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The Public Interest in Deleted Personal Data? The *Right to be Forgotten's* Freedom of Expression Exceptions Examined through the Lens of Article 10 ECHR

By Fiona Brimblecombe

1. INTRODUCTION

2020 is an exciting time in privacy law. Time marches on since the General Data Protection Regulation 2016 (hereafter the 'GDPR') came into force across the EU,[1] and in the UK, relevant national legislation has been passed in the form of the Data Protection Act 2018. Article 17 of the GDPR contains the "right to erasure," otherwise known as "the right to be forgotten" (hereafter the "RTBF").[2] This right enables private individuals to, in some circumstances, require the deletion of their personal data from Web sites by "data controllers."[3]

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The right has attracted controversy and those who argue that it will lead to censorship on the Web,[4] but much remains unclear about how significant the privacy protection afforded by the right will be. Indeed, the text of Article 17 and its exemptions is far from proscriptive and the formation of the scope of the right is at its crucial, early stages—only a limited amount of judgments on the right itself have so far emerged.[5] With respect to the English judiciary's significant interpretative powers,[6] in the UK there is perhaps "all to play for."

This author has elsewhere considered how best to interpret the new right to be forgotten with reference to the normative framework of Article 8 of the European Convention on Human Rights (ECHR), in the first piece of analysis written of this kind.[7] In this prior piece, various "balancing factors" were extracted from privacy jurisprudence of the European Court of Human Rights (ECtHR) and English courts which could give weight to a claim brought under the right to be forgotten if such factors are cross-applied in cases concerning erasure requests. This present article now turns to consider balancing factors going to the weight of a *competing interest in freedom of expression* which could arise when an erasure request is made—either on the part of a data controller or a relevant third party. This is a crucial consideration, as often when privacy claims are brought to court[8] the judiciary must undertake a balancing exercise between the personality rights of the claimant and freedom of expression. How this balancing exercise is approached will have a direct impact on the strength and breadth of the new right. Accordingly, the RTBF has two exceptions centered around free speech: the generalized freedom of expression exception present in Article 17(3)(a) and a journalistic exemption within Article 85 GDPR.[9] This piece will undertake an analysis through the lens of Article 10 ECHR and suggest how these freedom of expression exceptions ought to be interpreted by the English courts (and other courts around Europe) in order that the potential for the RTBF to reinstate informational privacy is not thwarted. The author is unaware of any other piece of existing literature which takes a cross-jurisdictional approach to analyze the RTBF's freedom of expression "caveats" in this way. The methodology of this article is chiefly doctrinal, with socio-legal elements[10] and a comparative approach; analyzing a EU regulation using ECtHR and English caselaw.

This article begins by briefly sketching the *status quo* of privacy online; including the demise of forgetting and the Internet's "perfect recall" capabilities. It next considers freedom of expression theory which seeks to put this article's analysis into context. Thirdly, the article sets out the text of Article 17 and its expression and journalistic exceptions. It then notes how Strasbourg jurisprudence is relevant to the interpretation of the GDPR. Finally, and most substantively, in an original analysis it will extrapolate various free expression balancing factors from Article 10 ECHR jurisprudence and English caselaw which courts *could use*, *should use* or *ought to avoid* when seeking to weigh an erasure claim against a competing freedom of expression exemption.

2. THE INTERNET'S PRIVACY PROBLEM

It has been stated by prominent US academic Cohen that privacy has an "image problem,"[11] but it is undeniable that the Internet has a privacy problem. Society's rapidly growing technological landscape has led to an undoubtedly negative impact on privacy rights online. We are now in the "digital age,"[12] and while technology continues to advance, the cost of purchasing such technology has decreased via competitive markets.[13] The Web can now be accessed through a range of devices, such as smartphones, tablets, and laptops, all of which are portable. An increasing amount of Internet-enabled technology is now readily available to individuals around the clock whether they are at home, at work, or anywhere else.[14] Citizens across England and Wales are now spending more time than ever before online,[15] and this development has meant that an ever-increasing amount of private information is uploaded to the Internet. It is now quick and easy to upload a photograph or other pieces of personal data about oneself or others to a Web site,[16] and this has gradually become a norm. Social media usage was at an "all time high" at the end of 2018, with 83% of adults in the UK now operating a social media account.[17]

People are uploading personal and private data to the Web in order to improve their job prospects

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(for example, by using LinkedIn), their sex lives (Tinder and Grindr) and their social and family lives (Facebook and Instagram).[18] All of these sites are free and have a large amount of members.[19] Alongside the rise of social media, the Internet is now seen as a safe space where personal data can be stored on Web sites such as Dropbox.[20] Corporations have also created news "apps," which deliver breaking news headlines directly to linked smartphones and tablets, often free of charge.[21] As digital reportage has instantaneous global reach, in the event that expression (which may include images) is promulgated which relates to a private individual, more people now than ever may access it.

These advances have heralded the increased risk of privacy infringement, through third parties viewing or accessing the personal data of others online.[22] Users are now uploading personal information to the Web at various different ages, and later in life may wish to rescind previous disclosures. Take the situation where, for example, data subject "Jane" uploaded personal information to a social media site when she was studying at university, including pictures of raucous nights out with housemates. Jane, although able to delete the pictures from her own personal Web page, may have lost control over this information; other friends may have uploaded similar photographs who she has since lost touch with, or third parties may have re-uploaded Jane's pictures.[23] Access to this information may be detrimental to her employability, as it is increasingly commonplace for employers to search the Web during a candidate selection process.[24] It should be emphasized that an individual's privacy is at risk through third parties uploading personal information about them to a worldwide audience online. Potential disclosures can range from benign to distressing. Information may also appear innocuous when it is not; images may reveal that a person was actually at a certain location at a particular time when they told friends and family they were elsewhere, leading to the breakdown of relationships.[25] People from different cultures and personal backgrounds may also perceive disclosures with different levels of severity; for example, if someone was a recovering alcoholic or was part of a strictly observant Muslim family they may view a picture online of them drinking alcohol as damaging to their reputation whereas someone else may not. Aside from reputational issues, personal information online has hindered individuals' ability to "move on" and forget—this is concerning as the ability of someone to put their past behind them is crucial to their future development.[26] Mayer-Schönberger in particular has called for increased global regulation over private information on the Internet.[27] As it is a substantive erasure mechanism, the RTBF may be the first step in the right direction for individuals in regaining control over their personal data online—if it is interpreted correctly.

3. THEORETICAL JUSTIFICATIONS FOR FREEDOM OF EXPRESSION

At this point, it is important to consider theoretical justifications for free speech, as this gives some context for later discussion regarding the RTBF's expression exceptions. It will be argued below that the most prevalent and traditional rationales supporting expression[28] have little application to (and are not generally facilitated by) the disclosure of personal data online. Therefore, this article argues that Article 17(3)(a)'s free expression and journalism exceptions:

i. must not be interpreted excessively broadly in order to account for concerns over censorship online and;
ii. provide a "safety net" whereby legitimate speech in the public interest can, in certain situations, override a deletion request.

Four traditional justifications for freedom of expression will now be addressed.

3.1 FREEDOM OF EXPRESSION IS ESSENTIAL FOR THE PURSUIT OF TRUTH

Perhaps the most prevalent rationale underpinning freedom of expression is the notion that if speech is unrestricted and all voices are heard, the truth about a given matter will emerge.[29] This theory was proposed by John Stuart Mill,[30] and was adapted by US Supreme Court Judge, Oliver Wendell Holmes. Holmes argued that this "social Darwinism"[31] helps expose the falsities advanced by large corporations or the government.[32] Additionally, if individuals' views are heard, then people are less likely to upset

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established order.[33] The truth justification assumes that the pursuit of truth is inherently a good thing that benefits society at large.

This expression theory can be subject to several criticisms. Firstly, it can be difficult for an individual to perceive accurate "truths" when viewing selected pieces of speech or information.[34] For example, a photograph may convey certain objective factual truths (such as where the photograph was taken) but such pictures often lack requisite context.[35] Secondly, this justification appears to make the assumption that all speech has equal value as it promotes the finding of generalized truths.[36] This aspect of the theory is problematic as it does not differentiate between data which has fundamental societal significance and mundane pieces of personal data. The publication and subsequent discussion of the "truths" of banal private information serves as a distraction from valuable public discussion of legitimate general interest.[37] Academics such as Greenawalt have suggested that *restricting* certain types of speech in particular circumstances can be helpful to find truth[38] as this can help refocus society on issues of pivotal importance.[39]

3.2 FREEDOM OF EXPRESSION FACILITATES A FLOURISHING DEMOCRACY[40]

This consequentialist speech justification is relied on extensively by the Strasbourg, English and US courts[41] as well as prominent legal academics. Meiklejohn advanced the argument that the First Amendment's value was in its ability to facilitate political process.[42] Brandeis argued that all citizens should participate in a democracy[43] and in order to facilitate a functioning democratic government there must be unbridled discussion of political issues.[44] In respect of the role of the media in exercising free expression, Lord Justice Ward in *K v NGN* stated that "unduly to fetter their freedom to report as editors judge to be responsible is to undermine the pre-eminence of the deserved *place of the press as a powerful pillar of democracy*."[45] A rationale for this justification is that the more political debate that occurs, the better educated the electorate will be regarding politics.[46] The justification was discussed during the prominent US defamation case of *New York Times Co. v Sullivan*.[47] Bollinger has observed that Meiklejohn's writings had a significant impact on the judgment in the case, the decision emphasizing that freedom of the press is necessary for the public to fully engage in the political process.[48] The justification is also related to the negative free expression theory of "distrust of government": free speech stops a government from censoring radical ideas for reasons of bias.[49]

Despite this theory's prominence, the amount of speech it can apply to is limited. Barendt argues that if its role in protecting democracy is the right's foremost justification, this only extends to information which facilitates the general public in holding the government to account;[50] in other words, political information.[51] Redish concurs and observes that despite academic assertion that the First Amendment is concerned with protecting political speech, many forms of non-political speech fall under the remit of its protection.[52] By way of comparison, Strasbourg "ranks" what degree of Article 10 protection particular speech should enjoy, with political speech receiving the most significant degree of protection.[53] Many different forms of political action can also assist democracy, rather than just expression.[54] Baker has argued that unbridled free speech can in fact unseat established democratic order and cause ructions in society, particularly in relation to highly offensive speech.[55]

3.3 FREE SPEECH IS NECESSARY FOR INDIVIDUAL AUTONOMY

Thirdly, the "free speech as autonomy" justification for expression argues that individuals should have a right to decide what they see, hear and say as this is a crucial aspect of human autonomy and free speech facilitates this (regardless of whether this will have a positive effect on their life). This is "self-governance."[56] As with the above two justifications, limitations apply to this theory. Firstly, Greenawalt argues that the notion of autonomy is expressly difficult to quantify or monitor.[57] To measure individual autonomy one must presuppose that there is an objective ideal, whereas in practice autonomy may be subjective to the person in question. For example, what someone who is a resident in Saudi Arabia may consider to be a life with a high level of individual autonomy may be different to that of someone resident in the UK or US. Furthermore, the expression as autonomy justification conflicts with the theory that the right to

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privacy allows for individual autonomy and dignity.[58] In essence, autonomy can be achieved *both* by effective self-governance over what one speaks, reads and writes as well as the ability to seclude oneself, allowing an individual to experiment and develop (socially or artistically) away from the watchful eyes of others.[59] This leads to a fundamental conflict of interests.[60]

3.4 FREE SPEECH AS NECESSARY FOR SELF-FULFILMENT/DEVELOPMENT

"Free speech as enhancing self-fulfilment" claims that free expression has a positive effect on an individual's life as access to certain speech can mean the person "flourishes."[61] The theory is if people are exposed to information relating to various life choices, they are increasingly likely to make informed (and therefore better) decisions in life themselves.[62] A similar criticism to that which was made above in relation to autonomy can be made of the speech as promoting self-development justification. Wragg has noted that justifications in favor of protecting privacy and justifications for protecting free expression (on the grounds of self-development) often contradict one another. When they do, academics such as Wragg argue that the judiciary ought to prioritize freedom of expression:

> Although every member of public is both a consumer and potential source of news, the *chances of the latter happening are considerably less* than the former such that it may be said that society's greater interest is in consumption and, therefore, this should be reflected in the court's treatment of the benefits-to-self argument.[63]

Due to the rise of the digital age, the likelihood of a data subject's personal information being disseminated online is now high. As a result of this, the self-development rights of *receivers* of information are increasing but the privacy and dignity rights of those whom the information is about are decreasing. Due to this (and contrary to Wragg's argument), it is argued here that this trend should be reflected in privacy caselaw in the sense that consequentialist arguments for the *protection of privacy* should be taken as the prevailing account when this conflicts with the narrative of expression as self-development. Arguments around the prioritization of privacy rights will be developed in more detail later in this piece.

The core notion of speech as supporting individual self-development has been questioned by academics such as Baker. Baker makes three strong propositions in this regard, which can be summarized as such:

i. individuals can effectively "self-rule" without access to an uninhibited flow of information;
ii. information-flow is not the only factor that enables self-rule and;
iii. information "overload" can actually inhibit self-rule.[64]

The first of these stipulations seems to support the argument outlined above that when consequentialist arguments in favor of privacy and self-development justifications for the importance of speech conflict, privacy rights should prevail. Essentially, Baker argues that "good" life decisions can be made by individuals without unfettered access to unlimited expression. For example, a person's anecdotal and personal life experience can provide a platform on which to make judgments. Secondly, he appears to suggest that individual self-development is comprised of more than just access to a broad degree of expression. Finally, he notes there is such a thing as having *too much* information with which to make a decision.

The aim of this theoretical subsection has been to give an overview of the key justifications behind the continued importance given to freedom of expression in jurisprudence of both the English and Strasbourg courts. Due to the limiting factors discussed above, each of these justifications often does not apply to private (and often mundane) personal information disclosed on the Internet. This must be borne in mind when examining the GDPR's expression exemptions and the privacy-expression balancing exercise which must be undertaken by the courts in the event that that one of these exemptions is relied upon.

4. THE TEXT OF THE RTBF AND ITS FREEDOM OF EXPRESSION EXCEPTIONS

Before this piece evaluates various expression "balancing factors" and their relevance to the RTBF

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and its exemptions, it is important to lay out the relevant text of the GDPR. Recital 65 notes that the right to freedom of expression will be the most significant exception to Article 17 (justifying the retention of data). Article 17 reads as follows:

1. The data subject shall have the right to *obtain from the controller the erasure of personal data* concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies:

   (a) the personal data are *no longer necessary* in relation to the purposes for which they were collected or otherwise processed;
   (b) the data subject *withdraws consent* on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing;
   (c) the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2);
   (d) the personal data have been unlawfully processed;
   (e) the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject;
   (f) the personal data have been collected in relation to the offer of information society services referred to in Article 8(1).[65]

In relation to Article 17(1)(b), an erasure right could become engaged in a scenario where consent to processing has initially been given by a data subject and subsequently revoked, with no time limit in operation.[66] A subject may withdraw consent to processing they have previously given under Article 6(1)(a): "the data subject has given consent to the processing of his or her personal data for one or more specific purposes" or Article 9(2)(a), which is akin to Article 6(1)(a) but applies to "special categories" of personal data.[67] It must be noted that revoking consent will only generate a deletion request under Article 17 where there is no other lawful ground for processing, which can in turn depend on whether data is deemed "sensitive." As Brimblecombe and Phillipson put it:

> …withdrawal of consent grounds a claim *only* where the previous consent of the data subject was the sole lawful basis for processing the data. Thus for "ordinary data", the controller could rely instead on their "legitimate interests" (unless overridden by the privacy interests of the data subject) as a lawful basis for processing. If the data is "sensitive" within the meaning of Article 9, the controller could seek to rely on a deliberate decision by the data subject to make the data public in the past, such as posting it to a public website as the basis. If this condition was found to be made out, then withdrawal of consent *per se* would not appear to ground a deletion request.[68]

Indeed, section 9(2)(a) states that a prohibition on the processing of special category data does not apply if "the data subject has given explicit consent to the processing of those personal data for one or more specified purposes"[69] and 6(1)(a) states that data processing is lawful if "the data subject has given consent to the processing of his or her personal data for one or more specific purposes."[70] Sartor has aptly observed that under (1)(b) processing only becomes unlawful after a data subject has withdrawn their consent and notified a controller.[71]

Although this article has and will argue for the need to afford greater protection to online privacy, it must be noted that in certain situations freedom of expression should prevail over privacy rights. This applies to erasure claims brought under Article 17. As discussed above, the RTBF contains several exceptions a data controller can rely upon in order to negate their obligation to delete personal data, one of which relates to freedom of speech online. Article 17 states that "Paragraphs 1 and 2 shall not apply to the extent that processing is necessary…(a) for exercising the *right of freedom of expression*…"[72] The importance and extent of this freedom of expression exception to the right to be forgotten remains to be seen. It suggests that, when the exemption is invoked, a balancing exercise will have to be undertaken between the privacy rights of a data subject and freedom of expression. A related but separate exemption is contained within Article 85 of the GPDR and fleshed out in Schedule 2, Part 5 of the Data Protection Act 2018—the journalistic

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exemption. In order to rely on the journalistic exemption, a much more specific set of criteria must be satisfied on the part of a controller. The "test" for this exemption can be summarized as such:

i. the personal data must be processed with the *intention to publish* the information as journalistic material;[73]
ii. a controller's *reasonable belief* that doing so is in the *public interest;*[74]
iii. a controller's reasonable belief that applying the relevant GDPR principle would *hinder this journalistic motive;*[75]
iv. A controller must be *aware of relevant privacy codes and follow them explicitly*.[76]

This article will consider expression arguments that could be used by defendant controllers in order to rely on either exception. It is crucial that an appropriate balance is struck between ensuring robust data protection and the maintenance of important speech online.

5. THE RELEVANCE OF STRASBOURG JURISPRUDENCE TO THE GDPR

It is important to explain why this article adopts a human rights framework for its analysis.[77] Firstly, it is wise to look to Strasbourg for inspiration in terms of the RTBF's interpretation in England and Wales, as the impact of future Court of Justice of the European Union (CJEU) caselaw on the RTBF is uncertain due to the UK's exit from the European Union.[78] Section 6(2) and 6(3) of the EU (Withdrawal) Act 2018 state that CJEU caselaw (dated until the point of withdrawal of the UK from the EU) could have influence on UK courts, but caselaw issued by the court after "Brexit" *may* only continue to have influence in the future, section 6(2) stating:

> a court or tribunal *may* have regard to anything done on or after exit day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal.[79]

Additionally, section 6(4) notes that "the Supreme Court is *not bound* by any retained caselaw."[80] This is in contrast to Strasbourg caselaw, which will have continued relevance to the decisions of English courts under the Human Rights Act 1998.[81] Secondly, as referenced in this piece's introduction, the right is relatively new and there has been little direction on it from any court. The case of *Google Spain* is perhaps to date the most high-profile judgment on the RTBF, despite the fact that it was decided before the GDPR was enforced across Europe.[82] The guidance offered in the case is limited as the matter predominantly turned on the liability of search engines.[83] In the English courts, caselaw on the RTBF is also as yet in short supply as there has been only one detailed judgment from the High Court directly on the matter, *NT1 and NT2 v Google*[84]—again, decided under the scheme of the "old" regime of the 1995 Data Protection Directive and the Data Protection Act 1998. Because of this lack of authority, the English courts (as well as courts in other jurisdictions) may look to the Strasbourg Court and its abundance of jurisprudence on privacy-expression balancing for inspiration. Strasbourg precedent is also relevant due to the relationship between the ECtHR and the CJEU. There is a significant amount of goodwill between both courts, with meetings between both sets of judiciary taking place and both often cross-referencing one another's decisions.[85] A final, compelling, reason that Strasbourg jurisprudence is relevant to Article 17 and its exemptions is the parallel rights to privacy enshrined within the ECHR (present in Article 8) and the Charter of Fundamental Rights of the European Union (Article 7).[86] The EU's Charter is "complementary" to that of the ECHR,[87] and when Charter and ECHR rights align, the Charter states that the meaning and scope of both are to be taken to be the same.[88] As privacy is such an overlapping right, Strasbourg jurisprudence is relevant to the English and European courts' formulation of Article 17—a data right which facilitates privacy on the Web.

6. ANALYSIS OF STRASBOURG'S ARTICLE 10 JURISPRUDENCE AND ITS APPLICATION TO THE RTBF AND ITS FREE EXPRESSION EXEMPTIONS

The "public interest" is the most frequently cited balancing principle that the ECtHR employs when evaluating the strength of an Article 10 claim,

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and, in the eyes of the English courts, a "decisive factor."[89] As noted above, *intended publication in the public interest* is a requirement to rely on the Data Protection Act 2018's journalism exemption. Indeed, the notion of publication in the public interest dominates expression jurisprudence. Despite its prevalence, the notion of public interest and how it balances against privacy rights is notoriously difficult to define.[90] The ECtHR has adopted both expansive and constrictive approaches to what it deems a matter of public interest and, as a result, the Strasbourg Court's precedent on this matter can appear contradictory. In *Sæther v Norway* the Court stated that the life of a popular performing artist would be a matter of public interest:

> The definition of what constitutes a subject of general interest will depend on the circumstances of the case. The Court nevertheless considers it useful to point out that it has recognised the existence of such an interest not only where the publication concerned *political issues or crimes*, but also where it concerned *sporting issues or performing artists*…[91]

Yet in *Von Hannover v Germany (No.2)* the court adopted the opposing view in relation to famous singers, stating that "…the rumoured marital difficulties of the President of a country or the financial difficulties of a famous singer were not deemed to be matters of general interest…"[92]

In *Von Hannover v Germany* the Strasbourg Court delivered a well-reasoned judgment in finding there was not a legitimate or overriding public interest in relation to pictures of Princess Caroline of Monaco which depicted the Princess going about her daily life.[93] The Court stated this was due to the fact that Caroline was not engaged in any official function while the photographs had been taken, and the images relatedly solely to her personal life.[94] In *Von Hannover v Germany (No.2)* the ECtHR, however, adopted a position less favorable to Caroline's privacy rights. Here the Court held that the Princess' Article 8 rights were trumped by the public interest in a magazine article detailing that her father, Prince Rainier, had been ill. The Court held that since the Prince was a member of a royal family he thereby garnered much attention and importance in the eyes of the public, his ill health a prominent "event of contemporary society."[95] Therefore, certain photographs relating to this matter could be published.[96] The position of the Court in this regard has been rightly criticized, with Phillipson arguing there was a tenuous link between the public interest value within the article and the selected pictures that the Court deemed protected by Article 10.[97] The Court, however, found that other photographs of the Princess' family within the article, unrelated to this matter, did not generate a legitimate public interest as they were for "entertainment purposes alone" and should be suppressed.[98]

In *Von Hannover v Germany (No.3)*, the Strasbourg Court appeared to further distance itself from its strong protection of Article 8 rights in *Von Hannover v Germany* and adopted an unduly broad approach with regards to what constitutes a matter of legitimate public interest. Here the Court found that publication of an article discussing the holiday home of Princess Caroline and her husband (alongside pictures of the family) was protected under Article 10, despite the fact the article contained seemingly banal information relating to the price and furnishings of the property.[99] Although such a piece may generate mild curiosity in some members of the public, it is more difficult to envisage how such an article could constitute a matter of *legitimate* or important public interest. Phillipson argues that a shift occurred in the ECtHR's judgments between *Von Hannover Nos. (1), (2)* and *(3)* towards expanding what it deemed to be in the public interest to disclose.[100] This Strasbourg trend towards a wide definition of the public interest will not work in favor of enforcing a comprehensive right to be forgotten, if this is adopted by the English or European courts. If the ambit of Article 17(3)(a)'s expression exception or journalism exemption is construed widely this would rid the erasure right of its power to reinstate privacy and forgetting, as deletion requests may often be trumped by an (albeit marginal) aspect public interest in the personal information concerned. More recently, there is some evidence to suggest that Strasbourg jurisprudence may be altering *again* in order to take into account the changing nature of privacy rights in the Internet age. In May 2016 the judgment of *Fürst–Pfeifer v Austria*[101] was issued. The case concerned the Article 8 rights of a claimant regarding an article distributed about them (both on paper

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and online). Dissenting Judges Wojtyczek and Kūris observed that:

> there must be growing awareness of the increasingly pressing need to ensure more effective protection for personality rights, in particular privacy rights, *vis – à – vis* a progressively all – powerful media, acting under the aegis of "public interest".[102]

Both judges went on to note the potential of the modern media to "mushroom its intrusions into individuals' privacy"[103] and emphasized European reliance on the right to be forgotten to uphold privacy rights.[104] Whether this heralds a changing trend in ECtHR privacy precedent remains unclear, particularly in light of the fact that Judges Wojtyczek and Kūris' opinions were in the minority, the majority of the court in the case deciding to uphold Article 10 interests.[105]

The evidence of an unduly broad approach to what constitutes the public interest is perhaps more prevalent in English rather than Strasbourg jurisprudence. For example, within the judgment of *Goodwin v News Group Newspapers* the English courts declared it was in the public interest to know that the married CEO of a bank had embarked upon a romantic affair with a colleague, despite the fact that he was not a well-known public figure and the nature of the information was inherently intimate.[106] Wragg notes that it appears that English courts often adopt the position that if there is *some aspect* of a public interest in the personal data at issue this automatically overrides a competing privacy claim.[107] Therefore the courts' assessment stops at this juncture, rather than going on to further consider the *weight* of the public interest involved, such as its contribution to an important debate[108] and then balancing this against the strength of the privacy claim. The end result of this is that the English judiciary has adopted a skewed interpretation of ECtHR jurisprudence as to what constitutes the public interest.[109] This lack of balancing between rights serves as an example of *what should not continue* when the courts' interpret Article 17 and its freedom of expression exception and journalism exemption. The purpose of an introduction to a deletion right in Europe (and the UK, including the Data Protection Act 2018) is to enhance privacy rights for individuals over their personal data online.[110] If *any* degree of public interest as generated means that expression automatically prevails over an erasure request in this manner the efficacy of the right to be forgotten will be substantially reduced.

What constitutes the public interest is a fraught legal area, and in order to determine whether a publication is legitimately in the public interest, several "balancing factors" can be extracted from the English and Strasbourg caselaw as a guide. The next part of this article will analyze various sub-factors of the public interest; in other words, arguments which indicate when dissemination of private information may further social goals and how they can be used to interpret Article 17's (3)(a) exception and journalism exemption. Five factors will now be discussed in turn.

6.1 ACCOUNTABILITY OF INDIVIDUALS IN PUBLIC OFFICE: THE PRESS AS A WATCHDOG

Perhaps one of the most long-standing and well-known subcategories of information in the public interest is *private data exposing wrongdoing or incompetence in public office*, the publication of which holds those in power to account, with the media acting as a "watchdog."[111] In other words, free speech works to trump privacy-related interests in order to uncover corrupt or incompetent officials.[112] This sub-factor relies on two central justifications. Firstly, as Baker observes, it operates as a deterrent: "this function involves both the media's power to expose governmental misdeeds and its ability to deter those misdeeds by increasing the likelihood of exposure."[113] Secondly, the press acting as a watchdog can promote the best usage of public resources. If a person in public office is not performing their role in an appropriate manner[114] resources can be reallocated accordingly, the officer's employment terminated and reform addressed.[115] The idea of the press as a watchdog finds authority in both ECtHR and English jurisprudence.[116] An example of this sub-factor in operation is present in the case of *Krone Verlag GmbH & Co. KG v Austria*, where the Strasbourg Court afforded Article 10 protection to a journalistic piece exposing a member of the European Parliament who had unjustly enriched himself by claiming a teacher's salary;[117] the Court noting that this was clearly a matter of public interest.[118]

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a. The Press as a Watchdog's Application to the Interpretation of Article 17(3)(a) and the Journalistic Exemption

In order to understand the extent of the *press as a watchdog* factor and its application to Article 17, it is important to clarify whom the courts consider to be an individual performing an official function. The distinction between a celebrity and someone who performs an official function appears to be that the former is someone well known to the general population and the latter is a person whom exercises authority on behalf of the state. The Strasbourg Court has held that as Princess Caroline does not hold a position of responsibility for the state of Monaco, she is not in public office.[119] Conversely, in a broader reading of the watchdog principle in the English case of *Trimingham*, Mr Justice Tugendhat found that the claimant was not a "purely private person" because she:

i. worked for someone who wished to be democratically elected;
ii. *that* person was asking voters to trust them;
iii. she was a "spin doctor."[120]

The English courts extend this notion of authority to not only those who hold office, but those who are running for office and their aides.[121] This reading of what constitutes an authority figure was also demonstrated in the 2018 case of *NT1 and NT2*,[122] the first "right to be forgotten" delisting-request case heard in the English courts.[123] In the case, Lord Justice Warby noted that Article 29 Data Protection Working Party suggested an expansive definition of "public figure" in their guidance: "individuals who, due to their functions/commitments, have a degree of media exposure."[124] Lord Justice Warby held that because "NT1" was a businessman, he was therefore classed as a public figure—he was also known to the public because of his fall from grace (his criminal conviction). Lord Justice Warby felt this tipped the balance in favor of the continued disclosure of personal data, as the balancing factor acts as a *disincentive for improper conduct*.[125] He reasoned this *despite the fact* that NT1 did not formally hold a public office—rather, he was involved in private business ventures.[126] The ECtHR also holds there are different acceptable levels of personal scrutiny depending upon type of office:

> …civil servants acting in an official capacity are, like politicians, subject to wider limits of acceptable criticism than private individuals. However, it cannot be said that civil servants knowingly lay themselves open to close scrutiny of their every word and deed to the extent politicians do.[127]

Hughes has noted that Strasbourg caselaw deems a public figure to include "businessmen, journalists and lawyers, well-known academics, as well as other persons who have a 'position in society' or have 'entered the public scene' rendering the scope of its application difficult to predict"—indeed, this is a seemingly broad list.[128]

The idea of *the press as a watchdog* could become relevant to an erasure claim under Article 17 if the data subject holds public office or is in a position of comparable influence in the private sector.[129] It is submitted here that the *watchdog* function of the public interest should only be applied to those who have genuine positions of importance or significance to society at large although they do not have to be exclusively elected officials—as distinctions between who or who is not a public figure are not "binary"[130] or clear cut. To avoid a slippery slope of expansion, it, however, is argued that in order to hold someone is a public figure (and therefore freedom of expression with regards to their information is more likely to win out in a privacy-expression balancing exercise) there should be a tangible link between the private behavior disclosed and a legitimate impact on the public; otherwise, the public interest factor could cover an ever-increasing amount of individuals. If this were to happen, the factor would be used as a mere tool to extend the public interest argument, even in the event there was little meaningful in the activity that the press was "watching over." By way of example, the English Court's extension of the definition of "public office" in *Trimingham* to those who *work for someone* who is attempting to become democratically elected is illogical and over-inclusive.[131] If the English Court's reasoning in the case was applied to the right to be forgotten's 17(3)(a) exception or journalism exemption, any person who has a professional (or perhaps even personal) relationship with an individual who is campaigning to hold an official function may not be entitled to secure the

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removal of their information.[132] It is clear to see that this catchment area is unduly broad in scope, as it reduces privacy rights by virtue of association.

This factor could have relevance to Article 17(3)(a) or the journalism exemption insofar as the data concerned relates to a person's suitability for public office or their behavior while performing that role. It, however, is important to consider that individuals (including the electorate) may have varying opinions as to what constitutes personal information *having a bearing upon a person's fitness for public office*. For example, a particularly conservative or religious voter might feel that the fact a politician is homosexual would be relevant to their suitability for being an MP. Therefore, it is submitted that there must be a *direct link* between the official function of a public office (or private-sector role of equivalent importance) and the personal information in question. Such information may expose particular tensions between the personal life of the person concerned and the performance of their job. This position is somewhat supported by the ECtHR in *Von Hannover v Germany (No.2)* and *Standard Verlags*.[133] The Strasbourg Court suggested that if private information has a bearing on the ability of the person in question to perform their official function, then it ought to be disclosed.[134] As Matthieson and Barendt note, in order to justify such a personal intrusion, there must be a *direct connection* between that aspect of an individual's private life and the performance of their public function or political role.[135] The Strasbourg Court elaborated upon this issue in *Verlags*, suggesting that a person's sexual life would seldom be considered relevant to their ability to do their job, other than in specific circumstances.[136] Such a circumstance may arise if the individual was an MP seeking to erase information about a romantic relationship that created a conflict of interests in their parliamentary role.[137] This approach echoes the US courts' distinction between "general" and "limited" public figures. Under the assessment of the American courts, the publication of private information relating to a limited public figure is only permissible if it relates to aspects of their private lives associated with their reason for fame or public office.[138] In this capacity, the watchdog principle has a certain degree of relevance towards data subjects in public office pursuing erasure requests.

6.2 THE PUBLIC INTEREST IN PRIVATE INFORMATION AS GIVING AN ACCOUNT OF A PARTICULAR MODE OF LIVING

This factor states that a substantial flow of personal information in general is valuable as this gives accounts of particular modes of living, allowing an observer to "personalise" a range of topics. Zimmerman summarizes the notion by stating: "all information is potentially useful in some way to the public in forming attitudes and values. Thus every communication is arguably privileged."[139] Founder of the US privacy torts, Prosser, believed that there is a correlative increase between the amount of personal information an individual has access to and the productivity in life choices they themselves are able to make.[140] The idea behind this is that if a person is exposed to alternative styles of living, their judgment improves with regards to decisions in their own personal lives—as they have a greater wealth of knowledge and experience to draw upon.[141] Raz clarifies this factor's theoretical basis:

i. [it serves] …to familiarize the public at large with ways of life common in certain segments of the public…
ii. …to reassure those whose ways of life are being portrayed that they are not alone, that their problems are common problems, their experiences known to others...
iii. [it serves] as validation of the relevant ways of life. They give them the stamp of public acceptability.[142]

The central downfall of this factor is that it is overinclusive.[143] Its rationale fails to place any limitations on the amount or type of personal information disclosed about an individual in order to give a lifestyle account. As Elwood observes, it has traditionally been argued by "pro-outing"[144] activists that exposing a person as gay serves as an important message to society; the message being that alternative sexualities other than heterosexuality exist.[145] This, however, fails to take into account the consent of the person in question to having their sexuality broadcasted publicly. It is important to note that throughout the 1960s to the 1980s many people suffered as a result of a trend in non-consensual "outing," particularly financially through loss of work and personally, through estrangement by their friends and families.[146]

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Indeed, the *modes of living* factor's central failure is its lack of *meaningful* consideration of the needs, desires or harms done to an individual on publication of their private facts—and the assumption that the benefits of revealing that private information are more important for society at large. This does not respect the personal autonomy and dignity of a data subject, which can be manifested in a decision to make only certain details about themselves public and the important need for seclusion.[147]

A further justification for this balancing factor is that exposure to different lifestyle choices helps facilitate change to cultural traditions and the acceptance of new forms of living.[148] This theory behind the factor is also problematic as it does not take into account the opportunity for individual self-reflection that privacy allows, or the need for a person to be able to experiment with different lifestyles away from the public eye.[149] Zimmerman makes a vague argument to support this balancing factor, stating that in order for society to function it is necessary for citizens to know information about one another.[150] Zimmerman does not detail the quantity or content of information that she encompasses in her statement. This is indeed true to an extent; it is necessary for an individual to disclose *certain* pieces of personal information to *particular* individuals in their daily lives. For example, a person would tell their milkman whether they prefer to drink whole or skimmed milk and would likely disclose to their best friend if they were recently bereaved. In such situations, an individual, however, has informational control over *who* they tell, and *what* they tell them. Conversely, if a person's private details are published in a newspaper or disclosed online by a third party then this is often absent of the individual's genuine consent. Zimmerman also fails to address that most personal information is relatively banal with no bearing upon the fabric of society.[151]

a. Giving an Account of a Particular Mode of Living's Application to the Interpretation of Article 17(3)(a) and the Journalism Exemption

Little heed should be given to this factor by the domestic courts when seeking to establish the limits of Article 17's freedom of expression exception or journalism exemption. The central justification that this balancing factor invokes[152] is a weak one. To criticize the factor on its own terms, there are many different ways that the public (or an online audience) can learn about alternative modes of living other than reading private exposés online.[153] Many forms of media contain information about different lifestyles and habits of living, including (but not limited to) books, music, plays, poems, and historical events. There are also many individuals who choose to continuously and voluntarily disclose facts about their personal lives. A contemporary example of the latter is American former Olympian and reality television star Caitlyn Jenner who underwent a gender transition in 2015 while filming a documentary to chronicle her new life.[154] Brimblecombe and Phillipson have also noted that there has been a "boom" in personal diary blogs online that are publicly accessible, often with anonymized authors.[155]

Aside from critique of the argument on its principles, it can also be said that the factor supports draconian invasions of privacy. Application of this factor to the interpretation of the right to erasure would yield concerning results: it could be argued that *any* personal information online should remain accessible in order to make Internet users feel secure in their own lifestyles or to improve their ability to make successful decisions regarding their habits of living. This factor represents an example of how the notion of "publication in the public interest" has been stretched.[156] It uses the premise that *even intimate* private information should be shared, regardless of the unduly harmful negative impact on a data subject, simply because it gives a lifestyle "account." This manifestly incorrect interpretation of the public interest conflicts with ECtHR precedent, in the sense that this interpretation of the public interest seemingly does not consider reputational interests of data subjects. The Strasbourg Court has noted that negative effects on a party's reputation would give rise to a heightened claim to privacy and such interests must be balanced against the right of the public to be informed of an issue in contemporary society.[157] In *Hachette Filipacchi Associés v France*, the ECtHR sought to emphasize that the impact on an individual and their family of having private information distributed is a crucial consideration when balancing Article 10 interests against an Article 8 claim.[158] Furthermore, in the cases of *Lindon*, *Otchakovsky-Laurens*, and *Bladet Tromsø* the Court stated that the reputation of others is a legitimate justification in restricting expression under Article 10(2) ECHR.[159]

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6.3 THE ROLE MODEL ARGUMENT AND CORRECTING FALSE IMPRESSIONS

Two further Article 10 balancing factors will now be discussed in tandem: *the role model argument* and *correcting false impressions*. These are two frequently referenced balancing factors in English and Strasbourg privacy caselaw,[160] which, if present in an action, often tip the scale in favor of disclosure of personal information. Firstly, the "*role model*" *argument* contends that if a person is a figure of leadership or some degree of importance in society, personal information regarding their transgressions ought to be published in the public interest. Secondly, the "*correcting false impressions*" factor states that if an individual has been seeking to project a misleading image of themselves to society, personal information which reveals this should be published in the public interest. It could be said that these factors both relate to the *pursuit of truth* freedom of expression theoretical justification. These factors and their application to Article 17's expression exceptions will now be dealt with in turn.

a. Who Is a Role Model?

A broad interpretation of who constitutes a role model has been prevalent within the jurisprudence of the English courts. Indeed, Phillipson observes that role model status has been applied to individuals who perform no public function and have been "thrust into the limelight through tragedy [or mishap]".[161] This is demonstrated in the case of *A v B*, where Lord Woolf sought to emphasize that a legitimate interest arises pertaining to someone in the public eye, regardless of whether they have *voluntarily* placed themselves there or otherwise.[162] Another example of the vast reach of the role model argument was shown in *Spelman v Express Newspapers* which justified the disclosure that a son of an MP who played minor league rugby was taking drugs to enhance his performance.[163] The role model argument is also unwaveringly applied to professional sportsmen and women by the English judiciary,[164] regardless of whether or not the sportsperson has made any effort to garner celebrity status or present themselves as someone to look up to.

b. Criticisms of the Role Model Balancing Factor

The justification of the *role model* balancing factor appears to stem from the idea that a person in the limelight's behavior has influence over their fans. This theory was given prominence by the ECtHR in *Axel Springer*, where the Court held that a popular German television actor's fans had a public interest in knowing that he had been arrested on drug charges.[165] The English courts concurred with this standpoint in *Ferdinand*, where it was stated that the moral wrong of professional footballer Rio Ferdinand being unfaithful to his partner ought to be disclosed to fans who looked up to him and his lifestyle.[166] The *role model factor* can be criticized in three ways. Firstly, there is not a clear link between it and information in the public interest.[167] Despite the premise of this factor being that information concerning a role model's misdemeanors ought to be published to their fans, little consideration appears to have been given to the effect of this information on the fans in question. Professional athletes accrue varied followings including many young admirers, who upon hearing such information may[168] think such behavior was legitimized as their favorite sporting personality has engaged in it. Disclosure of such data may therefore work actively *against* the public interest in its indirect encouragement of immoral or dangerous behavior.[169] Secondly, in a more general criticism of this factor, it can be argued that a fan's modification of their behavior is hardly a matter of important or societal interest, and little explanation is given by the English courts or the ECtHR as to why such emphasis is placed on this occurrence.[170] It is difficult to see how the subjectively moral wrong of Rio Ferdinand's affair has an impact on the "fabric of society" in terms of the public interest.[171] Finally, Fenwick and Phillipson have gone as far as to discredit the underlying relevance of this balancing factor as a whole, by questioning whether there is any credible evidence that a role model's immoral conduct will in fact meaningfully influence the public, in either a positive or negative manner.[172]

c. Rationale Behind the Correcting False Impressions Factor

The legal rationale behind the *correcting false impressions* factor is that it is justifiable to disclose personal data about an individual in order to correct a misleading impression they have portrayed of themselves.[173] A modern example of this factor in practice is in the case of *NT1 and NT2*.[174] In the case, one of the claimants (NT1) had requested the delisting of several online links to Web pages describing his

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prior criminality. It also emerged that he had hired a reputation "clean-up" agency in order to manage his image online—which involved the firm posting accolades about his business integrity on the Web, despite the fact he had been convicted of a dishonesty offense in relation to his business activities and served jail time.[175] Lord Justice Warby noted:

> His criminal past was also relevant…to anybody who read or might read the blog and social media postings which the claimant, via Cleanup, put out about himself. Those postings were false or misleading, and in my judgment unjustifiably so.[176]

Lord Justice Warby found against the claimant in the case. It was also deemed relevant that NT1 had engaged in business ventures *since* his conviction,[177] and that a potential client could seek information about him online to be greeted with a false barrage of overwhelmingly positive data. This case has a unique set of circumstances; there is an obvious public interest in NT1's prior criminality being known as he was seeking to hold himself out to the general market as an unblemished businessman. *NT1 and NT2* turned on its own peculiar set of facts, however, the English courts have failed to expressly articulate in *general terms* why it matters if a misleading impression is held. As stated earlier, it seems to hinge upon the truth justification for freedom of expression; indeed, the submissions of counsel in *Ferdinand* aptly demonstrate this factor's role in the pursuit of truth:

> The Defendant argued that the Claimant had embarked on a wider campaign since 2006 to project a more responsible and positive image than the reputation which he had had in the past. His charitable and business activities were part of this. Here, too, the Defendant argued, there was a public interest in demonstrating that this was misleading because his relationship with Ms Storey [his lover] had continued long after the time when he was supposed to have changed.[178]

This truth-seeking rationale can also be found in judgments of the ECtHR. In *Plon (Societe) v France*, defendant counsel sought to argue that the public had an interest in knowing the truth behind the lies they had been told concerning the health of the French president.[179] Wragg notes that when interpreted widely, this factor may encompass not only behavior that contradicts something an individual has previously said but behavior which is against commonly accepted societal morality at the time; making this balancing factor similar to the role model argument.[180]

d. Criticisms of the Correcting False Impressions Balancing Factor

Criticisms of this public interest factor largely relate to its scope; indeed, it could be invoked to bolster publication of any material which may give the general public a more accurate picture of the person under scrutiny. This is supported by this factor's relationship to the truth justification for free speech. This approach, however, should be avoided with regards to not only the interpretation of Article 17 and its expression exemptions, but also to speech-privacy balancing more generally. The false impressions factor lacks an appreciation of why and for what purpose individuals may choose not to disclose certain details. No explanation is given for why exposing (often mundane) private facts about individuals and proving them to be dishonest is in the public interest. Elwood powerfully argues that it is only right to disclose personal data—regardless of whether it serves to rectify a false impression—if an important matter of societal importance is involved, as this finds a balance between the harm done to personal autonomy and dignity when private information is revealed and the public's desire to know the truth.[181]

e. Application of Both to Article 17(3)(a) and the Journalism Exemption

In relation to the right to be forgotten, it is unlikely that the *role model argument* will apply unless the person in question is well known—however, the potential remains open for the courts to take an expansive view of the factor and find that it covers not only people in the public eye but also individuals who assume a role model-like function in their careers; for example, a teacher. It is argued that the English courts should strive to abandon the role model factor when interpreting Article 17's expression exceptions because its theoretical rationale lacks both logic and evidence. As discussed above, due attention has not

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been given to a circumstance where a young fan is made aware of potentially criminal or otherwise risky behavior of their idol, and due to their age or lack of experience, seeks to emulate them. The "press as a watchdog" factor performs the task of holding those in public office accountable for their misdeeds and it is difficult to see what further information of legitimate public interest could be exposed with regards to this using the role model argument.

It is also argued here that the *correcting false impressions argument* ought not to be a pivotal consideration for the English courts when determining the scope of Article 17(3)(a) or the journalism exemption. This factor has the potential to be widened in scope to a greater extent than the role model argument, as inventive counsel may argue that personal data ought to remain online as it represents truths about a *private individual*, rather than someone in the public domain.[182] Indeed, personal information online often has the ability to expose details concerning the private lives of individuals, but such matters rarely relate to a matter of genuine public interest. Although a person may be anxious to have embarrassing information removed about themselves online, the data will seldom relate to a matter of significant societal importance. The truth justification for free speech relies upon the notion that *it benefits society to be exposed to accurate information*. This, however, is a generalized theory and does not take into account harm done to the reputation of individual data subjects whose personal information is released. As the ECtHR has observed, reputation is a consideration when seeking to balance privacy and expression interests, and this is something that the correcting false impressions argument fails to meaningfully take into account.[183]

6.4 THE PASSAGE OF TIME AND THE PUBLIC INTEREST

The above-discussed Article 10 balancing factors are perhaps the most significant in terms of their influence over the privacy-expression balancing exercise. That being said, there are two further Article 10 factors that are occasionally employed by the courts in relevant caselaw. One of these less prominent factors is *the amount of time passed* between an event and its reportage. This passage of time can have an impact on whether the ECtHR deems that a publication has legitimate public interest value. The most pertinent example of this is in *Plon (Societe) v France*, which concerned the publication of information concerning the health of a former French president (who was deceased). In finding that Article 10 interests prevailed over privacy rights of the late minister's family, the Strasbourg Court noted that a significant factor in the case was the amount of time that had expired between the president's death and the publication of the material.[184]

a. Application of the Passage of Time Factor to the Interpretation of Article 17(3)(a) and the Journalistic Exemption

It is argued here that although *a significant amount of time amassed* between information as first posted and subsequently requested for deletion may be a relevant factor when interpreting Article 17, it ought not to be a *pivotal* consideration for the courts in terms of tipping the balance in favor of expression. Indeed, it may be the case that the greater the amount of time elapsed—and the more irrelevant data has therefore become—the *more likely* it is that a data subject will want the information "forgotten." For example, this could be the case with personal data available online that reveals that an individual has, at some prior point in their life, had a house repossessed. That individual may have subsequently restored their financial stability and be seeking to invoke the right to be forgotten in order to move on from this time.[185] This correlates directly with the theoretical justification of privacy as allowing an individual to move on in their lives, encouraging personal autonomy and the ability to change lifestyle. On the other hand, it is also crucial that the courts remember that personal information that has been posted online even contemporaneously can negatively impact a data subject's life. If a compromising picture of an individual is uploaded to a social networking site this has the potential to be viewed by their friends, lovers, co-workers, and colleagues *immediately*. Depending on the nature of the image, instant negative ramifications could arise from this both socially and professionally, virtually instantaneously. Due to this, it is argued here that despite the above judgment of the Strasbourg Court, the *passage of time* should not be a decisive factor for the judiciary when assessing the scope of Article 17's expression exception or journalistic exemption.

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6.5 THE PUBLIC INTEREST IN CRIMES

There is a trend in ECtHR jurisprudence towards the prioritization of Article 10 interests over privacy rights in relation to the *publication of details exposing criminal activity*. This is justified by the Court through a public interest in the reportage of criminal acts and wrongdoing, as was noted in *Axel Springer*.[186] It is also justified in the English courts by virtue of a criminal offense being a matter of public record—an offender cannot expect privacy in relation to the commission of such an offense for this reason.[187] In addition, freedom of expression also tends to be given priority in relation to the reportage of ongoing trials in good faith.[188]

a. Application of the Public Interest in Crimes Factor to the Interpretation of Article 17(3)(a) and the Journalistic Exemption

It is argued here that the reportage of crimes is something that will likely be protected under Article 17(3)(a)'s expression exception, journalism exemption or other exemption.[189] Despite this, attention ought to be paid by the English courts to data subjects requesting deletion of information relating to their previous *minor*[190] criminal offenses. In these circumstances deletion requests ought to be duly considered; the ability of an individual to reform themselves into a law-abiding citizen is of fundamental societal importance.[191] Indeed, the ability to do so has been codified into statute by the Rehabilitation of Offenders Act 1974.[192] If documentation of the prior illegality of such a person remains present online, it can be difficult for such an individual to put their past behind them. The ability to forget is a human function enabling a person to move forward and reconstruct themselves for the better. The "total recall" capabilities of the Internet interfere with this important psychological function, by solidifying events that would previously have been forgotten in its "perfect memory" as forever accessible. If Article 17 is to readdress the balance between remembering and forgetting online, deletion of data regarding past minor deviances must be considered to fall within its ambit. [193]

As noted above, the first English "delisting" case of *NT1 and NT2* concerned two data subjects requesting the deletion of links to Web sites which detailed their past criminal convictions.[194] Both men had been found guilty of criminal offenses in the past and had served jail time—both were entitled to rehabilitation under the Rehabilitation of Offenders Act. Lord Justice Warby in the case observed that there was an interaction between the Data Protection Act 1998 and the Rehabilitation of Offenders Act, and that part of an offender's rehabilitation was a right to privacy (under Article 8 ECHR).[195] Lord Justice Warby, however, reasoned that the rehabilitation of offenders is only a "qualified right" and can conflict with freedom of expression, and that an offender cannot have a reasonable expectation of privacy if they are subject to criminal proceedings.[196] He also noted that the Act does not mean that a person is guaranteed *complete* privacy regarding their spent conviction but this *will* be a weighty factor in favor of their privacy rights, due to the potential negative repercussions of revealing that information for the person concerned.[197] Lord Justice Warby found against one of the claimant's delisting requests (NT1) and for the other's (NT2). The decision largely hinged upon both claimants' behavior since their convictions had become spent. NT1 had sought to falsely present himself as a clean-cut businessman despite his conviction for a dishonesty offense, whereas NT2 had pleaded guilty to his offense and shown remorse.[198] In addition, it was relevant that NT2's conviction was always going to become spent (it was for a less significant crime than NT1's), whereas NT1's conviction only fell under the remit of the Rehabilitation of Offenders Act because of a recent change in the law.[199] It appears, then, if this case is followed in future with regards to the Data Protection Act 2018, that the Rehabilitation of Offenders Act *can* work, in some circumstances, to bolster a deletion right—depending on other factors in the case.

7. CONCLUSION

In this uncertain period in the wake of the GDPR and the Data Protection Act 2018, the English courts (and other courts around Europe) will be seeking guidance regarding the RTBF. Jurisprudence of the ECtHR will likely be turned to, chiefly because of the Strasbourg Court's expertise in Article 8–10 ECHR "balancing." This article has extrapolated several balancing factors from Strasbourg and English case-law that could be used by courts when balancing the RTBF against one of its freedom of expression

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exceptions. In a novel piece of this kind, this article has offered suggestions as to how each of these factors could and should (or should not be) used to influence the English courts' assessment of the new erasure right. In particular, the usage of the *role model/correcting false impressions* arguments has been criticized, and, moving forward, it is suggested that the courts abandon their usage of these two factors in order to ensure that the RTBF reaches its potential in restating online privacy. The theoretical rationale for the usage of the *modes of living* factor also lacks logic. On the contrary, the *passage of time* and the *public interest in crimes* as factors have relevance to whether an erasure claim stands up against a competing interest in freedom of expression, and could act in certain circumstances to negate a deletion request. All of the above-discussed Article 10 factors dictate how broadly the "public interest" can be drawn, but a theme that has shrouded this article is a lack of clarity over what the public interest *actually is*. An argument has been put forward that overtly broad conceptions of the public interest ought to be avoided concerning the courts' evaluation of the RTBF's expression exceptions. The crux of the matter is whether there is a *genuine* public interest in the information disclosed.

NOTES

1. Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1 (27/4/2016). Hereafter "*GDPR*." The GDPR came into force across the EU on the 25 May 2018.
2. *Ibid*, Article 17.
3. *Ibid.* Article 17(1)(b) allows a data controller to withdraw consent to the processing of their personal data.
4. *See* for example Meg L. Ambrose, "It's About Time: Privacy, Information Life Cycles, and the Right to be Forgotten" (2013) 16(2) *Stanford Technology Law Review* 369; Jeffrey Rosen, "The Right to be Forgotten" (2012) *Stanford Law Review Online* 88; Diane L. Zimmerman; "The 'New' Privacy and the 'Old': Is Applying the Tort Law of Privacy Like Putting High Button Shoes on the Internet?" (2012) 17 *Communications Law and Policy* 107; Paul Schwartz, "The EU-US Privacy Collision: A Turn to Institutions and Procedures" (2013) 126 *Harvard Law Review* 1966; Gregory W. Voss, "One year and loads of data later, where are we? An update on the proposed European Union General Data Protection Regulation" (2013) 16(10) *Journal of Internet Law* 13.
5. *See*: Case C-131/12 *Google Spain SL and another v Agencia Española de protección de Datos (AEPD) and another* [2014] W.L.R 659 which infamously concerns the requirement of Google to "de-list" search results to a particular Web page—however, this case was heard under the 1995 Data Protection Directive, rather than the GDPR—*see* and Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and of the free movement of such data [1995] O.J L 281, 31; also *see NT1 and NT2 v Google LLC and the Information Commissioner* [2018] EWHC 799 (QB)—the first right to be forgotten-style case heard in the English courts. The recent CJEU case of C-507/17 *Google LLC, successor in law to Google Inc. v Commission nationale de l'informatique et des libertés (CNIL)* 24 September 2019, ECLI:EU:C:2019:772 commented upon the territorial scope of the right to be forgotten, stating that the right was operable inside the EU and left open the possibility of an extension outside of the EU in a future case; *see* Iain Wilson and Elizabeth Mason, "ECJ confirms territorial limitations of 'the right to be forgotten'" *Inforrm*, media law blog, 3 October 2019, available at: *https://inforrm.org/2019/10/03/ecj-confirms-territorial-limitations-of-the-right-to-be-forgotten-iain-wilson-and-elizabeth-mason/* [last accessed 2/1/20].
6. Under a common law system. Historically, in the area of tort law, English courts are particularly ready to make judicial intervention; *see* for example *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 which heralded the English "privacy tort" of misuse of private information.
7. Fiona Brimblecombe and Gavin Phillipson, "Regaining Digital Privacy? The New 'Right to be Forgotten' and Online expression" 4(1) *Canadian Journal of Comparative and Contemporary Law* 1–66.
8. In this case, more specifically, RTBF claims.
9. *GDPR*.
10. Particularly with regards to part 2, which discusses the lack of privacy on the internet today, and the impact this has on society.
11. Julie Cohen, "What Privacy is For" (2013) 126 *Harvard Law Review* 1904.
12. *See generally* Viktor Mayer-Schönberger, *Delete* (2011).
13. On cursory inspection, it is possible as of December 2018 to purchase an Apple iPhone for £10 per month on a contract which also includes call time, texts and internet access, courtesy of the Carphone Warehouse: *see https://www.carphonewarehouse.com/mobiles/pay-monthly.html/?cid=PAIDSEARCH_Google_G%20-%20Non%20Postpay%20-%20Smartphones%20-%20BMM_Smartphones%20-%20Smartphone%20-%20Cheap%20-%20BMM_+smartphone%20+cheap_43700032979188061&&gclid=EAIaIQobChMIhZ6zwOvC3wIV1oTVCh272gdDEAAYASAAEgKW5vD_BwE&gclsrc=aw.ds* (last accessed 29/12/18). Also *see* the Online Harms White Paper, which discusses privacy-based online harms, April 2019, accessible at: *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793360/Online_Harms_White_Paper.pdf* [last accessed 1/7/19].
14. In 2015, the Guardian reported on a YouGov survey which stated that the average home in the UK owns 7.4 internet-enabled devices. *See* "Online all the time – average British household owns 7.4 internet devices", *The Guardian*, 9 April 2015, accessible at: *https://www.theguardian.com/technology/2015/apr/09/online-all-the-time-average-british-household-owns-74-internet-devices* [last accessed 28/12/18]. It seems safe to assume that since 2015 this number can have only increased.
15. *Ibid.* The study showed that time spent online for adults 16 and above doubled between 2005 and 2015.
16. *Ibid.*
17. Allison Battisby, "The latest UK social media statistics for 2018", *Avocado Social*, social media blog, 2 April 2018, accessible at: *https://www.avocadosocial.com/the-latest-uk-social-media-statistics-for-2018/* [last accessed 29/12/18].
18. *See https://gb.linkedin.com/*, *https://tinder.com/*, *https://www.grindr.com/*, *https://en-gb.facebook.com/* and *https://www.instagram.com/?hl=en* [last accessed 29/12/18].
19. *See* "The Top 20 Valuable Facebook Statistics – Updated December 2018", *Zephoria Digital Marketing*, digital marketing blog, 28 November 2018, accessible at: *https://zephoria.com/top-15-valuable-facebook-statistics/* [last accessed 29/12/18].

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20. *See https://www.apple.com/uk/icloud/* and *https://www.dropbox.com/h* (last accessed 29/12/18).
21. *See https://www.bbc.co.uk/news/10628994* [last accessed 29/12/18].
22. In particular Article 8 of the European Convention on Human Rights.
23. *See* for example Unilad's Facebook page which is dedicated to posting such content, accessible at: *https://www.facebook.com/uniladmag/* [last accessed 22/7/19].
24. *See* Lauren Salm, "70% of employers are snooping candidates; social media profiles", *CareerBuilder.com*, a career advice Web site, 15 June 2017, accessible at: *https://www.careerbuilder.com/advice/social-media-survey-2017* [last accessed 22/7/19].
25. *See* for example, "How can social media ruin a relationship" *TheLoveQueen.com*, a Web site for romantic advice, accessible at: *https://www.thelovequeen.com/how-can-social-media-ruin-your-relationship//* [last accessed 22/7/19].
26. *Delete*, *supra* n.12.
27. *See* Daniel Solove, "Speech, Privacy and Reputation on the Internet" in Saul Levmore and Martha Nussbaum (eds), *The Offensive Internet* (2010) and *ibid Delete*.
28. That of the pursuit of truth, autonomy, self-fulfilment and facilitation of democracy.
29. Helen Fenwick and Gavin Phillipson, *Media Freedom Under the Human Rights Act* (2006) at 683–4; Kent Greenawalt, "Free Speech Justifications" (1989) 89 *Columbia Law Review* 119, 130; G. Edward White, "The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America" (1996) 95(2) *Michigan Law Review* 299, 355 and Ruth Gavison, "Too Early for a requiem: Warren and Brandeis were right on privacy vs free speech" (1992) 43(3) *South Carolina Law Review* 437, 462.
30. Greenawalt, *supra* n.29 at 131 and John Stuart Mill, *On Liberty* (2009).
31. Pnina Lahav, "Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech" (1988) 4 *Journal of Law and Politics* 451, 456–8.
32. Fenwick and Phillipson, *supra* n.29 at 115.
33. *See* Greenawalt for a discussion concerning objective and subjective truths: *supra*, n.29 at 142.
34. *Ibid*, 130. Such discrete pockets of information can come in the form of pieces of personal information on the Web. Also *see* White, *supra* n.29 at 133–4.
35. *See Delete*, *supra* n.12.
36. Gavison, *supra* n.29 at 464. Gavison argues that most privacy–invading expression is not attempting to pursue certain truths.
37. Paul Wragg, "A Freedom to Criticise? Evaluating the Public Interest in Celebrity Gossip after Mosley and Terry" (2010) 2(2) *Journal of Media Law* 295, 304–7: Wragg argues that the UK press reporting on the sexual infidelities of footballers does not advance societal interests and does not hamper serious investigative journalism.
38. Greenawalt, *supra* n.29 at 138 and Lahav, *supra* n.31 at 456 and Lee C. Bollinger, "Free Speech and Intellectual Values" (1983) 92(3) *Yale Law Journal* 438, 451.
39. The issue with this stance being: *what constitutes an issue of pivotal importance?*.
40. Although this is one of the most prevalent justifications for freedom of expression, it is interesting to consider that influential American academic Redish argues against its continued prominence. Redish notes that despite many claiming that the First Amendment is concerned with preserving political speech, it has been shown (by the US as well as the Strasbourg courts) that many forms of none-political speech fall under the remit of its protection. He also observes that different types of political action can also facilitate democracy, rather than just political expression. *See* both Redish articles *infra*, n.42.
41. *See* for example *Observer and Guardian v the United Kingdom* Application no 13585/88, merits and just satisfaction, 26 November 1991 at [59]; *Axel Springer AG v Germany* Application no 39954/08, merits, 7 February 2012 at [91]; *Von Hannover (No.2)* Application no 60641/08, 7 February 2012 at [110] and *K v News Group Newspapers Ltd* [2011] EWCA Civ 439 [2011] 1 WLR.
42. *See* Martin Redish, "The Value of Free Speech" (1982) 130 *University of Pennsylvania Law Review* 591, 596.
43. Lahav, *supra* n.31 at 460–3.
44. White, *supra* n.29 at 355.
45. *K v NGN*, *supra* n.41 at [A], emphasis added.
46. Greenawalt, *supra* n.29 at 145–6; also *see New York Times Co. v Sullivan* 376 U.S 254 (1964).
47. *New York Times Co. v Sullivan* 376 U.S 254 (1964).
48. Bollinger, *supra* n.38.
49. Eric Barendt, *Freedom of Speech* (2007) at 21.
50. *Ibid* at 18.
51. And presumably also information which helps inform individual how to vote. The "watchdog" public interest factor is discussed in detail later in this article.
52. Martin Redish, "The Value of Free Speech", *supra* n.42 at 597.
53. Fenwick and Phillipson, *supra* n.29 at 689.
54. Redish, *supra*, n.42 at 600.
55. C. Edwin Baker, "Giving the Audience What it Wants" (1997) 58(2) *Ohio State Law Journal* 311.
56. White, *supra* n.29.
57. Greenawalt, *supra* n.29 at 144.
58. Tom Gerety, "Redefining Privacy" (1977) 12(2) *Harvard Civil Rights–Civil Liberties Law Review* 233, 265 and Emerson, "The right to privacy and freedom of the press" (1979) 14(2) *Harvard Civil Rights-Civil Liberties Law Review* 329, 339.
59. Gavison, *supra* n.29 at 464.
60. *See* the "giving accounts of different modes of living" free expression balancing-factor discussed below.
61. *See* White, *supra* n.29 at 345, discussing the works of Emerson.
62. Lahav, *supra* n.31 at 459 and Greenawalt above, n.29 at 144.
63. Paul Wragg, "The benefits of privacy-invading expression" (2013) 64(2) *Northern Ireland Legal Quarterly* 187, 203, emphasis added.
64. C. Edwin Baker, "Realizing self–realization: Corporate Political Expenditures and Redish's Value of Free Speech" (1981) 130 *University of Pennsylvania Law Review* 646, 661–3.
65. *GDPR* [emphasis added].
66. As this would, it is submitted here, come under the remit of Article 17(1)(a). C/f. Giovanni Sartor, "The Right to be Forgotten in the Draft Data Protection Regulation" (2015) 5(1) International Data Privacy Law 64, 65.
67. This includes "data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation" according to Article 9(1) *GDPR*.
68. Brimblecombe and Phillipson, *supra* n.7 at 26.
69. *GDPR*.
70. *GDPR*.
71. Sartor, *supra* n.66 at 65.
72. *GDPR*, Article 17.

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73. The Data Protection Act 2018, Schedule 2, Part 5, 26(2)(a).
74. *Ibid*, 26(2)(b).
75. *Ibid*, 26(3).
76. *Ibid*, 26(5).
77. *See* Brimblecombe and Phillipson, *supra* n.7 at 40.
78. As of November 2019, EU leaders have agreed to delay Brexit until the 31 January 2020. *See* Schraer, Brexit delay: How is Article 50 extended? *BBC news*, 28 October 2019, accessible at: *https://www.bbc.co.uk/news/uk-politics-47031312* [last accessed 7/10/19].
79. EU (Withdrawal) Act 2018.
80. *Ibid.*
81. *See* section 2.
82. *See Google Spain*, *supra* n.5.
83. *Ibid.* The case held that search engines such as Google can be considered "data controllers".
84. *NT1 and NT2 v Google LLC* (Intervenor: The Information Commissioner) [2018] EWHC 799 (QB).
85. Noreen O'Meara, "'A More Secure Europe of Rights?' The European Court of Human Rights, the Court of Justice of the European Union and EU Accession to the ECHR" (2011) 12(10) *German Law Journal* 1813, 1815–9.
86. Charter of Fundamental Rights of the European Union, (18/2/2000) OJ C364/3, Article 7 and Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950, 3 September 1953) 005 CETS (ECHR), Article 8.
87. Tommaso Pavone, *The Past and Future Relationship of the European Court of Justice and the European Court of Human Rights: A Functional Analysis* (M.A Programme in Social Sciences, University of Chicago, 2012) 3.
88. *See* Wolfgang Weib, "Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights After Lisbon" (2011) 7(1) *European Constitutional Law Review* 64, 64–67 and Charter of Fundamental Rights *supra* n.86, Article 52(3). Additional protection to that of the ECHR can also be conferred by the Charter's rights.
89. Wragg above, n.63 at 189.
90. *Ibid*, 189.
91. *Lillo-Stenberg and Sæther v Norway* Application No 13258/09, merits, 16 January 2014 at [36] (emphasis added).
92. *Von Hannover (No.2) supra* n.41 at [109] also *see* Gavin Phillipson, "Press freedom, the public interest and privacy" in Kenyon (ed) *Comparative Defamation and Privacy Law* (2016) at 154.
93. *Von Hannover v Germany* Application No 59320/00, merits, 24 September 2004.
94. *Ibid Von Hannover* [76] and Mowbray, *Cases and Materials on the European Convention on Human Rights* (2007) at 582.
95. *Von Hannover (No.2)*, *supra* n.41 at [118].
96. *Ibid.*
97. Phillipson, *supra* n.92 at 153.
98. *Von Hannover (No.2)*, *supra* n.41 at [118].
99. *Von Hannover v Germany (No.3)* Application No 8772/10, merits, 19 September 2013 and Bedat, "Case Law, Strasbourg; Von Hannover v Germany (no.3) Glossing Over Privacy" *Inforrm*, media law blog, 13 October 2013, available at: *https://inforrm.wordpress.com/2013/10/13/case-law-strasbourg-von-hannover-v-germany-no-3-glossing-over-privacy-alexia-bedat/* (last accessed 25/5/16).
100. Phillipson, *supra* n.92 at 152.
101. *Fürst-Pfeifer v Austria* Application Nos 33677/10 and 52340/10, merits, 17 May 2016 and Stijn Smet, Fürst—Pfeifer v Austria: "A one-sided, unbalanced and fundamentally unjust argument" (Strasbourg Observer, 16 June 2016) accessible at: *https://strasbourgobservers.com/2016/06/16/furst-pfeifer-v-austria-a-one-sided-unbalanced-and-fundamentally-unjust-judgment/*.
102. *Ibid.*
103. *Ibid.*
104. *Ibid.*
105. *Ibid.*
106. The information rendering likely ill-effects to the reputation and emotional wellbeing of the man concerned upon informational release. *See Goodwin v News Group Newspapers (No.3)* [2011] EWHC 1437 (QB) and Wragg, *supra* n.63 at 191. Also *see* the previous section of this chapter discussing the relevance to competing privacy/speech interests of the intimacy of data.
107. Wragg, *supra* n.63 at 198 and *see* for example *Ferdinand* and *Hutcheson (previously "KGM") v News Group Newspapers Ltd* [2011] EWCA Civ 808.
108. *Ibid* Wragg at 198.
109. *Ibid.*
110. *See Delete*, *supra* n.12 and Daniel Solove, "Speech, Privacy and Reputation on the Internet" in Martha Levmore and Saul Nussbaum (eds), *The Offensive Internet* (2010) and Reding, "The EU Data Protection Reform 2012: Making Europe the Standard Setter for Modern Data Protection Rules in the Digital Age" (22 January 2012) available at: *http://europa.eu/rapid/press-release_SPEECH-12-26_en.htm* (last accessed 18/6/15).
111. *Von Hannover (No.2)*, *supra* n.41 at [102].
112. Diane L. Zimmerman, "Requiem for a Heavyweight: A farewell to Warren and Brandeis's privacy tort" (1983) 68(2) *Cornell Law Review* 291, 326.
113. Baker, *supra* n.55 at 355.
114. Perhaps due to mishandling funds or through reasons of bias.
115. Baker, *supra* n.55 at 355.
116. For example, *Von Hannover (No.2)*, *supra* n.41 and *K v NGN*, *supra* n.41.
117. Which he was not entitled to while working full time for the European Union.
118. *Krone Verlag GmbH & Co. KG v Austria* Application No 34315/96, merits, 26 February 2000 at [36].
119. *Von Hannover*, *supra* n.93 at [62].
120. *See Carina Trimingham v Associated Newspapers Limited* [2012] EWHC 1296 (QB) and Sophie Mathiesson and Eric Barendt, "*Carina Trimingham v Associated Newspapers*: A right to ridicule?" (2012) 4(2) *Journal of Media Law* 309, 313.
121. *Ibid.*
122. *NT1 and NT2*, *supra* n.84.
123. *Google Spain*, *supra* n.5.
124. *NT1 and NT2*, *supra* n.84 at [137–8].
125. *NT1 and NT2*, *supra* n.84 at [137].
126. Who did float shares on the stock exchange.
127. *Pedersen and Baadsgaard v Denmark* Application No 49017/99, merits, 17 December 2004.
128. Kirsty Hughes, "The Public Figure Doctrine and the Right to Privacy" (2019) 78(1) *Cambridge Law Journal* 70, 73.
129. For example, this could include Rupert Murdoch—although the press mogul is not a democratically elected official, he doubtless is an influential public figure due to his control over major newspapers and corporations.

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130. Hughes, *supra* n.128 at 77–789.
131. Wragg, *supra* n.63 at 200.
132. In the abovementioned case of *Trimingham*, the claimant had both a personal and professional relationship with a person running for public office.
133. *Von Hannover (No.2)*, *supra* n.41 at [110] and *Standard Verlags GmbH v Austria (No.2)* Application No 21277/05, merits, 4 June 2009.
134. *Ibid Standard Verlags*, [51].
135. Mathiesson and Barendt, *supra* n.120 at 313.
136. *Standard Verlags*, *supra* n.133 [48 and 51] and *Von Hannover (No.2)*, *supra* n.41 at [110].
137. For further reading *see* John Elwood, "Outing, Privacy and the First Amendment" (1992) 102 *Yale Law Journal* 747.
138. Although presumably who is a "limited public figure" could be contested. *See Sullivan*, *supra* n.47.
139. Zimmerman, *supra* n.112 and also *see* Eugene Volokh, "Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People Speaking About You" (2000) 52 *Stanford Law Review* 1049.
140. *Ibid* Zimmerman and Eric Posner, "The Right of Privacy" (1978) 12 *Georgia Law Review* 393 (Zimmerman quotes Posner in her article).
141. *Ibid* Zimmerman at 354 and Posner.
142. Joseph Raz, "Free Expression and Personal Identification" (1991) 11 *Oxford Journal of Legal Studies* 303, 309–11 and also *see* Phillipson n.92 as well as Wragg above, n.63.
143. *Ibid* Raz, at 313 and Phillipson at 141.
144. In other words, publicly revealing that a person is homosexual.
145. John Elwood, "Outing, Privacy and the First Amendment" (1992) 102 *Yale Law Journal* 747, 772.
146. *Ibid*.
147. *See generally* Nicole Moreham, "Privacy in the Common Law" (2005) 121 *Law Quarterly Review* 628.
148. Raz, *supra* n.142 at 312.
149. Jeffrey Rosen, "Why Privacy Matters" (2000) 24(4) *The Wilson Quarterly* 32, 38 and Ruth Gavison, "Privacy and the Limits of the Law" (1980) 89(3) *The Yale Law Journal* 421.
150. Zimmerman, *supra* n.112 at 326.
151. Social networking sites are increasing in popularity, yet much of the personal information on them is mundane or only holds interest for a select quantity of individuals.
152. The importance of the publication of another's private information to inform others about differing lifestyle choices.
153. Phillipson, *supra* n.92 at 141 and Raz, *supra* n.142 at 310–11.
154. The documentary is entitled "I am Cait" and was shown on E! television network.
155. Brimblecombe and Phillipson, *supra* n.7 at 19.
156. *See* Geoffrey Gomery, "Whose autonomy matters? Reconciling the competing claims of privacy and freedom of expression" (2007) 27(3) *Legal Studies* 404, 414 and Paul Gewirtz, "Privacy and Speech" (2001) *The Supreme Court Review* 139, 154.
157. *Lindon, Otchakovsky-Laurens and July v France* App Nos 21279/02 and 36448/02, merits, 22 October 2007 at [44] and *Bladet Tromsø and Stensaas v Norway* App No 21980/93, merits, 20 May 1999) at [67 and 73].
158. *Hachette Filipacchi Associés v France*, App no. 71111/01 (ECHR, 14 June 2007) at [49].
159. *Lindon*, *supra* n.157 at [44] and *Bladet supra*, n.157 at [67 and 73].
160. *See* for example *Axel Springer, supra* n.41.
161. Phillipson above, n.92 at 154, bracketed text added.
162. *See Ferdinand v MGN* [2011] EWHC 2454 (QB) at [87], which quotes this section from Lord Woolf in *A v B* while discussing the role model argument and the original judgment: *A v B Plc and Another* [2002] EWCA Civ 337.
163. *Jonathan Spelman (by his Litigation Friends Mark Spelman and Caroline Spelman) v Express Newspapers* [2012] EWHC 355 (QB) [22].
164. *Ferdinand supra* n.162 at [87] and also *see Terry and persons unknown* [2010] EWHC 119 (QB).
165. *Axel Springer*, *supra* n.41.
166. *Ferdinand supra* n.162 at [87].
167. Phillipson, *supra* n.92 at 155.
168. Which presumably is the intended outcome of disclosing such information in the public interest: *see* Wragg, *supra* n.63 at 196.
169. Phillipson, *supra* n.92 at 155–56. "Immoral" behavior could arguably include adultery, whereas "dangerous" behavior could include taking recreational drugs.
170. *Ibid* Phillipson, 157 and Wragg *supra*, n.63 at 196.
171. *Ibid* Wragg, 195.
172. Fenwick and Phillipson, *supra* n.29.
173. *See Campbell*, *supra* n.6 and arguments made in favor of the publication of pictures of Naomi Campbell outside a drug rehabilitation meeting centre, citing that this was justified as she had sought to present herself as a model who did not take illegal drugs in order to manage her weight or lifestyle.
174. *NT1 and NT2, supra* n.84.
175. *Ibid* [130].
176. *Ibid* [168].
177. *NT1 and NT2*, *supra* n.84 at [121].
178. *Ferdinand supra* n.162 at [74].
179. *Plon (Societe) v France* App No 58148/00, merits, 18 May 2004 at [40].
180. Paul Wragg, "A Freedom to Criticise? Evaluating the Public Interest in Celebrity Gossip after Mosley and Terry" (2010) 2(2) *Journal of Media Law* 295, 307.
181. Elwood, *supra* n.145 at 775.
182. English and ECtHR privacy cases invoking the "correcting false impressions" argument exclusively concern individuals who are in the public eye.
183. *See*, for example, *Lindon*, *supra* n.157.
184. *Plon (Societe)*, *supra* n.179 and *see* Mowbray, *supra* n.94 at 580.
185. This is a deliberate (but approximate) parallel to the circumstances surrounding the case of *Google Spain*, *supra* n.5.
186. *Axel Springer, supra* n.41.
187. *See* below, *NT1 and NT2*.
188. *Erla Hlynsdóttir v Iceland (No. 3)* App no 54145/10, merits, 2 June 2015.
189. For example, Paragraph 5(3), schedule 2 of the Data Protection Act 2018 states that: "the listed GDPR provisions do not apply to personal data where disclosure of the data… is necessary for the purpose of, or in connection with, legal proceedings (including prospective legal proceedings)". This could potentially exempt the right to erasure in this scenario.
190. As opposed to serious criminal offences—for example, historical sex abuse and violent crime.
191. *See generally Delete*, *supra* n.12.
192. Rehabilitation of Offenders Act 1974.

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193. *See* Sylvia de Mars and Patrick O'Callaghan, "Privacy and Search Engines: Forgetting or Contextualising?" 43(2) *Journal of Law and Society* 257, 258 and Delete, *supra* n.12.
194. *NT1 and NT2*, *supra* n.84. It should be reminded here that this case was decided before the enforcement of the GDPR and the Data Protection Act 2018.
195. *NT1 and NT2*, *supra* n.84 at [166].
196. *Ibid* at [166].
197. *Ibid* at [166(2)].
198. *Ibid* at [169] and [203].
199. *Ibid* at [167].

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