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# SENIOR THESIS APPROVAL

This Honors thesis entitled

**“Freedom of Speech Vs. The Right to Privacy - Problems with the  
English Super Injunction”**

written by

**Nicci Fillinger**

and submitted in partial fulfillment of the requirements for completion of the Carl Goodson Honors Program meets the criteria for acceptance and has been approved by the undersigned readers.

Dr. Byron Eubanks - Thesis Director

Dr. Jeff Root - Second Reader

Dr. Barbara Pemberton - Third Reader

Dr. Barbara Pemberton - Honors Program Director  
April 16, 2012

**OUACHITA BAPTIST UNIVERSITY**

**FREEDOM OF SPEECH V. THE RIGHT TO PRIVACY – PROBLEMS WITH THE ENGLISH SUPER INJUNCTION**

**A THESIS SUBMITTED TO  
THE BOARD OF THE CARL GOODSON HONORS PROGRAM**

**BY  
NICCI FILLINGER**

**APRIL 16, 2012**

Free speech. The words of the First Amendment to the Constitution of the United States are close to hearts of Americans, especially journalists. However, not every country has the same amount of freedom granted in the US, and most Americans recognize this. Countries such as China, North Korea, and Libya are notorious for media censorship, but Americans would not typically add England to this list. In recent years, however, cases of media censorship in England that would shock American journalists have come to light.

The controversy over censorship results from tension between Article 8<sup>1</sup> and Article 10 of the European Convention on Human Rights. Ten member states of the Council of Europe adopted and ratified the European Convention on Human Rights in 1950. The Convention gives individuals the right to bring their case before the European Court of Human Rights if they think their rights have been violated under the Convention by a state party. This meant, however, that a case in the UK could not go before the Court until it had gone through all the UK courts, a process which could take up to seven years. Because of this, the Parliament passed the Human Rights Act 1998, making the European Convention on Human Rights apply to domestic law. The act went into full effect in October 2000.

The two articles that tend to come into conflict with each other are Article 8, which grants the right to respect for private and family life, and Article 10<sup>2</sup>, which grants the right of freedom of expression. The rights to general privacy and freedom of expression had never been established as constitutional rights in England until Human Rights Act 1998 was passed. This meant that both rights had

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<sup>1</sup>Article 8: Right to respect for private and family life. 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

<sup>2</sup>Article 10: Freedom of expression. 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

to be hammered out, a task that has proved to be very difficult as the new rights have a tendency to come into conflict with each other. The main issue between the rights comes when journalists write about a public figure's private life. Article 10 grants the right to "receive and impart information and ideas without interference by public authority and regardless of frontiers," so journalists are given the right to report what is going on in the world. Article 8, however, grants the "right to respect for one's private life and family life, his home and correspondence." This right to privacy does have limits, however. According to the National Council for Civil Liberties, limitations must be in accordance with the law, necessary and proportionate, and for a legitimate aim. Legitimate aims included are "the interests of national security, the interests of public safety or the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others."<sup>3</sup> The last provision, the protection of the right and freedoms of others, is the basis of the argument for freedom of speech over privacy.

What happens, then, when the information journalists want to impart is about a public figure's private life? In the US, public figures' lives are basically on display for all to see whether it concerns their political stance or who they are currently dating or anything in between; everything is fair game. In England when Human Rights Act 1998 was enacted, famous people began to claim their right to privacy, specifically in order to keep their private lives under wraps. They have achieved this by attaining anonymized injunctions, court orders that "restrain the media from publishing information that concerns the applicant and is said to be confidential or private where the names of either or both of the parties to the proceedings are stated."<sup>4</sup> To put it in simpler terms, if Tom Hanks had an affair and got an injunction on this information, a newspaper could report on the incident, but it would look something

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<sup>3</sup> Liberty Civil Liberties Group, "Article 8: Right to Respect for Private and Family Life," (<http://www.liberty-human-rights.org.uk/human-rights/human-rights/the-human-rights-act/what-the-rights-mean/article-8-right-to-a-private-and-family-life.php>).

<sup>4</sup> Report of the Committee on Super-injunctions: Super-Injunctions, Anonymised Injunctions, and Open Justice, by Lord Neuberger, chairman (May 20, 2011), 20.

like this: "A MARRIED entertainer cheats on his wife with an actress who then leaves the show they both appeared in."<sup>5</sup> The information about what happened may be published, but the names of the people involved cannot. Another type of injunction, the super injunction is even more extreme. According to a report from the Master of the Roll's committee on super-injunctions and anonymized injunctions, a super-injunction is "an interim injunction that restrains a person from: (i) publishing information that concerns the applicant and is said to be confidential or private; and (ii) publicizing or informing others of the existence of the order and the proceedings."<sup>6</sup> This means that not only can persons not mention the information the injunctions covers, but they cannot even mention that there is an injunction. It guarantees complete silence. These extreme injunctions are usually only granted for trials to help insure a fair trial and are lifted once the trial is over. News and debate about the use of injunctions has been frequent over the past year in England, but in most media coverage no distinction is drawn between super-injunctions and anonymized injunctions; all injunctions are referred to as super-injunctions. In this paper, "injunction" and "anonymized injunction" will be used synonymously and "super-injunction" will be used for the most secret injunctions as defined above.

### The Incident

On April 14, 2011 the story of a married premier league footballer's affair broke in a popular English newspaper *The Sun*. The headline read "Footie Star's affair with Big Brother's Imogen Thomas," and the rumors and questions began immediately. Who is this promiscuous footballer? Does he play for my favorite team? The article explained the lacking information saying, "A Premier League star last night gagged *The Sun* after we found him romping with busty Big Brother babe Imogen Thomas behind his

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<sup>5</sup> Bryan Flynn, "Doesn't it make you gag?" *The Sun News*, April 21, 2011. (<http://www.thesun.co.uk/sol/homepage/news/3538953/Cheating-married-entertainer-is-latest-hypocritical-celeb-to-court-fame-before-using-gag-order.html>).

<sup>6</sup> Report of the Committee on Super-injunctions, 20.

wife's back. The love rat got lawyers to ban us from naming him despite pals of lads' mag model Imogen saying he had told her she was the love of his life."<sup>7</sup> He got an anonymized injunction in a case named *CTB v. News Group Newspapers*. The claimant in anonymized injunction cases is assigned random initials to keep his or her identity hidden. The details of his affair with Thomas were published, but the name of the footballer was not revealed.

Privacy injunctions are having a hard time maintaining their hold in this technological age. The story of the unfaithful footballer had a name attached to it in no time due to social media, namely Twitter. Ryan Giggs, a midfielder for Manchester United, was exposed as the injunction holder by Twitter user @unknownj, James Webley, on April 14, the same day the injunction was granted. However, his tweet was not sensational (it was only retweeted twice and didn't reach a very large audience to begin with because Webley did not have a substantial number of followers), and Giggs' identity remained a secret.

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<sup>7</sup>Gary O'Shea, "Footie star's affair with Big Brother's Imogen Thomas," *The Sun News* (April 14, 2011). (<http://www.thesun.co.uk/sol/homepage/news/3526696/Footie-stars-affair-with-Big-Brothers-Imogen-Thomas.html>).



James Webley's tweet identifying Giggs as the holder of the injunction.<sup>8</sup>

Throughout April and the surrounding months, *The Sun* wrote articles criticizing the law and stories of salacious gossip with the names removed to make the use of injunctions known to the general public.<sup>9</sup> The British Prime Minister even took note, saying at a question and answer session that the

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<sup>8</sup>@unknownj(Webley, James), Twitter, April 14, 2011, 4:02 p.m. (<https://twitter.com/#/unknownj/statuses/58636237782781952>).

<sup>9</sup>"Cameron 'uneasy' over injunctions," *The Sun News*, April 21, 2011. (<http://www.thesun.co.uk/sol/homepage/news/3540195/Cameron-uneasy-over-injunctions.html>).

Tom Newton Dunn, "Cameron: Act on tweet gag farce," *The Sun News*, May 10, 2011. (<http://www.thesun.co.uk/sol/homepage/news/3571864/David-Cameron-says-its-time-to-act-on-twitter-super-injunction-farce.html>).

Tom NewtonDunn, "How many gags? We've lost count," *The Sun News*, April 23, 2011. (<http://www.thesun.co.uk/sol/homepage/news/3543056/How-many-gags-Weve-lost-count.html>).

Tom Newton Dunn, "PM hits out over gagging orders," *The Sun News*, April 22, 2011. (<http://www.thesun.co.uk/sol/homepage/news/3541576/PM-David-Cameron-hits-out-over-gagging-orders.html>).

Bryan Flynn, "Doesn't it make you gag?" *The Sun News*, April, 21, 2011. (<http://www.thesun.co.uk/sol/homepage/news/3538953/Cheating-married-entertainer-is-latest-hypocritical-celeb-to-court-fame-before-using-gag-order.html>).

David Lowe and Samantha Lawton, "Men hide behind an injunction and it's the girl who winds up getting hated. It is unfair." *The Sun News*, May 28, 2011. (<http://www.thesun.co.uk/sol/homepage/features/3605917/Divine-Brown-opens-her-mouth-about-gagging-orders.html>).



judges were using cases based on HRA to develop privacy law that left him feeling “a little uneasy.”<sup>10</sup>

The tension over injunctions continued to mount in every arena from the general public, to journalists, to politicians.

On May 8, 2011, however, all hell broke loose for Ryan Giggs and his injunction; an anonymous Twitter account, @injunctionsuper, was created under the pseudonym Billy Jones and named not only Giggs in connection with his injunction, but several other anonymized injunctions that had been in the news as well. The exposing tweet did not go unnoticed this time; it was retweeted by tens of thousands of people and became *the* topic of conversation around England. Everyone knew about Ryan Giggs, his affair, his attempt to cover it up, and the triumph of a single Twitter account in getting around the injunction and informing the world of his trysts with Thomas.

### Tweets

-  **Billy Jones** @InjunctionSuper 8 May  
Two stars of the TV show Shameless, David Threlfall and Pauline McLynn (Libby Croker) had an affair. Both are married.  
#superinjunction
-  **Billy Jones** @InjunctionSuper 8 May  
Jeremy Clarkson has an injunction preventing the publication or mention of intimate photographs of him and Jemima Khan.  
#superinjunction
-  **Billy Jones** @InjunctionSuper 8 May  
British actor Hugh Bonneville paid £195 for the services of prostitute Helen Wood. Wood used a sex toy on Bonneville. #superinjunction
-  **Billy Jones** @InjunctionSuper 8 May  
Gordon Ramsay sexually harassed a female employee and sacked a male chief executive for no reason, he is still owed wages.  
#superinjunction

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Rhodri Phillips, “Time to bin the gag laws,” *The Sun News*, April 25, 2011.  
(<http://www.thesun.co.uk/sol/homepage/news/3544609/Calls-for-Human-Rights-opt-out-on-superinjunctions.html>).

<sup>10</sup>“Cameron ‘uneasy’ over injunctions,” 2011.



Post by @InjunctionSuper on May 8 that became a Twitter sensation.<sup>11</sup>

Legal issues now abounded. An anonymous Twitter user had broken the law by reporting Giggs' name, but so had tens of thousands of English Twitter users when they retweeted the offending post. It is not feasible to arrest every person who retweeted the post, so the authorities were in a bind. Giggs paid tens of thousands of pounds to acquire an injunction and now everyone knew his secret and no one was getting in trouble for spilling the beans. The footballer decided to take action against Twitter since the identity of the tale-telling account holder remained a mystery. In the case of *CTB v. Twitter Inc, Persons Unknown*, Giggs attempted "to obtain limited information concerning the unlawful use of Twitter by a small number of individuals who may have breached a court order," according to Schillings, the law firm handling Giggs' case.<sup>12</sup> This lawsuit proved to be a grave mistake if the footballer had any hopes of all of England not knowing about his affair. As soon as the case against Twitter was announced,

<sup>11</sup> @injunctionsuper, Twitter, May 8, 2011. (<https://twitter.com/#!/injunctionsuper>).

<sup>12</sup> "Footballer obtains Twitter disclosure order," *BBC News*, May 21, 2011. (<http://www.bbc.co.uk/news/technology-13477811>).

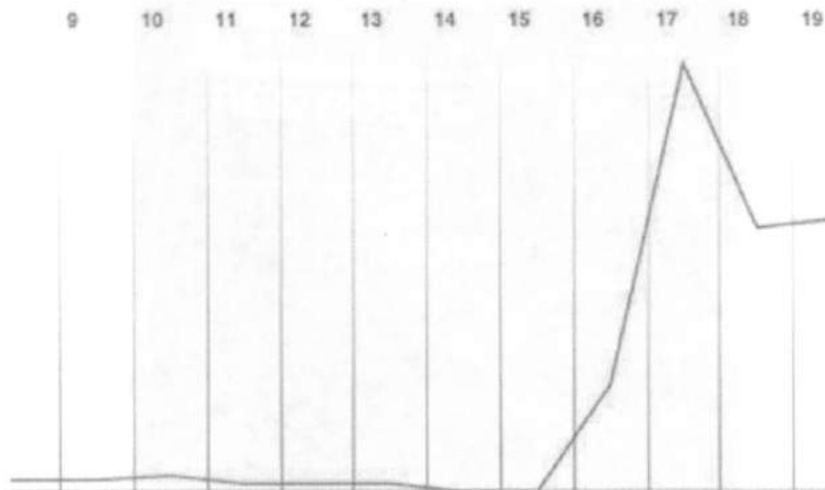
Twitter users were outraged, bringing Giggs' name even more into the light. People who probably did not previously care about Giggs' affair were now interested in the case because it was becoming a freedom of speech issue that affected them directly. When the lawsuit was announced, the Barbra Streisand effect came into full swing. The Streisand effect is "an online phenomenon in which an attempt to hide or remove a piece of information has the unintended consequence of publicizing the information more widely."<sup>13</sup> A graph published by The Guardian demonstrates the adverse effect the announcement of the lawsuit had. There is a clear spike in mentions of Giggs' name on Twitter after the announcement of the lawsuit that hoped to restrain mentions of his name on the site. Experian Hitwise, which takes its data from UK Internet service providers, reported that Twitter usage in the UK reached an all-time high the day after the announcement.<sup>14</sup> Though it is difficult to see from the graph, the number of mentions of Giggs' surname rose by the thousands after the announcement. One newspaper reported that within 24 hours of the announcement 12,000 tweets about Giggs and his relationship appeared on the site.<sup>15</sup>

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<sup>13</sup>Wikipedia contributors, "Streisand effect," *Wikipedia, The Free Encyclopedia*, [http://en.wikipedia.org/w/index.php?title=Streisand\\_effect&oldid=486891929](http://en.wikipedia.org/w/index.php?title=Streisand_effect&oldid=486891929) (accessed April 16, 2012).

<sup>14</sup> Charles Arthur, "Twitter traffic sees 22% spike in rush to find identity of injunction footballer," *The Guardian News*, May 23, 2011. (<http://www.guardian.co.uk/technology/2011/may/23/twitter-traffic-injunction-footballer>).

<sup>15</sup>"How much longer can he keep a lid on it? Newspaper breaks ranks and publishes barely concealed picture of injunction footballer," *The Daily Mail News*, May 23, 2011. (<http://www.dailymail.co.uk/news/article-1389689/Sunday-Herald-publishes-barely-concealed-picture-injunction-footballer.html>).



The horizontal axis represents the time of day (in military time) on May 20, 2011. The vertical axis is the number of mentions of Giggs' surname on Twitter.<sup>16</sup>

Two days after the lawsuit announcement, a Scottish newspaper, *The Sunday Herald*, published a picture of Ryan Giggs on their front page, with only a thin censor bar over his eyes. Injunctions only have jurisdiction in England and Wales, so the newspaper, which is only distributed in Scotland and took care not to post the story online, had no fear of legal action. The article in the *Herald* named Giggs as the injunction holder, but also sought to shed light on the unsustainability of privacy injunctions. The editorial along with the cover and story explained, "Today we identify the footballer whose name has been linked to a court super-injunction by thousands of postings on Twitter. Why? Because we believe it is unsustainable that the law can be used to prevent newspapers from publishing information that readers can access on the internet at the click of a mouse."<sup>17</sup> The article expressed the frustration of journalists throughout England and Wales and brought further attention to this problem with the law.

<sup>16</sup>Dan Sabbagh, "Twitter and the mystery footballer," *The Guardian News*, May 20, 2011. (<http://www.guardian.co.uk/technology/organgrinder/2011/may/20/twitter-superinjunctions>).

<sup>17</sup>*Sunday Herald*, May 22, 2011.



The cover of the Sunday Herald on May 22.<sup>18</sup>

The next day, Prime Minister David Cameron appeared on a morning television show and said that he “like everybody else” knew the identity of the cheating Premier League footballer and that the law is “unsustainable.” “It’s not fair on the newspapers if all the social media can report this and the newspapers can’t,” Cameron said. “So the law and the practice has got to catch up with how people consume media today.”<sup>19</sup> Shortly after this admission by Cameron, News Group Newspapers went back to court with an application to overturn the injunction since the information could be readily found online. Justice Eady, who granted the injunction in the first place, refused to revoke it, saying that, “To a great extent the same reasoning applies today as it did last week.” Eady said in a written judgment, “It is fairly obvious that wall-to-wall excoriation in national newspapers, whether tabloid or broadsheet, is likely to be significantly more intrusive and distressing for those concerned than the availability of

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<sup>18</sup> *Sunday Herald*, May 22, 2011. (<http://www.sportsgrid.com/media/ryan-giggs-sunday-herald-imogen-thomas/>).

<sup>19</sup> Gordon Rayner, “Ryan Giggs: day began with David Cameron saying the game was up for privacy injunctions,” *The Telegraph News*, May 23, 2011. (<http://www.telegraph.co.uk/technology/twitter/8532048/Ryan-Giggs-day-began-with-David-Cameron-saying-the-game-was-up-for-privacy-injunctions.html>).

information on the internet or in foreign journals to those, however many, who take the trouble to locate it up."<sup>20</sup>

Later that day, Cameron announced that there would be a committee set up to scrutinize the use of injunctions. At a Commons debate on the use of injunctions, MP John Hemming used parliamentary privilege to name Ryan Giggs, effectively breaking the injunction. Parliamentary privilege "allows members of the House of Lords and House of Commons to speak freely during ordinary parliamentary proceedings without fear of legal action on the grounds of slander, contempt of court or breaching the Official Secrets Act."<sup>21</sup> Because Hemming named Giggs in connection with the story and parliamentary procedures are public record, media could now name Giggs, essentially breaking the power of the injunction. This sparked a debate in the Commons about the appropriateness of the use of parliamentary privilege in connection with injunctions.

Even after Giggs had been named by Hemming and media could connect his name with the story through that avenue, a second application to overturn the injunction later that day was denied by Justice Tugendhat. He reasoned that the case was "not about secrecy but intrusion," and keeping the injunction in place kept reporters from being allowed to talk to Giggs, his family, friends, or Imogen Thomas about the affair.<sup>22</sup> Tugendhat explained, "If it is a government secret, once the information is out there is nothing left to protect. But with personal information, once you taunt someone the more distressing it becomes."<sup>23</sup> The injunction remains in place today.

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<sup>20</sup>Josh Halliday, "Sun fails in latest bid to lift footballer's gagging order," *The Guardian News*, May 23, 2011. (<http://www.guardian.co.uk/media/2011/may/23/sun-gagging-order-footballer>).

<sup>21</sup>Wikipedia contributors, "Parliamentary privilege," *Wikipedia, The Free Encyclopedia*, [http://en.wikipedia.org/w/index.php?title=Parliamentary\\_privilege&oldid=479184445](http://en.wikipedia.org/w/index.php?title=Parliamentary_privilege&oldid=479184445) (accessed April 16, 2012).

<sup>22</sup>Dan Sabbach and Josh Halliday, "Injunction remains despite MP's revelation," *The Guardian News*, May 23, 2011. (<http://www.guardian.co.uk/politics/2011/may/23/ryan-giggs-injunction-mp>).

<sup>23</sup> *Ibid.*

## American Law

If Giggs' situation had happened in the United States the case would have turned out quite differently. English injunctions are prior restraint laws. Prior restraint has been ruled unconstitutional except in cases of national security and exceptional cases that would help guarantee a fair trial.<sup>24</sup> A celebrity trying to hide an indiscretion certainly would not fall under either of these categories. Giggs' only other option would be to sue based on privacy after the publication of the information.

There are four areas of privacy law in the United States: appropriation of name or likeness for trade purposes, intrusion on an individual's solitude, publication of private information about an individual, and publishing material that puts an individual in a false light.<sup>25</sup> Appropriation protects an individual's name or likeness from commercial exploitation. This area of privacy law does not apply to Giggs' case because his name or likeness was not being used to advertise something or for commercial purposes, even though the newspaper would gain from the sales, this is not the kind of commercial gain covered by appropriation. The second area of privacy law, intrusion, would not apply to a case like Giggs'. Intrusion cases focus on how the information is gathered, which was not an issue in this case. Publishing material that puts an individual in a false light is also not an issue at play here. If Giggs' case were in the US, he would have to lean on the third area of privacy law – publication of private information about an individual.

For publication of private information to be established four requirements must be met. The material must be publicized, private and intimate facts that would be highly offensive to a reasonable person, and are not of legitimate public concern.<sup>26</sup> Of the four tort actions included in the right to

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<sup>24</sup> *Near v. Minnesota*, 283 U.S. 697 (1931).  
*Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976).

<sup>25</sup> Don R. Pember and Clay Calvert, *Mass Media Law*, (New York: McGraw-Hill, 2007) 278.

<sup>26</sup> Pember, Calvert, 315.

privacy, this one has had the least acceptance from the judiciary.<sup>27</sup> The Giggs' case meets the publication requirement because mass media disseminated the information. The information was private and intimate as well. The catch for Giggs in American law would have been the last two requirements – highly offensive to a reasonable person and not of legitimate public concern. Courts have found that intimate information is not newsworthy if publishing it would outrage the community.<sup>28</sup> Facts published for a “morbid and sensational reason, prying into private lives for no justifiable purpose” are not newsworthy.<sup>29</sup> These types of facts are information that a reasonable person would have no interest in knowing.<sup>30</sup> The information must be pretty extreme and offensive to the general community to have a case. Two successful cases brought by celebrities serve as an example of the extreme offensiveness that suffices for this tort law. Pamela Anderson and Bret Michaels successfully brought a private facts claim that prevented distribution of a videotape showing them having sex.<sup>31</sup> Brad Pitt successfully stopped further distribution of a Playgirl magazine that included a nude picture of him taken by an intrusive, trespassing photographer.<sup>32</sup> Beyond these sorts of extreme cases, however, celebrities are rarely successful with publication of private facts cases. A report about an affair would not be covered by this law. The last requirement, legitimate public concern, goes back to the newsworthiness of the information. Well-known people are inherently more newsworthy because the public wants to know about them and they have chosen to be in the spotlight. This argument makes it nearly impossible for celebrities to win a publication of private facts suit. Therefore, if Giggs' story had broken in America, he

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<sup>27</sup> *Ibid*, 316.

<sup>28</sup> Robert Trager, Joseph Russomanno, and Susan Dente Ross, *The Law of Journalism and Mass Communication*, (Washington, DC: CQ Press, 2010) 250.

<sup>29</sup> *Ibid*.

<sup>30</sup> *Ibid*.

<sup>31</sup> *Michaels v. Internet Entertainment Group, Inc.*, 5 F. Supp. 2d 823 (C.D. Cal. 1998).

<sup>32</sup> *Pitt v. Playgirl Inc.*, BC 178 503 (Cal. Sup.Ct. La. Co. 1997).



would have had no chance winning a publication of private facts case and no basis for keeping his story out of the media.

### **Legal Issues**

The current use of privacy injunctions in the UK needs to change for a number of reasons both legal and ethical. Legally, injunctions are nearly impossible to enforce. The effects of globalization are far-reaching and make this law impossible to maintain. The Internet houses information on almost every subject from outlets across the globe. News outlets in other countries can legally report information, even if there is an injunction.

The impossibility of informing everyone about the injunction is another reason this law is unenforceable. In the days when newspapers were the only form of mass media, injunctions would have been a lot easier to enforce. As it is today, however, there are numerous forms of mass media and anyone, not just official journalists, can get messages out to thousands of people within seconds. There is no way to inform all of the people who could write about or post on the Internet about something that has an injunction. This story illustrates the impossibility of this law. Jenny is visiting a hotel in London. She sees famous, married actor Jim Green enter the hotel room next to hers with Amber Brown, an actress Jenny knows is not his wife. She immediately tweets about it, saying that Jim Green is having an affair with Amber Brown. Hundreds of her followers on Twitter retweet this and it becomes sensational. Little does Jenny know, Brown has a privacy injunction that keeps this news from being revealed. Therefore, she broke the law unknowingly, as did the hundreds of people who retweeted her post. With the numerous forms of mass media today, there is simply no way to inform all outlets of an injunction. Even if it were possible, since so many people have Twitter and other forms of social media, it would be rather pointless to inform all the users of an injunction because this would, in effect, be telling tens of thousands of people.

The Giggs incident also raises the issue of the use of parliamentary privilege in exposing injunctions. When MP John Hemming used parliamentary privilege to name Giggs, he started a debate on the proper use of parliamentary privilege and the role of parliament. Hemming invoked parliamentary privilege by saying, "Mr Speaker, with about 75,000 people having named Ryan Giggs it is obviously impracticable to imprison them all."<sup>33</sup> John Bercow, House of Commons Speaker interrupted Hemming saying, "Let me just say to the honorable gentleman, I know he's already done it, but occasions such as this are occasions for raising the issues of principle involved, not seeking to flout for whatever purpose."<sup>34</sup> Bercow, along with many of Hemming's fellow MPs, felt Hemming was abusing the privilege and flouting the protocols of injunction law. Hemming has taken a strong stand against injunctions, using parliamentary privilege in two other instances to reveal the existence of a super-injunction (March 2010) and details of another injunction (July 2011).<sup>35</sup> The question is then raised about whether or not MPs should be allowed to use parliamentary privilege to flout injunction law without any risk of penalty. On the one hand, parliamentary privilege subject every injunction to the risk of being outed by anti-injunction politicians. On the other hand, without parliamentary privilege MPs cannot discuss issues in the government freely without fear of punishment, which compromises the quality of political discussion, weakening in the effectiveness of the government. Because of the role parliamentary privilege plays in other realms, it cannot be done away with or limited. Therefore, the relationship between upholding the protocols of injunction law and the use of parliamentary privilege must be decided by the MPs themselves. MP John Whittingdale, who disagreed with Hemming's use of

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<sup>33</sup>"Ryan Giggs named by MP as injunction footballer," *BBC News*, May 23, 2011. (<http://www.bbc.co.uk/news/uk-13503847>).

<sup>34</sup>Ibid.

<sup>35</sup>Robert Barr, "UK court: ex-RBS chief can't be called a banker," *Boston Globe News*, March 11, 2011. ([http://www.boston.com/business/articles/2011/03/11/uk\\_court\\_ex\\_rbs\\_chief\\_cant\\_be\\_called\\_a\\_banker/](http://www.boston.com/business/articles/2011/03/11/uk_court_ex_rbs_chief_cant_be_called_a_banker/)).

*Parliamentary Debates*, House of Commons, July 20, 2011, Columns 1039-1040 (John Hemming, Member of Parliament for Birmingham Yardley).(<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110720/debtext/110720-0004.htm#110720110001659>).

parliamentary privilege, made a good point when he said, "If MPs think the law is wrong then we should change the law rather than flout the law."<sup>36</sup> Members of Parliament need self-regulation when it comes to the use of parliamentary privilege. They should not use this privilege to circumvent the law; if they disagree with a law, they should put efforts into motion to change it.

### Ethical Issues

The law not only presents issues of practicality in enforcing the law, but also moral issues as well. One problem is the lack of distributive justice. Injunctions are only available to the rich. On paper, anyone could apply for an injunction, but the reality is that without a lawyer the average person will not be successful. "In theory, you could walk in off the street and do it yourself," media lawyer Amali de Silva said. "But that's a very daunting prospect for people without the support of a lawyer. After all, if you are taking on a newspaper you will be up against their lawyers."<sup>37</sup> Another media lawyer estimated that with the initial fee (approximately £50,000) for the barrister (a class of lawyer in England), the small court fee (£465), and money for possible court revisits (approximately £75,000 - £100,000), an injunction could cost anywhere from £125,000 to £150,000, which is approximately \$196,000 to \$235,000 in US dollars. Needless to say, the average person cannot afford an injunction, creating a level of privacy only available to the extremely wealthy.

In addition, an injunction only covers the person who takes it out, leaving others involved in the story to deal with the press. Imogen Thomas' name and face were plastered on every tabloid in England while Ryan Giggs remained anonymous. Thomas expressed her frustration with the law saying, "My name and reputation have been trashed while the man I had a relationship with is able to hide. What's more I can't even defend myself because I have been gagged. If this is the way privacy injunctions are

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<sup>36</sup>"Ryan Giggs named by MP as injunction footballer," 2011.

<sup>37</sup>Cathy Newman, "Law for the rich: The cost of Giggs' gagging," *Channel 4 News*, May 24, 2011. (<http://blogs.channel4.com/factcheck/law-for-the-rich-the-cost-of-giggs-gagging/6629>).

supposed to work there is something seriously wrong with the law."<sup>38</sup> Thomas was forced to sit idly by and watch as her reputation was ruined and Giggs' anonymity was, by law, preserved. She explained her disappointment in the law saying, "I had no intention of speaking about the man. I just wish that my name was protected. I didn't have £50,000 to get an injunction. How I feel is I have been thrown to the lions and (told to) deal with it; I can't deal with it."<sup>39</sup> Both the injustice of the law being available only to the rich and only covering the person who pays were aspects of the law that affected Thomas. Not only was she barred from talking about Giggs specifically, she could not discuss the relationship at all. She could not stand up for herself. The injunction impinged on Thomas' freedom of speech rights as well as the media's. The media were barred from sharing information they had on someone else. She was barred from sharing her own personal information.

With all the debate about privacy laws, the question needs to be asked – do people really have a moral right to privacy? If there is no moral right to privacy, it could be argued that there should not be a law protecting it. If there is a moral right to privacy, it should be protected. Steven Davis in his article "Is There a Right to Privacy?" argues that there is a moral right to privacy. He argues that the kinds of interests involved are what give privacy moral value.<sup>40</sup> Privacy is an instrumental desire. People's desire for privacy stems from some further purpose that privacy serves. For example, people desire privacy of their bank information. This desire stems from a desire for security. An NFL player may not want everyone to know that he gets a manicure every week; this desire for privacy might stem from the desire to be kept from embarrassment or from harassment by his teammates. Desires for respect,

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<sup>38</sup>Dan Sabbach and Josh Halliday, "Imogen Thomas 'blackmailed' superinjunction footballer, judge says," *The Guardian News*, May 16, 2011. (<http://www.guardian.co.uk/media/2011/may/16/imogen-thomas-superinjunction-affair-footballer?INTCMP=SRCH>).

<sup>39</sup>Caroline Gammell, "Imogen Thomas: 'I've been thrown to the lions' by footballer injunction," *The Telegraph News*, April 27, 2011. (<http://www.telegraph.co.uk/news/uknews/8477842/Imogen-Thomas-Ive-been-thrown-to-the-lions-by-footballer-injunction.html>).

<sup>40</sup>Davis, 462.

dignity, love, friendship, trust, freedom, autonomy, democracy, religious piety, sexuality, modesty, honor, family life, etc. all have contingent connections to privacy desires.<sup>41</sup> Given the importance of the values that privacy promotes, some of which themselves are moral rights, respect and, dignity, for example, it would follow that privacy is a right in those societies in which it plays an important or central role in fostering these important values."<sup>42</sup> Instrumental justification allows us to see privacy as a right. "Privacy contingently fosters other values that we take to be of central importance in giving a moral value to our lives."<sup>43</sup> By this reasoning, privacy is a right in most societies and does need to be protected, but as demonstrated above, protection as limits.

### Conclusion

The law clearly needs some kind of change; it is fraught with both legal and ethical difficulties. Not all the cases that emerge from this law are celebrity secret cases, however. Because Article 8 protects the "right to respect for his or her private and family life, home and correspondence," it covers much more than just the right to privacy.<sup>44</sup> It has been used to prosecute phone tapping,<sup>45</sup> the right to practice one's sexuality;<sup>46</sup> to make complex end-of-life decisions;<sup>47</sup> and to having same-sex staff provide personal care.<sup>48</sup> The Article can be very broadly interpreted and implemented in ways that are

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<sup>41</sup>Ibid, 466.

<sup>42</sup>Ibid.

<sup>43</sup>Ibid.

<sup>44</sup> Martin J. R. Curtice and John J. Sandford, "Article 8 of the Human Rights Act 1998: A Review of Case Law Related to Forensic Psychiatry and Prisoners in the United Kingdom," *Journal of American Academy of Psychiatry and the Law* 37 (June 2009): 232-238.

<sup>45</sup> *Halford v. the United Kingdom*, judgment of 25 June 1997.

<sup>46</sup> *Dudgeon v. U.K.* (1981) 4 EHRR 149.

<sup>47</sup> *R (on the application of Burke) v. General Medical Council* (2005) EWCA Civ 1003.

<sup>48</sup> *R (on the application of C) v. Royal Devon and Exeter NHS Foundation Trust* (2004).

legitimate. Therefore, deciding on a way to rectify the situation with injunctions will likely be a difficult process for English lawmakers, but a very necessary one.

April

Injunctions

2011

April 14

Injunctions

Arthur

The story of

The Sun newspaper

17 tweets

Woman's

May 8

Twitter

The case

May 13

Justice

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May 20

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Opps

May 22

with

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May 23

Justice

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## Giggs' Injunction Timeline

### 2010

#### April

Lord Neuberger sets up committee to take one year to examine the use of both anonymized and super injunctions.

### 2011

#### April 14

Injunction granted to Ryan Giggs to keep his name out of the news in connection with his affair with Big Brother star Imogen Thomas.

The story about a "married Premier League football player" having an affair with Imogen Thomas runs in *The Sun* newspaper.

1<sup>st</sup> tweet on Twitter appears that names Ryan Giggs as the "married Premier League football player," but doesn't become sensational.

#### May 8

Twitter account @injunctionsuper connects celebrity names with scandalous stories that had been in the news, including Ryan Giggs and the affair. Thousands of people repost the tweet.

#### May 13

Justice Baker issues an injunction specifically banning Twitter and Facebook in a case involving a woman who has been minimally conscious since 2003.

#### May 20

Lord Neuberger's Report of the Committee on Super-Injunctions comes out.

Giggs brings a case against Twitter in hopes of finding out the identity of @injunctionsuper.

#### May 22

Scottish paper *The Sunday Herald* runs thinly disguised picture of Giggs on the front page, naming him in the incident and bemoaning the lack of freedom of the press in England.

#### May 23

Justice Eady rejects News Group Newspapers' application to lift the injunction.

Prime Minister David Cameron says the law is "unsustainable" and announces that there will be a review of the law by a committee of MPs.

MP John Hemming uses parliamentary privilege to name Ryan Giggs, enabling the press to write about the story using his name.