

A critique of the role model argument under the law of misuse of private information.

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Abstract.

This thesis argues that the state of judicial reasoning in the role model argument in misuse of private information is unsatisfactory. To prove that the state of reasoning is unsatisfactory the thesis will split its argument into two strands: A) the state of judicial reasoning is unsatisfactory when it comes to how judges conclude that the information about the behaviour of the role model, if published, is likely to influence the behaviour of the audience and B) the state of judicial reasoning is unsatisfactory when it comes to how judges conclude that the private information of the role model in question is in the public interest to publish.

In regard to strand A, the thesis will carry a detail critical analysis on judicial reasoning on the behavioral understanding and behavioral effects of publishing a role model's private information. Due to the unsatisfactory state of judicial reasoning in this area, the thesis will introduce the prototype willingness model. The thesis hopes in introducing the psychological model to improve the state of judicial reasoning when it come to the influence of publication on adolescents who see the public figure as their role model.

In regard to strand B, the thesis will provide that the role model argument is unsuitable to fit under the public interest to publish argument. The thesis will argue, with the aid of Mill's harm principle, that the role model argument needs to be seen as a one that produces harmful speech. The thesis will conclude on strand B, that the public interest argument in the balancing exercise is flexible and capable of taking the new understanding of the role model argument in its equation.

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Chapter one: Overview.

1.1 Introduction

Many people have role models as teenagers, which is expected because as adolescents grow into adulthood, they look to others for methods to respond or behave. Adolescents learn behaviours, attitudes and opinions from their role models. Individuals often think of their role models as people with good qualities and values, and adolescents often look for qualities like popularity and attractiveness in their role models, often associated with celebrities.¹ However, role models can have positive or negative effects on adolescents.

Due to the mass media, attraction to celebrities and public figures has mainly relied on press coverage of celebrities reported by traditional journalists and the paparazzi.² Media coverage has focused on the professional and personal activities of these celebrities.³ With the introduction of social media and the internet, this coverage has extended to newspapers, websites and social media pages.⁴ In 2020, almost 9 in 10 children between 10 and 15 years used the internet daily.⁵ Celebrity presence on social media is one of the main reasons for greater adolescent presence and use of social media⁶ since social media provides instant access to their role model celebrities.

In misuse of private information, the topic of celebrities as role models and their influence on adolescents appeared as the role model argument. This thesis focuses on the role model

¹ A Jiménez and A Mesoudi, 'Prestige-biased social learning: current evidence and outstanding questions' (2019) 5 Palgrave Communications, article 20

² K Eyal, Te'eni-Harari and K Katz, 'A content analysis of teen-favored celebrities' posts on social networking sites: implications for teen fame-valuation' (2020) 14(2) Journal of Psychology Research on Cyberspace, article 7 page 2

³ S Holmes, 'Off-guard, unkempt, unready? Deconstructing contemporary celebrity in heat magazine' (2005) 19(1) Continuum: Journal of Media & Cultural Studies 21 and H Van den Bulck, S Paulussen and A Bel, 'Celebrity news as hybrid journalism: An assessment of celebrity coverage in Flemish newspapers and magazines' (2017) 18(1) Journalism 44

⁴ M Mosrtensen and A Jerslev, 'Taking the extra out of the extraordinary: Paparazzi photography as an online celebrity news genre' (2014) 17(16) International Journal of Cultural Studies 619

⁵ Office for National Statistics, 'Children's Online behaviour in England and Wales year ending March 2020' <<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/childrenonlinebehaviourinenglandandwales/yearendingmarch2020>> accessed 17 June 2022

⁶ Yuval Dror, Israelis in the Digital Age 2012: Summary and Main Findings it is a report <<https://www.iataskforce.org/resources/view/242>> accessed 16 June 2022 see also D Greenwood, 'Fame, Facebook, and Twitter: How attitudes about fame predict frequency and nature of social media use' (2013) 2(4) Psychology of Popular Media Culture 222 and B Wiederhod, 'As parents invade Facebook, teens tweet more' (2012) 15(8) Cyberpsychology, Behavior and Social Networking 385

argument in the misuse of private information, arguing that judicial reasoning under the argument is unsatisfactory and the time has arrived to amend it. Before diving into the aim of this thesis, the thesis first briefly explains the law of misuse of private information, followed by an overview of role models. This chapter presents a literature review where the aim of this thesis is explored in detail, followed by the thesis structure and exploration of the methodology used.

1.2 The law

The House of Lords in *Campbell v MGN* established a two-stage test for misuse of private information claims.⁷ In stage one, the court asks whether the information is ‘within the sphere of the complaint’s private and family life’.⁸ In this stage, the court typically asks if the claimant has a ‘reasonable expectation of privacy’.⁹

The logic behind this test is that if the information is classified as private, then that information will activate the claimant’s article 8 right to respect his or her private and family life under the European Convention of Human Rights (ECHR),¹⁰ allowing a smooth transition to the balancing exercise in stage two between article 8 ECHR and article 10 ECHR.¹¹

If and only if the test in stage one is satisfied, the court proceeds to stage two to ask whether the right to private life outweighs the right to the freedom of expression.¹² The test in stage two is usually a balancing exercise between article 8 ECHR and article 10 ECHR. Courts consider the strength of privacy and free speech rights in the balancing process.¹³

In stage two, courts presume an equal value of articles 8 and 10 when balancing between privacy and free speech. Lord Justice Sedley, in *Douglas v Hello!* Stated that for courts to

⁷ *Campbell v MGN Ltd* [2004] UKHL 22

⁸ *Campbell v MGN Ltd* [2004] UKHL 22

⁹ *Campbell v MGN Ltd* [2004] UKHL 22

¹⁰ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 8

¹¹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 10

¹² As shown in *Campbell v MGN Ltd* [2004] UKHL 22

¹³ As shown in *Campbell v MGN Ltd* [2004] UKHL 22

achieve compatibility with the Convention when balancing between articles 8 and 10, domestic UK courts would initially have to treat both rights equally:

The European Court of Human Rights has always recognised the high importance of free media of communication in a democracy, but its jurisprudence does not – and could not consistently with the Convention itself – give article 10(1) the presumptive priority which is given, for example, to the First Amendment in the jurisprudence of the United States’ courts. Everything will ultimately depend on the proper balance between privacy and publicity in the situation facing the court.¹⁴

The House of Lords, in the leading case of *Campbell v MGN*, expressly agreed and followed Lord Justice Sedley’s method of balancing between articles 8 and 10, confirming that both rights have equal value. Lord Nicholls stated famously ‘the case involves the familiar competition between freedom of expression and respect for an individual’s privacy. Both are vitally important rights. Neither has precedence over the other’. Following their lordships’ claims on the equal value of both rights, they conducted a ‘parallel analysis’ by scrutinising the strength and weakness of the claims under both articles, examining whether interference with either right would be further than necessary. Lord Steyn stressed again and clarified this approach in *Re S*:

First, neither article has such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each.¹⁵

This guidance produced by the lordships sitting in the House of Lords is now consistently referred to by judges and applied by the lower courts in the misuse of private information cases.

¹⁴ *Douglas v Hello! Ltd* [2001] 1 QB 967, [2001] 2 WLR 992 [135]

¹⁵ *Re S (A Child)* [2004] UKHL 47, [2005] 1 AC 593 [52]

1.3 The link between role models, adolescents and the media

Unfortunately, the term 'role model' has not been defined in misuse of private information. However, it does not mean a general understanding of role models cannot be identified. The role model concept in psychological and sociological literature has been researched widely. For example, the term 'role' was first defined in 1950 by Merton: 'Individuals in specific roles who serve as examples of behaviour associated with that role'.¹⁶ Lockwood later described a role model as an 'individual who provides an example of the kind of success that one may achieve, often also provides a template of behaviour that is needed to achieve such success'.¹⁷ Moreover, Gaunlett defined role models as 'someone to look up to and base your character, values and aspirations on'.¹⁸

Steven and Joseph conducted a survey with adolescent participants asking about their definitions of role models. Most responses indicated that 'a role model is someone to look up to' or 'someone you want to be like'.¹⁹ Role models may include parents, relatives, non-related adults, peers, celebrities and fictional characters.²⁰ However, this thesis does not attempt to provide a legal definition of role models in the misuse of private claims, which is beyond the scope of the question.

Generally, society thinks role models positively influence young people and others with a vision to work towards. However, role models can notably set a bad example for adolescents. For example, athlete role models are often excellent displays of character 'performing live under unpredictable sporting conditions'²¹, yet many athletes in recent times have been the subject of scandals or serious reports. Girls Guide and the United Nations, with its International Narcotics Control Board, have claimed that 'celebrity drug offenders can profoundly influence public attitudes, values and behaviour towards drug abuse, particularly among young people who have not yet taken a firm and fully informed position on drug issues'.²²

¹⁶ Robert K Merton, *Social theory and social structure* (Free Press 1957)

¹⁷ P Lockwood and Z Kunda, 'Superstars and me: Predicting the impact of role models on the self' (1997) 73 *Journal of social psychology* 91

¹⁸ A Gaunlett, *Media, gender and identity* (Routledge 2002) see also Yancey, K Antronette, S Judith, and M Kimberly, 'Role models, ethnic identity, and health risk behaviours in urban adolescents' (2002) 156(1) *Archives of paediatric and adolescent medicine* 55

¹⁹ Steven White and Joseph O'Brien, 'Role Models for Youth: A survey and Unite of Study' <<http://www.socialstudies.org/sites/default/files/publications/yl/1301/130105.html>> accessed 5 Jan 2022

²⁰ Melissa Kearney and Phillip Levine, 'Role Models, Mentors, and Media Influences' (2020) 30 *The Future of Children* 83

²¹ International Narcotics Control Board (annual report, New York 2007)

²² International Narcotics Control Board (annual report, New York 2007)

Adolescence is a growth phase that humans go through between childhood and adulthood.²³ Identity formulation usually takes place during adolescence.²⁴ Thus, adolescents are likely to look to a role model to ‘determine what is appropriate and acceptable behaviour’ during this stage of life.²⁵ Moreover, adolescents *may*²⁶ also look at their role model’s behaviour and try to mimic it.²⁷ Adolescents mimicking a role model’s behaviour can increase their self-esteem.²⁸ Therefore, role models are important to adolescents’ lives.

The traditional and new media report information to viewers and readers, which can be viewed as a channel to change individuals’, including adolescents’, attitudes and preferences.²⁹ Data suggests that adolescents nowadays spend much more time on media than adolescents four decades ago.³⁰ As acknowledged earlier, celebrities as role models are not a new phenomenon.³¹ Role models are a facet of everyday life. Today, adolescents are exposed to an immense range of influential public figures through many outputs such as television, radio, social media and printed media. Adolescents may take celebrities as role models because those celebrities have desirable talents, lifestyles, wealth or status.³² Young people sometimes report that reading an autograph or hearing their role models in an interview has strongly influenced their lives.³³ For instance, a study by Boon and Lomore found that 75% of young adults have

²³ S Sawyer, P Azzoparadi, M Wickremarathne and G Patto, ‘The age of adolescence’ (2018) 2(3) *Lancet Child Adolesc Health* 223

²⁴ Theo Klimstra, William Hale III, Quinten Raaijmakers, Susan Branje and Wim Meeus, ‘Identity formation in adolescence: change or stability?’ (2010) 39 *Journal of Youth and Adolescence* 150 see also Wim Meeus, ‘The study of adolescent identity formation 2000-2010: A review of longitudinal research’ (2011) 21(1) *Journal of Research on Adolescence* 75

²⁵ Miharu Nakanishi, Syudo Yamasaki, Kaori Endo, Shuntaro Ando, Yuko Morimoto, Shinya Fujikawa, Sho Kanata, Yusuke Takahashi, Toshi Furukawa, Marcus Richards, Mariko Hiraiwa-Hasegawa, Kiyoto Kasai and Atsushi Nishida, ‘The association between the role model presence and self-regulation in early adolescence: A cross-sectional study’ (2019) 14(9) *PLOS ONE*

²⁶ emphasis added

²⁷ Eric Erikson, *Identity: Youth and Crisis* (New York W.W. 1968)

²⁸ A Yancy, J Siegel and K McDaniel, ‘Role Models, ethnic identify, and health-risk behaviours in urban adolescents’ (2002) 156(1) *Arch Pediatr Adolesc Med* 55

²⁹ Melissa Kearney and Phillip Levine, ‘Role Models, Mentors, and Media Influences’ (2020) 30 *The Future of Children* 83

³⁰ Melissa Kearney and Phillip Levine, ‘Role Models, Mentors, and Media Influences’ (2020) 30 *The Future of Children* 83

³¹ Narmina Abdulaev and Baruch Shomron, ‘Celebrity politicians as health-promoting role models in the media: the case study of Vladimir Putin, Donald Trump and Benjamin Netanyahu’ (2020) *International Journal of Politics, Culture and Society* 369

³² Melissa Kearney and Phillip Levine, ‘Role Models, Mentors, and Media Influences’ (2020) 30 *The Future of Children* 83

³³ D Matthews, ‘Media memories: the first cable/VCR generation recalls their childhood and adolescent media viewing’ (2003) 6 *Mass communication and society* 219

a strong attraction to a celebrity at some point in their lives, with musicians and movie stars being the most popular recipients of adulation.³⁴ Celebrities as role models have risen hand in hand with new media technologies.³⁵ Adolescents are perhaps most affected by role models since they are in a stage of uncertainty while negotiating identity, future goals and aspirations.³⁶ Rall, Coffey and Williamson stated that adolescent identities during this period 'are understood to be generally fluid; it is a period of transition during which elements of an adult's future self explored and in one way or another decided upon'.³⁷

1.4 The role model argument in the misuse of private information

The argument is used in stage two in the misuse of private information to justify the public interest in publishing the private information in question.³⁸ Usually, the argument is drafted and argued by the party seeking to publish the information. The role model argument (the argument) is usually used by journalists and newspaper editors who argue that public figures have a status as role models to validate the invasion of their privacy. The argument advocates that when a celebrity is a role model, it is in the public interest to reveal 'antisocial or immoral behaviour to their easily led followers'.³⁹

1.4.1 Literature Review: The Gap

In the misuse of private information, the commentary is somewhat limited regarding the role model argument. Most scholars cited in this literature review have focused on broader issues within the law of the misuse of private information rather than specifically looking at the role model argument. Therefore, this thesis undertakes a study specifically focusing on the role model argument validity in UK courts.

³⁴ D Boon and D Lomore, 'Admirer-celebrity relationships among young adults: explaining perceptions of celebrity influence on identity' (2001) 27 Human communication research 432

³⁵ Narmina Abdulaev and Baruch Shomron, 'Celebrity politicians as health-promoting role models in the media: the case study of Vladimir Putin, Donald Trump and Benjamin Netanyahu' (2020) International Journal of Politics, Culture and Society see also A Bandura and E Locke, 'Negative self-efficacy and goal effects revisited' (2003) 88(1) Journal of applied Psychology 87

³⁶ D Boon and D Lomore, 'Admirer-celebrity relationships among young adults: explaining perceptions of celebrity influence on identity' (2001) 27 Human communication research 432

³⁷ T Rall, A Coffey and H Williamson, 'Self, space and place: youth identities and citizenship' (1999) 20(4) British Journal of sociology and education 501

³⁸ Phillipson G, 'Press freedom, the public interest and privacy' in Andrew Kenyon (ed) *Comparative Defamation and Privacy Law* (Cambridge University Press 2016) 155

³⁹ Phillipson G, 'Press freedom, the public interest and privacy' in Andrew Kenyon (ed) *Comparative Defamation and Privacy Law* (Cambridge University Press 2016) 155

The literature on the role model argument can be divided into two categories. The first category focuses on the effect of the role model argument on the claimant, while the second category focuses on the effect of the role model argument on the audience who consider the public figure a role model.

a) The argument's effect on the public figure in question

A common criticism expressed in the literature about the effect of the argument on the claimant is the vagueness of the role model. Rowbottom argued that there is a clear vagueness in the role model argument, with a clear lack of definition about when judges may consider a public figure a role model.⁴⁰ Howarth argued that the vagueness of the argument draws ready deference for the press to use it anytime they want to strengthen their position⁴¹, while Wragg explained that it has been treated as a scapegoat by the press.⁴² For example, the vagueness attached to a role model in the misuse of private information means the role model argument can apply to those who have never positively set themselves as role models or those who have set themselves as role models.⁴³ This vagueness can be problematic because the lack of a clear definition increases the risk that almost any public figure can identify as a role model, strengthening the public interest in publishing private information.

The literature seems to be indecisive on how to solve this problem. Sprugin suggested that unless public figures hold themselves to be role models, then the press is not entitled to do so.⁴⁴ Moreover, Hatzis argued that the more media attention a public figure is given, the more likely the public figure would be considered a role model.⁴⁵

The second argument that appears in the literature related to the effect of the role model argument on the claimant, however extremely limited, is whether the role model argument

⁴⁰ Jacob Rowbottom, 'In The Shadow of the Big Media: Freedom of Expression, Participations and the Productions of Knowledge Online' (2014) PL 491, 505

⁴¹ David Howarth, 'Privacy, Confidentiality and the Cult of Celebrity' (2002) 61(2) The Cambridge Law Journal 264

⁴² Paul Wragg, 'Protecting Private Information of Public Interest: Campbell's Great Promise, Unfulfilled' (2015) 7(2) Journal of Media Law 225

⁴³ Nicholas McBride and Roderick Bagshaw, *Tort Law* (second edition, Longman Law Series 2005) 320

⁴⁴ Earl Sprugin, 'Hey, How did I become a Role Model? Privacy and the Extent of Role-Model Obligations' (2012) 29(2) Journal of Applied Philosophy 118

⁴⁵ Nicholas Hatzis, 'Giving privacy its due: private activities of public figures in Von Hannover v Germany' (2005) 16(1) King's Law Journal 143

covers information unrelated to the public figure's reason for fame. Hatzis argued that the vagueness of the argument contributes to and paves the path for the press to argue that role models are also influential in their private life, unrelated to their reason for fame.⁴⁶ There is a clear lack of discussion on whether this should be the case. This issue has only been briefly mentioned in a report by the University of Oxford that stated no clear reason why a public figure is seen as a role model in private matters that does not contribute to their fame.⁴⁷ Maresins et al. suggested that there is unlikely to be a public interest in the information in question if it is unrelated to the reason for the fame of the role model.⁴⁸

b) The role model argument effect on the audience

The main argument presented in the literature concerning the effect of the role model argument on the audience is that the argument is factually unsound. Generally, when the role model argument is put forward in the misuse of private information claims, the court believes that it is in the public interest to reveal the information because adolescents might mimic the misbehaviour; therefore, revealing the information will lead to adolescents choosing another suitable role model. Wragg⁴⁹ argued that judges' hypotheses on the influence of role models on youth are unsupported by evidence.⁵⁰ Moreover, Phillipson argued that it is 'not clear why' the courts think the audience is under the influence of their role models.⁵¹ Sedley,⁵² one of the loudest critics of this position, questioned what the court thinks about when faced with the role model argument.⁵³ Hughes recently added that such exposure might 'encourage such conduct' by those who take the celebrity as a role model.⁵⁴ As a suggestion to solve this problem,

⁴⁶ Nicholas Hatzis, 'Giving privacy its due: private activities of public figures in *Von Hannover v Germany*' (2005) 16(1) *King's Law Journal* 143

⁴⁷ Stephen Whittle and Glenda Cooper, 'Privacy, probity and public interest' (Reuters Institute for the Study of Journalism, University of Oxford 2009)

⁴⁸ Basil Markesinis, Colm O'Conneide, Jörg Fedtke and Myriam Hunter-Henin, 'Concerns and Ideas About Developing English Law of Privacy (And How Knowledge of Foreign Law Might Be Of Help)' (2004) 52(1) *The American Journal of Comparative Law* 133

⁴⁹ Paul Wragg, 'A Freedom to Criticise? Evaluating the Public Interest in Celebrity Gossip after *Mosley and Terry*' (2010) 10 *JML* 295

⁵⁰ Paul Wragg, 'A Freedom to Criticise? Evaluating the Public Interest in Celebrity Gossip after *Mosley and Terry*' (2010) 10 *JML* 295, 315

⁵¹ Phillipson G, 'Press freedom, the public interest and privacy' in Andrew Kenyon (ed) *Comparative Defamation and Privacy Law* (Cambridge University Press 2016) 155

⁵² Stephen Sedley, 'Towards a Right to Privacy' *London Review of Books* (London, 8 June 2006)

⁵³ Stephen Sedley, 'Towards a Right to Privacy' *London Review of Books* (London, 8 June 2006) 20

⁵⁴ Kirsty Hughes, 'The Public Figure Doctrine And The Right To Privacy' (2019) 78(1) *Cambridge Law Review* 70, 90

Cathcart⁵⁵ briefly argued that those who take a celebrity as a role model are likely to copycat their misbehaviour. Therefore, it is in the public interest to conceal the misbehaviour.⁵⁶

1.4.2 Rationales

This thesis focuses on the second category presented in the literature review (i.e. the effect of the role model argument on the audience who take the public figure in question as their role model). It is accepted that the literature has questioned the validity of the courts' line of thinking in the role model argument (i.e. Wragg, Philipson and Sedley). However, such questioning was not expansive enough to examine the problem in greater detail. Despite several comments in the literature, there is still a lack of serious understanding, research and discussion on the influence of role models on their audiences and the method of incorporating the role model argument in the balancing exercise in the misuse of private information.

The main argument of this thesis is that the role model argument in the misuse of private information is not in its best position due to its unsatisfactory nature of judicial reasoning. The thesis will divide the problem into two strands: A) the state of judicial reasoning is unsatisfactory when it comes to how judges conclude that the information about the behaviour of the role model, if published, is likely to influence the behaviour of the audience b) the state of judicial reasoning is unsatisfactory when it comes to how judges conclude that the private information of the role model in question is in the public interest to publish.

In exploring the unsatisfactory nature of judicial reasoning, this thesis explains why the unsatisfactory nature of reasoning is problematic and must be solved. Due to the role model arguments' current effect of adding weight to the public interest to publish the information in question, the argument and its justification must be unambiguously understood and discussed by judges. This discussion is currently absent from the English courts' reasoning in the role model argument. Therefore, by incorporating the prototype-willingness model and understanding the recommendation in *Browne v Associated News*,⁵⁷ this thesis intends to improve judicial reasoning by explicitly reflecting on a behavioural understanding of the role model argument.

⁵⁵ Brian Cathcart, 'Opinion: "Role models and hypocrites" - Max Mosley' (Inform's Blog, 21 October 2011) < <https://inform.org/2011/10/21/role-models-and-hypocrites-max-mosley/>> accessed 6 January 2022

⁵⁶ Brian Cathcart, 'Opinion: "Role models and hypocrites" - Max Mosley' (Inform's Blog, 21 October 2011) < <https://inform.org/2011/10/21/role-models-and-hypocrites-max-mosley/>> accessed 6 January 2022

⁵⁷ *Browne v Associated News Ltd* [2007] EMLR 19, [38]

This thesis is distinct from those present in the literature for several reasons. First, unlike other works, it applies psychological and behavioural understandings of the effects of role models' argument. In doing so, the thesis provides a more rigorous analysis between normative compliance and psychological effectiveness in crafting the role model argument in the misuse of private information. By incorporating other disciplines' wisdom, in this case, psychology, this thesis aims to eliminate or reduce the current unsatisfactory state of judicial reasoning in the role model argument. Secondly, with the psychological understanding of role models' behavioural influences in mind, this thesis suggests a novel way to incorporate the role model argument in the balancing exercise.

1.4.3 Scope of the thesis

This thesis explores the courts' approach to the role model argument in the balancing exercise in the misuse of private information.

1.4.3.1 Informational privacy

Given that the thesis is concerned with the effect of the role model argument on the audience if the information is published, this thesis focuses on informational privacy only and does not extend to privacy in the form of seclusion from intrusion.

1.4.3.2 English law

This thesis only focuses on the unsatisfactory nature of judicial reasoning in England and Wales. It suggests an improved approach to the role model argument problem(s) in informational privacy in that jurisdiction only. However, this approach should not limit further exploration beyond this thesis into whether the problems focused on by the thesis appear in other jurisdictions with similar laws and whether the solutions suggested in this thesis could also be applied.

A limited mention of ECHR law appears in this thesis because the law of the ECHR influences English law. However, such appearance in this thesis does not include or intend to include a comprehensive assessment of ECHR law or a comparison of English and ECHR law.

1.4.3.3 Common tort law

This thesis focuses on the common law protection of private information. English courts have confirmed that the misuse of private information claim is a tort.⁵⁸ Although the courts, when considering the cause of action as one in tort, did not discuss why the misuse of private information should be served through tort law, despite this, this cause of action has been accepted as a tort.⁵⁹

1.4.3.4 Stage two: The balancing exercise

This thesis only focuses on stage two, the balancing exercise, in the misuse of private information because, as stated earlier, the tort of misuse of private information has a two-stage test, and the role model argument appears in the second stage of the test.

As a result, this thesis does not question or concern itself with how courts approach stage one of the test. It is assumed throughout the thesis that stage one has been adequately met, and judges have moved into the second stage of the test, the balancing exercise.

1.4.3.5 Thesis structure and findings

Chapter 1 presents the law of the misuse of private information, introduces role models, adolescents and the media, conducts a literature review, provides a rationale, scope, structure and findings of the thesis, and explains the methodology adopted throughout the thesis.

Chapter 2 focuses on strand A of the problem: the state of judicial reasoning is unsatisfactory when it comes to how judges conclude that the information about the behaviour of the role model, if published, is likely to influence the audience who has taken the public figure as their role and. The chapter will start by providing a logical analysis of how the role model argument has been interpreted by the courts. The chapter then will move to focus on the unsatisfactory nature of judicial reasoning and introducing the prototype-willingness model as a guideline for

⁵⁸ *Vidal-Hall v Google Inc* [2015] 3 WLR, [43]-[51]

⁵⁹ *PJS v NGN* [2016] AC 1081, [32]-[44]

judges to take when examining the role model argument. Finally, it will present a hypothetical case study on illegal drug consumption to show how the prototype-willingness model can improve the state of judicial reasoning in the role model argument.

Chapter 3 focuses on strand B of the problem: the state of judicial reasoning is unsatisfactory when it comes to how judges conclude that publishing the private information of the role model in question is in the public interest. This chapter criticises the courts' understanding that the role model argument increases the public interest in publishing private information. The chapter then shows how the new understanding of the role model argument, supplemented by the prototype willingness model, leaves the argument unsuitable as one in the public interest to publish. The chapter then argues that speech resulting from the role model argument is harmful if published. Finally, the chapter shows how the balancing exercise's public interest under article 10 is flexible enough to take the role model argument's harmful speech into its equation.

1.4.3.6 Methodology

The methodologies mentioned below do not appear in the order given but are used in this thesis:

a) Theory

The theoretical examination ensures that any new legal reasoning proposed in this thesis is based on a credible, morally defensible approach stemming from a philosophical justification. This methodology ensures that the suggestions in this thesis (see Chapter 3) are defensible and plausible. This approach was defended by Dan-Cohen when he stated, 'Although theories are not designed to decide cases, greater theoretical clarity is indispensable'.⁶⁰

Setting the theoretical parameters in this thesis mainly occurs in Chapter 3, which explores the theoretical foundations of the freedom of speech using John Stuart Mill's harm principle to argue that the speech resulting from the role model argument must be seen as harmful.

b) Doctrine

⁶⁰ M Dan-Cohen, *Normative Subjects* (OUP 2016) 209

The critical examination of doctrine is key to any attempt to improve the state of judicial reasoning. Framing this thesis with a critical examination ensures it produces conclusions related to its overall objective (improving judicial understanding and reasoning of the role model argument), revealing the root causes of the main problem (unsatisfactory judicial reasoning). This goal can only be possible via a sharp critical examination of the existing case laws.

The critical examination of doctrine appears at the beginning of Chapters 2 and 3. The thesis provides a detailed critical analysis of the current judicial reasoning under the role model argument, allowing each chapter to pinpoint the root cause of the problem (unsatisfactory judicial reasoning) to pave the path for introducing a solution.

c) Interdisciplinary

Interdisciplinary methodology is key to this thesis. Applying psychological behavioural understanding to the role model argument allows the thesis to understand, in terms of behaviour, the reaction of adolescents who take the public figure in question as their role model. Integrating the prototype willingness model data and information will provide a fundamental understanding of the role model argument beyond a single discipline interpretation.

d) Application

This step combines the three methodologies mentioned above. Chapter 2 combines the doctrine and interdisciplinary methodologies to suggest a practical amendment for improving the state of judicial reasoning of strand A of the thesis problem, while Chapter 3 combines the doctrine and theoretical methodology with strand B of the thesis problem to produce a solution to improve the state of judicial reasoning.

Chapter Two: The influence of role models in misuse of private information.

2.1 Introduction.

This chapter will focus on strand A of the thesis main argument: the state of judicial reasoning is unsatisfactory when it comes to how judges conclude that the information about the behaviour of the role model, if published, is likely to influence the behaviour of the audience. This chapter will conduct a detailed critical analysis on judicial understanding of the role model argument and will conclude that its state is unsatisfactory. In hope to improve judicial reasoning in this area, this chapter will introduce the prototype willingness model as a method for judges to understand the behavioural reactions of adolescents.

Section 2.2 argues that Interpretation one's starting line on focusing on the behaviour of the role model is persuasive and should be retained, while the remaining reasoning of the method lacks transparency. In regard to Interpretation two, this chapter argues that questions about the suitability of the public figure as a role model do not, in reality, reflect adolescents' true thoughts. Section 2.3 argues that Laing J's suggestion to amend the role model argument presents several difficulties and is therefore an unattractive solution to replace current understandings of the role model argument. Section 2.4 introduces the prototype willingness model, while Section 2.5 shows how the prototype willingness model can apply to the behaviour question, how the model explains behavioural reactions of adolescents' and how media exposure to misbehaviour might increase the chance that adolescents mimic that behaviour. In doing so, the thesis aims to show the prototype willingness model is likely to improve the state of judicial reasoning in the role model argument. Finally, Section 2.6 proposes a hypothetical case study on the consumption of illegal drugs and shows how the prototype willingness model can improve judicial reasoning under the role model argument in respect of misuse of private information.

2.2 The role model argument and its two meanings.

This sub-section identifies two judicial interpretations that have been used to understand the role model argument. Interpretation one focuses on the behaviour of the role model, while interpretation two focuses on the suitability of the role model in question. This sub-section argues that interpretation one's initial line of reasoning is satisfactory but that much of the remaining judicial reasoning lacks transparency. Moreover, this sub-section argues that the understanding of the role model argument in interpretation two is unsatisfactory.

2.2.1 Interpretation one.

The first way that the role model argument has been interpreted in case law has been by focusing on the behaviour in question. Such interpretation has been seen in *A v B plc*.⁶¹ The Court of Appeal case, involved the claimant, who is a married premiership footballer. The claimant sought an injunction to prevent the first defendant, a newspaper from publishing information about his sexual relationships that he had with the second defendant and other women and to restrain any disclosure by those women to anyone with a view to such information being published in the media. In regards to the role model argument, Lord Woolf stated that a public figure who 'may be a role model whose *conduct could* well be emulated by others'.⁶² His Lordship continued, reasoning that 'footballers were role models and undesirable *behaviour* on their part *can* set an unfortunate example'.⁶³ Lord Woolf meant that the focus does not need to be on the title of a role model (here, footballers); instead, Lord Woolf suggested that one examine the specific behaviour or conduct in question and determine whether it may or may not influence adolescents who view the public figure as a role model.

One could argue that his Lordship's focus on the behaviour of the role model is a convincing approach. In 2004, The House of Commons Culture, Media and Sport select committee released a report entitled *Drugs and Role Models in Sport: Making and Setting Examples*.⁶⁴ The report suggests that, based on evidence provided by the British Psychological Association,

⁶¹ *A v B plc* [2002] EWCA Civ 337

⁶² *A v B plc* [2002] EWCA Civ 337, [11 xii]

⁶³ *A v B plc* [2002] EWCA Civ 337, [43 vi]

⁶⁴ Culture, Media and Sport Committee, *Drugs and role models in sport: making and setting examples* (HC 499-1)

the *manner*⁶⁵ in which role models go about their lives ‘can’ have a ‘strong and persuasive’ influence on others.⁶⁶ The reason why the British Psychological Society focused on manner as a concept is because adolescents pay particular attention to the manners, behaviours and opinions of their role models and often mimic them uncritically.⁶⁷ Although the committee’s report was published after the decision in *A v B plc*, and despite Lord Woolf’s omission to explain why he focused on the conduct of the role model specifically, yet the unexplained focus on the conduct of role models matched the committee’s psychologically informed focus on the manner in which a role model conducts themselves. This suggests that the initial line of reasoning adopted by the Court in *A v B plc*, which focuses on the conduct of the role model, is a convincing one and should be continued as the starting line in the role model argument in misuse of private information.⁶⁸

However, Lord Woolf’s conclusion on the role model argument lacks transparency in terms of judicial reasoning. Lord Woolf’s judgement is worded very carefully. One might note that his Lordship used verbs such as ‘can’ and ‘could’ rather than ‘will’ and ‘would’.⁶⁹ Grammatically, the verb ‘could’ indicates that something is a possibility.⁷⁰ In the role model argument, this possibility could mean that a role model’s behaviour might or might not be influential. However, Lord Woolf did not explain how he reached the conclusion that a footballer’s sexual relationships might influence adolescents or that the undesirable behaviour in question might ‘set the fashion’.⁷¹ One might ask whether his Lordship arrived at the conclusion subjectively or objectively or whether he relied on evidence, and if so, what type of evidence? The judgement provides no insights into why the Court reached this particular decision on the role

⁶⁵ Emphasis added.

⁶⁶ UK Parliament ‘Memorandum submitted by British Psychological Society’ (2004) <<https://publications.parliament.uk/pa/cm200304/cmselect/cmcmums/499/499we07.htm>> accessed 14 February 2022

⁶⁷ UK Parliament ‘Memorandum submitted by British Psychological Society’ (2004) <<https://publications.parliament.uk/pa/cm200304/cmselect/cmcmums/499/499we07.htm>> accessed 14 February 2022 see also, Mihar Nakanishi, Syudo Yamasaki, Kaori Endo, Shuntaro Ando, Yuko Morimoto, Shinya Fujikawa, Sho Kanata, Yusuke Takahashi, Toshi Furukawa, Marcus Richards, Mariko Hiraiwa-Hasegawa, Kiyoto Kasai and Atsushi Nishida, ‘The association between the role model presence and self-regulation in early adolescence: A cross-sectional study’ (2019) 14(9) PLOS ONE

⁶⁸ See the case study in this chapter for an elaboration on how this can be the case.

⁶⁹ *A v B plc* [2002] EWCA Civ 337, [11 xii], [43 vi]

⁷⁰ Cambridge Dictionary <<https://dictionary.cambridge.org/dictionary/english/could>> accessed 14 February 2022

⁷¹ *A v B plc* [2002] EWCA Civ 337, [11 xii]

model argument or how the decision was justified. As acknowledged in the literature review, both Wragg and Philipson confirm that the court's approach is not supported by evidence.⁷²

This thesis posits that these gaps affect the quality of the argument of the role model argument. The lack of evidential support and transparency in the role model argument is problematic because the argument's rationales cannot be justified. As Thomas Perry notes, a rational justification is very important as 'a good judgement produces arguments that cannot be denied the title of rational justifications' to strengthen its validity.⁷³ In their guide to assist judges in producing strong decisions, the Government Legal Department encourages judges to provide reasons for their decisions as 'failure to give reasons may ... disappoint a legitimate expectation'.⁷⁴ One of the expectations that the guide discusses is for judges to 'show by what process of reasoning issues were resolved'.⁷⁵ This illustrates how the lack of rational justification stemming from omitting to rely on evidence in the Court's decision is problematic because it affected the role model argument reasoning. Therefore, behavioural evidence is needed to improve the quality of future decisions in the role model argument in respect of the misuse of private information. In Section 2.4, this thesis introduces the prototype willingness model to answer the question as to whether a particular type of behaviour is influential or not in the hope of addressing the lack of evidence and transparency in judicial reasoning in the role model argument.

One could also make similar comments about the *Theakston v MGN Limited* decision.⁷⁶ *Theakston v MGN Limited* was about a photograph of Jamie Theakston that was taken without his consent whilst he was in a brothel in London. Theakston was very intoxicated the night the photograph was taken. He received text messages over a few weeks following his visit to the brothel from a prostitute, threatening to go to the press if Theakston did not pay a sum of money. The prostitutes took their story to the press. Theakston requested an injunction to

⁷² Paul Wragg, 'A Freedom to Criticise? Evaluating the Public Interest in Celebrity Gossip after Mosley and Terry' (2010) 10 JML 295 and Gavin Philipson, 'Press freedom, the public interest and privacy' in Andrew Kenyon (ed) *Comparative Defamation and Privacy Law* (Cambridge University Press 2016)

⁷³ Thomas Perry, 'Judicial Methods and Concept of Reasoning' (1970) 19(2) Buffalo Law Review 225, 255

⁷⁴ Government Legal Department, 'The judge Over your shoulder – a guide to good decision making' (2006) 55 – 57.

⁷⁵ Government Legal Department, 'The judge Over your shoulder – a guide to good decision making' (2006) 57

⁷⁶ *Theakston v MGN Limited* [2002] EWHC 137 (QB)

prevent the publication of both the details of his activities in the brothel and the photographs. Ouseley J accepted that Theakston was a role model due to the nature of his job as a TV presenter.⁷⁷ Ouseley J specifically commented on the behaviour in question when examining the role model argument. He stated that Theakston's 'lifestyle would at least be harmless if followed ... [yet] the activity in question here *may* make the viewers or parents of viewers react differently'.⁷⁸ The language used in the *Theakston* case is similar to *A v B plc* in terms of the focus on the behaviour in question. Like Lord Woolf, Ouseley J here used the verb 'may' to indicate that there is a possibility rather than a certainty that others may mimic the behaviour. However, like *A v B plc*, the *Theakston* decision still lacks transparency with respect to how Ouseley J decided that views may react to the behaviour in question. Ouseley's J judgement on the role model argument attracts the same criticisms of its rationales as the *A v B plc* decision, which was discussed in the paragraphs above.

2.2.2 Interpretation two.

The second interpretation of the role model argument links the argument to the general suitability of the public figure in question as a role model. The suitability line of reasoning revolves around a key question: Is the public figure a suitable role model for young fans? The suitability of a role model is based on the role model standard of behaviour. This question focuses on the standards of behaviour of the role model in question and examines whether their behaviour is of a high standard. Interpretation two is illustrated by the decisions in *Ferdinand v MGN*⁷⁹ and *McClaren v NGN*.⁸⁰

In *Ferdinand v MGN*,⁸¹ the Sunday Mirror published an article about the claimant's relationship with a woman. The article suggested that the claimant had an affair with the woman and that the claimant later terminated his relationship with her after he was made the captain of England's football team. Nicol J linked the role model argument to the suitability of

⁷⁷ *Theakston v MGN Limited* [2002] EWHC 137 (QB), [69]

⁷⁸ *Theakston v MGN Limited* [2002] EWHC 137 (QB), [69]

⁷⁹ *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB)

⁸⁰ *McClaren v News Group Newspaper* [2012] EWHC 2466 (QB)

⁸¹ *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB)

the public figure as a role model to adolescents. He acknowledged that Ferdinand is a role model⁸² and decided that

during the course of the hearing I asked the parties whether it was incumbent on me to decide whether the Claimant was fit to be England captain. Thankfully they agreed that it was not. The issue is rather whether the Defendant's article reasonably contributed to the debate as to his suitability for that role.⁸³

Similarly, in *McClaren v News Group Newspaper*,⁸⁴ the Court found that the claimant 'belongs to the category of those from whom the public could reasonably expect a higher standard of conduct'.⁸⁵ Therefore, in the eyes of the law, the claimant was a role model.

Unfortunately, the interpretation here is not convincing to be used as a method to understand the role model argument. This is because suitability of the role model strays away from typical understandings of the concept of the role model. The focus on the suitability of a particular public figure as a role model does not match the concept of the role models; this is because adolescents examine a role model's behaviour, manner and opinions and try to mimic them regardless of whether they are good or bad.⁸⁶ Adolescents are unlikely to judge the suitability of a role model before choosing an individual (including a public figure) as their role model and being influenced by their behaviour.⁸⁷ Therefore, the suitability line of thinking presented in interpretation two does not accord with reality. Sivakumar argues law does not function alone: it 'operates for and in society'.⁸⁸ If the concept of the role model revolves around the idea that role models are individuals whom adolescents look to and whose behaviour they

⁸² *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB), [90]

⁸³ *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB), [92]

⁸⁴ *McClaren v News Group Newspaper* [2012] EWHC 2466 (QB)

⁸⁵ *McClaren v News Group Newspaper* [2012] EWHC 2466 (QB), [34]

⁸⁶ Miharū Nakanishi, Syudo Yamasaki, Kaori Endo, Shuntaro Ando, Yuko Morimoto, Shinya Fujikawa, Sho Kanata, Yusuke Takahashi, Toshi Furukawa, Marcus Richards, Mariko Hiraiwa-Hasegawa, Kiyoto Kasai and Atsushi Nishida, 'The association between the role model presence and self-regulation in early adolescence: A cross-sectional study' (2019) 14(9) PLOS ONE and Melissa Kearney and Phillip Levine, 'Role Models, Mentors, and Media Influences' (2020) 30 The Future of Children 83

⁸⁷ See section 2.3 and 2.4 in this chapter.

⁸⁸ S Sivakumar, 'Judgement or Judicial Opinion: How to Read and Analyse' (2016) 58(3) Journal of the Indian Law Institute 273

*might*⁸⁹ mimic,⁹⁰ then surely judgements need be based on the idea of mimicry (such as in *A v B plc*⁹¹) rather than suitability. This is because as Sivakumar argued that law does not function alone, then the interpretation of the role model argument needs to reflect and show the understanding of social behaviours of those adolescents who take the public figure as their role model. Therefore, the initial line of reasoning in *A v B plc*⁹² is the most attractive one, and it ought to be followed in the future in accordance with the suggestions that are offered in Section 2.4 of this chapter.

2.3 Attempts to improve the role model argument in relation to the misuse of private information.

The previous section suggested that the current interpretations of the role model argument in regard to the misuse of private information are not completely satisfying. Before putting forward a novel understanding of the role model argument, this thesis reviews Elizabeth Laing J's suggestion to improve the role model argument. This section argues that Laing J's suggestion has several shortcomings that make her argument a weak one to be implemented; therefore, the thesis introduces a novel understanding of the role model argument later in the chapter.

2.3.1 Elizabeth Laing J's suggestion.

In *AMC and KLJ v News Group Newspaper*,⁹³ Laing J suggested an improvement to the role model argument.⁹⁴ The improvement developed revolves around the behaviour in question and

⁸⁹ emphasis added

⁹⁰ Miharu Nakanishi, Syudo Yamasaki, Kaori Endo, Shuntaro Ando, Yuko Morimoto, Shinya Fujikawa, Sho Kanata, Yusuke Takahashi, Toshi Furukawa, Marcus Richards, Mariko Hiraiwa-Hasegawa, Kiyoto Kasai and Atsushi Nishida, 'The association between the role model presence and self-regulation in early adolescence: A cross-sectional study' (2019) 14(9) PLOS ONE see also Erik Erikson, *Identity: Youth and Crisis* (New York W.W. 1968)

⁹¹ See interpretation one in section 2.2 in this chapter.

⁹² *A v B plc* [2002] EWCA Civ 337

⁹³ *AMC and KLJ v News Group Newspaper* [2015] EWHC 2361 (QB)

⁹⁴ Michael Lamb, 'The Role Model Argument: A Fundamentally Flawed Concept' (2017) 5 Newcastle Law Review 21, 23

if the behaviour in question is linked to the public figure's reason of fame. In the case,⁹⁵ the first applicant (A1) was a 'prominent and successful professional sportsman' who had held positions of responsibility in sports and had 'appear[ed] in advertisements for some products'.⁹⁶ The second applicant (A2) was A1's wife. A1 had a relationship with X 'some years ago and lasted a few months'.⁹⁷ X was described by the court as someone who had 'chosen to display in public aspects of her life which others might regard as normally private'.⁹⁸ The respondent proposed publishing an article relating to a previous sexual relationship between A1 and X. The proposed article was said to be X's account of the relationship to 'put the records straight', and the applicants applied to the High Court to prevent its publication. The High Court granted the applicants (i) an interim injunction to restrain the respondent's publication of material relating to the first applicant's sexual relationship with a third party, X, and (ii) a corresponding anonymity order.

Laing J's perspective on the role model argument is set out in the following paragraph:

[A1] is a role model for sportsmen and aspiring sportsmen. Any scrutiny of his conduct away from sports ought to bear a reasonable relationship with the fact that he is a sportsman. His position does not turn him into an example in every sphere of his existence. He is not a role model for cooks, or for moral philosophers. The fact that he is a prominent sportsman does not mean that he impliedly pontificates publicly about private morality. In my judgement, a discreetly conducted affair, before he was married, some years ago, is not obviously inconsistent with his public role, even if it involved the breach of team rules.⁹⁹

Focusing particularly on "[A1] is a role model for sportsmen and aspiring sportsmen. Any scrutiny of his conduct away from sports ought to bear a reasonable relationship with the fact that he is a sportsman".¹⁰⁰ It can be understood that Laing J advises to focus on whether the behaviour in question is linked to the reason the role model is famous. If so, then the role model argument is satisfied. For example, if the person making a claim is a footballer, the behaviour

⁹⁵ *AMC and KLJ v News Group Newspaper* [2015] EWHC 2361 (QB)

⁹⁶ *AMC and KLJ v News Group Newspaper* [2015] EWHC 2361 (QB), [6]

⁹⁷ *AMC and KLJ v News Group Newspaper* [2015] EWHC 2361 (QB), [7]

⁹⁸ *AMC and KLJ v News Group Newspaper* [2015] EWHC 2361 (QB), [18]

⁹⁹ *AMC and KLJ v News Group Newspaper* [2015] EWHC 2361 (QB), [20]

¹⁰⁰ *AMC and KLJ v News Group Newspaper* [2015] EWHC 2361 (QB), [20]

in question is about football, then the role model argument in respect of the misuse of private information is satisfied. However, this understanding has several difficulties and weaknesses.

The first difficulty with Laing J's suggestion is that it is detached from reality. Laing J's suggested amendment suggests that because A1 is a sportsman 'he is not a role model for cooks, or for moral philosophers'.¹⁰¹ This suggests that, when it comes to his professional behaviour, A1 is only a role model to adolescents who are interested in football. With respect, such a line of thinking is mistaken and therefore makes the Laing J argument a weak one. Research suggests that adolescents' mimicry of role models and the influence that role models' behaviour has on them is not just limited to behaviours that are related to the reason why a role model is famous.¹⁰² For example, adolescents can be inspired by a role model because of their similar interests or general success in life. Take Mohammed Salah, a famous Liverpool FC footballer. Many adolescents who are football fans and who aspire to be like Salah in the future view Salah as a role model; however, many adolescents who are not interested in football but want to succeed, might view Salah as a role model for this success story.¹⁰³ This means that footballers can be role models for adolescents from all walks of life. Therefore, Laing J's line of reasoning that role models only inspire those with the same professional goals or interests is not aligned with reality. If the suggested amendment is implemented by judges in the future, the role model argument will carry serious judicial reasoning problems.

The second difficulty in Laing J's suggested amendment is that it is not inclusive enough. With the increasing use of social media by public figures, it can be difficult to pinpoint or precisely determine the reason why a role model is famous. It is difficult to achieve the standard that Laing J set when she stated that for the footballer in question, 'his position does not turn him into an example in every sphere of his existence'¹⁰⁴ because contemporary role models share more information with fans than simply information that is related to the reason why they are famous. For example, David Beckham frequently shares fashion-related content, his preferred

¹⁰¹ *AMC and KLJ v News Group Newspaper* [2015] EWHC 2361 (QB), [20]

¹⁰² Sara Johnson, Mary Buckingham, Stacy Morris and Sara Suzuki, Michelle Weiner, Rachel Herberg, Ettya Fremont, Milena Batanova, Caitlin Aymong, Cristina Hunter, Edmond Bowers, Jacqueline Lerner and Richard Lerner, 'Adolescents' Character Role Models: Exploring Who Young People Look Up to as Examples of How to Be a Good Person' (2016) 13(2) *Research in Human Development* 126

¹⁰³ Solava Ibrahim, 'Mohammed Salah Effect' is real – My research shows how he inspires Egyptian youth' (The Conversation, 25 May 2018) <<https://theconversation.com/the-mohamed-salah-effect-is-real-my-research-shows-how-he-inspires-egyptian-youth-97220>> accessed 5 May 2021

¹⁰⁴ *AMC and KLJ v News Group Newspaper* [2015] EWHC 2361 (QB), [20]

alcoholic beverages and his exercise routine with fans; this has made him a role model for those who are interested in men's fashion. Moreover, it is very difficult to pinpoint social media influencers'¹⁰⁵ professions or the reason why they are famous.¹⁰⁶ For example, many adolescents view Kim Kardashian and Moly Mea as role models for a variety of different reasons. For example, some see Kim Kardashian as a role model because of her sense of fashion and her taste in make-up, while others view her as a role model because of her success in business. Given these trends, as public figures' use of social media has increased, it has become very difficult to pinpoint a public figure's profession or limit their sphere of influence to a single profession. One might thus conclude that Laing J's suggestion is problematic as it is not inclusive enough.

Finally, Laing J's suggested argument presents a similar problem to interpretation two of the role model argument identified earlier in this chapter.¹⁰⁷ The suggestion does not question whether the behaviour in question is likely to be mimicked by adolescents who select a public figure as their role model. Again, this must be the main priority when examining the role model argument because the concept of the role model revolves around being inspired by someone's behaviour, attitude and opinions. Overall, this indicates that Laing J's suggestion is unlikely to improve the current state of the role model argument in respect of the misuse of private information. Given the current unsatisfactory state of the role model argument as shown in section 2.2 and Laing J's suggested amendment to the argument, this thesis in the next section will introduce a new way to understand the role model argument. The following section introduces the prototype willingness model, which can be used to better understand the role model argument in respect of the misuse of private information in the future.

2.4 The prototype willingness model.

As Sections 2.2 and 2.3 have shown, the current state of the role model argument is not completely satisfactory, and Laing J's suggestion for reform of the argument has several shortcomings. It needs to be understood that the remaining of this chapter will build upon Lord Woolf's satisfactory focus on the particular behaviour in question. Taking such a step

¹⁰⁵ Digital, Culture, Media and Sports Committee, *Influencer Culture: Lights, camera, inaction?* (HC258) para 2

¹⁰⁶ Digital, Culture, Media and Sports Committee, *Influencer Culture: Lights, camera, inaction?* (HC258) para 4

¹⁰⁷ See section 2.2.2 in this chapter.

goes in harmony with the thesis argument in interpretation one,¹⁰⁸ that is, the focus on the behaviour in question as a starting point to the role model argument is a satisfactory step. However, the remainder of this chapter, will focus on how the prototype willingness model can replace the unsatisfactory understanding and reasoning when it comes to judges deciding whether the information about behaviour in question, if published, might influence adolescents to mimic the behaviour.

This sub-section introduces the prototype willingness model and argues in favour of its use as a guideline that judges can consult when considering the role model argument in the future. The prototype willingness model offers a way to understand whether a particular behaviour will influence adolescents if information is published about the behaviour. This sub-section first describes the prototype willingness model. It then demonstrates how the model can be incorporated into and improve the role model argument.

2.4.1 What is the prototype willingness model?

The prototype willingness model is a psychological model that can be used to provide reasons why adolescents decide to engage in risky behaviours.¹⁰⁹ The model was developed by Gibbons et al to attempt to explain such behaviour by accepting that not all behaviours performed by human beings are determined by intention.¹¹⁰ Instead, behaviour can sometimes be the result of ‘subjective, reactive and non-deliberative decisions that are reactions to the social environment’.¹¹¹

¹⁰⁸ see section 2.2.1 in this chapter.

¹⁰⁹ Jemma Todd, Emily Kothe, Barbra Mullan and Lauren Monds, ‘Reasoned versus reactive prediction of behaviour: a meta-analysis of the prototype willingness model’ (2016) 10(1) *Health Psychol Rev* 24

¹¹⁰ F Gibbons and M Gerrard, ‘Predicting young adults’ health risk behaviour’ (1995) 96(3) *Journal of personality and social psychology* 505 and F Gibbons, M Gerrard, H Blanton and D Russell, ‘Reasoned action and social reaction: Willingness and intention as independent predictors of health risk’ (1998) 74(5) *Journal of personality and social psychology* 1164

¹¹¹ M Gerrard, F Gibbons, A Houlihan, M Stock and E Pomery, ‘A dual-process approach to health risk decision making: the prototype willingness model’ (2008) 28(1) *Developmental Review* 29

The prototype willingness model has been utilised as a dual-route model of decision making.¹¹² In this type of model, both routes of decision-making occur simultaneously.¹¹³ The two routes of decision making are: (1) a reasoned route and (2) a social reaction route.¹¹⁴ These dual routes in the prototype willingness model aim to explain both ‘reasoned’ and ‘reactive’ decision-making processes, usually involving risky behaviour.¹¹⁵ The model suggests that decision-making shifts from a more social reaction process to a more reasoned one while an individual grows up.¹¹⁶ Age may play a critical role in decision-making as the brain network that relates to planning and self-regulation gradually matures throughout adolescence and into young adulthood.¹¹⁷

The reasoned route involves an analytical process of thinking.¹¹⁸ This route is described as being a ‘reflective, rational and analytic’.¹¹⁹ It is characterised by the use of an information processing technique that is conscious, slow and deliberate.¹²⁰ Elements of this route include (1) attitudes (e.g. ‘perceived personal risk in engaging in a behaviour’) and (2) subjective norms¹²¹ (e.g. ‘perceived pressure to engage in a particular behaviour’).¹²² The outcome of the

¹¹² F Gibbons, M Gerrard, L Michelle, Stock and D Finneran ‘The prototype/willingness model’ in Mark Conner and Paul Norman (eds), *Predicting and changing health behaviour: research and practice with social cognition models* (third edition, Open University Press 2015)

¹¹³ F Gibbons, M Gerrard, L Michelle, Stock and D Finneran ‘The prototype/willingness model’ in Mark Conner and Paul Norman (eds), *Predicting and changing health behaviour: research and practice with social cognition models* (third edition, Open University Press 2015)

¹¹⁴ F Gibbons and M Gerrard, ‘Predicting young adults’ health risk behaviour’ (1995) 96(3) *Journal of personality and social psychology* 505

¹¹⁵ F Gibbons and M Gerrard, ‘Predicting young adults’ health risk behaviour’ (1995) 96(3) *Journal of personality and social psychology* 505

¹¹⁶ F Gibbons, M Gerrard, L Michelle, Stock and D Finneran ‘The prototype/willingness model’ in Mark Conner and Paul Norman (eds), *Predicting and changing health behaviour: research and practice with social cognition models* (third edition, Open University Press 2015)

¹¹⁷ Melissa Lewis, Dana Litt, Kevin King, Tracey Garcia, Katja Waldron and Christine Lee, ‘Consideration of future consequences as a moderator of the willingness-behaviour relationship for young adult marijuana use and consequences’ (2018) 87(8) *Addict Behav* 16

¹¹⁸ F Gibbons, M Gerrard, L Michelle, Stock and D Finneran ‘The prototype/willingness model’ in Mark Conner and Paul Norman (eds), *Predicting and changing health behaviour: research and practice with social cognition models* (third edition, Open University Press 2015)

¹¹⁹ Jemma Todd, Emily Kothe, Barbra Mullan and Lauren Monds, ‘Reasoned versus reactive prediction of behaviour: a meta-analysis of the prototype willingness model’ (2016) 10(1) *Health Psychol Rev* 24

¹²⁰ Keith Stanovich, *Who Is Rational? Studies of Individual Differences in Reasoning* (Routledge 1999)

¹²¹ I Ajzen and M Fishbein, ‘Prediction of goal directed behaviour: attitudes, intentions and perceived behavioural control’ (1986) 22 *Journal of experimental social psychology* 453.

¹²² F Gibbons, M Gerrard, L Michelle, Stock and D Finneran ‘The prototype/willingness model’ in Mark Conner and Paul Norman (eds), *Predicting and changing health behaviour: research and practice with social cognition models* (third edition, Open University Press 2015)

reasoned route is an intended behaviour (behavioural intention).¹²³ Intention here refers to a 'formal commitment to perform any given behaviour, and is assessed with a direct statement about future plan'.¹²⁴

The social reaction route (or heuristic route) is a reactive rather than an analytic or reasoned process of decision-making.¹²⁵ This route is about rapid, unanalytical and automatic information processing.¹²⁶ Like the reasoned route, the social reaction route also consists of (1) attitudes and (2) subjective norms.¹²⁷ However, this route also involves a (3) prototype image, which is the main interest of this thesis. The social reaction route differs in terms of its behavioural outcomes. Unlike the reasoned route, the social reaction route ends with behavioural willingness.¹²⁸

Gibbons et al explained that willingness differs from intention, as individuals may not intend to engage in risky behaviour but may nonetheless do so if the opportunity is available.¹²⁹ Willingness is about the acknowledgement of one's capability to perform such a behaviour.¹³⁰ Behavioural willingness recognises that many risk behaviours are unplanned and evolve out of reaction to 'risk conducive situations'.¹³¹ It is believed that holding positive perceptions of the prototypical person who engages in any given behaviour (whether good or bad) increases that individual's willingness to participate in or mimic that behaviour, and thus increases the

¹²³ F Gibbons, M Gerrard, L Michelle, Stock and D Finneran 'The prototype/willingness model' in Mark Conner and Paul Norman (eds), *Predicting and changing health behaviour: research and practice with social cognition models* (third edition, Open University Press 2015)

¹²⁴ I Ajzen and M Fishbein, 'Prediction of goal directed behaviour: attitudes, intentions and perceived behavioural control' (1986) 22 *Journal of experimental social psychology* 453

¹²⁵ F Gibbons, M Gerrard, L Michelle, Stock and D Finneran 'The prototype/willingness model' in Mark Conner and Paul Norman 'Predicting and changing health behaviour: research and practice with social cognition models' (third edition, Open University Press 2015)

¹²⁶ Jemma Todd, Emily Kothe, Barbra Mullan and Lauren Monds, 'Reasoned versus reactive prediction of behaviour: a meta-analysis of the prototype willingness model' (2016) 10(1) *Health Psychol Rev* 24

¹²⁷ F Gibbons, M Gerrard, L Michelle, Stock and D Finneran 'The prototype/willingness model' in Mark Conner and Paul Norman (eds), *Predicting and changing health behaviour: research and practice with social cognition models* (third edition, Open University Press 2015)

¹²⁸ F Gibbons, M Gerrard, L Michelle, Stock and D Finneran 'The prototype/willingness model' in Mark Conner and Paul Norman (eds), *Predicting and changing health behaviour: research and practice with social cognition models* (third edition, Open University Press 2015)

¹²⁹ F Gibbons and M Gerrard, 'Predicting young adults' health risk behaviour' (1995) 96(3) *Journal of personality and social psychology* 505

¹³⁰ F Gibbons, M Gerrard, L Michelle, Stock and D Finneran 'The prototype/willingness model' in Mark Conner and Paul Norman (eds), *Predicting and changing health behaviour: research and practice with social cognition models* (third edition, Open University Press 2015)

¹³¹ F Gibbons and M Gerrard, 'Predicting young adults' health risk behaviour' (1995) 96(3) *Journal of personality and social psychology* 505

likelihood that the individual will engage in that behaviour.¹³² This route is more associated with adolescents and the influence that role models have on their behaviour. This thesis places a detailed focus on the prototype in the reactive behaviour as it provides the main explanation for an adolescent's behaviour in this thesis.

a) Prototypical image.

Understanding prototype images is key to this thesis because the understanding of role models influence on adolescents' behaviour in this thesis is supplemented by prototype images. Role models are a type of prototype image¹³³, and prototype images influence how *willing* the individual is to engage in a particular behaviour when the opportunity arises.¹³⁴ Prototype images are 'images that individuals hold of typical people who perform specific actions', and this includes role models.¹³⁵ A prototype image reflects a form of social influence to which an individual, in most cases an adolescent, compares him or herself in order to decide whether the prototype reflects his or her desired or undesired characteristics.¹³⁶ The extent to which prototype perceptions influence an individual's willingness to engage in a behaviour is somewhat reliant on the social circumstances surrounding that individual.¹³⁷ These social circumstances are built upon the 1) favourability of the image¹³⁸ and the image's 2) similarity (i.e. how similar the individual thinks the prototype is to themselves).¹³⁹ The greater the

¹³² F Gibbons, M Gerrard and S McCoy, 'Prototype perception predicts (lack of) pregnancy prevention' (1995) 21(1) *Personality and social psychology bulletin* 85 see also Dana Litt, Melissa Lewis, Anne Fairlie, Maya Head-Corliss, 'An examination of the relative associations of prototype favourability, similarity, and their interaction with alcohol and alcohol-related risky sexual cognitions and behaviour' (2020) 8(2) *Emerging Adulthood* 168, 168-169

¹³³ F Gibbons, M Gerrard, L Michelle, Stock and D Finneran 'The prototype/willingness model' in Mark Conner and Paul Norman (eds), *Predicting and changing health behaviour: research and practice with social cognition models* (third edition, Open University Press 2015)

¹³⁴ Dana Litt and Michelle Stock, 'Adolescent alcohol-related risk cognitions: the roles of social norms and social networking sites' (2011) 25(4) *Psychology of Addictive behaviours* 708 See also Joseph Hammer and David Vogel, 'Assessing the Utility of the Willingness/Prototype Model in Predicting Help-Seeking Decisions' (2013) 60(1) *Journal of Counselling Psychology* 83

¹³⁵ B van Lettow, H de Vries, A Burdorf and P van Empelen, 'Quantifying the strength of the associations of prototype perceptions with behaviour, behavioural willingness and intentions: a meta-analysis' (2014) *Health Psychology review* 1

¹³⁶ F Gibbons and M Gerrard, 'Predicting young adults' health risk behaviour' (1995) 96(3) *Journal of personality and social psychology* 505

¹³⁷ F Gibbons and J Eggleston, 'Smoker network and the "typical smoker": a prospective analysis of smoking cessation' (1996) 15 *Health Psychology* 469

¹³⁸ Dana Litt, Melissa Lewis, Anne Fairlie, Maya Head-Corliss, 'An examination of the relative associations of prototype favourability, similarity, and their interaction with alcohol and alcohol-related risky sexual cognitions and behaviour' (2020) 8(2) *Emerging Adulthood* 168, 168-169

¹³⁹ M Setterlund and P Niedenthal, 'Who am I? Why am I here?: self-esteem, self clarity and prototype matching' (1993) 65(4) *J Pers Soc Psychol* 769

favourability of the prototype and the greater perceived similarity to the prototype, the more willing a person will be to engage in a particular behaviour (whether the behaviour is good or bad).¹⁴⁰

b) Prototype Favourability.

A prototype image can be more or less favourable; the more favourable a prototype image, the more willing one will be to engage in the portrayed behaviour'¹⁴¹ and be more willing to accept the social consequences of that behaviour.¹⁴² 'To visualize high favourability, the favourability of a prototype can be created through an adolescent's attraction to the socially desirable traits of their role model such as physical attractiveness and trendiness'.¹⁴³ Usually, adolescents show high prototype favourability towards their role models.

c) Prototype similarity.

Prototype similarity has also been found to be an important predictor of willingness to engage in a behaviour.¹⁴⁴ Prototype similarity refers to the extent to which one perceives oneself as being similar to a prototype.¹⁴⁵ Adolescents tend to have more favourable attitudes towards

¹⁴⁰ F Gibbons and J Eggleston, 'Smoker network and the "typical smoker": a prospective analysis of smoking cessation' (1996) 15 *Health Psychology* 469

¹⁴¹ Dana Litt, Melissa Lewis, Anne Fairlie, Maya Head-Corliss, 'An examination of the relative associations of prototype favourability, similarity, and their interaction with alcohol and alcohol-related risky sexual cognitions and behaviour' (2020) 8(2) *Emerging Adulthood* 168, 168-169

¹⁴² Dana Litt, Melissa Lewis, Anne Fairlie, Maya Head-Corliss, 'An examination of the relative associations of prototype favourability, similarity, and their interaction with alcohol and alcohol-related risky sexual cognitions and behaviour' (2020) 8(2) *Emerging Adulthood* 168, 168-169)

¹⁴³ Dana Litt, Melissa Lewis, Anne Fairlie, Maya Head-Corliss, 'An examination of the relative associations of prototype favourability, similarity, and their interaction with alcohol and alcohol-related risky sexual cognitions and behaviour' (2020) 8(2) *Emerging Adulthood* 168, 168-169)

¹⁴⁴ Amanda Ravis, Paschal Sheeran, Christopher Armitage, 'Augmenting the theory of planned behaviour with the prototype/willingness model" predictive validity of actor versus abstainer prototypes for adolescents' health-protective and health-risk intentions' (2006) *Br J Health Psychol* 483

¹⁴⁵ F Gibbons and M Gerrard, 'Predicting young adults' health risk behaviour' (1995) 96(3) *Journal of personality and social psychology* 505 and F Gibbons, M Gerrard, H Blanton and D Russell, 'Reasoned action and social reaction: Willingness and intention as independent predictors of health risk' (1998) 74(5) *Journal of personality and social psychology* 1164

people who they perceive to be similar to themselves.¹⁴⁶ Additionally, adolescents view themselves as being highly similar to their role models.¹⁴⁷

2.5 The need to adopt the prototype willingness model in the role model argument.

Following the description of the prototype willingness model, this sub-section showcases how the prototype willingness model is highly likely to improve the state of reasoning in the role model argument in respect of the misuse of private information. This sub-section examines three different aspects of the prototype willingness model: behaviour, age and media exposure. The sub-section demonstrates how the model can improve the state of judicial reasoning when it comes to decide whether the information on the behaviour in question, if published, can influence adolescents to mimic the behaviour.

2.5.1 Nearly every possible misbehaviour has been researched in the prototype willingness model.

Taking Lord Woolf's focus on behaviour into account, the prototype willingness model has been widely used to research numerous behaviours. This means that, in the future, if judges decide to take the prototype willingness model into account, it is highly likely that a research under the model has been conducted on the behaviour in question which leaves data ready to be easily interpreted by judges. Various behaviours have been assessed frequently using the prototype willingness model, such as risky sexual behaviour,¹⁴⁸ taking nude photographs¹⁴⁹

¹⁴⁶ F Gibbons and M Gerrard, 'Predicting young adults' health risk behaviour' (1995) 96(3) Journal of personality and social psychology 505 and F Gibbons, M Gerrard, H Blanton and D Russell, 'Reasoned action and social reaction: Willingness and intention as independent predictors of health risk' (1998) 74(5) Journal of personality and social psychology 1164

¹⁴⁷ Dana Litt, Melissa Lewis, Anne Fairlie, Maya Head-Corliss, 'An examination of the relative associations of prototype favourability, similarity, and their interaction with alcohol and alcohol-related risky sexual cognitions and behaviour' (2020) 8(2) Emerging Adulthood 168, 168-169)

¹⁴⁸ Ingri Myklestad and Jostein Rise, 'Predicting Willingness to Engage in Unsafe Sex and Intention to Perform Sexual Protective Behaviours Among Adolescents' (2007) 34(4) Health Education & Behavior 686 and Amanda Ravis, Paschal Sheeran and Christopher Armitage, 'Augmenting the theory of planned behaviour with the prootype/willingness model: predictive validity of actor versus abstainer prototypes for adolescents' health-protective and health-risk intention' (2010) 11(3) British Journal of Health Psychology 483

¹⁴⁹ Johanna van Oosten, Jochen Peter and Laura Vandenbosch, 'Adolescents' Sexual Media Use and Willingness to Engage in Casual Sex: Differential Relations and Underlying Processes: Sexual Media Use and Casual Sex' (2016) 43(1) Human Communication Research 127

and sexting.¹⁵⁰ This suggests that the model is accessible in terms of data and evidence that judges can use to formulate their evidence-based judgements as to whether adolescents are likely to mimic a particular behaviour in question, if information about that behaviour is published.

2.5.2 The prototype willingness model and age.

As the reasoning in interpretation one demonstrates, when commenting on the role model argument, judges like Lord Woolf and Ousley J usually focus on adolescents.¹⁵¹ The prototype willingness model can aid judges' understanding of how *adolescents* will react if they learn of their role models' misbehaviour. The prototype willingness model was developed with adolescents in mind.¹⁵² It suggests that adolescents' behavioural reactions are more heuristic than analytic.¹⁵³ Research on the effect of age that uses the prototype willingness model tends to find that 'the prototype willingness model maintains that both routes do continue throughout the life span, but that the ratio of the heuristic to analytic processing tends to decrease with age'.¹⁵⁴ Linking this to the concept of the role model argument, if adolescents favour their prototypes and see themselves as being similar to them, then they are unlikely to examine the potential consequences of engaging in the behaviour they have been exposed to.

Supplementing such understandings in judicial reasoning with respect to the role model argument will illuminate the current lack of transparent and unsatisfactory reasoning about that

¹⁵⁰ M Walrave, K Ponnet, J Ouystel, E Gool, W Heirman and A Verbeek, 'whether or not to engage in sexting: explaining adolescent sexting behavior by applying the prototype willingness model' (2015) 32 *Telematics and Informatics* 796 and Bianca Klettke, David Hallford and David Mellor, 'Sexting prevalence and correlates: a systematic literature review' (2014) 34(1) *Clin Psychol Rev* 44 and E Confalonieri, G Cucci, M Olivari, E Borroni, D Villani, 'What are you sexting? Parental practices, sexting attitudes and behaviours among Italian adolescents' (2020) (8)1 *BMC Psychology* article 63

¹⁵¹ See section 2.2.1

¹⁵² F Gibbons, M Gerrard, L Michelle, Stock and D Finneran 'The prototype/willingness model' in Mark Conner and Paul Norman (eds), *Predicting and changing health behaviour: research and practice with social cognition models* (third edition, Open University Press 2015)

¹⁵³ F Gibbons, M Gerrard, L Michelle, Stock and D Finneran 'The prototype/willingness model' in Mark Conner and Paul Norman (eds), *Predicting and changing health behaviour: research and practice with social cognition models* (third edition, Open University Press 2015)

¹⁵⁴ S Chen and S Chaiken, 'The heuristic-systematic model in its broader content' in S Chaiken and T Trope (eds) *Dual process theories in social psychology* (The Guilford Press 1999) 73 and R Pacini and S Espeitin, 'The rational and experiential information processing styles to personality, basic beliefs, and the ratio-bias phenomenon' (1999) 76 *Journal of Personality and Social Psychology* 972

argument, such as the reasoning in *A v B plc*¹⁵⁵ and *Theakston v MGN*.¹⁵⁶ As shown above, the prototype willingness model has been developed with adolescents in mind; at the same time, the role model argument is about adolescents as well. Understanding the behavioural reactions of adolescents – who the role model argument is about – is highly likely to improve the process or state of reasoning in the role model argument. Improving the state of judicial reasoning would also improve the justification of the argument, too. Therefore, the quality of reasoning in the role model argument should not be vague and untransparent, rather it should be replaced with behavioural evidence and understanding on adolescents.

Usually, cases involving the misuse of private information involve misbehaviour or risky behaviour by a public figure. The prototype willingness model can aid judges in understanding adolescents' behavioural reactions to misbehaviour or risky behaviour by their role models. Under the model, adolescents are the most likely group to engage in risky behaviour.¹⁵⁷ This is because adolescents' reactions are more heuristic than analytic, making them more prone to engaging in more risky behaviour. For example, Steinberg's studies have confirmed that behavioural willingness develops earlier than intention, which explains why adolescents are more likely to be involved in risky behaviours.¹⁵⁸ In other words, adolescents at this stage of life are unlikely to consider the consequences of risky behaviour before they engage in it.¹⁵⁹ Therefore, if the behaviour in question is risky and the prototype willingness model data on that behaviour suggests that adolescents will be willing to mimic it if exposed to it, then it is very likely that adolescents will mimic the act without considering its consequences. If implemented in the role model argument, this understanding, which is provided by the prototype willingness model, will enhance judicial understanding of the behavioural reactions of adolescents when it comes to their exposure to their role models' misbehaviours or risky behaviours. Such an understanding will help judges produce a transparent and informed decision on the role model argument. Again, an informed and transparent decision-making process is a valid and

¹⁵⁵ *Av B plc* [2002] EWCA Civ 337 [11 xii], [43 vi]

¹⁵⁶ *Theakston v MGN Limited* [2002] EWHC 137 (QB) [69]

¹⁵⁷ Ugnė Paluckaitė and Kristina Zardeckaitė-Matulaitienė, 'Adolescents' Intention and Willingness to Engage in Risky Photo Disclosure on Social Networking Sites: Testing the Prototype Willingness Model' (2021) 15(2) *Cyberpsychology: Journal of Psychological Research on Cyberspace* Article 1

¹⁵⁸ Laurence Steinberg, 'A social neuroscience perspective on adolescents risk taking' 2008 28(1) *Dev. Rev.* 78

¹⁵⁹ L Steinberg and E Cauffman, 'Maturity of judgement in adolescence: Psychosocial factors in adolescents decision making' (1996) 20(3) *Law and Human Behavior* 249 see also S Moore and E Gullone, 'Predicting adolescent risk behaviour using a personalised cost-benefit analysis' (1996) 33(1) *Journal of Youth and Adolescence* 129

legitimate one. Therefore, this thesis encourages forming an understanding based on the prototype willingness model in the role model argument.

2.5.3 Repeated media exposure.

Due to the nature of misuse of private information claims, if Article 10 outweighs Article 8, the publication will typically be used in terms of media publications i.e. the information is published in newspapers or media platforms. Judges in the role model argument have not specifically considered adolescents' behavioural reactions where adolescents are exposed to their role model's misbehaviour via the media. Such consideration is needed because media exposure, particularly repeated media exposure, plays a vital role in increasing adolescents' willingness to engage in behaviours performed by their role models.

Research under the prototype willingness model demonstrates that traditional media exposure increases behavioural willingness in adolescents.¹⁶⁰ Media exposure is one of the primary ways in which adolescents develop their favourite prototypes¹⁶¹ i.e. adolescents are likely to choose a role model who they have been exposed to by the media. Adolescents observe the behaviours they see in the media and learn from those behaviours.¹⁶² Brown et al. argue that exposure to media may act as an influential mean for adolescents by 'providing models of attractive older' prototypes engaging in a behaviour (whether the behaviour is positive or negative).¹⁶³ Gibbons et al. found that the influence of media and public figures, mostly those who work in the

¹⁶⁰ M Gerrard, F Gibbons, Michelle Stock, Linda Vande Lune and Michael Cleveland, 'Images of smokers and willingness to smoke among African American pre-adolescents: An application of the prototype/willingness model of adolescents health risk behavior to smoking initiation' (2005) 30(4) *Journal of Pediatric Psychology* 305

¹⁶¹ JA Andrews and M Peterson, 'The development of social images of substance users in children: a Guttman unidimensional scaling approach' (2006) 11 *Journal of substance use* 205

¹⁶² F Gibbons, E Pomery, M Gerrard, J Sargent, C Weng, T Wills, J Kingsbury, S Chin, K Worth, M Stoolmiller, S Tanski and H yeh, 'Media as social influence: racial differences in the effects of peers and media on adolescent alcohol cognitions and consumption' (2010) 24(4) *Psychol Addict Behav* 649

¹⁶³ J Brown, L L'ngle, C Pardum, G Guo, K Kenneavy and C Jackson, 'Sexy media matter: exposure to sexual content in music, movies, television and magazine predicts Black and White Adolescents' (2006) 117 *Pediatric* 1018 see also F Gibbons, E Pomery, M Gerrard, J Sargent, C Weng, T Wills, J Kingsbury, S Chin, K Worth, M Stoolmiller, S Tanski and H yeh, 'Media as social influence: racial differences in the effects of peers and media on adolescent alcohol cognitions and consumption' (2010) 24(4) *Psychol Addict Behav* 649

entertainment sector, influence adolescents' behaviours in a direct way.¹⁶⁴ Research has also shown that media exposure is linked to prototypes via the social heuristic pathway of the prototype willingness model.¹⁶⁵ Furthermore, research on repeated media exposure has demonstrated that repeated media exposure to a behaviour might increase the likelihood that adolescents come to view the behaviour as an acceptable riskless one.¹⁶⁶ Moreover, the more risky behaviour that adolescents observe in the media, the more likely they are to mimic those behaviours.¹⁶⁷ Exposure to the risky behaviour of an attractive actor or actress or some other public figure role model leads adolescents to view those types of behaviour more positively due to age as explained in the section above.

Because adolescents consume new media at very high rates, exposure to risky behaviours by public figures on social media cannot be ignored. Adolescents spend increasing amounts of time on social media following their favourite celebrities and 'fans create and share user generated content in the form of images and videos on social media, thus providing free publicity to the celebrity'.¹⁶⁸ This sort of online behaviour increases the chance that adolescents will be repeatedly exposed to their role models' misbehaviours if information about those behaviours is published. Like traditional media, exposure (and particularly repeated exposure on social media) to these behaviours increases people's willingness to mimic these misbehaviours. Walrave et al. also found that the higher the rate at which one consumes social media about a role model, the more favourable the behaviour thus becomes, making it more likely to be mimicked by adolescents.¹⁶⁹

¹⁶⁴ F Gibbons, M Gerrard, L VandeLune, T Wills, G Brody and R Conger, 'Context and cognition: environmental risk, social influence, and adolescents use' (2004) 30 *Personality and social psychology bulletin* 1048

¹⁶⁵ Sonya Dal Cin, Keilah Worth, Meg Gerrard, Frederick Gibbons, Mike Stoolmiller, Thomas Wills and James Sargent, 'Watching and drinking: Expectancies, prototypes, and peer affiliation mediate the effect of exposure to alcohol use in movies on adolescent drinking' (2009) 28(4) *Health Psychol* 473

¹⁶⁶ S Tanski, M Stoolmiller, S Dal Cin, K Worth, J Gibson and J Sargent, 'Movie character smoking and adolescent smoking: who matters more, good guys or bad guys?' (2009) 124 *American Academy of Pediatrics* 135 and S Dal Cin, K Worth, M Gerrard, F Gibbons, M Stoolmiller, T Wills, and J Sargent, 'Watching and drinking: experiences, prototypes, and peer affiliations mediate the effect of exposure to alcohol use in movies on adolescent drinking' (2009) 28(4) *Health Psychology* 473

¹⁶⁷ F Gibbons, E Pomery, M Gerrard, J Sargent, C Weng, T Wills, J Kingsbury, S Chin, K Worth, M Stoolmiller, S Tanski and H yeh, 'Media as social influence: racial differences in the effects of peers and media on adolescent alcohol cognitions and consumption' (2010) 24(4) *Psychol Addict Behav* 649

¹⁶⁸ A Kaplan and M Heanlein, 'users of the world, unite! The challenges and opportunities of social media' (2010) *Busniness Horizons* 53(1) 59

¹⁶⁹ M Walrave, K Ponnet, J Ouystel, E Gool, W Heirman and A Verbeek, 'whether or not to engage in sexting: explaining adolescent sexting behavior by applying the prototype willingness model' (2015) 32 *Telematics and Informatics* 796

In the future, if judges consulted the evidence on media exposure that is available from the prototype willingness model before rendering their judgements on the role model argument, it will assist them in producing informed decisions and reasoning on the role model argument. If judges consider such information before they write their conclusions on the role model argument, it will produce a transparent evidentially informed decision on the argument. This is because judges will have taken into account more than one angle of the discussion, including the behaviour itself, the age of those who view the public figure as their role model and the effect of media exposure on the misbehaviour in question. As this thesis has noted, an evidentially informed decision improves the justification and validity of that decision. Therefore, rather than using vague and untransparent reasoning like in *A v B plc* and *Theakston v MGN*, judges are advised to examine the prototype willingness model.

2.6 Hypothetical illegal drugs consumption case study.

Taken together, the significant body of research on different behaviours, age and media exposure could provide a path to making informed decisions about the role model argument. By using the prototype willingness model as a line of reasoning to determine adolescents' potential reactions to the release of information about their role models, judges can address the current lack of transparency in judgements and validate their judgements on the role model argument. This sub-section will provide a case study to illustrate how the prototype willingness model can improve judicial reasoning when it comes to the role model argument in respect of the misuse of private information.

2.6.1 Hypothetical: Martin's illegal drugs consumption case.

Martin is an activist and a very well-known footballer who plays for Liverpool Football Club. He is a role model¹⁷⁰ and an anti-drug activist. Martin uses his social media accounts to share

¹⁷⁰ There is an argument in the literature that maybe adolescents take footballers as their role models. For example, see, Rob Cover, *Vulnerability and Exposure: Footballers scandals, masculine identity and ethics* (UWAP Scholars 2015) and Patricia Bricheno and Mary Thornton, 'Role model, hero or champion? Children's views concerning role models' (2007) 49 Educational Research 4

his professional life and his campaigns. He maintains a very healthy lifestyle and shares that this lifestyle is the secret to his success. Ever since Martin's first match with the Liverpool Football Club, he has advocated strongly against the use of illegal drugs, campaigning widely against their use. His activism involves holding regular campaigns at schools and youth clubs on the danger of illegal drugs, especially their negative impact on one's performance in sports. As a result, Martin has millions of followers on social media. However, Martin has never published anything about his personal life and never talks about it in the media.

The editor of *England Today*, a national daily newspaper that is published in print and online and is read by millions of people every day, contacts Martin. The editor informs Martin that he has information from a confidential source who is close to Martin; the information shows that Martin does not follow the lifestyle he advocates for. The source has told the editor that he saw Martin at a private party smoking marijuana and purchasing and consuming cocaine. Martin knows that the information is true. Martin chooses not to comment, but the editor says that he will publish the information regardless.

Martin applies for a permanent injunction against *England Today* in respect of all of the information. The action is based on the tort of misuse of private information. A court finds that Martin has satisfied stage one of the misuse of private information test. At stage two of the test, *England Today* argues that Martin is a role model to many young people and therefore the information must be published.

In the following paragraphs, this thesis shows how using the prototype willingness model would supply judges with evidence and understanding on the effect that publishing Martin's private information would have on adolescents. The thesis will rely on the evidence of the behaviour itself (consumption of illegal drugs here), age and media exposure. It demonstrates how this information can lead to better and more transparent judgements on the role model argument. The case study for now, will not discuss whether the court after consulting the prototype willingness model, need to continue to see the argument as a one in the public interest to publish. Such a discussion will resume in chapter three.¹⁷¹

¹⁷¹ See section 3.4 in chapter three.

2.6.3.1 Examination of the behaviour in question.

The broad body of research on the consumption of illegal drugs within the prototype willingness model is valuable. It can be used to add a behavioural understanding to judges' reasoning in cases where a public figure's misbehaviour might be published and seen by those who view the public figure as their role model. Judges can better understand the effect of role models' illegal drug consumption by viewing prototype willingness model data on illegal drugs. Various studies on illegal drug consumption conducted under the prototype willingness model have confirmed that the decision to consume drugs is significantly reliant on prototypes. These studies have examined a range of drugs, from Class A to Class C drugs. Dodge, Stock and Litt tested the possibility that adolescents will begin using performance-enhancing substances (PES) based on heuristic images influenced by applying the prototype willingness model.¹⁷² The authors found that viewing favourable images of male athletes using illegal PESs predict an individual's willingness to use illegal PESs.¹⁷³ Lewi also found the perception that the cocaine prototype is luxurious and celebrity drug use in general have a major influence on individuals' decisions to consume them.¹⁷⁴ Moreover, Ataee et al. examined the consumption of methamphetamine.¹⁷⁵ They find that the prototype of methamphetamine consumption is statistically significant for predicting drug use.¹⁷⁶ In regards to marijuana, Lewis et al. found those who are exposed to favourable marijuana-related prototypes will report an increased willingness to use marijuana.¹⁷⁷

Prototype willingness model research has been conducted on a variety of drugs. It shows adolescents' willingness to use drugs will increase if they see their role models consuming them. The evidence in the psychological literature, can inform the judges setting on Martin's

¹⁷² T Dodge, M Stock, D Litt, 'Judgements about illegal performance-enhancing substance: reasoned, reactive, or both?' (2012) 18(7) *Journal of Health Psychology* 962

¹⁷³ T Dodge, M Stock, D Litt, 'Judgements about illegal performance-enhancing substance: reasoned, reactive, or both?' (2012) 18(7) *Journal of Health Psychology* 962

¹⁷⁴ Anna Lewi, 'Woke about coke? Investigating college students experiences of experimenting with cocaine, in the midst of the Fentanyl Epidemic' 13(1) *Intersect* 1

¹⁷⁵ M Ataee, A Jouybari, M Alavijeh, A Aghaei, M Mahboubi, F Motlagh, 'Images of Methamphetamine Users among Iranian Adolescents: an application of prototype willingness model' (2014) 11(4) *Life Science Journal* 224

¹⁷⁶ M Ataee, A Jouybari, M Alavijeh, A Aghaei, M Mahboubi, F Motlagh, 'Images of Methamphetamine Users among Iranian Adolescents: an application of prototype willingness model' (2014) 11(4) *Life Science Journal* 224

¹⁷⁷ Melissa Lewis, Dana Litt, Kevin King, Tracey Garcia, Katja Waldron and Christine Lee, 'Consideration of future consequences as a moderation of willingness-behaviour relationship for young adult marijuana use and consequences' (2018) 87(8) *Addict Behav* 16

case that those adolescents who view Martin as their role model will exhibit a greater willingness to consume illegal drugs. Based on the research available on drug consumption in the context of Martin's case, the broad body of research in the field of the prototype willingness model can be expected to strongly improve judgements in the future because judicial reasoning hopefully will be built on evidence. Judges' decisions, in the future, would be improved in the sense that they would be built on their understanding of adolescents' behavioural reactions to being exposed to evidence of their role models' misbehaviours; this is in contrast to the vague judicial assumptions that has been discussed in Section 2.2 of this chapter.

2.6.3.2 age and illegal drugs consumption in the prototype willingness model.

Applying the evidence highlighted by the prototype willingness model to age in section 2.5.2 will better inform judges on adolescents' behaviours. From the evidence provided in Section 2.5.2, one can conclude that if adolescents are exposed to Martin's drug use, their willingness to consume drugs will increase. Again, if judges familiarise themselves with such evidence, they will develop a behavioural understanding of adolescents who view the public figure in question as their role model. Such an understanding should create even more informed decision-making with respect to the role model argument.

2.6.3.3 Repetitive media exposure.

The evidence that the prototype willingness model provides on media exposure in section 2.5.3 could also be used to improve the state of reasoning in the role model argument. In Martin's case, the judge could consider that if the media plans to expose Martin's drug consumption, it is likely to increase adolescents' willingness to mimic that behaviour. Taking such evidence into consideration would improve the state of reasoning in the role model argument with the goal of ensuring judges make evidence-based conclusions with respect to the argument.

2.7 Conclusion.

Judges who consider these guidelines regarding the misbehaviour of the role model itself, adolescents' reactions when exposed to this misbehaviour and their exposure to that

misbehaviour via the media are likely to improve the state of reasoning on the role model argument. If such guidelines are used in the future, it is possible that they will address the current lack of transparency in judgements. Judges are encouraged to take the prototype willingness model into account to assist them in drawing evidence-based conclusions about the argument. This should be relatively simple to implement due to the availability and accessibility of data under the prototype willingness model.

Chapter 3: The public interest in the role model argument

3.1 Introduction

The second stage test in the misuse of private information has been characterised as ‘the balancing exercise’¹⁷⁸ between privacy (article 8) and Freedom of Expression (article 10) to decide which rights should prevail.¹⁷⁹ Although the ultimate balancing test does not mention the public interest in the text, the courts have habitually considered the public interest¹⁸⁰ in *publication*,¹⁸¹ primarily as a reason for enabling article 10 to prevail over article 8.¹⁸² Section 12(4)(ii) of the Human Rights Act mandates consideration of whether the publication of journalistic material is in the public interest.¹⁸³

¹⁷⁸ *Campbell v MGN Ltd* [2004] 2 AC 457, [36]

¹⁷⁹ *Re S (A Child)* [2005] 1 AC 593, [17]

¹⁸⁰ In chronological order: *A v B plc (Flitcroft v MGN Ltd)* [2002] 2 All ER 545, [11], [29]; *AAA v Associated Newspapers Ltd* [2013] EWCA Civ 554, [9], [43], [55]; *Ali v Channel 5 Broadcast* [2018] EMLR 17, [195]-[197] and [2019] EWCA Civ 677, [85]-[93]; *AMM v HXW* [2010] EWHC 2457 (QB), [38]-[39]; *AMM v NGN Ltd* [2014] EWHC 4063 (QB), [7]; *Author of a Blog v Times Newspapers Ltd* [2009] EMLR 22, [7], [12], [23], [33]; *AXB v BXA* [2018] EWHC 588 (QB), [8], [53], [55]; *Browne v Associated Newspapers Ltd* [2007] 3 WLR 289, [38], [55]; *Bull v Desporte* [2019] EWHC 1650 (QB); *Callaghan v Independent News and Media Ltd* [2009] NIQB 1, [25]; *Campbell v MGN* [2004] UKHL 22, [56]-[63], [101]-[113], [116], [142]; *CDE v MGN Ltd* [2011] 1 FLR 1524; *CTB v NGN Ltd* [2011] EWHC 1326 (QB), [26]; *CVB v MGN Ltd* [2012] EMLR 29; *D v Revenue and Customs Commissioners* [2017] UKFTT 850 (TC), [136]-[138]; *Donald v Ntuli* [2011] 1 WLR 294; *Douglas v Hello! Ltd (No 6)* [2005] 3 WLR 881, [254]; *ERY v Associated Newspapers Ltd* [2017] EMLR 9, [47], [69]; *ETK v NGN Ltd* [2011] 1 WLR 1827, [13], [19], [23]; *Ferdinand v MGN* [2011] EWHC 2454 (QB), [62]-[65], [84]-[87], [99]; *Goodwin v NGN Ltd* [2011] EMLR 27; *Gray v UVW* [2010] EWHC 2367 (QB), [44]; *Green Corns Ltd v Claverly Group Ltd* [2005] EMLR 31, [82]-[99], [108]; *HRH Prince of Luxembourg v HRH Princess of Luxembourg* [2018] 2 FLR 480, [99]-[100]; *HRH Prince of Wales v Associated Newspapers Ltd* [2007] 3 WLR 222; *Hutcheson v NGN Ltd* [2012] EMLR 2, [34]; *Jagger v Darling* [2005] EWHC 683 (Ch), [14]; *KJH v HGF* [2010] EWHC 3064 (QB), [4]; *McClaren v NGN Ltd* [2012] EMLR 33; *McKennitt v Ash* [2006] EMLR 10, [96]-[101]; *McKennitt v Ash* [2007] 3 WLR 194; *Mosley v NGN Ltd* [2008] EMLR 20, [110]-[171]; *NNN v Ryan* [2013] EWHC 637 (QB), [13]; *Norman*, [76]; *PJS*, [21]-[26], [31]-[36]; *Re C* [2016] EWCOP 21; *Re Guardian News and Media Ltd* [2010] 2 AC 697; *Richard v BBC* [2018] 3 WLR 1715; *Rocknroll v NGN Ltd* [2013] EWHC 24 (Ch), [35]; *Spelman v Express Newspapers* [2012] EWHC 355 (QB), [92], [102]-[108]; *Terry v Persons Unknown* [2010] EMLR 16; *Theakston v MGN Ltd* [2002] EMLR 22; *TUV v Persons Unknown* [2010] EMLR 19, [4]; *Weller v Associated Newspapers Ltd* [2016] 1 WLR 1541, [40]; *X v Persons Unknown* [2007] EMLR 10, [51]; *YXB v TNO* [2015] EWHC 826 (QB), [17]; *ZXC v Bloomberg LP* [2017] EMLR 21, [48]; *ZXC v Bloomberg LP* [2019] EWHC 970 (QB), [127]; *Duchess of Sussex v Associated Newspaper Ltd* [2021] EWHC 273 (Ch)

¹⁸¹ Emphasis added.

¹⁸² *Douglas v Hello! Ltd (No 6)* [2005] 3 WLR 881, [70]

¹⁸³ Human Rights Act section 12(4)(ii)

This chapter focuses on the second strand of the thesis' main problem: the unsatisfactory nature of judicial reasoning on the role model argument being seen as in the public interest to publish. This chapter illuminates the clear lack of transparency in judicial thinking regarding the court's conclusion that a role model's behaviour influencing adolescents is in the public interest to be published.

Chapter 3 is built on the assumption that the behaviour in question is influential according to the prototype willingness model. Section 3.2 argues that the current state of judicial reasoning regarding the role model argument, adding weight to the public interest to publish, is unsatisfactory. Section 3.3 then demonstrates that the role model argument is unsuitable under the public interest to publish private information. Section 3.4 produces a novel understanding of the role model argument in producing harmful speech. John Stuart Mill's harm principle aids this section in producing the argument. Next, Section 3.5 demonstrates how the new understanding of the role model argument – one producing harmful speech – can be incorporated into the balancing exercise in misuse of private information. Finally, Section 3.6 provides a general conclusion to the chapter.

3.2 The unsatisfactory nature of judicial reasoning

Continuing with interpretation one from Chapter two,¹⁸⁴ under the role model argument, when a judge finds out that the role model's behaviour in question can be influential, it is usually followed by the argument that it is in the public interest to publish the information.¹⁸⁵ For example, in *A v B plc*, Lord Woolf explained the following:

Where an individual is a public figure, he is entitled to have his privacy respected in the appropriate circumstances. A public figure is entitled to a private life. The individual, however, should recognise that because of his public position, he must expect and accept that his actions will be more closely scrutinised by the media. Even trivial facts relating to a public figure can be of great interest to readers and other observers of the media. Conduct which in the case of a private individual would not be the appropriate subject of comment can be the proper subject of comment in the case

¹⁸⁴ See section 2.2.1 in chapter two.

¹⁸⁵ *A v B plc* [2002] EWCA Civ 337 and *Theakston v MGN Limited* [2002] EWHC 137 (QB)

of a public figure. The public figure may hold a position where higher standards of conduct can be rightly expected by the public. The public figure may be a role model whose conduct could well be emulated by others. He may set the fashion. The higher the profile of the individual concerned, the more likely that this will be the position. Whether you have courted publicity or not, you may be a legitimate subject of public attention. If you have courted public attention, then you have less ground to object to the intrusion which follows. In many of these situations, it would be overstating the position to say that there is a public interest in the information being published. It would be more accurate to say that the public have an understandable and so a legitimate interest in being told the information. If this is the situation, then it can be appropriately taken into account by a court when deciding on which side of the line a case falls. The courts must not ignore the fact that if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest.¹⁸⁶

Notably, Lord Woolf addressed public figures and role models in the same paragraph, which is problematic regarding public interest reasoning. Before diving into the criticism, it must be accepted that an individual can be both a public figure and a role model simultaneously. However, these two concepts are rather different. Specifically, a public figure is ‘a famous person who is often written about in newspapers and magazines or is often on television or radio’.¹⁸⁷ Legally, public figures can be those who exercise official functions,¹⁸⁸ businessmen,¹⁸⁹ journalists,¹⁹⁰ lawyers,¹⁹¹ academics,¹⁹² those who have a ‘position in society’,¹⁹³ and those who have ‘entered the public scene’.¹⁹⁴ Usually, with public figures, audiences and fans are interested in their work only. However, a role model is someone adolescents look up to and are influenced by.¹⁹⁵

¹⁸⁶ *A v B plc* [2002] EWCA Civ 337 [11 xii]

¹⁸⁷ Cambridge Dictionary <<https://dictionary.cambridge.org/dictionary/english/public-figure>> accessed 17 March 2022

¹⁸⁸ *Von Hannover v Germany (No 1)* [2005] 40 EHHR 1

¹⁸⁹ *Verlagsgruppe News GmbH v Austria (No 2)* [2007] EMLR 13, [36] see also *Goodwin v NGN* [2011] EMLR 27, [103]

¹⁹⁰ *Zybertowicz v Poland* (Application no. 59138/10)

¹⁹¹ *Zybertowicz v Poland* (Application no. 59138/10)

¹⁹² *Hasan Yazici v Turkey* (Application no. 40877/07)

¹⁹³ *Verlagsgruppe News GmbH v Austria (No 2)* [2007] EMLR 13

¹⁹⁴ *Standard Verlags GmbH v Austria (No 3)* (Application no. 34702/07)

¹⁹⁵ Miharū Nakanishi, Syudo Yamasaki, Kaori Endo, Shuntaro Ando, Yuko Morimoto, Shinya Fujikawa, Sho Kanata, Yusuke Takahashi, Toshi Furukawa, Marcus Richards, Mariko Hiraiwa-Hasegawa, Kiyoto Kasai and

This paper now returns to Lord Woolf's public interest judgement with the difference between the nature of the public figure and the role model in mind. Arguably, Lord Woolf merged both roles as one role when commenting on the public interest. Specifically, Lord Woolf stated, 'Whether *you* have courted publicity or not, you may be a legitimate subject of public attention. If you have courted public attention, then you have less ground to object to the intrusion which follows'.¹⁹⁶ When his lordship targeted his reasoning towards 'you', he did not specify whether he was addressing the public figure or role model persona of the individual in question. Thus, separation is needed due to the differing nature of these roles.

Assuming that Lord Woolf addressed his public interest reasoning towards role models, the question is then how role models can be a 'legitimate subject of public attention'¹⁹⁷ or how adolescents can expect 'a legitimate interest in being told the information'¹⁹⁸ about their role model. Lord Woolf did not answer these questions, making the state of judicial reasoning under the role model argument in the public interest unsatisfactory as it lacks reasoning. Reasoning in this stage of the claim is vital because the finding of public interest usually leads to the suspension of article 8 right in the claim.¹⁹⁹ Therefore, the reasoning is required to make the suspension justifiable.

Moreover, Lord Woolf's statement is unsatisfactory because he did not differentiate between the section of 'public' who see the claimant as a public figure and the section of 'public' who see the claimant as their role model. His lordship stated, 'It would be more accurate to say that the public have an understandable and so a legitimate interest in being told the information'. In this situation, the public can be understood as two different sections of society when looking at the concept of role models and public figures. For role models, the 'public' are those adolescents who look up to role models and are influenced by their behaviours, attitudes and opinions, while the 'public' to public figures are usually fans, audiences or those interested in being exposed to the celebrity's news. Therefore, Lord Woolf needed to make this distinction when giving reasons specifically why adolescents who take public figures as their role models have a legitimate public interest in receiving private information. Such a lack of

Atsushi Nishida, 'The association between role model presence and self regulation in early adolescence: a cross sectional study' (2019) 14(9) PLoS One

¹⁹⁶ *A v B plc* [2002] EWCA Civ 337 [11 xii]

¹⁹⁷ *A v B plc* [2002] EWCA Civ 337 [11 xii]

¹⁹⁸ *A v B plc* [2002] EWCA Civ 337 [11 xii]

¹⁹⁹ Paul Wragg, 'Protecting Private Information of Public Interest: Campbell's Great Promise, Unfulfilled' (2015) 7(2) Journal of Media Law 225, 226

acknowledgement renders the reasoning unsatisfactory because there is a clear lack of demarcation on why these adolescents have a legitimate public interest to receive their role model's private information.

Lord Phillip in *Campbell v MGN* at the Court of Appeal criticised Lord Woolf's approach. However, the criticism's nature was also unsatisfactory. His Lordship stated:

We consider that those of Morland J's conclusions that we have summarised above are consistent with Lord Woolf CJ's guidance. We wish, however, to make some brief observations about this because we believe that it has been misunderstood by some. When Lord Woolf CJ spoke of the public having 'an understandable and so a legitimate interest in being told' information, even including trivial facts, about a public figure, he was not speaking of private facts which a fair-minded person would consider it offensive to disclose. That is clear from his subsequent commendation of the guidance on striking a balance between article 8 and article 10 rights provided by the Council of Europe Resolution 1165 of 1998. . . . For our part, we would observe that the fact that an individual has achieved prominence on the public stage does not mean that his private life can be laid bare by the media. We do not see why it should necessarily be in the public interest that an individual who has been adopted as a role model, without seeking this distinction, should be demonstrated to have feet of clay.²⁰⁰

In paragraph 41, Lord Phillip directed his comments to role models. His Lordship set the onus of responsibility on the role model. It can be understood that Lord Phillip said that there could be a public interest in publishing a role model's private information if that role model has put himself to the public as a role model. However, such reasoning is unsatisfactory for several reasons.

Firstly, Lord Phillip omitted to discuss, explain or even demonstrate, if a public figure has put himself to the public as a role model, how publishing the private information will be in the public interest. How could this benefit the public? Considering the difference between audiences, how can publishing a role model's misbehaviour benefit the interest of adolescents who take public figures as their role models and aspire to be like them? His lordship, unfortunately, failed to give reasons on this account or give an insight into his map of thinking.

²⁰⁰ *Campbell v MGN Ltd* [2002] EWCA Civ 1373, [40]-[41] also Lady Hale in the House of Lords shared similar thoughts as Lord Phillip see *Campbell v MGN Ltd* [2004] UKHL 22, [149]

As stated earlier in this chapter, the reasoning is remarkably important at this stage since the outcome usually leads to suspending either of the rights in conflict.²⁰¹

Secondly, there is a line of thinking in the literature that the role model argument is open to abuse by the defendant (usually a publishing agency).²⁰² The abuse assumes that publishing agencies are more likely to use the role model argument to strengthen their position in publishing private information. For example, if a journalist's position under article 10 is not strong, he might merely label the public figure as a role model to strengthen his position. While Lord Phillip set the onus of who is a role model on public figures to put themselves to the public as role models when he stated 'without seeking this distinction', he gave the impression that his main concern was to protect public figures from the abuse of the role model argument by the defendants. However, Lord Phillip had the chance to comment on the link between the role model argument being in the public interest. Unfortunately, he failed to do so.

Overall, this section argues that the state of judicial reasoning regarding the role model argument and the public interest is unsatisfactory. Judges at this stage have refrained from providing the information or reasoning on how the role model argument can be in the public interest. Therefore, the following section provides a common understanding of the public interest in misuse of private information and shows that the purpose of the role model argument, supplemented by the understanding of the prototype willingness model, makes the argument unsuitable to be understood as in the public interest to publish.

3.3 The meaning of the public interest in misuse of private information

If the concept of the public interest is a decisive²⁰³ tool at this stage, what does 'public interest' mean? To date, the concept of public interest in misuse of private information remains explicitly undefined by judges. However, broadly, public interest under the misuse of private

²⁰¹ Paul Wragg, 'Protecting Private Information of Public Interest: Campbell's Great Promise, Unfulfilled' (2015) 7(2) *Journal of Media Law* 225, 226

²⁰² David Howarth, 'Privacy, Confidentiality and the Cult of Celebrity' (2002) 61(2) *The Cambridge Law Journal* 264

²⁰³ *EKT v NGN Ltd* [2011] 1 WLR 1827, [23]

information indicates that the concept will ‘develop to meet changing needs’²⁰⁴ in society or in ‘plural society there will be a range of views as to what matters or is of significance’.²⁰⁵

Despite the lack of a clear definition of the public interest, there appear to be two common meanings in the misuse of private information: democratic debate and truth.²⁰⁶ With the current understanding of the public interest in misuse of private information, it appears that the meaning given here increases the weight of the argument that the publication is in the public interest to be published (see figure1).

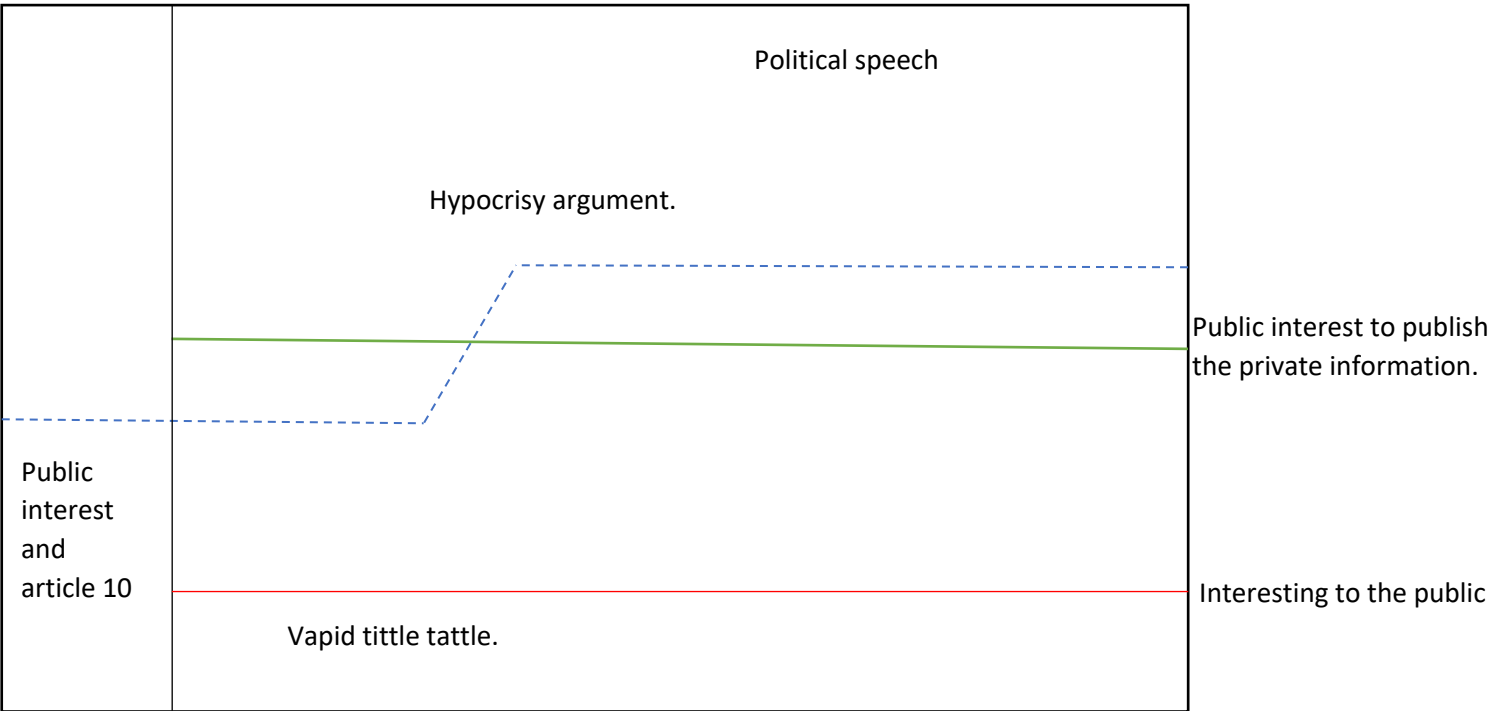


Figure 1. The figure shows the effect of the hypocrisy argument and political speech argument on the balancing exercise in misuse of private information. Both arguments add weight to the speech in question to be in the public interest to be published.

²⁰⁴ *Goodwin v NGN Ltd* [2011] EMLR 27, [113]
²⁰⁵ *Ferdinand v MGN Ltd* [2011] EWHC 2425 (QB), [64]
²⁰⁶ For more in depth analysis on public interest in misuse of private information see Rebecca Moosavian, ‘Deconstructing ‘Public Interest’ in the Article 8 vs Article 10 Balancing Exercise’ (2014)6(2) *Journal of Media Law* 234

In this subsection, the thesis argues that the role model argument supplemented by the prototype willingness model makes the argument unsuitable per either justification. This subsection first showcases the argument's unsuitability to fit under the democratic debate, followed by the truth argument.

3.3.1 Democratic debate

The first factor considered in the public interest is whether the publication contributes to a democratic debate.²⁰⁷ The argument behind the democratic debate is that free speech and the openness of ideas and thoughts will lead to an informed electorate, resulting in citizens casting their votes wisely and debating political issues.²⁰⁸ Judges here believe that political speech justifies publication because it will serve the public by allowing them to understand political issues and participate in politics with informed knowledge.²⁰⁹ Baroness Hale in *Campbell v MGN* prioritised political speech because of its importance to a democratic society.²¹⁰

Nevertheless, although democratic speech does not have a strict meaning, it is difficult and unsuitable to include the role model argument under this justification since, as we understand from the prototype willingness model,²¹¹ the exposure of a role model's misbehaviour may lead to an increase in willingness to mimic the published behaviour. Nothing in the psychological literature under the prototype willingness model suggests that exposing a role model's misbehaviour will increase political participation. Even if the role model in question is a political figure, the misbehaviour, if published, is unlikely to contribute to political participation. For example, Miller and Werner-Winslow found that those who took Donald Trump as their role model started mimicking his sexual language rather than debating how his sexual language affected his political role.²¹² The article found that the publication of Trump's speech did not contribute to political participation. Therefore, it can be argued that the role model argument, in its new understanding, is unsuitable for publishing under the understanding of the public interest in encouraging political debate.

²⁰⁷ Jacob Rowbottom, *Media Law* (Hart Publishing 2018) 82

²⁰⁸ A Meiklejohn, *Political Freedom: The constitutional power of people* (Harper 1960) 19-28.

²⁰⁹ *Von Hannover v Germany (No 1)* [2004] EMLR 21, [63]; *ETK v MGN Ltd* [2011] 1 WLR 1827, [21]; *Goodwin v MGN Ltd* [2011] EMLR 26, [132]-[133]

²¹⁰ *Campbell v MGN Ltd* [2004] UKHL 22, [148]-[149].

²¹¹ See sections 2.4 and 2.4 in chapter two.

²¹² Cassie Miller and Alexandra Werner-Winslow, 'Ten Days After: Harassment and Intimidation in the Aftermath of Election' (Southern Poverty Law Center, 2016) <<https://www.splcenter.org/20161129/ten-days-after-harassment-and-intimidation-aftermath-election>> accessed on 1 March 2022

3.3.2 Truth discovery

The second factor of the public interest in publication is that publication will reveal hypocrisy or truth about the public figure if the public has been misled.²¹³ This form of interpreting is witnessed in *Campbell v MGN*²¹⁴ and *Ferdinand v MGN*.²¹⁵ The truth discovery argument stems from John Stuart Mill's truth argument.²¹⁶ Briefly, under Mill's argument, all opinions and beliefs matter, and truth can only be discovered through exchanging ideas and beliefs.²¹⁷ Limiting the flow of ideas and speech will inherently limit truth discovery.²¹⁸ Therefore, by exercising the freedom of expression, opinions and ideas are exchanged to achieve truth.

It is assumed that the role model argument is linked to the truth justification of the public interest to publish.²¹⁹ The line of argument appears that adolescents who take public figures as their role models will benefit from the exposure to their role models' misbehaviour because, after exposure, they will choose another suitable role model. Hence, the argument is in the public interest to publish. However, such a belief is mistaken. Those who claim that publishing the private information of a role model will lead adolescents to choose another suitable role model do not appeal to any evidence. Therefore, this omission renders the argument weak for future precedent.

Arguably, the argument that the truth will benefit all sorts of 'public' in society believes that all the individuals are similar.²²⁰ However, not all audiences are the same. Indeed, some audiences may benefit from revealing a public figure's truth, but it is certainly not the situation in the role model argument. Notably, the role model argument revolves around adolescents who take public figures as their role models. The prototype willingness model informs us that

²¹³ Rebecca Moosavian, 'Deconstructing 'Public Interest' in the Article 8 vs Article 10 Balancing Exercise' (2014)6(2) *Journal of Media Law* 234, 247

²¹⁴ *Campbell v MGN Ltd* [2004] UKHL 22, [117]

²¹⁵ *Ferdinand v MGN Ltd* [2011] EWHC 2425 (QB), [80] – [81]

²¹⁶ John S Mill, *On Liberty* (1859) (CUP 2011)

²¹⁷ John S Mill, *On Liberty* (1859) (CUP 2011)

²¹⁸ Rebecca Moosavian, 'Deconstructing 'Public Interest' in the Article 8 vs Article 10 Balancing Exercise' (2014)6(2) *Journal of Media Law* 234 for a general criticism on truth as a reason to be seen in the public interest to publish please see H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (Oxford, Oxford University Press 2006) 803-805 and E Barendt, *Freedom of Speech* (2nd edition, OUP 2005) 12

²¹⁹ Michael Lamb, 'The role model argument: A fundamentally flawed Concept' (2017) *NE L Rev* 21, 22

²²⁰ S Ingber, 'The Marketplace of Ideas' [1984] *Duke L J* 38-39

the audience here is unlikely to behave rationally due to age,²²¹ prototype favorability²²² and prototype similarity.²²³ Instead, it is their willingness and unanalytical process of thinking that drives their decision-making.²²⁴ Therefore, if the media exposed a role model's misbehaviour, that publication is unlikely to contribute to intellectual discussion between adolescents who take the public figure as their role model to critique the information and choose another suitable role model. Arguably, from the psychological evidence available, it is clear that the role model argument is unsuitable to be used under the truth justification of public interest to publish the private information in question.

3.3.3 Information that is interesting to the public.

This thesis has identified that the new understanding of the role model argument is unsuitable under the public interest justification to publish private information (democratic participation and the truth argument). This thesis now eliminates the possibility that the new understanding of the role model argument can fit under the interesting to the public argument.

Information that is interesting to the public is seen as entertainment rather than adding benefit to those who receive it.²²⁵ The 'vapid tittle-tattle' adds little weight to the freedom of expression in the balancing exercise (see figure 2).²²⁶ Interesting speech to the public usually comes in the form of gossip or speech that satisfies 'the curiosity of a particular readership'.²²⁷

²²¹ See section 2.5.2

²²² See section 2.4.1(a)

²²³ See section 2.4.1(b)

²²⁴ See section 2.4 and 2.5

²²⁵ Rebecca Moosavian, 'Deconstructing 'Public Interest' in the Article 8 vs Article 10 Balancing Exercise' (2014)6(2) *Journal of Media Law* 234, 250-255

²²⁶ *Campbell v MGN Ltd* [2004] UKHL 22, [153] and *Jameel v Wall Street Journal Europe SpA* [2007] 1 AC 359, [147]

²²⁷ *Mosely v MGN Ltd* [2008] EMLR 20, [114]

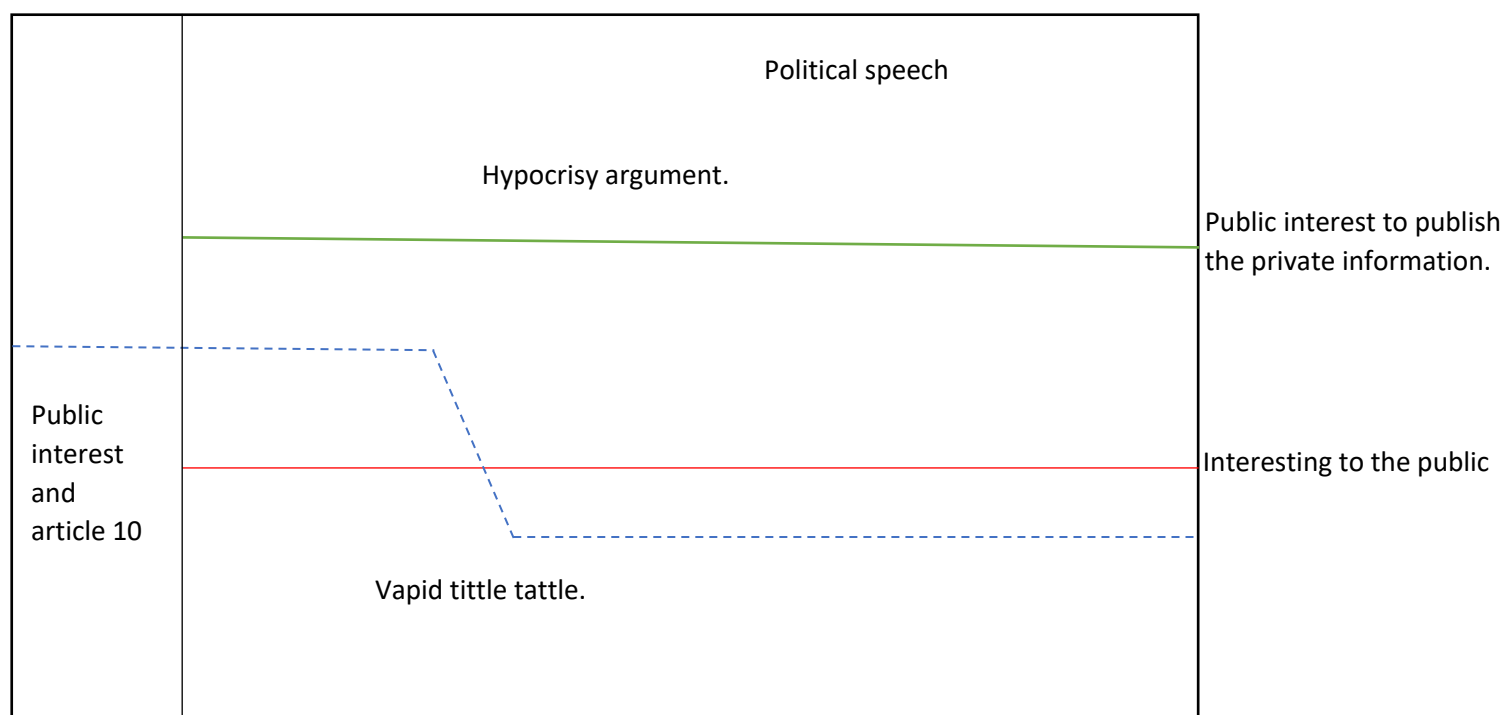


Figure 2. The figure shows the effect of the speech that is interesting to the public effect on the balancing exercise in misuse of private information.

Notably, when judges write about interesting speech to the public, they usually mention a ‘particular readership’²²⁸ who reads celebrity news to satisfy their curiosity. For clarity, this particular readership is unlikely to apply to adolescents who receive their role model’s misbehaviour publication because when they receive the information, it is likely to increase their willingness to mimic the exposed behaviour. The prototype willingness model does not suggest that adolescents who read or are exposed to their role model’s behaviour will satisfy their curiosity, but rather, they will aspire to be similar to their role model. Therefore, the prototype willingness model eliminates the possibility for the role model argument to be seen as interesting to the public.

²²⁸ Rebecca Moosavian, ‘Deconstructing ‘Public Interest’ in the Article 8 vs Article 10 Balancing Exercise’ (2014)6(2) Journal of Media Law 234, 254

3.4 The role model argument in its novel understanding

As identified earlier, the role model argument is unsuitable for the concept of the public interest, nor is it interesting to the public. Then, what kind of speech is it? This subsection argues that the speech resulting from the role model argument is harmful. The speech is harmful in the sense that it might increase the risk of harm to adolescents who mimic their role model's behaviour. This subsection uses Mill's harm principle to establish that the speech resulting from the role model argument is harmful.

Before diving into the argument, this thesis first describes Mill's harm principle. Mill was a proponent of liberalism, a political philosophy that entails a presumption in favour of individual liberty and requires that a liberty limiting principle justify any limitation of liberty.²²⁹ A liberty limiting principle identifies a prima facie reason to justify social coercion.²³⁰ To Mill, the harm and greatest happiness principles were the only acceptable liberty limiting principles.²³¹ Mill wrote his influential essay 'On liberty' and explained and defended the harm principle:

That principle is the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can rightfully exercise over any member of a civilised community, against his will, is to prevent *harm*²³² to others. His own good, either physical or moral, is not a sufficient warrant.²³³

The harm principle articulates a limiting principle on the intrusion of society by only allowing consideration of 'harm to others' to contribute to the justification of social interference with the individual's control over his own actions and rights.²³⁴ To Mill, unless a person's conduct

²²⁹ Piers Norris Turner, 'Harm and Mill's Harm Principle' 2014 124(2) Ethics 299

²³⁰ Melina Bell, 'John Stuart Mill's Harm Principle and Free Speech: Expanding the Notion of Harm' 2020 33(2) Utilitas 1

²³¹ Melina Bell, 'John Stuart Mill's Harm Principle and Free Speech: Expanding the Notion of Harm' 2020 33(2) Utilitas 1

²³² emphasis added

²³³ John Stuart Mill, *On Liberty* (Batoche Books 2001) 13

²³⁴ Piers Norris Turner, 'Harm and Mill's Harm Principle' 2014 124(2) Ethics 299

raises a definite risk of harm to other persons, who either do not consent to the risk or cannot consent, that conduct is outside society's jurisdiction.²³⁵

Before starting the argument that the publication of a role model's misbehaviour might increase the risk of harm, there is a pressing need to define the concept of harm, which Mill did not define.²³⁶ The only guidance he gave was that he 'denies that mere inconvenience or offence' should be considered harm.²³⁷ A convincing meaning of harm was put forward as the 'violation of another person's interests'.²³⁸ Feinberg explained that 'interest' is something a person has a 'state' in. Thus, interest is a person's stake in certain matters, such as their life going better or worse, depending on how matters develop'.²³⁹ Feinberg argued that interest could be seen as 'the things [that] interests are in, are distinguishable components of a person's wellbeing: he flourishes or languishes as they flourish or languish'.²⁴⁰ Feinberg further argued that if something was not in the individual's interest, the interest was set back. Notably, Joel Feinberg identified that when Mill referred to harm, he included actual harm and risk of harm.²⁴¹

Nevertheless, the debate continues among many scholars on whether Mill linked the meaning of harm to interest. This question, unfortunately, can only be confirmed by Mill. However, there is strong evidence and justifications for interpreting harm this way. Firstly, Gray cited an example of Mill's essay on Auguste Comte and positivism to prove that Mill likely linked harm to interest.²⁴² Secondly, Smith argued that although the word 'interest' did not appear in 'On liberty', where the principle was established, the word 'interest' made 15 appearances elsewhere in the document.²⁴³ Therefore, harm is likely linked to the interest of individuals. Linking harm to the concept of interest is attractive because it aids this thesis in showing how adolescent interests worsen for those who receive their role model's misbehaviour.

²³⁵ John Stuart Mill, *On Liberty* (Batoche Books 2001)

²³⁶ Clare McGlynn and Ian Ward, 'Would John Stuart Mill have Regulated Pornography?' (2014) 41(4) *Journal of Law and Society* 507

²³⁷ David Brink, 'Millian Principles, Freedom of expression, and hate speech' (2001) 7(2) *Legal Theory* 119, 121

²³⁸ Joel Feinberg, *Harm to Others: The Moral Limits of The Criminal Law* (Oxford University Press 1986) 31-61

²³⁹ Joel Feinberg, *Harm to Others: The Moral Limits of The Criminal Law* (Oxford University Press 1986) 33-34

²⁴⁰ Joel Feinberg, *Harm to Others: The Moral Limits of The Criminal Law* (Oxford University Press 1986) 34

²⁴¹ Joel Feinberg, *Harm to Other: The Moral Limits of The Criminal Law* (Oxford University Press 1984) 187 - 193

²⁴² John Gray, *Gray's Anatomy* (Penguin Books Limited 2013) chapter two

²⁴³ Steven Smith, 'The Hollowness of the Harm Principle' (University of San Diego Public Law and Legal Theory Research Paper Series, University of San Diego 2004)

Taking Mill's harm principle and Feinberg's interpretation of harm allows the thesis to build its argument that the speech produced from the role model argument is harmful and cannot (and should not) fit under the public interest to publish argument in the freedom of expression. The speech is harmful because, if published, it may increase the risk of harm to adolescents who take the public figure as their role model. The risk of harm here is shaped by the adolescents' willingness to increase mimicking the published behaviour, which will likely set back or worsen their interest.

For example, from our case study on Martin's use of illegal drugs,²⁴⁴ the prototype-willingness model informs us that publication of a favourable prototype will increase the willingness to mimic behaviour. Hence, publishing Martin's use of illegal drugs is likely to increase adolescents mimicking the specific behaviour. This increase in willingness is harmful because it will set the audience's interest back. Illegal drugs, if consumed, the person is likely to suffer physically,²⁴⁵ psychologically,²⁴⁶ socially,²⁴⁷ financially²⁴⁸ and legally.²⁴⁹ Therefore, it is challenging to defend whether the argument is in the public interest to publish or is interesting to the public due to the role model argument's consequences. Instead, according to the prototype willingness model, it is more suitable to argue that the role model argument must be understood as an argument resulting in harmful speech to adolescents who take a public figure as their role model.

The consequence of the change in behaviour resulting from the role model's exposed misbehaviour further strengthens the argument that speech from the role model argument is plausible to be seen as harmful. The likely consequences of publishing private information

²⁴⁴ See Martin's case study in section 2.6.

²⁴⁵ For example see G Saini, N Gupta and K Prabhat, 'Drug addiction and periodontal diseases' 2013 17(5) *Journal of Indian Society of Periodontology* 587; Alan Leshner, 'Addiction is a brain disease, and it matters' 1997 278(5335) *Science* 45; Michael Young and Jennifer Stuber, 'Interpersonal Discrimination and the Health of Illicit Drug Users' 2009 31(3) *The American Journal of Drug and Alcohol Abuse* 371 and Tyrone Borders, Brenda Booth, Russel Falck, Carl Leukefeld, Jichuan Wang and Robert Carlson, 'Longitudinal changes in drug use severity and physical health-related quality of life among untreated stimulant users' 2009 (34)11 *Addictive Behaviours* 959

²⁴⁶ Jonathan Shedler and Jack Block, 'Adolescent drug use and psychological health: a longitudinal inquiry' 1990 45(5) *American Psychologist* 612; Linda Viney, Mary Westbrook and Carol Preston, 'Sources of anxiety in drug addiction' 1985 41(1) *Journal of Clinical Psychology* 124

²⁴⁷ For example see Marina Barnard, *Drug Addiction and Families* (Jessica Kingsley Publishers 2006) and Gabriele Schafer 'Family functioning in families with alcohol and other drug addiction' (2011) 37 *Social Policy Journal of New Zealand*

²⁴⁸ Hinckley Jones-Sanpei and Richard Nance, 'Financial capability in addiction research and clinical practice' 2021 56 (2) *Substance Use and Misuse* 214

²⁴⁹ Section 5(2) of the Misuse of Drug Act 1971

(misbehaviour) of a role model to adolescent fans may lead to a change of behaviour, increasing the willingness to mimic the behaviour. Mill denied that ‘mere inconvenience or offence’ counts as harm.²⁵⁰ As Feinberg stated, reactive emotions are a sting: we wince, suffer a pang or two, then get on with work, unharmed and whole. The experience of temporary discomfort or pain – ‘unhappy mental states’ – does not set back interest. Concerning the prototype willingness model on the result of the role model’s exposed misbehaviour, it is extremely unlikely to lead adolescents to disappointment or discomfort with their role model’s behaviour. Instead, the evidence suggests that adolescent behaviour might change due to increased willingness to mimic the exposed behaviour. Therefore, the consequence is more than an ‘unhappy mental state’. Due to the consequences of the behaviour change, it is convincing to argue that the role model argument must be understood as an argument that harms its recipients.

The understanding that speech can sometimes be harmful is not novel and has been shown elsewhere. For instance, The Independent Press Standards Organization (IPSO) in their Editor’s Code of Practice encouraged the press on reporting suicide not to insensitively report on it as otherwise creates harm by making those who are more prone to suicide to be vulnerable if they read the information published.²⁵¹ The IPSO relies on multiple pieces of evidence to conclude that publishing too much suicidal information is harmful to a section of society.²⁵² Psychological and Sociological literature has widely addressed this risk.²⁵³ Likewise, as taken from the prototype willingness model, the publication of a role model’s misbehaviour can harm a section of society.

²⁵⁰ Joel Feinberg, *Harm to Others: The Moral Limits of The Criminal Law* (Oxford University Press 1986) 45-51

²⁵¹ Independent Press Standards Organisation, ‘Guidance on reporting suicide’ <<https://www.ipso.co.uk/media/1725/suicide-journo-v7-online-crazes.pdf>> accessed 1 June 2022

²⁵² Independent Press Standards Organisation, ‘Guidance on reporting suicide’ <<https://www.ipso.co.uk/media/1725/suicide-journo-v7-online-crazes.pdf>> accessed 1 June 2022

²⁵³ A Cheng, K Hawton, C Lee and T Chen, ‘The influence of media reporting on the suicide of a celebrity on suicide rates: A population-based study’ (2007) 36(6) *International Journal of Epidemiology* 1229; King-Wa Fu and Paul Yip, ‘Estimating the risk for suicide following the suicide deaths of three Asian entertainment celebrities: A meta-analysis approach’ (2009) 70(6) *Journal of Clinical Psychiatry* 869; Niall McTernan, Ailbhe Spillane and Grace Cully, ‘Media reporting of suicide and adherence to media guidelines’ (2018) 64(4) *International Journal of Social Psychiatry* 536; Thomas Niederkrotenthaler, King-wa Fu, Paul Yip, Daniel Fong, Steven Stack, Qijin Cheng and Jane Pirkis, ‘Changes in suicide rates following media reports on celebrity suicide: A meta-analysis’ (2011) 66(11) *Journal of Epidemiology and Community Health* 1037; J Pirkis, R Blood, ‘Suicide and the media. Part II: Portrayal in fictional media’ (2001) 22(4) *Crisis* 155; M Sisask and A Varnik, ‘Media roles in suicide prevention: A systematic review’ (2012) 9(1) *International Journal of Environmental Research and Public Health* 123

This section has argued that the role model argument should be seen as resulting in harmful speech instead of in the public interest. However, the next question is how the new understanding of the role model argument can be translated into the balancing exercise concerning the misuse of private information. The following section aims to answer this question.

3.5 Translating the new understanding of the role model argument into the balancing exercise.

This thesis has argued that understanding the role model argument must shift from being attached to the truth to increasing the risk of harm to adolescents. The next question is how this shift can fit into the balancing exercise. This subsection argues that the public interest argument concerning the freedom of expression in the balancing exercise is flexible enough to take harmful speech into its equation in misuse of private information.

As explained earlier in this chapter,²⁵⁴ currently, in the balancing exercise, the courts only consider two arguments concerning the public interest in article 10. The first argument is where there is a public interest in publishing private information, and the second is where the private information in question is interesting to the public.

This thesis argues that the public interest in the freedom of expression in the balancing exercise is capable and flexible enough to include the public interest not to publish argument. Such an argument is possible because the Court of Appeal in *Browne v Associated Newspapers*²⁵⁵ has reasoned as follows:

The newspaper wishes to exercise its freedom of expression under article 10(1). It should be noted that article 10(2) provides that the right to freedom of expression includes the freedom to receive information. It is not in dispute that, other things being

²⁵⁴ See section 3.2

²⁵⁵ *Browne v Associated News Ltd* [2007] EMLR 19

equal, the newspaper has the right to publish information of the type that it wishes to publish in this case. However, that right must be balanced against any article 8 rights of privacy. Thus, at a trial, a balance will have to be struck between the claimant's rights under article 8 and the newspaper's rights under article 10. In the case of each of the pieces of information in dispute, the court must consider whether the justification in article 10(2) is established. By its express terms, article 10(2) provides that the freedom of expression may be subject to such restrictions (and the like) as are prescribed by law and necessary in a democratic society for the protection of the reputation or rights of others and for preventing the disclosure of information received in confidence. The question is sometimes said to be to ask where the public interest lies. It is a question of balance.²⁵⁶

Specifically focusing on the words '[t]he question is sometimes said to be to ask where the public interest lies. It is a question of balance',²⁵⁷ Sir Anthony Clarke MR did not specify that there is only one side to the public interest in article 10 (i.e. in the public interest to publish). Therefore, the discussion on where the public interest lies is flexible enough to include the argument or the possibility for the public interest to include the public interest *not to publish*. Hence, when considering the public interest in article 10, judges can consider both arguments: speech being in the public interest to publish and speech also being not in the public interest to publish. Thus, the courts will still carry the public interest as a 'question of balance' while considering different effects of speech (beneficial and harmful effects of its publication).

This flexibility is plausible because it can consider the different publication effects of speech in the balancing exercise. Indeed, certain speech can simultaneously benefit and harm the public interest. For example, in the context of the misuse of private information,²⁵⁸ revealing the public information can show hypocrisy (truth) that benefits the public while being harmful if revealed to adolescents who take the public figure as their role model. Specifically, the situation in the case study in Chapter 2 presented this conflict.²⁵⁹ Revealing Martin's drug behaviour to the general audience was in the public interest to publish because it would show

²⁵⁶ *Browne v Associated News Ltd* [2007] EMLR 19, [38]

²⁵⁷ *Browne v Associated News Ltd* [2007] EMLR 19, [38]

²⁵⁸ assuming the information passed stage one of the two stage test.

²⁵⁹ See section 2.5 in chapter two.

the general audience Martin's hypocrisy. In contrast, if the same information under the role model argument was revealed, it would likely increase the risk of harm to adolescents who took Martin as their role model.²⁶⁰ Therefore, the flexibility of public interest in article 10 is plausible because it considers different types of speech. This flexibility allows the public interest in article 10 to move away from a one-size-fits-all rule while allowing the court to consider the different effects of the same speech.

This thesis also argues that the acknowledgement and presence of harmful speech should not be a guarantee of prohibition to the publication of the speech in question. Referencing Mill's harm principle, Mill did not treat the presence of harm as a guarantee of loss of liberty.²⁶¹ In 'On liberty', Mill could not think that harm prevention was sufficient to justify restricting liberty. Mill stated, 'As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be proof by interfering with it becomes open to discussion'.²⁶² Later, Mill explained that harm prevention is necessary but not sufficient to justify restricting liberty: 'It must by no means supposed, because damage, or probability of damage, to the interests of others, can alone justify the interference of society, that therefore it always does justify interference'.²⁶³

Focusing on 'become open to discussion', judges are encouraged to continue the balancing exercise and arrive at whatever outcomes are convincing based on the wisdom of the court. This treatment can avoid courts going through a categorical treatment of the role model argument. Instead, this approach can continue to leave the nature of the misuse of private information as fact-sensitive depending on the circumstances, allowing judges to consider all recipient interests. This flexibility will guarantee that the balancing exercise will still occur in stage two, as recommended in the case of *Browne*, and publication might still occur even if there is a countervailing reason for speech not being published in the public interest. For an illustration, see figures 3 and 4 below. Translating this to Martin's case study, judges setting on his case can take into account both nature of speech and arrive to either conclusion on the public interest to publish.

²⁶⁰ See the previous section on why mimicking Martin's behaviour is harmful.

²⁶¹ John Stuart Mill, *On Liberty* (Batoche Books 2001)

²⁶² John Stuart Mill, *On Liberty* (Batoche Books 2001) 69

²⁶³ John Stuart Mill, *On Liberty* (Batoche Books 2001) 86

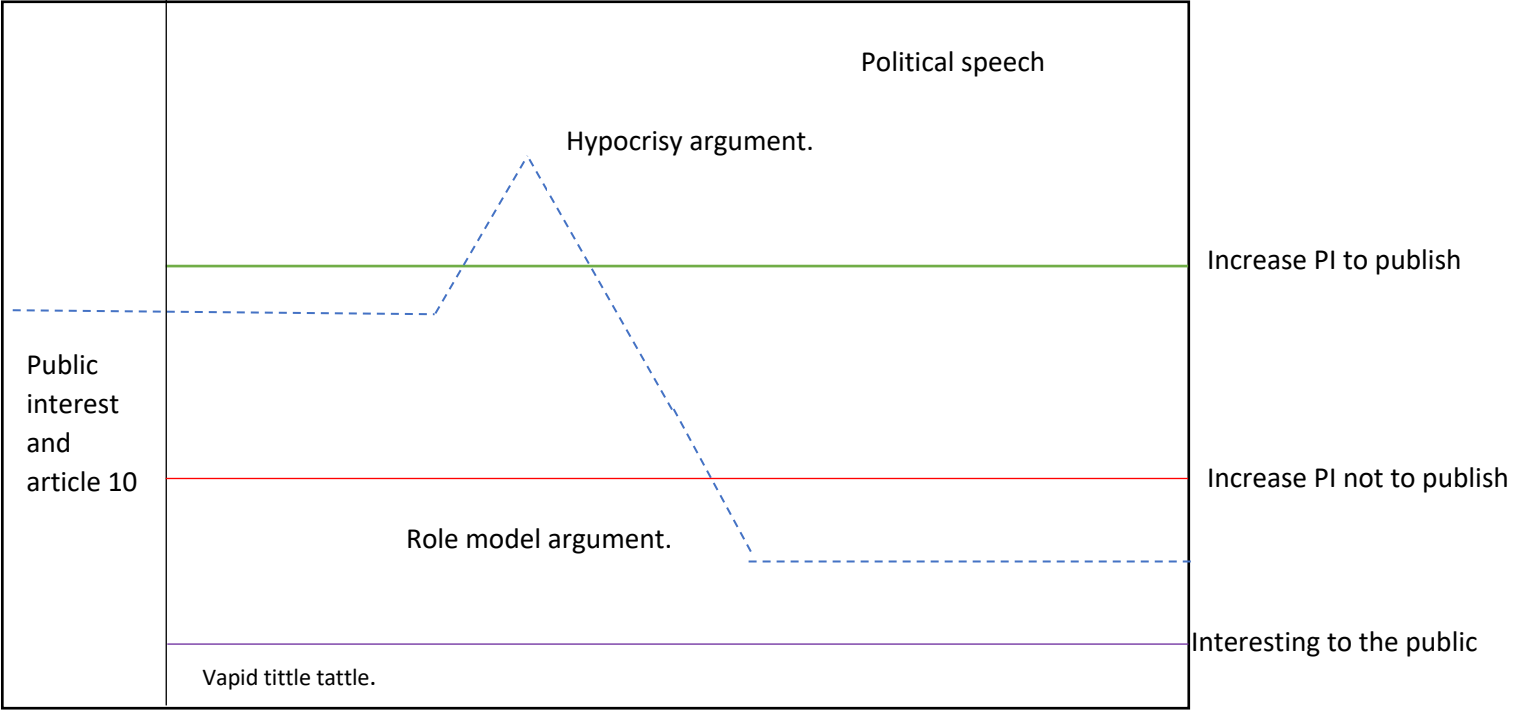


Figure 3. The figure shows that the balancing exercise is capable of taking the speech in question to be both a one that increase the public interest to publish the private information and a one that increase the public interest not to publish the private information. Figure 3 shows that when considering both arguments on the speech in question, it is possible to arrive to the conclusion that the speech increases the public interest not to publish argument.

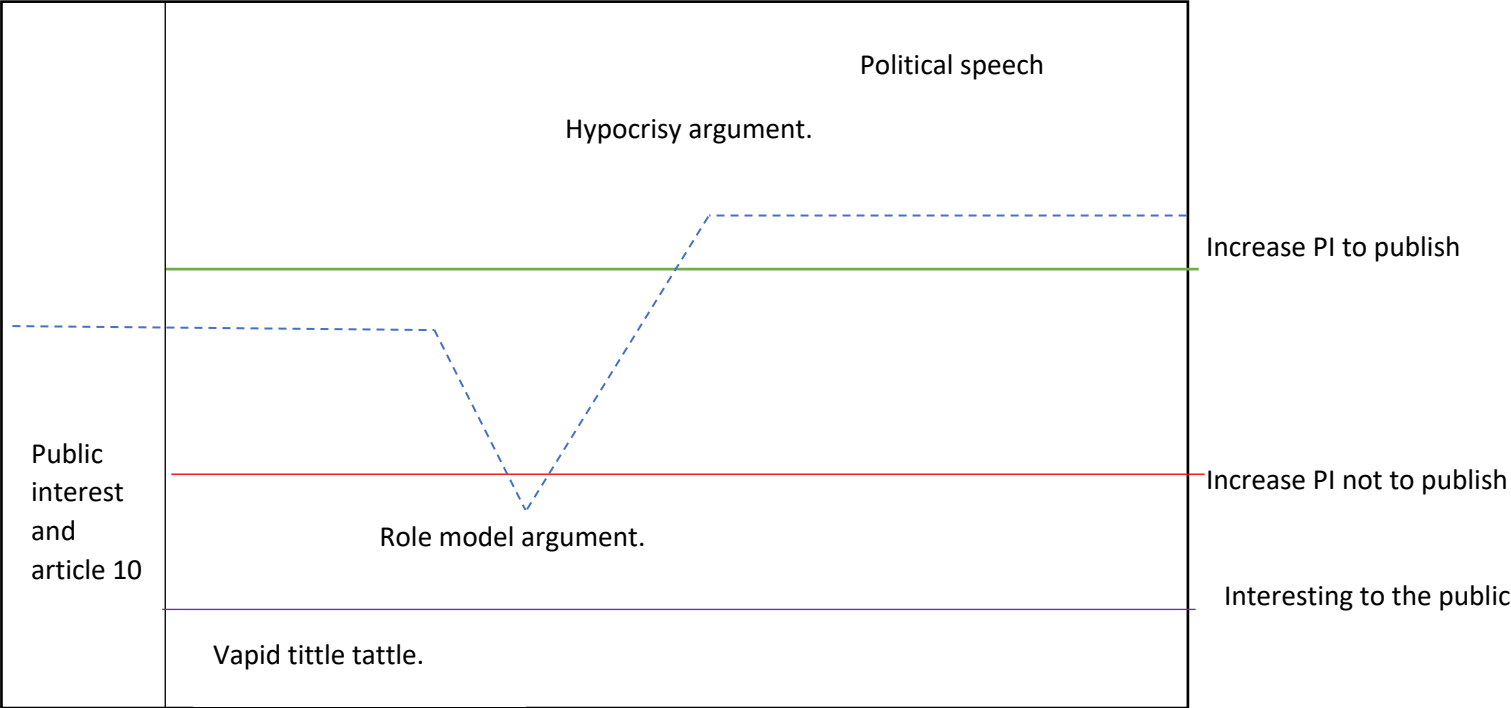


Figure 4. The figure shows that the balancing exercise is capable of taking the speech in question to be both a one that increase the public interest to publish the private information and a one that increase the public interest not to publish the private information. Figure 3 shows that when considering both arguments on the speech in question, it is possible to arrive to the conclusion that the speech increases the public interest to publish argument.

The thesis has recommended above for the role model argument to be seen as an argument that is in the public interest not to publish and should not be used as a trump card to prohibit speech. This paragraph adds that the undefined nature of the ‘public’ in public interest can further strengthen the argument that the new understanding of the role model argument should not act as a trump card in the balancing exercise. As previously explained, the public is not the same and should not be seen as such. For example, fans of a public figure are a section of the public interested in that public figure, the public who take the public figure as their role model and the other section of general readers. The undefined status of the public in the concept of public interest leaves the question open to judges on whose interest matters or should prevail. The lack of definition allows judges to deviate from the understanding that all the public have the same interests. The flexibility will allow judges to consider various groups’ interests, whether of the majority or the minority. The undefined nature will allow judges to continue on *Browne’s*²⁶⁴ and Mill’s²⁶⁵ recommendations to keep the question as one of the nature of

²⁶⁴ *Browne v Associated News Ltd* [2007] EWCA Civ 295, [2008] QB 103 [38]
²⁶⁵ John Stuart Mill, *On Liberty* (Batoche Books 2001) 86

balance. Thus, the flexibility allows the court to consider the different public sections while simultaneously carrying the balancing question to choose which section of the public interest is preferred or most convincing for upholding the public interest in article 10.

Moreover, the argument to see speech as not in the public interest to publish because it is harmful to a section of society is not novel in general law. For instance, concerning suicide reporting, the IPSO recommended that journalists must not publish excessive details of suicide as doing so might increase the risk of harm to those who are vulnerable or prone to suicidal behaviours.²⁶⁶ This argument was placed to protect a specific section of the public more prone to suicidal behaviour, resulting in a recommendation not to report. Therefore, the argument that the public interest not to publish to protect a section of the public is seen elsewhere in law is unlikely to make this thesis recommendation seem radical.

Moreover, such a recommendation will protect the role model argument from being abused by a person seeking privacy. Although the principal argument of privacy and the public interest not to publish are significantly different, both argue for the same outcome: not to publish the private information. Therefore, the thesis recommendation to not treat the role model argument as a trump card for private information to be in the public interest not to publish will protect the argument from being abused. If the thesis recommended that the role model argument needs to be seen as a trump card, the abuse of the argument might come in the form of the claimant arguing that there is a public interest not to publish the information because the claimant is a role model under the public interest in article 10. The argument will be abused because it achieves the outcome desirable for the claimant regardless of its legal foundation and principle. Therefore, the thesis recommends that the role model argument should not be a trump card for the public interest to land on not publishing, allowing the argument to be genuinely used to protect adolescents who take a public figure as their role model.

If the speech in question is both in the public interest to publish and not to publish, there is an unavoidable subjective judicial assessment on which argument should prevail. Allowing judges

²⁶⁶ Independent Press Standards Organisation, 'Guidance on reporting suicide' <<https://www.ipso.co.uk/media/1725/suicide-journo-v7-online-crazes.pdf>> accessed 1 June 2022

to decide which public interest in article 10 will prevail might give judges too much power to decide over society. This power of choice left to judges can appear as giving space for personal judicial reasoning. Because the thesis does not suggest in which circumstances the public interest not to publish will overcome the public interest of the public and vice versa, personal judicial reasoning might appear here. However, this thesis argues that personal understandings or judgements are unlikely to affect the balance of the discussion and outcome in which the public interest will prevail. It must be accepted that judges cannot separate their personal values when deciding a case. Personal values can be psychologically defined as ‘endorsing beliefs that a specific mode of conduct is personally or socially preferable to an opposite or converse mode of conduct’.²⁶⁷ Psychologists like Rokeach, Rohan, Schwartz and Kahneman have separately argued that personal values are central to decision-making.²⁶⁸ These personal values can be associated with ‘attitudes and moral judgements’.

Leading judges in the country have acknowledged this influence. For example, Lord Dyson stated, ‘I am not surprised that there are differing opinions, that is inevitable at this level, with the nature of cases that we hear. They are complicated; they are difficult. Some of them involve the question of judgement and almost philosophy, I mean, approach to life’.²⁶⁹ Moreover, Lady Hale stated, ‘Everyone comes to the task with a set of values and perspectives that may lead you to pick different bits of materials to reason towards an outcome’.²⁷⁰ However, notably, the balancing exercise is not about personal judgement; it is about informed judgement reached via the wisdom of the court. The debate between speech that is both in the public interest to publish and not to publish and how it contributes to the final judgement is not based on what the judge sitting in the court thinks. It is rather about judges practicing their wisdom in listening

²⁶⁷ M Rokeach, *Understanding Human Values: Individual and Societal* (Free Press 1979) On how personal values develop see S Hitlin and J Piliavin, ‘Values: Reviving a Dormant Concept’ (2004) 30 *Annual Review of Sociology* 359

²⁶⁸ M Rokeach, *The Nature of Human Values* (Free Press 1979); M Rohan, ‘A rose by Any Name? The Values Construct’ (2004) 4 *Personality and Social Psychology Review* 255; S Schwartz, ‘Universals in the content and structure of values: theoretical advances and empirical tests in 20 countries’ (1992) 25 *Advances in Experimental Social Psychology* 1; D Kahneman, *Thinking Fast and Slow* (Penguin 2011) see also, J Haidt, *The Righteous Mind. Why good people are divided by politics and religion* (Penguin 2012) Also, some judges are not aware of this as personal values effecting their decision. On this see Rachel Cahill-O’Callaghan, ‘The Influences of Personal Values on Legal Judgement’ (2013) 40(4) *Journal of Law and Society* 596, 601

²⁶⁹ ²⁶⁹ The Guardian, ‘Supreme Court: does it deliver justice? < tp :// www.guardian.co.uk/law/video/2011/oct/25/supreme-court-deliver-justice- video?INTCMP=SRC> accessed 3 May 2022

²⁷⁰ Lady Hale, oral evidence before the Constitution Committee Autumn 2011, reported in A. Paterson and C. Paterson, *Guarding the guardians: towards an independent, accountable and diverse senior judiciary* (2012), at <http://www.centreforum.org/assets/pubs/guarding-the-guardians> accessed 3 May 2022

to counsel's submission, evaluating evidence and formulating advice and a final judgement.²⁷¹ If such skills are practiced to provide an informed judgement backed with reasoning, then personal judgement is unlikely to be seen as problematic. In the end, judges are human beings, and they are placed as judges to practice their wisdom and skills to give judgements. These characteristics contribute to arriving at informed judges with clear reasoning who contribute to the wisdom of the court.

3.6 Conclusion.

Chapter three has focused on the unsatisfactory nature of judicial reasoning when it comes to treating the role model argument as in the public interest to publish the private information in the balancing exercise. Section 3.2 provide a critical analysis on judicial reasoning on the issue. While, section 3.3 showcased how the role model argument, with its new understand, is not suitable to be fitted under the public interest to publish argument nor interesting to the public argument. Section 3.4 argued that the speech resulting from the role model argument need to be seen as a harmful one. Finally, section 3.6 argued that the role model argument needs to be seen as in the public interest not to publish and showed how the argument can fit in the balancing exercise.

²⁷¹ P Baltes and M Staudinger, 'Wisdom: A metaheuristic (pragmatic) to orchestrate mind and virtue toward excellence' (2000) 55 American Psychologist see also Heidi Levitt, 'The Development of Wisdom in Judicial Decision Making' (2015) The Humanistic Psychologist

Overall conclusion

Overall, this thesis has argued that the state of judicial reasoning in the role model argument in misuse of private information is unsatisfactory. The thesis split the main argument into two strands: A) the state of judicial reasoning, in the role model argument, is unsatisfactory when it comes to examining the influence of publication on adolescents. B) the state of judicial reasoning is unsatisfactory when judges treat the role model argument in the balancing exercise as an argument in the public interest to publish.

Chapter two focused on strand A of the problem. The chapter carried a detail critical analysis on case laws involving the role model argument. Due to the unsatisfactory state of judicial reasoning in this area, the thesis introduced the prototype willingness model. The thesis hoped in introducing the psychological model to improve the state of judicial reasoning when examining the influence of publication on adolescents who see the public figure as their role model.

Chapter three focused on strand B of the problem. The chapter pinpointed the unsatisfactory judicial reasoning when treating the role model argument as an argument in the public interest to publish. The chapter argued, the role model argument, with its new understanding, is unsuitable to fit under the current understanding of public interest. The thesis proceeded to argue the speech produced from the role model argument needs to be seen as a harmful one. Finally, chapter three showcased how the public interest concept in the balancing exercise is flexible and capable of taking the role model argument's harmful speech into its equation.

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