

# The impact of the image on personal life: is current law out of focus?

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**Abstract:** Drawing upon empirical research carried out by the author, this paper demonstrates that the current law in England and Wales on privacy fails to provide appropriate recourse for a person who feels aggrieved at their photograph being taken and shared, particularly where this evokes emotions of embarrassment or humiliation. Whilst some improvements to the current law are discussed to improve protection for the photographed's privacy rights, the main conclusion suggests that a greater focus on education and guidance would be a pragmatic and cost-effective solution, with this shift in emphasis concentrating efforts on the actions of the photographer. In turn, this would protect the interests of the photographed as a form of preventative measure, rather than reactionary move.

**Keywords:** photographs, privacy, misuse of private information

## Is the current law out of focus?

Privacy concerns have long been related to the matter of taking and sharing photographs and images. However, this is an area where the law has struggled to find a solution, particularly in relation to unwanted, humiliating or embarrassing photographs. Except for harms which generally fall under specific criminal laws, or within the remit of misuse of private information (which in itself, is seen to be somewhat of an 'elastic' concept),<sup>1</sup> privacy protection is limited, and can leave individuals without an appropriate remedy.<sup>2</sup> Drawing upon empirical research including interviews and a research survey,<sup>3</sup> this paper provides a unique and insightful perspective from which to consider the practical understanding of privacy in England and Wales, its shortfalls, and areas where improvements are desirable. Ultimately, this article postulates that a greater focus on education and guidance can prevent many of these harms from arising in the first place.

Millions of photographs are taken and shared daily, the sheer quantity of information and images being shared online posing an immediate problem and the law struggling to keep pace of developments. Some 96% of respondents to the Law and Photography Research Survey carried out by the author (hereafter 'Research Survey') use mobile phones to take pictures; and 68% cameras. Social media is now engrained in our culture, and encourages individuals to share information about private lives, therefore it is not surprising to learn that 99% had shared images on social media.<sup>4</sup> This corresponds with Mills' argument that 'No interaction is deemed to have happened unless recorded by a photograph, a tweet or a status update'.<sup>5</sup> Reasons for taking pictures were explored in the Research Survey, the most popular being: for memories (91%); to capture moments (84%); for leisure (80%); and to share with others (74%). 80% took photographs daily or weekly, which underpins the idea that photography has a 'social aspect',<sup>6</sup> and fulfils emotional/psychological needs of the individual.

Technology challenges the concept of control, particularly within the context of images. Whereas in the past photographs were developed from negatives and a limited

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<sup>1</sup> *ZXC v Bloomberg L.P.* [2020] EWCA Civ 611 per Lord Justice Simon at [54].

<sup>2</sup> Harms that can arise through the taking/dissemination of images might include (and not all will be considered in this article): image-based abuse; identity theft; tracking; cyber-bullying; humiliation; embarrassment; social engineering; coercion and loss of anonymity. Sharing images can be particularly problematic for children, who have no control over these shared images.

<sup>3</sup> Carried out as part of a broader PhD project completed in 2018 which sought to establish levels of understanding of current law relating to photography, where the discrepancies between law and understanding exist, and how best to deal with the matter in the future. This included data from research interviews with three academics, two ex-politicians, one photography organisation, three journalists, one activist and one person who had been involved in an air disaster which was filmed by others ('experience'). The research survey had 189 respondents from both the general public and law students aged over 18 years old and based in England and Wales at the time of completing the survey. Further information on the methodology can be obtained by contacting the author.

<sup>4</sup> Research Survey, 'Social media sites used to share photographs', 180 responses.

<sup>5</sup> Max Mills, 'Sharing privately: The Effect Publication on Social Media Has on Expectations of Privacy' (2017) 9 *Journal of Media Law* 45.

<sup>6</sup> Liz Wells (ed), *Photography: A Critical Introduction* (3<sup>rd</sup> ed, Routledge, 2004) 20.

number of copies created, digitalisation has caused a significant shift in how images are stored and shared, especially with the development of social media. For example, the potential for being 'tagged' in photographs on social media may subsequently lead to the possibility of being recognisable, and the 'oversharing' of information means that ultimately the poster of those images may have 'less control over the audience',<sup>7</sup> as images can be disseminated quickly on a widespread scale. The idea that a person's privacy interests can be used to control what information is revealed about oneself is intrinsic to understanding the individual's relationship with the image, but it is also important to acknowledge that one's rights can be impacted upon by the actions of others. As worrying it as it may seem, it has been suggested by Oswald et al, that '...it could even be the case that 'Generation Tagged' would be regarded as having no reasonable expectation of privacy at all because of the actions of others'.<sup>8</sup>

The widespread sharing of images can lead to breaches of privacy, but an individual finding their personal information shared may have very limited remedies available to them. Combined with the potentially high costs of bringing a privacy action, it can be seen how non-legal options would be preferable. The author's empirical research demonstrates that (i) there is little understanding of the concept of misuse of private information in practice; (ii) further clarity of the law would be beneficial, e.g. in relation to the role and relevance of consent; (iii) the law is not necessarily the best route of progression in this area for individuals, and (iv) guidance and education are a more effective solution.

Part I focuses on both the current understanding and shortcomings of current privacy law, with Part II exploring non-legal options that could be implemented and developed in the future.

## Part I – The blurry lines of privacy

The first area explored with interviewees and respondents to the Research Survey was their understanding of law in relation to photography/privacy. The data obtained helped establish where the law is clear and where areas of confusion arise.

The following statements were put to survey respondents to gauge their understanding:

- i. It is legal to take photographs of anybody in the street.
- ii. I need an identifiable person's permission to publish an image of them on the internet.
- iii. Images I take belong to me.

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<sup>7</sup> Jacob Rowbottom, 'To Rant, Vent and Converse: Protecting Low Level Digital Speech' (2012) 71 Cambridge Law Journal 355, 366.

<sup>8</sup> Marion Oswald, Helen James and Emma Nottingham consider 'Generation Tagged' to be the youngest members of 'Generation Z', who, although adept at using technology, may have little awareness of the impact of social media on their privacy, 'The Not-so-Secret Life of Five-Year-Olds: Legal and Ethical Issues Relating to Disclosure of Information and the Depiction of Children on Broadcast and Social Media' (2016) 8 Journal of Media Law 198, 199.

- iv. Images I take belong to the person photographed.

The results make for interesting reading:

- i. Over 50% of respondents were undecided/disagreed with the statement 'It is legal to take photographs of anybody in the street', when this is an accepted part of everyday life in today's society.<sup>9</sup>
- ii. 60% of respondents agreed/strongly agreed that an identifiable person's permission would be required to publish an image of them on the internet, when the law rarely requires this to be the situation.<sup>10</sup>
- iii. 19% were undecided/disagreed with the statement that 'Images I take belong to me' - when copyright law clearly states that the image belongs to the photographer.<sup>11</sup>
- iv. Just under 40% were undecided or agreed with the statement 'Images I take belong to the person photographed', in contrast to the position under current law which does not allow for image rights.<sup>12</sup>

These responses demonstrate that current law is not clearly understood, yet this is perhaps not unexpected as these are areas where much is dependent upon the circumstances. As Bessant averred, when even the 'professionals' do not always understand the law,<sup>13</sup> it is hardly surprising that the public struggle to comprehend it. Interviewees also saw this as an area where confusion was rife, with one ex-Journalist commenting 'I don't think they [the public] understand privacy at all...' and a representative from a Photographic Organisation commented '...at the moment a lot of people aren't clear, or think they can't photograph. An ex-politician interviewee echoed these sentiments, saying 'I think that it's very unclear, and certainly lots of people have views on when photographs can and cannot be taken, for example, when you don't correspond with what the law actually is, and I think that's very problematic'. Collectively, these points strongly emphasise the need for education and guidance on the matter.

Important distinctions need to be made between something that is generally understood as 'private' in everyday life, and something that is legally recognised as being embodied within the spirit of 'private life' as protected under Article 8 (Right to respect for private and family life, home and correspondence) of the European Convention on Human Rights (hereafter ECHR). Whilst an individual may *feel* that any information about themselves which they do not wish others to know is private to them and thus they would *choose* not to share this with others, legally protection has traditionally been available in somewhat more limited circumstances. With no law of

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<sup>9</sup> Photographs taken of twin children of a celebrity couple in a New Zealand street did not breach their privacy rights: *Hosking v Runting* (2003) 3 NZLR 385, 415 at [138], confirmed in *Campbell v MGN* [2004] UKHL 22 Lord Hope at [122].

<sup>10</sup> This is a grey area, as permission may be required in some situations, e.g. data protection or child protection, but it is not a general requirement.

<sup>11</sup> Under s4(1)(a) of the Copyright, Designs and Patents Act 1988, a photograph is an "artistic work" with copyright subsisting in it under s1(1)(a).

<sup>12</sup> In England and Wales, there is currently no provision for image rights.

<sup>13</sup> A study carried out in 2014 found that local authorities' understandings of the law varied significantly: Claire Bessant, 'Data Protection, Safeguarding and the Protection of Children's Privacy: Exploring Local Authority Guidance on Parental Photography at School Events' (2014) 23 Information and Communication Technology Law 256.

privacy *per se* in English and Welsh law, development has taken a piecemeal approach with, most fundamentally for the purposes of this article, protection given through the tort of ‘misuse of private information’, deriving from Article 8 of the ECHR and developed in the leading case of *Campbell*.<sup>14</sup>

Although the matter of what is ‘private’ is a broad question,<sup>15</sup> certain categories of information have been held to be private, including health<sup>16</sup> and sexual activities.<sup>17</sup> Attempts to neatly categorise information into ‘public’ or ‘private’ have been criticised; for example, Selinger and Hartzog argue that to attempt to do so is inadequate, rather there being a ‘continuum of obscurity’ that ranges from information which ‘we’re shouting from the rooftops and want to be absolutely transparent,’ to that which ‘we keep to ourselves and want to be kept absolutely secret’.<sup>18</sup> More broadly, the right to private life recognises that a number of aspects of an individual’s development require protection within this, from autonomy<sup>19</sup> through to protection of one’s reputation and image.<sup>20</sup> Another important distinction revolves around the idea of privacy as secrecy, and the manner in which the information has been withheld from others. Moreham describes the use of privacy ‘barriers’ in this vein,<sup>21</sup> suggesting that rather than the content or nature of the information being private, it is private due to it being something that others should not know or access, e.g. information or images that are password protected to deter others from access.<sup>22</sup>

When images of individuals are involved, there are sensitivities surrounding the taking and publication of such images. ECtHR jurisprudence clearly includes the right to protection of one’s image, as set out in *Von Hannover*:

[F]reedom of expression includes the publication of photos...This is nonetheless an area in which the protection of the rights and reputation of others takes on particular importance, as the photos may contain very personal or even intimate information about an individual or his or her family...<sup>23</sup>

Further clarity is provided through the *Von Hannover* cases<sup>24</sup> and, following *Von Hannover v Germany No. 2*, the Court laid down criteria to be applied when balancing

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<sup>14</sup> *Campbell* (n 9).

<sup>15</sup> *Murray v Big Pictures* [2008] EWCA Civ 446 at [36].

<sup>16</sup> *Campbell* (n 9).

<sup>17</sup> *Mosley v News Group Newspapers* [2008] EWHC 1777 (QB).

<sup>18</sup> Evan Selinger and Woodrow Hartzog, ‘Obscurity and Privacy’ [2014] Routledge Companion to Philosophy of Technology 1, 4.

<sup>19</sup> See *Pretty v United Kingdom* (2002) 35 EHRR 1 at [61] and *Christine Goodwin v UK* (2002) App No 28957/95 ECHR 588 at [90].

<sup>20</sup> See *Reklos and Davourlis v Greece* [2009] ECHR 200 at [40]. Photographs were taken of a baby in a sterile unit in a Greek clinic to which only the staff had access, by a professional photographer as part of a photography service offered to clients, without the knowledge of the parents. The clinic refused to hand over the negatives to the parents. The key points emphasised were the lack of parental consent, and potential future use of the negatives. The Greek government argued that since the photographs had not been published, the ‘private life’ of the baby was not an issue, and that the baby was too young to sense any infringement of rights. However, the ECtHR found otherwise, highlighting how Article 8 protects multiple aspects of the individual, from personality to the image.

<sup>21</sup> Nicole Moreham, ‘Privacy in Public Places’ (2006) 65 Cambridge Law Journal 606, 621-632.

<sup>22</sup> This is an area where the law has been more reticent to provide protection, Moreham argues for a *physical* privacy action to cover such situations – see Nicole Moreham, ‘Beyond Information: Physical Privacy in English Law’ (2014) 73 Cambridge Law Journal 350, 351.

<sup>23</sup> *Von Hannover v Germany (No 2)* [2012] EHRR 15 at [103].

<sup>24</sup> *Von Hannover v Germany* [2004] EMLR 379; (2005) 40 EHRR 1; *Von Hannover v*

Articles 8 and 10<sup>25</sup> of the ECHR.<sup>26</sup> Under the laws of England and Wales, privacy protection is reliant upon the concept of the claimant having a ‘reasonable expectation of privacy’, with two related questions asked:

- (1) Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy, e.g. Is Article 8 ECHR (the right to respect for private and family life) engaged?<sup>27</sup>
- (2) If so, does this expectation of privacy outweigh the publisher’s Article 10 ECHR rights to freedom of expression?<sup>28</sup>

Although it has been emphasised how establishing a reasonable expectation of privacy takes into account all the circumstances of the case,<sup>29</sup> the need and sensibility of such a test has been questioned,<sup>30</sup> particularly in circumstances where information is obviously private. A threshold of seriousness must also be attained to receive protection.<sup>31</sup> If, as outlined in *ZXC*, there is no ‘reasonable expectation of privacy’ or ‘legitimate expectation of protection’ (the tests being synonymous), ‘there is no relevant interference with the personal autonomy of the individual and article 8.1 is not engaged’.<sup>32</sup> If there is such an expectation, it is for the defendant to justify the interference.

A key thread throughout is the *control* that an individual exercises over their personal information – particularly their image - based within the concept of autonomy. As provided by Raz’s autonomy theory:

The autonomous person is a (part) author of his own life. The ideal of personal autonomy is the vision of people controlling to some degree, their own destiny, fashioning it through successive decisions throughout their lives.<sup>33</sup>

However, here emerges a conflict; both the *photographer* and the *photographed* will wish to have control of *what* happens to their image, *who* gets to see it, and *who* benefits from it. They will not necessarily have the same aims and objectives of control, and this can result in a clash of rights, leading to the ultimate question: ‘...who should have rights in relation to photographs – those who take the pictures or those ‘snapped at’?’<sup>34</sup> Having control over one’s *own* image would suggest that an individual

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*Germany (No. 2)* (n 23). 15; *Von Hannover v Germany (No. 3)* (2013) Application No.8772/10.

<sup>25</sup> Freedom of expression – European Convention on Human Rights 1950.

<sup>26</sup> See *Axel Springer AG v Germany App no 39954/08* (2012) 227 ECHR at [89]; *Von Hannover v Germany (No.2)* (n 23).

<sup>27</sup> This considers what a reasonable person of ordinary sensibilities would feel if placed in the same position as the claimant and faced with the same publicity, *Campbell* (n 9) Lord Hope of Craighead at [99].

<sup>28</sup> *Campbell* (n 9) Lord Nicholls at [20].

<sup>29</sup> *Murray v Big Pictures* (n 15) at [36].

<sup>30</sup> See for example Rebecca Moosavian, ‘Stealing ‘souls’? Article 8 and photographic intrusion’ (2018) Northern Ireland Law Quarterly, 69(4): 531, 546 and Eric Barendt, ‘Problems with the “reasonable expectation of privacy” test, (2016) Journal of Media Law, 8 (2), 129-137.

<sup>31</sup> See *R (Wood) v Commissioner of Police of the Metropolis* [2010] 1 WLR 123 at [122].

<sup>32</sup> *ZXC v Bloomberg L.P* (n 1) at [46].

<sup>33</sup> Joseph Raz, *The Morality of Freedom* (1<sup>st</sup> Edition, Oxford University Press, 1986) 369.

<sup>34</sup> Jessica Lake, ‘Is It OK for People to Take Pictures of You in Public and Publish Them?’

(*The Conversation*, 27 May 2014) <<http://theconversation.com/is-it-ok-for-people-to-takepictures->

has the choice over *when* or *how* images of themselves be shared – but, as illustrated above, the Research Survey respondents found the legal position over ownership or use of images unclear. In *Weller*,<sup>35</sup> one of the reasons given by Paul and Hannah Weller for bringing a privacy action was to *control* the use of images of their children.<sup>36</sup> An ex-journalist interviewee suggested that it is important in today's society to give individuals control over whether their image is captured:

I think it's just a sign of the times and it's making people think about whether they want to or not...It's not actually discouraging them, it's just reminding them that if they don't want to be part of the digital record, they should say so, otherwise it's presumed they will be.

The antithesis to having control is the possibility of losing control over one's image. Images have the potential to reveal intimate information and details about a person which might not be revealed through other forms of communication. As one interviewee, who had been involved in a disaster where graphic images were spread online, explained:

...there is a sort of sense, that we understand pretty well as a society. If you go to the doctors, when you come back, someone doesn't go – "What's wrong with you? Tell me about it"...There are some barriers there, but we seem to have lost that with images.

Photographs in this context may include images that are distributed with the aim of humiliating or harming a person, often through doctored, hacked or stolen images. Seeing privacy as something worth controlling assumes there is value in retaining anonymity (security through obscurity),<sup>37</sup> but photographs have the potential to remove this anonymity, they establish a person's movements and location at a particular time.

Children's privacy rights are seen as particularly important, though controversial. Paternalism suggests that children are to be treated differently from adults, as it is assumed that they lack maturity and do not have the capacity to make decisions. This is reflected in the law's approach towards children's privacy, which corresponds with Article 3(1) of the Convention of the Rights of the Child, giving the child the right to have his or her best interests assessed and taken into account.<sup>38</sup> Key difficulties concern the potential embarrassment that may be caused to a child in the future, and

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of-you-in-public-and-publish-them-27098> accessed 19 April 2021.

<sup>35</sup> *Weller & Ors v Associated Newspapers Ltd* [2015] EWCA Civ 1176. The defendant (Associated Newspapers Ltd) was found liable for misuse of private information and breach of the DPA 1998. The article was published in the Mail Online headed 'A family day out', which showed Weller and his children out shopping in the street and relaxing in a café. Seven unpixelated photographs were published, despite the fact that there had been no parental consent, Weller had requested that the photographer stop, and an assurance had been given that the photographs would be pixelated. Damages were awarded in respect of publication of the photographs, despite the fact that there was nothing inherently private about them, save for the fact that they showed the children's faces, a range of emotions and that the children were identified by name.

<sup>36</sup> *Weller* (n 35).

<sup>37</sup> This is 'the idea that information is safe—at least to some degree—when it is hard to obtain or understand' – see Evan Selinger and Woodrow Hartzog, 'Obscurity and Privacy' (2014) Routledge Companion to Philosophy of Technology 1, 2.

<sup>38</sup> UN Convention on the Rights of the Child 1989.



whether the child knowingly seeks publicity or whether this happens through the actions of their parents.

Following *Reklos*<sup>39</sup> and *Weller*,<sup>40</sup> it appears that a child's Article 8 rights may be engaged through the taking of an image of the child's face or revealing the name of the child.<sup>41</sup> To date, an equivalent privacy right has not been found in similar circumstances for adults. This is despite the fact that the court ruled in *Murray* that the claimant being a child would not in itself be a reason to depart from the reasonable expectation of privacy test, although it could be a relevant factor.<sup>42</sup> The child may not even have been aware that the photographs had been taken or existed, as in both *Reklos* and *Weller* the children were too young to appreciate the effect of being photographed.

The phenomenon of 'sharenting' provides particular difficulties. As articulated by Steinberg, 'There is no "opt-out" link for children and split-second decisions made by their parents will result in indelible digital footprints' for the children.<sup>43</sup> In June 2018 the UN Special Rapporteur Joseph Cannataci said that 'strong guidelines' would be needed in order to preserve the rights of children whose parents upload video and images of them online.<sup>44</sup> It is likely that even those without a social media account are likely to have an online presence through the accounts of family and friends.<sup>45</sup> This can cause issues, particularly in the context of the parent/child relationship, through competing interests. Indeed, both parties' Article 8 rights may conflict with one another, e.g. the parent's right to family life/self-expression in creating and possessing family photographs, as opposed to the child's right to privacy in not wanting them shared. Although it can be argued that it is important for individuals to know what their families looked like in the past, in line with the cultural view that sees photography as 'irreplaceable and amongst people's most treasured possessions',<sup>46</sup> photographs of children posted online by parents can be problematic. Although Ofcom research from 2017 indicated that 56% of parents say they do not use social media to share, post or blog photos or videos of their children,<sup>47</sup> 'many parents will post hundreds of

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<sup>39</sup> *Reklos* (n 20).

<sup>40</sup> *Weller* (n 35).

<sup>41</sup> It is important to note that *Reklos* is an ECHR decision and may not be followed by the domestic courts, *Weller* is a domestic decision.

<sup>42</sup> *Weller* (n 35).

<sup>43</sup> 'Sharenting' is a term used to describe how parents share details of their children's lives online – see discussion by Stacey Steinberg, 'Sharenting: Children's Privacy in the Age of Social Media' (2017) 66 *Emory L.J.* 839, 842 & 844.

<sup>44</sup> Olivia Rudgard, 'Parents who share pictures of their children on social media putting their human rights at risk, UN warns' (*The Telegraph*, 29 June 2018)

< <https://www.telegraph.co.uk/news/2018/06/29/parents-share-pictures-children-social-media-putting-human-rights/> > accessed 21 April 2021.

<sup>45</sup> Zoe Williams, 'Why you shouldn't post photos of friends without permission' (*The Guardian*, 22 January 2019)

<<https://www.theguardian.com/media/shortcuts/2019/jan/22/why-you-shouldnt-post-photos-of-friends-without-permission-social-media-online>> accessed 21 April 2021.

<sup>46</sup> Joe Moran, 'Childhood and Nostalgia in Contemporary Culture' (2002) 5 *European Journal of Cultural Studies* 155, 161.

<sup>47</sup> Ofcom, 'Communications Market Report' (2017)

<[https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0017/105074/cm-2017-uk.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0017/105074/cm-2017-uk.pdf)> accessed 21 April 2021.

photographs of their children before they reach their fifth birthday',<sup>48</sup> with baby photos appearing on social media within an average of 57.9 minutes of their birth.<sup>49</sup> Depending on parental consent in such circumstances may be problematic: as Oswald et al caution 'We are concerned that relying on parental consent might not be a fair and ethical way of protecting the best interests of a child, when material on the Internet may have a long-term effect on the child, i.e. beyond the age that the child would gain capacity.'<sup>50</sup> This is an area where improved education, awareness and guidance could help encourage responsible sharing and protect the best interests of children.

## The power of the image

Few would dispute the power of the visual image, a point emphasised by Lord Nicholls's famous statement in *Campbell*, which serves as a reminder of the unique quality of images:

In general photographs of people contain more information than textual description. That is why they are worth a thousand words.<sup>51</sup>

Images cannot be unseen, and are able to 'give visual form to invisible power and make present what is absent'.<sup>52</sup> The competing interests of the photographer and photographed can create challenges, with the *sharing* or *publication* of images often causing more problems than the taking, in line with the persuasive New Zealand authority of *Hosking v Runting*<sup>53</sup> where the taking of photographs in the street was seen as an everyday occurrence. Therefore, publication of a photograph may be actionable where words alone would not be,<sup>54</sup> even where the information revealed by the photograph is already in the public domain. This distinction has been emphasised by the courts; for example, in *Campbell*, Lord Nicholls noted that it was the *publication* of the image that created the issue:

Miss Campbell, expressly, makes no complaint about the taking of the photographs. She does not assert that the taking of the photographs was itself an invasion of privacy which attracts a legal remedy.<sup>55</sup>

It would appear, therefore, that it is the *sharing* of personal images and information that may make an individual feel as though they have lost control, and there may be various reasons why a person might wish to control information about themselves. Typically, in the context of images of individuals, the concept of privacy applies to the

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<sup>48</sup> Claire Bessant, 'Sharenting: Balancing the Conflicting Rights of Parents and Children' (2018) 23 Communications Law 7, 7.

<sup>49</sup> Theo Merz, 'Babies Appear on Social Media within an Hour of Birth' (*The Telegraph*, 27 August 2013) <<https://www.telegraph.co.uk/technology/10268615/Babies-appear-on-social-media-within-an-hour-of-birth.html>> accessed 19 April 2021.

<sup>50</sup> Oswald (n 8) 218.

<sup>51</sup> *Campbell* (n 9).

<sup>52</sup> Costas Douzinas, 'The Legality of the Image' (2000) 63 Modern Law Review 813, 816.

<sup>53</sup> Photographs taken of twin children of a celebrity couple in a street in New Zealand did not breach their privacy rights: *Hosking v Runting* (2003) 3 NZLR 385, 415 at [138] confirmed in *Campbell* (n 9) Lord Hope at [22].

<sup>54</sup> See *Theakston v MGN Ltd* [2002] EWHC 137 (QB); *Campbell* (n 9).

<sup>55</sup> *Campbell* (n 9).

rights of the *photographed*, as opposed to the *photographer*. The *photographed* might wish to share information only with a certain group and not others, or desire to keep something private, but in an online world this is challenged on a daily basis. Technology and social media scholar boyd<sup>56</sup> describes the issue as ‘context collapse’ - the idea that, when online, a person may be talking to a number of individuals who would ordinarily be in different contexts offline and therefore subject to differing behaviour and vocabulary, for example work colleagues, family and friends - but differentiating between these groups online is more challenging.<sup>57</sup> The extent to which a person *should* have control over their personal information and who is able to access it has been an area where the courts have struggled to find a definitive answer.

Under the current law, there can be limited recourse for a person who feels ‘harmed’ by the use or sharing of their image by others. Whilst information can be harmful, humiliating or detrimental, if it does not meet the threshold of seriousness<sup>58</sup> it may not necessarily be *private* in the sense that it is protected by Article 8.<sup>59</sup> In some instances, such as *Weller*, the Courts have used misuse of private information to provide protection for individuals. Here, *Weller*’s children were able to claim damages for misuse of private information, despite there being nothing inherently private about the photographs.<sup>60</sup> However, the use of misuse of private information in this manner can lead to consequences that are two-fold, both of which are problematic:

- (a) Misuse of private information is being stretched to an extent where in some instances it becomes unrecognisable as a privacy interest in order to provide protection for individuals;<sup>61</sup> and
- (b) If the information revealed does not fall within any existing scope of action, the person photographed may be left without an appropriate or actionable remedy – for example, the concept of ‘stranger shaming’.

Whilst there may be some limited alternatives available outside of the realm of misuse of private information, including various criminal laws, intellectual property and communications offences, these will only apply in specific circumstances and will not be considered in this article, which will instead focus on privacy.

## Limitations of the law

Although privacy is a fluid concept that is developing with society, it has been demonstrated that it is hard to understand and limited in circumstances. For example, images that are humiliating or embarrassing but which do not contain private

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<sup>56</sup> boyd has deliberately opted not to capitalise her name: see ‘what’s in a name?’ ‘danah michele boyd’ <<http://www.danah.org/name.html>> accessed 19 April 2021.

<sup>57</sup> See danah boyd, ‘Coining Context Collapse (December 2013) <<http://www.zephoria.org/thoughts/archives/2013/12/08/coining-context-collapse.html>> accessed 19 April 2021.

<sup>58</sup> See *Wood* (n 31).

<sup>59</sup> Emily Laidlaw, ‘Online Shaming and the Right to Privacy’ (2017) 6 *Laws* 3, 6.

<sup>60</sup> *Weller* (n 35).

<sup>61</sup> For example, it may be questioned whether the issues in *Weller* (n 35) truly gave rise to privacy concerns, or whether it was about parents being able to control the dissemination of images of their children, something which was later admitted by the *Wellers*.

information may not receive the protection of the law. Take for instance, the ‘Women Who Eat on Tubes’ Facebook group from 2014,<sup>62</sup> where photographs were taken surreptitiously of women eating on the tube, then widely shared online for comment. Whilst such behaviour may seem morally questionable, there is currently minimal opportunity for the law to play a role. As Laidlaw notes, ‘Privacy has struggled with how to handle humiliation and whether to handle it at all’.<sup>63</sup> Whilst in this specific example there is the potential that the existence of such groups is discriminatory (against females), Article 14 ECHR can only be relied upon in relation to the enjoyment of some other substantive right in the Convention. It is unlikely another would apply, for example, it would be outside the scope of Article 8 protection.<sup>64</sup> Hargreaves remarks that ‘...privacy law of course offers no remedy to someone who feels anxiety or shame related to a general culture of objectification’.<sup>65</sup>

The challenges faced by the law can be illustrated through the phenomenon of ‘sharenting’ where both information and images of young people may be shared by their parents online, the knowledge of such behaviours only being established later in life.<sup>66</sup> Thus, a case can be made for (a) privacy to extend to cover such matters; (b) an alternative cause of action to provide recourse or (c) an emphasis on education and guidance to discourage the taking and sharing of such images (the preferred route). Moreham suggests the former - an expansion of privacy law – and that privacy should be interpreted as ‘desired inaccess or freedom from unwanted access’, putting forward an argument for a new *physical* privacy action in limited circumstances or, alternatively, an extension of the misuse of private information doctrine. This would be an intrusion-based tort,<sup>67</sup> making it an actionable breach of privacy for ‘unwanted watching, listening or recording, even if little information is obtained and none is disseminated’.<sup>68</sup> Whilst the creation of such an action is on first impression an attractive proposition, the consequences for freedom of expression could be problematic, and from the research carried out as part of this study it appears that a legal response would not necessarily achieve the desired outcome. The same could be true for developing an alternative cause of action, which would need to be carefully scoped to balance rights. However, Uelmen puts forward an interesting idea, with the creation of a tort of ‘objectification’ in US law, targeted towards ‘engaged spectators’ who opt to record behaviour rather than observing.<sup>69</sup> Uelmen’s proposal is quite

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<sup>62</sup> Sophie Wilkinson, ‘Women Who Eat On Tubes: “I Was Hurt and Humiliated When My Photo Appeared Online – I’m Never Going to Stranger-Shame Again”’ (*The Independent*, 9 April 2014) <<https://www.independent.co.uk/life-style/gadgets-and-tech/features/women-who-eat-on-tubes-i-was-hurt-and-humiliated-when-my-photo-appeared-online-im-never-going-to-9249512.html>> accessed 21 April 2021.

<sup>63</sup> Laidlaw (n 59) 6, 3.

<sup>64</sup> Article 14 ECHR provides for the prohibition of discrimination.

<sup>65</sup> Stuart Hargreaves, ‘I’m a Creep, I’m a Weirdo’: Street Photography in the Service of the Male Gaze’ (2018) 5 *The Chinese University of Hong Kong Faculty of Law Research Paper*, 2-3.

<sup>66</sup> See Steinberg (n 43).

<sup>67</sup> Closer to that seen in New Zealand under *C v Holland* [2012] NZHC 2155.

<sup>68</sup> Moreham, ‘Beyond Information’ (n 22) 351.

<sup>69</sup> Amelia Uelmen, ‘Crime Spectators and the Tort of Objectification’ *University of Massachusetts Law Review* (2017) Vol.12: Iss. 1,2, 75, 4. <<http://scholarship.law.umassd.edu/umlr/vol12/iss1/2/>> accessed 21 April 2021.

narrowly drawn but such a tort could be expanded to cover humiliating or embarrassing situations. Whilst both the above options would go some way to alleviating difficulties, the most practical and cost-effective solution would be through improved education and guidance, as outlined in Part II below.

## Part II: Building the case for developing non-legal solutions

What became clear from the responses to the Research Survey is that a *legal* answer is not necessarily required in such situations, just an *effective* solution, e.g. having the ability to remove images placed online without consent – thus privacy law is not always the answer or the most appropriate mechanism. Sometimes people just want an image removed, regardless of whether a reasonable expectation of privacy exists, but it seems that current take-down mechanisms fall short of providing an effective service to do this. It does, however, appear that progress is being made in this direction, with ongoing discussions regarding the UK Government’s Online Harms Bill, and latterly the Online Safety Bill which intends to impose a ‘duty of care’ on social media companies to prevent online harms.<sup>70</sup>

For the law to be effective, it is essential that there is a basic level of understanding, thus what constitutes ‘private’ was explored through the Research Survey. Respondents were asked to rank the factors set out in *Murray*<sup>71</sup> in order of importance to them, to gauge whether the test is (a) understood and (b) asks relevant questions. Below are the results, with each factor ranked from most important to least important.

Factors (n=130)	Attributes of the person	Nature of the activity	The place the photograph is taken	The nature and purpose of the intrusion	Absence of consent	The effect on the person photographed	The circumstances of the publication
Most important	1%	8%	31%	18%	28%	12%	7%
2 <sup>nd</sup> choice	3%	17%	21%	19%	21%	11%	10%
3 <sup>rd</sup> choice	9%	16%	12%	25%	18%	15%	8%
4 <sup>th</sup> choice	13%	13%	10%	22%	13%	20%	10%
5 <sup>th</sup> choice	12%	16%	13%	5%	10%	21%	19%
6 <sup>th</sup> choice	14%	20%	7%	8%	7%	17%	21%
Least important	49%	10%	7%	2%	3%	4%	25%

<sup>70</sup> See current progress here ‘Online Harms White Paper: Full government response to the consultation’ (15 December 2020) <<https://www.gov.uk/government/consultations/online-harms-white-paper/outcome/online-harms-white-paper-full-government-response>> accessed 21 April 2021.

<sup>71</sup> *Murray* (n 15) at [36].

## Figure 1: Findings from the Law and Photography Survey

The 130 responses identified two areas as priorities, seen as significantly more important than others, these being (1) **The place the photograph was taken** and (2) **The absence of consent**. The least important factor was seen as the attributes of the person, the responses indicating that whether a person is, for example, an adult, child, celebrity, alcoholic, or good Samaritan - should be largely irrelevant.

To consider the most important factors in greater depth:

### **(1) The place the photograph was taken**

The place the photograph was taken (or location) was seen as the most important or second choice by 52% of respondents – yet the public/private geographical differentiation is perhaps less useful in today's understanding of privacy. As has been seen through cases such as *Peck*,<sup>72</sup> it is not the location that is definitive of privacy, but the circumstances. *Peck* was captured on CCTV as he attempted to commit suicide. Although in a public place, there was a reasonable expectation of privacy, confirmed more recently in *Weller*. Although these can be attributable to the particular circumstances in each case, which relates to the idea of *privacy by circumstance*; as outlined in *von Hannover*, there is a 'zone of interaction with others, even in a public context, that may fall within the scope of private life'.<sup>73</sup> As emphasised in *ZXC v Bloomberg*, article 8 is 'the most elastic of rights' – as 'the circumstances in which there may be interference with a right to personal autonomy are variable; and the articulation of rights may change in response to changes in societal attitudes and developments in technology'.<sup>74</sup>

In *Weller*,<sup>75</sup> following the publication of photographs taken in a café, a privacy action was successful. The continued development of privacy in public places<sup>76</sup> leaves this area subject to even more confusion, despite Patten J's statement in *Murray*:

If a simple walk down the street qualifies for protection then it is difficult to see what would not. For most people who are not public figures in the sense of being politicians or the like, there will be virtually no aspect of their life which cannot be characterized as private. Similarly, even celebrities would be able to confine unauthorized photography to the occasions on which they were at a concert, film premiere or some similar occasion...Even after *von Hannover v Germany* there remains, I believe, an area of routine activity which when conducted in a public place carries no guarantee of privacy.<sup>77</sup>

An interviewee explained the fundamental difficulty in understanding privacy, commenting '...it's not like a light switch that you switch on and off' (Academic: ex-Journalist/Law). Similarly, Solove notes that the binary view of privacy is increasingly

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<sup>72</sup> *Peck v UK* [2003] EHRR 41.

<sup>73</sup> *Von Hannover v Germany* (n 23) at [50].

<sup>74</sup> *ZXC v Bloomberg L.P.* (n 1) at [54].

<sup>75</sup> *Weller* (n 35).

<sup>76</sup> See *Peck* (n 72).

<sup>77</sup> *Murray v Big Pictures* (n 15) Patten J at [65]-[66].

being abandoned.<sup>78</sup> Instead, it is more of a continuum, dependent on a variety of factors in each individual situation. These findings also reinforce the idea that the law no longer turns on the definition of public/private by location but more by virtue of the *circumstances*, there being 'no bright line which can be drawn between what is private and what is not'.<sup>79</sup> This view has been emphasised by the courts, who, in reference to the two categories of activity identified in *von Hannover*<sup>80</sup> (public and private), noted in *Murray* that 'We do not agree that it is possible to draw a clear distinction in principle between the two kinds of activity'.<sup>81</sup>

In most instances progression in such a manner is a logical development of the law, as a definition based on the public/private divide can be too rigid and runs the risk of over or under-protecting privacy but, on the other hand, this can lead to a lack of clarity. To date, privacy in public places has rarely been found unless there are aggravating circumstances, e.g. health, sensitive information, or the involvement of children, which serve to indicate that privacy interests might be engaged.

However, it is asserted that current case law gives rise to dual development of the law to provide:

- (1) Extension of privacy protection beyond private spaces; and
- (2) The creation of 'private space' in public.

With regard to the second point, Moreham argues that it is theoretically sound for a reasonable expectation of privacy to exist in a public place:

...first, because people can choose how much or how little of themselves they reveal in public and secondly, because it is always possible to disseminate an image of a person to a much wider audience than the one to which he or she was originally exposed. In other words, it does not follow from the fact that an individual is happy for some aspect of him- or herself to be observed by some members of the public in some contexts, that he or she must be prepared to have all aspects of him- or herself observed by the public at large in any context.<sup>82</sup>

The European Court of Human Rights (ECtHR) and domestic cases conflict on the matter. The ECtHR decision in *Lillo-Stenberg v Norway*<sup>83</sup> indicates that the creation of 'private space' in public would not be possible. In this case, two folk singers rowed out to an island and were married on National Trust property in Norway. A photographer used a long-lens camera from the publicly-accessible cliffs across the other side to take photographs, and the images were published in a magazine. The couple argued that this breached their Article 8 privacy rights, but the Norwegian Supreme Court and Strasbourg Court disagreed, holding it is not possible to create private space in public.<sup>84</sup> This is despite the fact that the public might reasonably understand a wedding to be a private occasion (which reflects the dissenting opinion in the Case), and the fact that the photographs were surreptitiously taken by a long-

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<sup>78</sup> Daniel Solove, *The Future of Reputation: Gossip, Rumor and Privacy on the Internet* (Yale University Press, 2008) 2.

<sup>79</sup> Christina Michalos, *The Law of Photography and Digital Images* (Sweet & Maxwell, 2004) 286.

<sup>80</sup> *Von Hannover (No. 1)* (n 24).

<sup>81</sup> *Murray v Big Pictures* (n 15).

<sup>82</sup> Moreham, 2006 (n 21) 620.

<sup>83</sup> *Lillo-Stenberg v Norway App No. 13258/09* [2014] ECHR 59.

<sup>84</sup> *ibid.*

lens camera. Meanwhile, domestically, *Weller*<sup>85</sup> appears to provide the potential for even innocuous photographs to engage a reasonable expectation of privacy in the future, given the lack of intimate details revealed and the images not being taken in a private place. Again, the concept of 'privacy by circumstance' could help to engage privacy rights. As a result, there seems to be a conflict between public and private *places*, as opposed to public and private *activities*.

## (2) **Absence of consent**

Absence of consent was the second factor highlighted by respondents to the Research Survey as being of crucial importance, with a total of 49% of respondents rating it the most important or second choice. When considering consent, the first point to note is that in today's society the nature of consent has changed, with many uses of the image now possible due to the potential for sharing information. Consent was mentioned numerous times by survey respondents who asserted that they did not mind the taking or sharing of photographs *so long as they had consented*. The role of consent was emphasised by a Journalist, who said:

I mean, all photographs are at the expense of somebody else, they're all kind of a violation of somebody's space...unless they specifically say, I'm going to take your picture, are you okay with that?

44% stated that they would not object to a stranger taking a photograph of them in the street, and 46% commented that it would depend on the circumstances, with only 10% objecting in all circumstances. The qualitative responses suggest that the majority took the viewpoint that if they were photographed incidentally as part of the background or if permission was sought this would not be a problem, whereas if they were identified or featured this would be more problematic. The respondents' views mirror the decision of the Court in *Weller*, who made a differentiation between shots of identifiable individuals and unknown crowd shots,<sup>86</sup> and also the decision of the ECtHR in *Peck*.<sup>87</sup>

Writing on the subject of consent in relation to *Peck*, Vaver outlines:

The claimant may have expected to be seen by the odd passer-by but not the millions of reader or viewers to which he was eventually exposed. The European Court of Human Rights said the council should have "asked or masked", i.e. either got the claimant's consent or taken steps to ensure his image was unrecognisable. So people on public streets are not fair game for every use a journalist or marketer can dream up for them.<sup>88</sup>

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<sup>85</sup> *Weller* (n 35).

<sup>86</sup> *Weller* (n 35) at [171].

<sup>87</sup> *Peck* (n 72).

<sup>88</sup> David Vaver, 'Advertising Using an Individual's Image: A Comparative Note' (2006) 122 Law Quarterly Review 362, 367.



Where consent is not given, e.g. in surreptitious photography, the key factors will be both the lack of *awareness* of an image being taken and, as a consequence, the lack of *consent* to the photograph.<sup>89</sup> Michalos notes that 'secret filming or photography of people in a public place can amount to infringement of Article 8 (1) even where there is no private element to the events filmed'.<sup>90</sup> However, when a person does not know that a photograph is being taken, they may not be aware of its existence until it is shared or potentially causes them some embarrassment. Particularly for the media, it is possible that public interest considerations might outweigh a lack of consent in terms of publication, but where privacy interests are dominant it will take strong justification for the material to be published without consent. If consent was a mandatory or legal requirement this would serve to better protect an individual's rights, but would come at a cost to freedom of expression.

Also of relevance to consent in relation to photographs is change of use. It is possible that an individual will consent to one use but not another, as a photograph can be used in a way that was not originally envisaged. The *Reklos*<sup>91</sup> judgment emphasised the importance of gaining consent at the time the picture was *taken*, as opposed to *publication*. It was noted how an action may be founded if a later use arises that was not originally planned. Consent therefore provides another way in which an individual can control the use of their image, but also highlights how the law cannot control everything, particularly in light of technological change, where digitalisation has removed the physical control that existed over photographs in the past. Whilst an image that remains on a person's camera, phone or personal device and reaches no further than that individual is unlikely to cause a problem, it is when it reaches a wider audience that difficulties occur. As emphasised in *Murray v Express Newspapers plc*:

The essence of the complaint in virtually all of these cases centres on the degree of publicity which the occasion photographed ultimately receives. A photograph taken by a member of the public which remains the property of that person and is at most shown to family and friends does not infringe any right of privacy because it does not lead to any real public exposure of the event portrayed.<sup>92</sup>

An error of judgment when posting something online which at the time may seem funny or entertaining can have long-lasting effects. Respondents' experiences of having had images shared on social media were explored, with 85% of respondents having been subject to this. Where permission was sought and the photographed remained in control of their image, responses tended to be more favourable, e.g. 'I like to be aware that it is being posted and therefore have some control', and 'Ok because I have said it's ok to share'. However, when it came to sharing without consent, some were opposed to it: 'I was quite angry about having my image shared on social media without my permission', 'lacking control' and 'annoyed'. Ironically, there appears to be a disconnect between people's expectations of privacy and how they act themselves, an interviewee from a Photographic Organisation observing:

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<sup>89</sup> See *Söderman v Sweden* [2013] App No 5786/08.

<sup>90</sup> Michalos (n 79) 369.

<sup>91</sup> *Reklos* (n 20).

<sup>92</sup> *Murray v Express Newspapers plc* [2007] EWHC Ch 1908 at [37].

I think people do have more of an expectation of privacy, but at the same time those same people are going to be the first people that are using their smartphones at a concert, or in public areas to take photographs in a way that would not have been done with more traditional cameras and equipment because, actually, your smartphone is always with you...A lot of people have an expectation of privacy, even if they are in a public space, but at the same time they're also photographing and taking pictures and then actually once those pictures go onto social media, then obviously there's no way then of pulling those back.

Both interviewees and respondents felt happier when consent was obtained and they were able to retain control over their image. Perhaps a middle-ground should be found, whereby rather than consent being required to take a photograph, consent is required to publish identifiable photographs of others on social media/media, especially given that Ofcom found that 75% of social media/messaging site users disagreed with the statement 'It is OK to share a photograph or video of other people without their permission'<sup>93</sup> and over 60% of respondents to the Research Survey thought you already needed an identifiable person's permission to share images online. However, again, consent would be difficult to enforce and could create a chilling effect on freedom of expression. A more preferable approach would be to encourage greater responsibility on the part of the photographer/sharer, thus enabling further control for the photographed.

Education and awareness could play a fundamental role in the shaping of social norms (explored further below), whereby it would become the social norm for photographs taken and shared without permission to be removed at the request of the photographed. Such a change in norm would encourage the obtaining of permission prior to both taking and sharing images – but in the event that this was not sought, it would give the photographed some way of having their image removed from public view (even if it did not contravene social media sites terms of use, which is often cited as the reason as to why photographs are not removed). Whilst reliant upon an individual to comply, and requiring knowledge of the existence of a photograph, such a solution would be both simple and cost-effective, and a step in the direction of giving greater control to the photographed.

The research findings demonstrate that everyday understanding may not correlate with the law and is an area where further clarity would be welcomed. Writing on the application of the reasonable expectation of privacy test, Moreham has criticised the courts for focusing on whether a person *can*, as a matter of fact expect privacy in the circumstances, when instead, they should focus on whether a person *should* expect privacy in the circumstances – to do otherwise may mean that an intrusive practice could lead to a lack of privacy protection becoming widespread. To alleviate this, she suggests adding the word 'protection' to the reasonable expectation of privacy test (to

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<sup>93</sup> Ofcom, 'Adults' Media Use and Attitudes Report' (2018)  
<[https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0011/113222/Adults-Media-Use-and-Attitudes-Report-2018.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0011/113222/Adults-Media-Use-and-Attitudes-Report-2018.pdf)> 147.

read: a reasonable expectation of privacy protection).<sup>94</sup> In an earlier work, Moreham helpfully put forward a number of factors that may contribute to whether a person has a reasonable expectation of privacy not to have images taken in public disseminated at large, including:

- i. The nature of location (whether only a few people could see/hear them);
- ii. The nature of the claimant's activity – whether intimate, embarrassing or traumatic (where she argues there should be a *presumed* reasonable expectation of privacy), or whether as a result of one drawing attention to oneself;
- iii. The way in which the image was obtained (e.g. was it obtained surreptitiously, using technological devices to break through self-presentation barriers or as part of a campaign of harassment?); and
- iv. The extent to which the publication focused on the claimant (whether the photographed is the principal subject, or incidentally captured).<sup>95</sup>

As the emphasis moves further away from locational or geographically based privacy ideas and increasingly becomes circumstantially based, providing greater clarity as to its application, this can only bring benefits. By acknowledging that the circumstances affect the outcome (as happens through the *Murray* factors), this would subtly change the focus away from the idea of information needing to be 'misused' (which is not always the case), and would create a better understanding of the tort. It would also help explain how the same physical location under different circumstances could lead to privacy in some situations, yet not others.

### Changing the focus: Suggestions for the future

Whilst the freedom to photograph has been rightly and fiercely defended, the current law on privacy is not in a satisfactory state. There remain significant gaps in protection, particularly for the non-famous, who may lack the means or methods to protect their privacy, despite the statement in *Sciacca v Italy*, which emphasises that the 'applicant's status as an "ordinary person" enlarges the zone of interaction which may fall within the scope of private life'.<sup>96</sup> This can particularly be the case for a member of the public who finds their photograph posted on social media, evoking emotions of fear, anger and discomfort. Consequently, they will not necessarily be seeking legal redress but a practical, cost-effective solution to protect their privacy. As outlined in 2012 by Phillips, there is a desperate need for:

A clear understanding of what is and what isn't private information; and clarity as to how the public interest is defined, so that if something is deemed to be private, then we are clear as to the circumstances in which it is appropriate to reveal it.<sup>97</sup>

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<sup>94</sup> Nicole Moreham, 'Unpacking the reasonable expectation of privacy test' (2018) L.Q.R., 134 (Oct) 651, 654-655.

<sup>95</sup> Moreham, 'Privacy in Public Places' (n 21) 621.

<sup>96</sup> *Sciacca v Italy* (2006) 43 EHRR 400 at [29].

<sup>97</sup> Gill Phillips, director of editorial legal services for the Guardian, 'Gill Phillips's Speech on Press Regulation at the Annual UCL/Bindmans Debate': (*The Guardian*, 8 February 2012) <<https://www.theguardian.com/gnm-press-office/phillips-speech-press-freedom-versus-privacy>> accessed 21 April 2021.

The question therefore remains: What can be done to increase an individual's control over one's image and thus right to privacy?

Research Survey respondents were asked "What should be the way to remedy a situation for a person who feels that their privacy has been infringed by the taking or publishing of images?" For 74% of respondents, the matter of primary importance was to prevent publication, with just 6% opting for monetary compensation and 5% an apology, demonstrating that preventing publication would be preferable to retrospective action, once again highlighting the need for education and guidance to ensure that one's privacy is not infringed in the first place.

### Accessibility of law

This debate no longer applies just to the traditional remit of the media vs. public figures, but to individual vs. individual, as anyone can now be the target of intrusion into their privacy, particularly through social media. However, as will be demonstrated, access to the law is very much geared towards the realm of the rich and famous, with the law's inaccessibility to the ordinary person, due to prohibitive costs, having been criticised. As Rowbottom explains, 'The debate about privacy and the press continues but, since *Campbell*, the terms of the debate have shifted'<sup>98</sup> from media intrusions through to the private individual:

Ordinary people have increasing power to gather information about people, disseminate that information and allow that information to be aggregated with similar information or posted on easily accessible sites.<sup>99</sup>

Bessant notes that the 'primary difficulty arises where the defendant publisher is an individual, with the misuse of private information tort having been designed to tackle media intrusion.'<sup>100</sup> Any solutions need to be both pragmatic and accessible to all.

### Increased role for social media platforms?

When a person loses control of an online image, boyd suggests that 'people feel as though their privacy has been violated when their expectations are shattered'.<sup>101</sup> Whilst expectations may be 'shattered', this does not necessarily mean that there will be a violation of one's privacy but, morally at least, an individual may feel harmed. It relates to how far an individual envisages information being shared, and whether there is an expectation that something will remain private once posted online, e.g. even if

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<sup>98</sup> Jacob Rowbottom, 'A Landmark at a Turning Point: Campbell and the Use of Privacy Law to Constrain Media Power' (2015) 7 Journal of Media Law 170, 178.

<sup>99</sup> Rowbottom, (n 98) 190.

<sup>100</sup> Claire Bessant, 'Photographs of Children in Public: The Wider Significance of Weller v Associated Newspapers' (2016) 27 Entertainment Law Review 197, 201.

<sup>101</sup> See danah boyd, 'Privacy and Publicity in the Context of Big Data' (Talk, North Carolina, 29 April 2010) <[www.danah.org/papers/talks/2010/WWW2010.html](http://www.danah.org/papers/talks/2010/WWW2010.html)> accessed 21 April 2021.

posted to a 'private' page,<sup>102</sup> it may be that individuals should be prepared for their information to be more widely shared than they might at first expect; indeed, social media terms of use emphasise that sharing on a potentially global scale is a real possibility.<sup>103</sup>

Respondents reported issues with getting photographs removed from social media. Whilst being able to 'de-tag' a photograph was a straightforward process, this did not always go far enough – with comments such as 'No action was taken by Facebook', 'it's easy to remove a tag but difficult to have it offline' and 'I think on a couple of occasions I have clicked that I do not like the image, the options social media sites give for removal are not always what you're looking for'. Ofcom research found that 'for many, retaining control of their online image is important', with 62% having 'untagged' themselves from photographs.<sup>104</sup> 39% of those surveyed by Ofcom did not feel that it was easy to delete information from the internet.<sup>105</sup> These findings cumulatively highlight two important issues, these being:

- (1) There is a level of apathy by individuals in respect of taking action or removing information online.
- (2) There is a lack of action by social media platforms once such issues are reported.

75% of respondents thought that social media sites should play a greater role in protecting privacy. This is especially important for the generations growing up with social media, particularly for those who, having found their personal information shared online, struggled to find an appropriate remedy. The 2018 Edelman Trust Barometer found that 70% of Britons believe that social media companies do not do enough to prevent illegal/unethical behaviour on their platforms,<sup>106</sup> and six in ten social media/messaging site users agreed that they usually accepted the terms and conditions without reading them.<sup>107</sup> Ofcom research has further found that more than half (56%) of those with a social media profile agreed with the statement: 'Once my post goes online I no longer have control over it', whilst 31% disagreed,<sup>108</sup> illustrating that there is still some way to go in terms of educating users, particularly given the statistics that 28% of users were happy sharing personal photographs and video on social media with 'everyone'.<sup>109</sup>

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<sup>102</sup> Moreham suggests that certain behaviours, such as having a closed page, could be interpreted as a 'privacy signal' – see Moreham, 'Unpacking the reasonable expectation of privacy test' (n 94).

<sup>103</sup> See for example Facebook, 'Community Standards'

<<https://www.facebook.com/communitystandards/>> accessed 19 April 2021 and Twitter, 'Twitter Rules' <<https://help.twitter.com/en/rules-and-policies/twitter-rules>> accessed 19 April 2021.

<sup>104</sup> Ofcom, 2017 (n 47), 32.

<sup>105</sup> Ofcom, 2018 (n 93), 146.

<sup>106</sup> --'Social Media on Notice as Public Calls Out Insufficient Regulation' (*Edelman Trust Barometer*, 2018) <<https://www.edelman.co.uk/sites/g/files/aatuss301/files/2019-05/Website-Edelman-Trust-Barometer-Press-Release-2018%20%281%29.pdf>> accessed 21 April 2021.

<sup>107</sup> Ofcom, 2018 (n 93), 143.

<sup>108</sup> *ibid* 145.

<sup>109</sup> *ibid* 148.

## Focus on the taking?

Although an area given limited attention through both the courts and literature thus far, a renewed focus on the matter of consent before *taking* images, prior to the *sharing*, would help to alleviate some of these problems. There has been the suggestion that the taking of photographs as an act in itself, without aggravating circumstances, can engage Article 8.<sup>110</sup> Although thus far this has only been the case in respect of children,<sup>111</sup> whether this extends more broadly in the future remains to be seen. This is again an area where improved guidance and awareness would result in photographs being taken in more appropriate circumstances.

Whilst, legally, consent is only required in a few situations (such as under Data Protection law), obtaining consent prior to identifiable images being shared or published would give individuals not only more control over their image, but would bring the situation in line with the public's expectations.<sup>112</sup> This article posits that where possible, it should be the social norm for consent to be sought before the taking/sharing of images. Here, social media platforms can play a role through reiterating the role of consent, e.g. a pop-up to serve as a reminder/nudge 'Have you sought consent before sharing this image?' – or perhaps in more layman terms 'Would you be happy to share this image if it was of yourself?' Correspondingly, consent could play a role where privacy interests do not (i.e. the harm is based upon lack of consent, rather than some aspect of privacy being engaged).

## Education Campaign and Social Norms

The recurrent solution throughout this article has been the recommendation of an education/awareness campaign and social norms regarding the appropriate taking and sharing of images.

With moral and ethical debates playing a role here, particularly when taking into account public interest considerations,<sup>113</sup> there has been some discussion as to whether journalistic Codes of Practice,<sup>114</sup> or a separate Code created for citizens

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<sup>110</sup> Moreham, 'Beyond Information' (n 22).

<sup>111</sup> *Reklos* (n 20); *Weller* (n 35).

<sup>112</sup> Seven out of ten people think that photos and images of people should not be shared without the permission of the people in the video: Ofcom, 'Communications Market Report' (2017) 34 <[https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0017/105074/cmr-2017-uk.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0017/105074/cmr-2017-uk.pdf)> accessed 21 April 2021 and see the discussion on consent above. It also needs to be noted that lack of consent is a factor given consideration under *Murray*.

<sup>113</sup> Although it needs to be acknowledged that there is some debate as to what is public interest constitutes – for example see Rebecca Moosavian, 'Deconstructing "Public Interest" in the Article 8 vs Article 10 Balancing Exercise' (2014) 6 *Journal of Media law* 234; and Paul Wragg, 'The Benefits of Privacy-Invasive Expression' (2013) 64 *Northern Ireland Legal Quarterly* 187, 195.

<sup>114</sup> Such as the 'IPSO Editors' Code of Practice' (2021) <<https://www.ipso.co.uk/editors-code-of-practice/>> accessed 21 April 2021; National Union of Journalists Code of Conduct <<https://www.nuj.org.uk/about-us/rules-and-guidance/code-of-conduct.html>> accessed 21 April 2021.

should be applicable.<sup>115</sup> Whilst this may be of benefit to citizen journalists, particularly when sharing content such as disaster or accident scene images, the author's view is that more generic education and guidance is needed to reach a wider audience and to encourage integration of morals and ethics into everyday life. There are currently steps in this direction, particularly starting with young people – through incorporation of social media awareness into school education, such as the Safer Internet Day,<sup>116</sup> and greater media and visual literacy, with groups such as '5Rights' aiming to educate young people.<sup>117</sup> There also needs to be more education around social media and the consequences of sharing information online. Such education should be encouraged by social networking sites.

In relation to children and the issue of 'sharenting', this is a more complex issue, as the parents' wishes may be in direct conflict with those of their children. Parents should be encouraged to talk about such matters with their children to establish their wishes. Until children are old enough/mature enough to have that conversation, parents should be discouraged from posting images of their children online (publicly at least), as this is very different from sharing photographs in an album or with a limited group of family/friends. Where photographs are shared, they should always be appropriate, e.g. the child fully dressed, not showing the child's face. A further norm could be to recommend that whilst images may be posted online, if the person featured objects, there should be a presumption that the image will be removed on this request. The extent to which individuals should be able to request removal of *unwanted* photography is a relatively recent debate, with this becoming a topic for discussion particularly in relation to celebrities who wish to control their image.<sup>118</sup> If one considers one's right to autonomy as incorporating control over one's image, these debates become a pertinent matter for education and conversation.

Education needs to be complemented by guidance which would ultimately aim to become rules of thumb, reinforcing the social unacceptability of certain behaviours. This is important as the research has demonstrated that the older generations are also confused, so education alone is not enough, guidance is also needed. This guidance could encourage others to think about how they would wish for their own image to be treated. One interviewee even suggested that ultimately there may be a 'health warning on your mobile phone: "Do not take pictures if you don't wish to be shared"' (Academic 2: ex-Journalist/Law).

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<sup>115</sup> For example, this was a point argued by Peter Coe in a Seminar, 'Mind the Gap: a blueprint for a new regulatory framework that effectively captures citizen journalists' *IALS Information Law and Policy Centre Evening Seminar Series*, 28th February 2019.

<sup>116</sup> -'Safer Internet Day' (Website) <<https://www.saferinternetday.org/>> accessed 21 April 2021.

<sup>117</sup> --5Rights, 'About Us' <<https://5rightsframework.com/about-us.html>> accessed 21 April 2021.

<sup>118</sup> See for example – 'Khloe Kardashian tries to get unfiltered photo removed from social media' (*BBC News*, 8 April 2021) <<https://www.bbc.co.uk/news/entertainment-arts-56660476>> and Alex Taylor, 'Can celebrities control their image online?' (*BBC News*, 6 April 2021) <<https://www.bbc.co.uk/news/entertainment-arts-56592762>> both accessed 09 April 2021.

The author proposes that a suggested format of such a framework would be to use a simple traffic light framework,<sup>119</sup> as follows:

(a) **Red ‘danger’ zones** are where photography and sharing should not happen under any circumstances—where photography goes beyond just taking a picture to crossing moral and (either what is or should be) legal boundaries, e.g. scenes which jeopardise a person’s dignity. In some instances, this line has already been crossed and criminal laws are in place as an appropriate remedy, e.g. in relation to upskirting<sup>120</sup> and image-based sexual abuse.<sup>121</sup> Ultimately, this legal response could be combined with technology, e.g. algorithms that flag certain types of pictures and issue warnings.

(b) **Amber ‘be warned’ zones** suggest that photography should be approached with caution and, as such, consent should be sought prior to the taking of photographs. At the very least consent should be sought prior to publication. This could include matters such as photographs of children. These ‘be warned’ zones could also include where photographs are taken as evidence, so careful thought should be given before publication.<sup>122</sup>

(c) **Green ‘OK’ zones** apply where photography is generally acceptable, e.g. photographs of crowds, non-identifiable individuals in public places and photographs taken and shared with consent. ‘Green zone’ photographs can usually be published without issue too.

Such a suggestion would be simple and easy to understand. Further, it would enable matters to develop in line with societal and cultural understanding, providing flexibility and adaption to technological and societal developments in a way in which fixed regulation such as law would be unable to respond as effectively.

## Conclusion

The points made during this article and conclusions gained from responses to the Research Survey, demonstrate that the current law is not fully understood, due to both theoretical and practical difficulties with its application. The Research Survey and interviews have provided an original and unique lens through which to view the related difficulties, and established a solid foundation for the development of further research in future. Whilst further clarity would undoubtedly assist, such as greater precision on the role of consent and clearer terminology around privacy, it seems that the most logical answer does not lie in law - which has a number of limitations, not least the cost to bring an action in privacy - but in guidance to clarify and control the appropriateness of taking and sharing images. In relation to consent, this plays a fundamental role in understanding and giving respect to the wishes of those

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<sup>119</sup> Similar to the ‘Sexual Behaviours Traffic Light Tool’ developed by the sexual health and wellbeing organisation <<https://www.brook.org.uk/training/wider-professional-training/sexual-behaviours-traffic-light-tool/>> accessed 21 April 2021.

<sup>120</sup> Under the Voyeurism (Offences) Act 2019, section 1.

<sup>121</sup> Under Criminal Justice and Courts Act 2015, section 33 ‘Disclosing private sexual photographs and films with intent to cause distress’.

<sup>122</sup> Encouraging a change in behaviour would be preferable as individuals posting information online that could jeopardise trials is likely to be a problem that will only grow in the future. It is however important to note that such matters are legally dealt with through Contempt of Court, and exemplary cases being brought before the courts.



photographed. Whilst making consent for the taking and sharing of photographs a mandatory requirement would, in practice, amount to an image right (which is outside the scope of this paper<sup>123</sup>), *encouraging* the obtaining of consent before taking photographs would help the photographed individual to have greater control over their image, bring social norms in line with expectations and, from a psychological perspective, enable an individual to feel empowered, and retain autonomy.

As reflected in the Research Survey results to the Law and Photography Survey, 58% would prefer guidance, and only 8% law, 31% both and a mere 2% neither. There are a number of actions society can take to implement this, starting with school education, complemented by guidance and social norms that encourage responsible taking and sharing of photographs. This could be complemented by increased responsibility of social media platforms, with the use of privacy nudges to encourage social norms, along with technological solutions,<sup>124</sup> for example, a pop-up option which asks ‘Do you have consent to share this photograph?’ or simply ‘Would you be happy if this image of you was shared?’ prior to uploading photographs online. The interviewee from the Photographic Organisation felt that such nudges could be an option, saying:

I think it probably starts with the schools, and there are warnings that websites, social media sites should probably be putting up to warn people, perhaps every time an image is uploaded, there’s a warning put in place to say – Do you want this image published? Or if it’s tagged to an individual, have a take-down mechanism that comes up more automatically than currently...Certainly the more that us, government, membership organisations particularly in areas such as scouts, Mumsnet, some of these people in big organisations - particularly where children are involved - then I think it’s incumbent on them to try and raise awareness.

Whilst the House of Commons Digital, Culture, Media & Sport Parliamentary Committee Report on ‘Disinformation and fake news’ suggested that ‘...social media should allow more pause for thought’,<sup>125</sup> the practicalities of such measures were explored by Wang et al who conducted an experiment on Facebook to see if privacy nudges had an influence, providing three types of nudge to a small sample of individuals, including: (1) visual clues about the audience of a post, (2) time delays before a post is published and (3) feedback about the post (i.e. whether it is perceived positively or negatively). They found that ‘privacy nudges could potentially be a

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<sup>123</sup> See Holly Hancock, ‘Could image rights solve issues raised by unwanted photography?’ *Journal of Intellectual Property Law & Practice*, Volume 15, Issue 3, March 2020, 198–208.

<sup>124</sup> For example, facial recognition technologies can be used to alert users when stolen photographs are posted without their consent (although not in the UK as yet) – see Margi Murphy, ‘Facebook to Alert Users When Stolen Photos Posted without Their Consent’ (*The Telegraph*, 19 December 2017) <<https://www.telegraph.co.uk/technology/2017/12/19/facebook-alert-users-stolen-photos-posted-without-consent/>> accessed 21 April 2021.

<sup>125</sup> House of Commons Digital, Culture, Media and Sport Committee, ‘Disinformation and ‘fake news’’: Final Report, Eight Report of session 2017-19 (14 February 2019) 96 <<https://publications.parliament.uk/pa/cm201719/cmselect/cmcmds/1791/1791.pdf>> accessed 21 April 2021.

powerful mechanism to discourage unintended disclosures in social media that may lead to regret'.<sup>126</sup>

In conclusion, given the impact that an image can have on personal life, it is suggested that the current law on privacy is out of focus in the era of social media. Alongside current law, improved guidance and education would lead to the public having a better understanding of the implications of taking and sharing photographs for both themselves and others. This in turn would create more responsibility in photograph sharing on social media, as individuals would be more aware of the potential consequences of this, removing the need for recourse to legal action. Simultaneously, social media platforms have a responsibility in relation to images published or shared on their sites and should employ the use of nudges to allow individuals to safeguard privacy, along with easy removal of photographs uploaded without consent. Finally, there should be new 'social norms' to remind the general public of acceptable behaviour in relation to the taking and sharing of images.

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<sup>126</sup> Yang Wang and others, 'Privacy Nudges for Social Media: An Exploratory Facebook Study' (ACM Press 2013) 770 <<http://dl.acm.org/citation.cfm?doid=2487788.2488038>> accessed 21 April 2021.