolf in *A v B* [2002] EWCA Civ 337, 11(xi), where he declared that the "courts must not ignore the fact that if newspapers do not publish information that the public are interested in, there will be fewer newspapers published, which will not be in the public interest".

¹³⁵ G. Phillipson 'Press Freedom, the Public Interest and Privacy', p.144.

clearly articulated in the US, is the notion that public figures have other mechanisms for protecting their reputation.¹³⁶ Yet as our own courts have acknowledged, reputation and privacy are different in this respect, as reputation is something that can, in principle, be restored (although there may be considerable challenges in doing so), whilst privacy once lost can never be restored.¹³⁷ We should therefore be extremely cautious about migrating rationales for prioritising freedom of expression from one context to another.

3. *Self-Fulfilment*

Finally, we may turn to broader accounts of freedom of expression, in particular those that claim that access to the private information of others contributes to the audience's *self-fulfilment*. Paul Wragg presents the best version of this argument claiming that "everyday speech" plays an important role in forming our opinions, that much of this concerns celebrities and that individuals in society develop and mature as a result of access to this information.¹³⁸ He argues that the value of freedom of expression in privacy cases is not limited to the democratic process, but is instead linked to the audience's personal development. This broader explanation extends beyond elected officials and is a better fit with the current broad public figure approach. There are a number of reasons, however, why we cannot draw upon this analysis to justify the public figure doctrine.

At a conceptual level Wragg's theory might be contested in two important respects. First, we may question whether Wragg is right to assume that privacy-invading expression "encourage[s] self-reflection, personal growth and maturity in its audience", when it may be counter-argued that such attributes are impeded by our privacy-invasive celebrity culture.¹³⁹ Second, even if Wragg is right that access to this information facilitates the dignity and self-growth of the audience, we might (as others have done) question whether that should be prioritised over and above the dignity and self-growth of the privacy seeker that is violated as a result.¹⁴⁰ In any event, even if we overcome these doubts and accept that the audience benefits from access to this type of expression, this would not necessitate a public figure doctrine. Indeed whilst Wragg focuses on public figures,¹⁴¹ there is nothing that intrinsically limits the potential benefits

¹³⁶ *Gertz v Robert Welch* 418 U.S. 323, public figures have greater access to "the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy".

¹³⁷ See *Mosley* [2008] EWHC 1777; K. Hughes, "Privacy Injunctions No Obligation to Notify Pre-Publication" (2011) 3(2) J.M.L. 179; A. Scott, "Prior Notification in Privacy Cases: A Reply to Professor Phillipson" (2010) J.M.L. 49; G. Phillipson, "Max Mosley Goes to Strasbourg: Article 8, Claimant Notification and Interim Injunctions" (2009) J.M.L. 73.

¹³⁸ Wragg, "The Benefits".

¹³⁹ *Ibid.*, at p. 194.

¹⁴⁰ G. Phillipson, "Leveson, the Public Interest and Press Freedom" (2013) J.M.L. 220, at 237–8.

that he identifies to information concerning public figures. Certainly if the benefit of access to personal information is that it can help us to “feel better about [our]selves, normalize behaviour, and develop our ‘sense of confidence’”,¹⁴² that it enables “a deeper understanding of what it is to be a member of society and to be human”,¹⁴³ and that we “learn something valuable that we might apply to [our] own everyday lives”¹⁴⁴ then we may benefit equally, or perhaps even more so, from access to privacy-invading expression about friends and colleagues. Wragg’s analysis thus provides support for according greater weight to freedom of expression in general, rather than a distinction between public figures and private individuals.

Where we may seek to invoke Wragg’s analysis is to support the suggestion in *Couderc* that we should prioritise freedom of expression. Wragg suggests that “privacy-invading expression should only be interfered with in narrow circumstances where the expression is seriously harmful, such that it amounts to violence or coercion (such as blackmail), or because it touches the inner core of intimacy”.¹⁴⁵ One might wish to challenge the balance that he strikes between the two rights, but in any event it is not the same as the position suggested in *Couderc*. Wragg leaves (albeit very narrowly confined) some scope for an assessment of the importance of the right to privacy, whereas the position suggested in *Couderc* focuses entirely on whether there is a public interest in expression. Moreover, if we seek to plug Wragg’s understanding of the importance of freedom of expression into the *Couderc* position then we run into the same difficulty that we encountered with both the truth rationale and the democratic rationale, namely that such theories assert that there is always a public interest in freedom of expression. Importing Wragg’s explanation of the importance of freedom of expression into the *Couderc* position would thus mean that freedom of expression would always trump the right to privacy. A position that does not sit well with the Court’s analysis in *Mosley*.¹⁴⁶ Yet Wragg (like Schauer) accepts that the benefits of freedom of expression fall to be evaluated against other competing interests, and does not argue that freedom of expression should trump privacy in this way.¹⁴⁷ Thus if we wish to address the benefits that Wragg identifies we should give greater weight to the public interest in publication in the balancing exercise. Indeed Wragg clearly explains how the benefits that he articulates are matters that can (although we might dispute whether they should be) taken into account when considering the public interest in publication.¹⁴⁸ Hence Wragg’s argument for

¹⁴¹ Wragg, “The Benefits”, p. 200.

¹⁴² *Ibid.*, at p. 194.

¹⁴³ *Ibid.*, at p.194.

¹⁴⁴ *Ibid.*, at p. 196.

¹⁴⁵ *Ibid.*, at p. 207.

¹⁴⁶ *Mosley* (2011) 53 EHRR 30.

¹⁴⁷ Wragg, “The Benefits”, p. 202.

¹⁴⁸ *Ibid.*

privacy-invading expression, whilst providing a better explanation of the potential assumptions that may have led to a public figure distinction does not itself necessitate examining public figure status as part of a reasonable expectation of privacy test, nor the notoriety criterion, nor the position suggested in *Couderc*.

It is therefore apparent that none of the arguments premised upon freedom of expression supports the position in *Couderc*, highlighting the extent to which the coupling of the public figure doctrine with the public interest assessment is ultimately a crude means of moralistic determination. Although Article 10 ECHR may often be weightier in the factual scenarios that arise in public figure cases that does not justify a decision to mandate a *lower* level of protection. On the contrary the fact that public figures may be more likely to lose out in the balancing process means that we can (and should) leave it to that process to resolve matters. The courts should thus reject the suggestion in *Couderc* that public figures will only have their right to privacy upheld if there is no public interest.

V. CONCLUSION

The Strasbourg Court has expanded and migrated the public figure doctrine far beyond its origins in politicians' defamation cases. Yet whilst the Court routinely states that public figures are not entitled to the same level of privacy protection there is considerable uncertainty as to what this means in practice, whom it affects and what justifies this move. A potentially very broad category of persons may be captured by this approach; whilst rights may be affected in three ways: (1) the scope of the right to privacy may be limited, (2) the weight accorded to the rights may be affected through the application of the notoriety criterion and (3) the balance between the rights may be altered through the development of a rule that freedom of expression will only cede to the right to privacy in public figure cases where there is no public interest in disclosure. This challenges important fundamental understandings of the conceptual framework of rights including the universality of rights, the non-hierarchical nature of the rights, the relationship between domestic law and the Convention and the process of resolving conflicts of rights. Yet if – as this article has argued – the public figure doctrine does not help with the process of evaluating rights and actually obscures the process, then it should be rejected. On closer inspection it transpires that it does not and cannot serve a useful function.

There are a number of propositions implicit in claims that different rules should apply to public figures; some are credible, others are not, but none of them necessitates using the fact that the applicant was a public figure to devalue or curtail the right to privacy, nor tilting the balance between the competing rights. Where such considerations come into play in individual cases these can be adequately (and, in fact, more appropriately) addressed

by looking directly at whether a given publication contributes to a debate of general interest and the corresponding weight to be given to Article 10 ECHR. They do not justify according *fewer* privacy rights or mandating a *lower* level of protection for a public figure's privacy. The courts should therefore reject the public figure doctrine and focus instead upon the relative importance of the rights and degree of intrusion into those rights a process that between aligns with the Convention rights framework and the values it represents. They should also be attune to the risks of migrating doctrines across the rights framework without adequate consideration of the normative values underpinning the rights and the processes of analysing rights.