Anti-doping, whereabouts, and privacy: An ethico-legal analysis of WADA's whereabouts requirements.

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ANTI-DOPING, WHEREABOUTS, AND PRIVACY

An ethico-legal analysis of WADA's whereabouts requirements

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Abstract

The World Anti-Doping Agency (WADA) is the primary global organization responsible for implementing rules against doping in sport. A central element of its mission is the requirement that elite athletes submit their whereabouts information for every day of the year to their relevant Anti-Doping Organization (ADO), in order to facilitate no advance notice out-of-competition doping testing. These requirements have attracted considerable criticism, including the claim that they invade elite athlete privacy in a legally or ethically unacceptable manner.

The validity of these claims is threatened by the contestedness of the concept of *privacy*, which arises from the many different uses to which the concept is put, including in legal and philosophical contexts. Resolving this conceptual confusion requires taking an explicit position on various questions of philosophical methodology, themselves subject to contention. As an alternative to such abstraction, and particularly given the need for a philosophically defensible yet pragmatic policy application, I argue that privacy is best conceived of as the absence of certain contextually relevant harms to the person, which arise in relation to such underlying normative values as fairness between competing athletes.

In the specific context of elite athlete whereabouts requirements, I maintain that privacy concerns arise principally in relation to surveillance, intrusion, and breaches of confidence. Of these, the first and second face legal difficulties in the UK, on the basis of European legislation concerning human rights and maximum working time. Ethical problems also arise due to WADA's undifferentiated application of the whereabouts requirements, which ignores the heterogeneity of different types of sports and their respective vulnerabilities to doping. I argue that WADA's whereabouts requirements ought therefore to be revised to (*a*) ensure that they do not conflict with established law, and (*b*) respect the very different sets of circumstances entailed by the heterogeneous world of elite sports.

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Без вас,
мои дорогие девочки,
эта диссертация
никогда бы не была
написана!

Acronyms

ADAMS Anti-Doping Administration and Management System
ADO Anti-Doping Organization
BALCO Bay Area Laboratory Co-Operative
BCCI Board of Control for Cricket in India
CAS Court of Arbitration for Sport
CCES Canadian Centre for Ethics in Sport
CE Council of Europe
CEU Council of the European Union
CJEU Court of Justice of the European Union
DPA 1998 Data Protection Act 1998
ECHR European Convention on Human Rights
ECJ European Court of Justice
ECtHR European Court of Human Rights
EDPD 1995 European Data Protection Directive 1995
EEAA EU Athletes
EPO Erythropoietin
EWTD 2003 European Working Time Directive 2003
FIFA International Federation of Association Football
FIFPro International Federation of Professional Footballers
FINA International Swimming Federation
GDR German Democratic Republic
HMRC Her Majesty's Revenue and Customs
HRA 1998 Human Rights Act 1998

HSE Health and Safety Executive
IAAF International Association of Athletics Federations
ICC International Cricket Council
ICO Information Commissioner's Office
IF International Federation
IOC International Olympic Committee
IOCA 1985 Interception of Communications Act 1985
IRTP International Registered Testing Pool (of ICC)
ISPPPI *International Standard for the Protection of Privacy and Personal Information*
IST *International Standard for Testing*
- **IST1** *International Standard for Testing*, 1st version. 2003.
- **IST2** *International Standard for Testing*, 2nd version. 2009.
- **IST3** *International Standard for Testing*, 3rd version (minor revisions). 2012.
- **IST4** *International Standard for Testing*, 4th version. Forthcoming (2013).

NADO National Anti-Doping Organization
NCF National Cricket Federation
NDPB Non-Departmental Public Body
NPP National Player Pool (of ICC)
PCC Press Complaints Commission
RIPA 2000 Regulation of Investigatory Powers Act 2000
RTP Registered Testing Pool
THG Tetrahydrogestrinone
UEFA Union of European Football Associations
UDHR UN Universal Declaration of Human Rights
UKAD UK Anti-Doping
USADA US Anti-Doping Agency
WADA World Anti-Doping Agency
WADC *World Anti-Doping Code*
- **WADC1** *World Anti-Doping Code*, 1st version. 2003.
- **WADC2** *World Anti-Doping Code*, 2nd version. 2009.
- **WADC3** *World Anti-Doping Code*, 3rd version. Forthcoming (2013).

WCF World Curling Federation
WTR 1998 Working Time Regulations SI 1998/1833

— 1 —

Introduction

The World Anti-Doping Agency (WADA) is the primary global organization responsible for creating, implementing, curating, and monitoring rules against doping in elite sport. A central element of its anti-doping mission is the requirement that all elite athletes competing at a sufficiently high level submit their location, or "whereabouts," information, for every day of the year without exception, to their relevant Anti-Doping Organization (ADO). This allows ADOs to locate and perform no advance notice out-of-competition doping tests on athletes. Many athletes, sporting federations, and scholars have, however, raised various legal and ethical objections to the whereabouts requirements, including the claim that they constitute an unacceptable privacy invasion for the affected athletes. In this thesis, I assess the strength of these legal and ethical privacy objections to WADA's whereabouts requirements. This introductory chapter sets out the background—in addition to the conceptual and topical limitations—to the investigation, followed by a structural overview of the argument I develop in the subsequent chapters.

1.1 Background

Sporting competitions and performance enhancement have, historically, gone hand in hand. The last century or so has, however, seen the development of an increasingly fraught relation between the two.

On the one hand, the nature of sporting competitions has changed drastically from their humble beginnings. Today, elite sporting events are often multi-million dollar

spectacles, involving an army of athletes, coaches, referees, functionaries, officials, dieticians, doctors, scientists, journalists, spectators, and many more. The stakes—in terms of social goods like fame, prize money, sporting and commercial contracts, national pride, etc.—have increased many times over, to the point where a significant amount of professional athletes have attained both significant wealth and super-stardom as a result of their sporting prowess. And the most high-profile sporting competitions—events like the Olympic Games, the World Cup, and the Tour de France—amass an astonishing number of viewers from around the globe (along with a substantial level of potential marketing opportunities and brand exposure for sponsors). At no point in the past have so many people taken such a big interest in the world of elite sport.

At the same time, these increasing stakes and interest have led to increased calls for more detailed and specific regulation of sporting practices. What type of equipment is acceptable in a given sport? What sort of dimensional and/or material restrictions ought we to impose on it? How are different problem-cases—such as faulty refereeing in crucial qualification games—to be appropriately resolved? How ought we to distinguish between, say, different genders, or levels of disability, in different sports? As the number and salience of such questions have grown, so have the rules and regulations determining the specifics of each sport. This development has also, and in particular, affected the regulation of performance-enhancing practices. What constitutes acceptable and unacceptable types of performance enhancement, and how ought we to approach the latter? Or, to rephrase, what is to be done about doping in elite sport?

As the primary centralized global organization tasked with the responsibility of answering this question, WADA has implemented a number of far-reaching policies to seek to attain its goal of doping-free sport. Among these, it has placed particular emphasis on the importance of no advance notice out-of-competition doping testing. Insofar as certain doping substances retain their performance-enhancing effect even after the likelihood of detecting them in an athlete sample has vanished, the only available means of monitoring such use is through reliance on tests that occur outside of competition situations. Importantly, this form of testing is only viable if doping control officials know where to find the athletes whom they are tasked with testing. To solve this practical problem, WADA introduced athlete whereabouts requirements, stipulating that every elite athlete competing at a sufficiently high level must submit their whereabouts information in advance, for every day of the year without exception, to their relevant ADO.

These requirements, which apply universally to all higher-level elite athletes regardless of sport, make it possible for the doping control officials to perform no advance notice out-of-competition doping tests, thereby, WADA maintains, reducing the risk that athletes actually dope under such circumstances.

However, various arguments have been raised against WADA's whereabouts requirements, including the legally and ethically significant claim that the requirements constitute an unacceptable privacy invasion for those athletes upon whom they are imposed. This claim has been made in different forms, but the general sentiment of it can be summed up as follows: "Although doping-free sport is important, and although no advance notice out-of-competition doping testing may be a crucial means of achieving doping-free sport, the current whereabouts requirements constitute an invasion of athlete privacy that is out of proportion with the actual risks of wrongdoing, and the requirements are therefore themselves wrong."

This sentiment, thus expressed, constitutes the primary focus for this thesis. The research question to be answered can, therefore, be formulated as follows: *In relation to elite athlete privacy, are WADA's current whereabouts requirements acceptable?* Although it would be possible to state the final conclusion already now, proper appreciation of its strength, nature, and implications requires a fuller account of the various terms, topics, and values involved in reaching it. As with any scholarly inquiry, the first step toward such an account consists of a more precise specification and delimitation of the context in which the research question arises, making explicit what falls within and what, perhaps more importantly, falls without its boundaries.

1.2 Limitations

Sport is a broad term with indistinct conceptual boundaries. Not only does it range over a wide variety of different forms of human behavior and practices, it is also difficult to clearly and unambiguously distinguish from its near conceptual relatives *game* and *play*.[1] Furthermore, *sport* is inherently ambiguous, being equally applicable to specific individual sports (such as rugby), collections of specific individual sports (such as

[1]For the central canonical consideration of the definition of *game*, see Suits, *The Grasshopper*; for an overview of the subsequent sport-focused conceptual discussions emanating from Suits's work, see the various contributions to Morgan and Meier, *Philosophic Inquiry in Sport*, pt. I; and to McNamee, *The Ethics of Sports*, pt. 1.

Olympic sports), or something like the phenomenon of sport generally, without any particular sport or sports in mind. This latter ambiguity is, however, not usually considered troubling, as context generally suffices to determine which of the possible interpretations is the valid one in relation to any given instance of use.

Within this thesis, *sport* is allowed to remain ambiguous in the latter manner (with the context signaling the intended use), but is limited to those sports that WADA actively seeks to regulate, including through the demand that the relevant ADO for a sport impose WADA's full whereabouts requirements on its highest echelons of athletes.[2] In practice, this includes all Olympic sports, as well as the majority of widespread and popular league sports. It does not, however, include many of the so-called *extreme* sports, or more obscure or local sports, except where WADA actively seeks to regulate them. Similarly, although a number of more or less well-established and popular sports—particularly those striving for inclusion in future Olympic Games—voluntarily follow at least parts of WADA's regulations, they will not come under further consideration here, unless their top athletes are currently required, by WADA, to submit their whereabouts information in full to their relevant ADO.

It is worth noting that not all sports that WADA actively seeks to regulate have actually implemented the organization's rules in full. As already mentioned, various sporting federations have objected to the whereabouts requirements, and some have chosen to introduce their own derivative (milder) versions of the requirements as an alternative to WADA's own. This is, for instance, the case with the International Cricket Council (ICC). Elite-level cricket nevertheless falls within the range of *sport*, as interpreted here, insofar as WADA still actively demands that the ICC implement its regulations in full. The fact that the ICC chooses not to do so (and to some extent is able to get away with not doing so) is a secondary issue of real-world policy, rather than one of conceptual boundaries.[3]

As with *sport*, there are many possible interpretations of *doping*.[4] In contemporary discussions, it primarily refers to the use of those performance-enhancing technologies

[2] *Athletes* are here understood as active competitors in any of the sports thus circumscribed, and *elite athletes* are understood as those athletes who compete at a sufficiently high level for WADA to consider them to be subject to its full whereabouts requirements.

[3] I discuss the ICC's development of its own whereabouts requirements in further detail in chapter 2.

[4] For discussion of some of the various difficulties surrounding the conceptualization of the term, see Møller, *The Ethics of Doping and Anti-Doping*, 4–12; McNamee and Tarasti, "Ethico-Legal Aspects of Anti-Doping Policy," 9.

(substances and methods) that are considered inappropriate by WADA, as established by their inclusion in its annually reviewed *Prohibited List*.[5] Such use is inherently disapproving, to the extent that it identifies as doping only those technologies that are explicitly against the rules of sport. Hence doping, thus understood, is always cheating, and is therefore in itself bad; mere mention of it tends to preclude ethically non-judgmental discussion.

This use can be questioned on various points. First, numerous scholars have objected to the negative valence of the term, arguing that doping is not ethically problematic, or perhaps even ethically preferable to the current system of anti-doping regulation.[6] The debate on the normative status of doping and anti-doping is large and complex, and there is no room to explore these issues here. Instead, I will simply assume that, everything else being equal, doping is ethically problematic and that, therefore, there are pro tanto reasons to seek to minimize or perhaps even eliminate it. That is to say, I agree, for the sake of argument, with the general thrust of WADA's views on doping. The issue here is not one of whether or not there can be any justification of anti-doping regulation in the first place, but rather of whether or not WADA's current whereabouts requirements are acceptable, from a perspective of privacy, despite presumed agreement on the ethical preferability of doping-free sport.

Second, the reference of the term is highly contingent, due to the annually amended nature of the *Prohibited List*. This state of affairs gives rise to potential time-indexing difficulties. If the use of strychnine by athletes was not banned in the nineteenth century, but it is banned today, was it still doping for those nineteenth-century athletes? Or, to take a more contemporary example, caffeine was previously banned by WADA, but the ban was lifted in 2004 as the result of, among other things, the sheer ubiquity of the substance.[7] Does this mean that an athlete ingesting a certain dose of caffeine in 2003 was doping, while the same athlete ingesting the same amount of caffeine in 2005 was not? Or that the athlete was not doping in either instance, since caffeine is no longer banned?

These sorts of difficulties are not easily resolved. If anti-doping policy strives toward doping-free sport, what, exactly, is the conception of sport in question? Or, to

[5]WADA, *The 2013 Prohibited List*.

[6]Illustrative examples of such positions include Savulescu, Foddy, and Clayton, "Why We Should Allow Performance Enhancing Drugs in Sport"; Tamburrini, "Are Doping Sanctions Justified?"

[7]WADA, *Questions and Answers on 2012 Prohibited List*.

rephrase, what precise practices need to be removed in order for a sport to qualify as "doping-free"? I have no immediate answer to these questions, but will do little more here than note them as potentially problematic for those anti-doping proponents striving for such an ideal. Within the scope of this thesis, I will limit use of *doping* to refer to that vague and poorly defined phenomenon to which anti-doping proponents object, as characterized by WADA's various *Prohibited Lists*. While hazy at the boundaries, there is sufficiently widespread agreement on more central instances of the term—such as the use of steroids, erythropoietin (EPO), and blood transfusions—to nevertheless allow for meaningful discussion, regardless of one's personal views on the acceptability of such practices.[8]

Both the negative valence and the terminological difficulties can be avoided, to some extent, by using the normatively more neutral and referentially more stable term *performance enhancement* and its cognates; here understood as a broader field of technologies believed (by athletes and other relevant actors in sport) to enhance sporting performance.[9] On such an interpretation, *doping* categorizes a subset of performance-enhancing technologies, namely those that WADA considers sufficiently problematic to include in its *Prohibited Lists*. Or, in other words, *performance-enhancing* includes such technologies as caffeine, protein supplements, and weightlifting (not prohibited by WADA), as well as amphetamine, EPO, and blood doping (prohibited by WADA). Using this terminology, particularly in a historical discussion such as that presented in chapter 2, neutralizes ethical prejudgment to at least some extent. While some performance-enhancing technologies may be ethically problematic, *performance-enhancing* itself is not inherently so, ranging, as it does, over technologies that are both permitted and restricted.

Finally, in terms of initial conceptual clarification, it is important to highlight certain aspects of the nebulous concept of *privacy*. Privacy is a controversial term, giving rise to numerous conflicting and competing accounts. It suffers from such a range of interpretations and applications as to render it highly difficult to establish, with any certainty,

[8] Cf. MacGregor and McNamee, "Philosophy on Steroids," 402–3.

[9] The notion of *performance-enhancing* is of course itself subject to various boundary disputes. I will leave this issue to the side, as the term's exact conceptual boundaries are not pertinent to the discussion herein. No premise in my arguments hinges on any precise distinction between, say, *performance-enhancing* and *therapeutic*, a highly difficult distinction to successfully maintain. On this latter point, see Morgan, "Athletic Perfection, Performance-Enhancing Drugs, and the Treatment-Enhancement Distinction," 163–66.

whether any of a number of instances rightly fall within its range or are perhaps better treated under the heading of some other closely related concept (such as *liberty* or *autonomy*).[10] There are many reasons for this conceptual confusion, which I delineate in later chapters. At this stage, I will merely note my terminology of choice for describing the phenomena surrounding the as-yet undefined concept of privacy.

First and foremost, privacy is something people can *have*, and something they can *lose*. To lose one's privacy in relation to some situation or other is an ethically neutral way of describing what happens; the loss might, for instance, be due to a voluntary relinquishing of privacy (I might choose to share a personal secret with others). The sort of losses of privacy that interest or concern most people, however, are those that arise due to others' actions, in some manner that is considered *harmful* to those who suffer the loss. This includes such paradigmatic privacy cases as Peeping Toms and totalitarian governments secretly stockpiling sensitive information about their citizens. Where such harms are likely, I will say that privacy is *threatened*; the likelier the harm, the stronger the threat. Where such harms are realized, I will say that privacy is *invaded*.

Often there will be attempted justifications both for and against such harms; police might, for instance, be granted access to databases holding extensive information about the citizens of a country, on the grounds of working to minimize the risk of terrorism within that country. Where the justifying reasons for such harms are taken to be stronger than the justifying reasons against them, the invasion of privacy is *acceptable*. Where they are weaker, it is *unacceptable*.

There are many potential sources of justification, in relation to these sorts of issues. In this thesis, I focus on two: legal justification and ethical justification. Legal justification arises in relation to international treaties, legislation, and common law principles pertaining to the harms in question; either because they protect against them, or because they provide a legal rationale for their imposition. Ethical justification arises in relation to normative values that may or may not be treated in the law, and that may also be relied on to either generate support for or opposition to the harms in question.

Both legal and ethical justification might sometimes take the form of some sort of right (usually taken to mean something like a sufficiently strongly justified claim): a right to privacy, say, or perhaps a right to live in a country without fear of terrorist acts. While it is possible (and in some cases common) to speak of privacy purely within the

[10] Cf. Solove, "A Taxonomy of Privacy," 479–81.

language of rights, I aim to keep my discussion unencumbered by any such terminological imposition. Whether or not we can make sense of rights is an important legal and ethical issue, but the points I make are largely independent of that discussion, and therefore arguably best not forced into those terms.[11] In fact, in at least the legal case, a violation of a right to privacy and an invasion of privacy need not overlap at all: if an international treatise stipulates that a legal right to privacy must be incorporated into the law of all signatory countries, then citizens in a country that fails to incorporate that right into their law arguably have a valid complaint when they claim that their right to privacy is being violated, regardless of whether or not any of them actually suffer invasions of their privacy. I will, therefore, speak in terms of rights only where necessary—either because some instance of justification is formulated in terms of rights, or because another scholar discusses privacy in terms of rights—and refrain from developing any substantial position of my own in relation to the issue. Regardless of whether or not we can ultimately talk meaningfully about any legal or ethical right to privacy, I take it we can still establish whether a privacy invasion in a given instance is normatively acceptable or not.

I turn now to some important topical limitations. This thesis deals with the legal and ethical issues arising from the intersection of two broad topics: WADA's whereabouts requirements on the one hand, and elite athlete privacy on the other. As my focus lies on the intersection itself, any further aspects of these topics will be bracketed for the scope of the thesis. I will, in other words, not consider those issues of elite athlete privacy that do not directly pertain to the whereabouts requirements, nor those issues arising in relation to the whereabouts requirements that do not pertain directly to privacy. A few brief illustrations of what I mean, in each case, will have to suffice.

There are serious potential privacy issues arising from the storage and processing of the personal athlete data acquired through the analyses of blood and urine (and, possibly in the near future, genetic) samples.[12] Although certainly within the ambit of elite athlete privacy, these concerns do not arise from the whereabouts requirements themselves, as they concern test samples that are acquired both in and out of competition.

[11] Cf. DeCew, *In Pursuit of Privacy*, 27, for a similar point.

[12] See e.g. Teetzel, "Respecting Privacy in Detecting Illegitimate Enhancements in Athletes"; Holm, "The 36th Meeting of the Pay and Conditions Committee of the Union of Philosophers, Sages and Other Luminaries (UK University Branch), or Doping and Proportionality," esp. 228–30; Schneider, "Privacy Rights, Gene Doping, and Ethics."

That is, the privacy concerns in such situations would remain even if the whereabouts requirements were annulled, and, by the same token, the same privacy concerns could be mitigated without any amending of the whereabouts requirements; strictly speaking, the whereabouts requirements are neither necessary nor sufficient for these particular privacy concerns.

Analogous considerations apply to the requirement that elite athletes provide urine samples in full view of a (same-gender) doping control officer where so requested:

> The doping control officer shall ensure an unobstructed view of the Sample leaving the Athlete's body and must continue to observe the Sample after provision until the Sample is securely sealed. ... In order to ensure a clear and unobstructed view of the passing of the Sample, the doping control officer shall instruct the Athlete to remove or adjust clothing which restricts the clear view of Sample provision.[13]

The requirement aims to minimize the possibilities of catheterization, urine substitution, or any other form of tampering with the sample, in order to maximize its accuracy. But the potential privacy issues of exposure and shame that such situations involve are again only indirectly related to the whereabouts requirements, being neither a central aspect nor a direct consequence of the latter.[14]

Similar restrictions apply to the whereabouts requirements: the potential harms of the requirements range over a broader number of instances than just those concerning privacy. The requirements are, for instance, demanding on athletes, in terms of the time it takes to submit one's whereabouts information. But demands on time are not normally considered sufficient to trigger any particular privacy issues. The same sort of reasoning applies also to the myriad legal issues that any piece of global regulation is likely to encounter in at least some national jurisdictions; where there is no obvious connection to some form of privacy concern, it is difficult to maintain that the issue warrants any further investigation relative to the focus herein.

Even given such a restriction, however, there are still bound to be far too many potential legal privacy issues with the whereabouts requirements across various different national jurisdictions. Insofar as it is near impossible to treat such a broad range of

[13]WADA, *IST3*, Annex D, § D.4.9.

[14]For treatment of the ethical issues surrounding athlete urinalysis, see Thompson, "Privacy and the Urinalysis Testing of Athletes"; Waddington, "Surveillance and Control in Sport," 266–69; Møller, "One Step Too Far," 189.

possibilities in any depth, I will restrict my investigations to the context of elite athletes in the UK. The appropriately revised research question then becomes twofold: *(a) Do WADA's current whereabouts requirements constitute a legally acceptable invasion of the privacy of elite athletes in the UK? (b) Do WADA's current whereabouts requirements constitute an ethically acceptable invasion of the privacy of elite athletes generally?*

As regards the first question, elite athletes in the UK are subject to a variety of sets of legal rules stemming from different legal jurisdictions. By way of brief clarification, UK parliamentary legislation covers the entire UK, including Northern Ireland and Scotland. The countries of the UK differ, however, in their common law traditions, although England and Wales are both covered by English common law. For the simple reason that there is more scholarly discussion of English common law developments, I have chosen to focus on these exclusively wherever common law is relevant, ignoring any Northern Irish and Scottish counterparts.

At the same time, the UK is also a member state of such international organizations as the EU and the Council of Europe (CE), each of which imposes certain requirements on the development of UK law as a condition of continued membership status. Where, for instance, UK parliamentary legislation and EU legal directives conflict, it is not always obvious which one takes, or ought to take, legal precedence. Not all EU and CE law is equally binding on member states, and even where it is, it often leaves some room for differing interpretations between different countries. So although the CE's European Convention on Human Rights (ECHR) establishes a qualified human right to private and family life, and the UK is bound by its own Human Rights Act 1998 (HRA 1998) to develop its law in line with the ECHR's proclamations, the UK has nevertheless refrained from legislating any right to privacy as such, choosing instead to interpret and apply the ECHR right within its pre-existing framework of common law remedies, none of which explicitly protect privacy.

To this complex legal state of affairs can be further added international treaties to which the UK is also a signatory. Some of these, such as UNESCO's International Convention against Doping in Sport, put significant international pressure on the UK to comply with WADA's approach to doping in sports, including their insistence on the whereabouts requirements in their present form. Where an elite athlete in the UK is subject to WADA's whereabouts requirements, it is, in other words, far from clear whether the requirements infringe any particular legal privacy protection, or which of the mul-

tiple conflicting national and international legal edicts take precedence over the others, and in what manner and under what circumstances.

The ethical question is not restricted in the same manner: wherever the normative values relevant to the appraisal of the issue are shared to a sufficient degree, the ethical analysis can be considered equally valid. The ethical focus in the thesis therefore need not be limited to the context of elite athletes in the UK. This is also in line with WADA's (implicit) insistence that the normative values underlying its anti-doping work have global merit, given that the organization's anti-doping regulations do not differ between countries.

Answering the above research questions concerning the privacy of elite athletes—both in regards to the legal state of affairs in the UK, as well as to the ethical state of affairs generally—requires significant work sorting out various strands of legal, philosophical, and ethical argumentation that impinge on the issue. As a result, the majority of this thesis is dedicated to just that, in order to thereby determine more clearly the precise contours of the intersection between the whereabouts requirements and elite athlete privacy.

1.3 Summary Overview

I begin by providing, in chapter 2, the contextual framework for the overall discussion. In it, I chronicle what is known about the use of performance enhancement throughout sporting history, in order to demonstrate that reliance on performance enhancement constitutes a historically longstanding and prevalent practice among elite athletes. The extent to which it has become entrenched in many sporting cultures goes some way to explain the substantial practical difficulties the growing anti-doping movement of the post-war years has faced. At the same time, and as a part of this growth, many athletes have called on their various sporting organizations to do more about the endemic prevalence of doping. The social and political momentum provided by this explains, to some extent, the lengths to which WADA has at times been willing to go in its fight against doping, including through its focus on no advance notice out-of-competition doping testing. More specifically, chapter 2 gives an account of the development of WADA's whereabouts requirements, through their first to their second and current iteration. In doing so, I detail some of the various responses that the requirements have encountered,

with a particular focus on the manner in which privacy objections to them have been raised.

Chapter 3 sets the legal contextual framework, by providing an overview of the most important national and international legal personal privacy protections, relative to the UK context. The UK has no legal right to privacy, as such, in parliamentary legislation or in common law. I therefore instead briefly summarize the historical development of the equitable doctrine of breach of confidence, along with similar privacy-related currents of development, in addition to looking at several of the more recent failed attempts to legislate on the protection of personal privacy in Parliament. Following this, I introduce the three pieces of European privacy law with a direct impact in the UK that are most relevant to the whereabouts issue: EU law on data protection, EU law on working time, and CE human rights law. The latter, in particular, has influenced the development of common law privacy protections in the UK, largely by being incorporated into the doctrine of breach of confidence. The point of the chapter is twofold: (*a*) to give a sufficiently broad overview of those parts of the UK legal terrain within which the legality of the whereabouts requirements will later be assessed, and (*b*) to provide the historical legal background necessary to, in the subsequent chapter, better appreciate the origins of the US legal right to privacy, and its subsequent philosophical and ethical developments.

In chapter 4, I turn to the concept of privacy. Because the scholarly philosophical and ethical discussion of privacy arose almost exclusively from US legal considerations, I begin by charting the development of the legal right to privacy in the US, from the end of the nineteenth century onward. Crucially, the 1965 US Supreme Court case *Griswold v. Connecticut*[15] established an expansion of this right into new territories. The court decision was followed by heated debate—in jurisprudence as well as in philosophy—on whether or not the expansion was conceptually defensible. Roughly, privacy scholars can still be divided into two general camps on the issue of the proper scope of privacy: those who argue for its narrow restriction to personal information and find the *Griswold* decision conceptually indefensible, and those who are willing to entertain a wider range of conceptual reference to include, in addition to cases concerning personal information, such instances as *Griswold*. I present the major philosophical accounts in

[15]381 US 479 (1965).

each of the two camps, and conclude that one of the primary differences between them lies in the weight that they accord to common interpretations of privacy.

Chapter 5 begins with the acknowledgement that unless one can establish the appropriate weights of various elements of a theoretical account of any given phenomenon, it will be difficult to determine which of any number of well-developed competing accounts is stronger. For the same reason, resolving the impasse between the proponents of narrow and wide accounts of privacy would require some sort of prior methodological specification of the weights one ought to accord the various elements of potential relevance to those accounts, including reliance on common interpretations of privacy. However, this sort of abstraction quickly leads into skeptical self-refutation: by which meta-methodological valuations are the relative theoretical element weights themselves to be determined? Instead, I propose an ostensibly pragmatic solution: given the difficulty in assessing the strength of different accounts of privacy, and the simultaneous need for an account of privacy amenable to policy application, I argue that it is preferable to adopt a view of privacy as an open-ended list of particular sorts of harms to the person, of which only a subset will be relevant to any given context invoking privacy concerns, depending on the underlying values at play in that context. Establishing whether or not such contextual privacy harms are acceptable will then depend on an appraisal of these underlying values, in order to establish a contextually valid means of weighing them against each other.

Chapter 6 seeks to flesh out the sketch of a contextualized account of privacy provided at the end of chapter 5. More specifically, it consists of a discussion of those privacy harms and values that pertain directly to the context of elite athlete whereabouts requirements (henceforth just "whereabouts context"). While there are a number of potentially relevant harms within the context, the ones that warrant further investigation are the harms arising from (*a*) the unprecedented level of surveillance to which elite athletes are subjected; (*b*) the intrusion suffered by many athletes into their homes and personal (non-professional) lives as a direct practical result of the requirements; and (*c*) the potential breaches of confidence of athlete whereabouts information, by ADOs, as has been observed in specific instances. As to the underlying values at play in the debate on the acceptability or not of the whereabouts requirements, the central contention is identified as one concerning fairness. Proponents of the requirements emphasize fairness between elite athlete competitors, maintaining that the requirements

are crucial to ensure such fairness, while detractors emphasize fairness between athletes and other members of general society, claiming that there are no analogous burdens on non-athletes, and that the requirements are therefore not acceptable.

The previous strands of argument are woven together in chapter 7, which answers the original research questions: *(a) Do WADA's current whereabouts requirements constitute a legally acceptable invasion of the privacy of elite athletes in the UK? (b) Do WADA's current whereabouts requirements constitute an ethically acceptable invasion of the privacy of elite athletes generally?* In answering the first question, and by looking at those areas of UK and European law relevant to the topics of surveillance, intrusion, and breach of confidence, I determine the following: (*a*) the level of surveillance entailed by the whereabouts requirements directly engages the ECHR right to private and family life, but may nevertheless be justifiable in light of international commitments to the importance of anti-doping work generally; and (*b*) the intrusion that the whereabouts requirements involve are not compatible with EU law regarding working time restrictions, for those athlete to whom the latter applies. Although the issue of breach of confidence would be illegal in any instances where it arises, these arguably occur only very rarely at the international level, and possibly not yet at all within the UK. In answering the second question, I argue that the considerations of different forms of fairness arise to different extents in different sports; where there is little or no risk of doping out of competition in a certain sport, the justificatory force of fairness between competing athletes is correspondingly low. As a result, I conclude that the whereabouts requirements are not ethically acceptable in those instances where the risk of doping out of competition in some sport falls below some reasonable threshold value.

Finally, chapter 8 provides a summary overview of the argument presented herein, some practical policy recommendations that follow from it, and, finally, a brief account of WADA's current and ongoing finalization of its second regulatory review, which will ultimately result in a third iteration of its anti-doping rules, to be introduced in 2015. To its credit, WADA has seen fit to at least tentatively propose amendments to the whereabouts requirements that take much of the general thrust of the foregoing into account, among other things by allowing less strict whereabouts requirements for those sports that do not exhibit a sufficiently high risk of doping out of competition. The exact process of the review is, however, not open to scrutiny. As such, although the changes have been suggested by WADA itself, it remains to be seen whether or not, or to what extent,

they will actually be implemented in the final version. In the meantime, I point out that the current whereabouts requirements remain, at least in specific respects, legally and ethically unacceptable.

— 2 —

Doping and Anti-Doping

Performance-enhancing technologies have a long-standing history of use among humans, within organized sport as well as within other social practices. Over the past century—as sport has grown increasingly popular, widespread, and well financed—its various rules and regulations have undergone a significant expansion in both breadth and depth. Of the many sporting phenomena subject to such regulation, few have achieved the same focus, or notoriety, as performance enhancement, particularly in those instances where it is considered illicit, or doping. This drive to eliminate doping practices among elite athletes has resulted in the requirement that they submit their personal whereabouts information, for every day without exception, to their relevant ADOs. While some of the affected athletes consider the requirement to be an acceptable burden, as part of the general fight against doping in elite sport, others maintain that it constitutes an unacceptable invasion of their privacy.

2.1 The History of Performance Enhancement

The ingestion of various substances to increase strength and aggressiveness, reduce fear, and aid in healing and pain relief is widespread in both prehistoric societies and contemporary tribal societies.[1] This seems to suggest that performance-enhancing technologies have a history of longstanding and widespread use among humans. Similar

[1] For the former, see e.g. Cartmell et al., "The Frequency and Antiquity of Prehistoric Coca-Leaf-Chewing Practices in Northern Chile"; Gildenberg, "History of Pain Management," 439–40; for the latter, see e.g. Lehmann and Mihalyi, "Aggression, Bravery, Endurance, and Drugs."

indications for those civilizations that offer more complete historical records further confirm this conjecture. By the time of the Olympic Games in ancient Greece, for instance, athletes would consume such things as wine, hallucinogenic mushrooms, and dried figs, in order to strengthen themselves.[2] The gladiators of Rome also relied on various substances to fight and recover from injury more efficiently. The Greek-Roman physician Galen—whose prominence helped establish humoralism as the dominant theory of human physiology for several centuries—for a while treated the injuries of gladiators. In his writings, he suggested "Olympic Victor's Dark Ointment"—a mixture of, among other things, opium, frankincense (containing tetrahydrocannabinol), and crocus flowers—for the treatment of pain.[3]

There are similar claims about various groups from the Middle Ages, such as Viking berserkers and medieval knights.[4] Although the exact details of some of these statements are questionable,[5] the general hypothesis is nevertheless plausible: in warfare, as well as in ritualized displays of chivalry and heroism, it was likely commonplace to seek to gain an edge against one's opponents by utilizing those performance-enhancing technologies available at the time.

2.1.1 Performance Enhancement in the Modern Era

By the time of the first modern high-profile sporting events, during the second half of the nineteenth century, the practice of relying on performance-enhancing substances was standard among athletes. At that time, medical advances had caused widespread optimism regarding the possible expansion of human capacities.[6] Just prior to the start of the century, Edward Jenner successfully utilized cowpox blisters to inoculate patients

[2]Verroken, "Drug Use and Abuse in Sport," 1; Møller, *The Doping Devil*, 30.

[3]Bartels, Swaddling, and Harrison, "An Ancient Greek Pain Remedy for Athletes"; Harrison, Hansen, and Bartels, "Transdermal Opioid Patches for Pain Treatment in Ancient Greece."

[4]For the former, see e.g. Todd, "Anabolic Steroids," 91; Parrott et al., *Understanding Drugs and Behaviour*, 3–4; Mazanov and McDermott, "The Case for a Social Science of Drugs in Sport," 277; for the latter, see e.g. Verroken, "Drug Use and Abuse in Sport," 1; Møller, *The Doping Devil*, 30; Mazanov and McDermott, "The Case for a Social Science of Drugs in Sport," 277.

[5]Conclusive evidence for the claim that Viking berserkers ingested *armanita muscaria* mushrooms to increase their fearlessness and strength is, for instance, altogether lacking; it is instead probably based on a popularized myth originating in an entirely hypothetical article: Ödman, "Försök, att utur naturens historia förklara de nordiska gamla kämpars berserka-gång."

[6]For a general overview of medical development during this period, see Shortt, "Physicians, Science, and Status," esp. 52–54.

against smallpox. Anesthesia by diethyl ether—at first a source of entertainment at so-called *ether frolics*, where audience members would inhale diethyl ether or nitrous oxide for general amusement—was successfully administered to a patient by US physician Crawford Long, for the purpose of a tumor removal, in 1842. Following Louis Pasteur's work on micro-organisms and Ignaz Semmelweis's discovery in 1847 that fewer mothers died of childbed fever if their physicians first cleaned their hands in a chlorinated lime solution, Joseph Lister developed the practice of antisepsis, using carbolic acid (phenol), in the mid-1860s. These factors, particularly in combination with the development of radiology in 1895, helped transform surgery into a credible option for various ills. In the years between 1879 and 1884, the bacterial and protist causes of leprosy, typhoid, malaria, tuberculosis, diphtheria, cholera, and tetanus were all identified. Advances of these sorts underlie the gradual move from humoralism to modern cellular pathology.[7]

Within sport, this general medical optimism was reflected in the grueling endurance races of the day, including canal swimming and multi-day foot and bicycle races.[8] The competitors would openly ingest all manner of substances believed to enhance performance, ranging from *Vin Mariani*—a mixture of wine and coca leaves—through caffeine and pure oxygen to ether, nitroglycerine, cocaine, heroin, and strychnine.[9] There were few concerns about the potentially deleterious side effects; most athletes viewed performance-enhancing substances merely as "pharmacological antifatigue therapy."[10]

English cyclist Arthur Linton, protégé of infamous cycling manager "Choppy" Warburton, is often credited as the first doping fatality. The historical evidence, however, seems to indicate that he died of a fever at his own home, in 1886 or 1896 depending on the source.[11] It has never been determined whether the "magic potions" Warburton provided to his racers during competitions were performance-enhancing or merely showmanship on his behalf. Other cases are, however, more certain. UK athlete Thomas Hicks came close to death after almost collapsing numerous times during the marathon

[7]Ibid., 53.

[8]The latter included such feats as racing 585 km in twenty-four hours (Charles Terront in 1891) and completing 3,073 miles in six days of unlimited riding (Teddy Hale in 1896), as per Møller, *The Doping Devil*, 198n4.

[9]Møller, *The Doping Devil*, 30–31; Mazanov and McDermott, "The Case for a Social Science of Drugs in Sport," 277.

[10]Hoberman, "Putting Doping Into Context," 11.

[11]Todd, "Anabolic Steroids," 91; Møller, *The Ethics of Doping and Anti-Doping*, 34–35.

race at the 1904 St. Louis Olympics, only to be revived by injections of strychnine from his assistants. Although he fainted after crossing the finishing line, he recovered and went on to receive a gold medal for his feat.[12] Four years later, at the London Olympics, Italian athlete Sorando Pietri was less fortunate, losing out on the first place prize as a result of being carried over the finishing line by his fans, after collapsing due to strychnine ingestion.[13]

Not all athletes were content with this situation. At the 1923 Tour de France, racing brothers Henri and Francis Pélissier complained to the press about the extent of their dependence on performance-enhancing substances:

> Do you want to see what we run on? Look. ... That's cocaine for the eyes; that's chloroform for the gums. ... That is a cream to warm up my knees. And the pills, do you want to see the pills? ... In short, we run on "dynamite."[14]

There was also skepticism from some sporting organizations, as reflected in the arguably first prohibition against athlete doping, by the International Association of Athletics Federations (IAAF), from 1928:[15]

> Doping is the use of any stimulant not normally employed to increase the poser of action in athletic competition above the average. Any person knowingly acting or assisting as explained above shall be excluded from any place where these rules are in force or, if he is a competitor, be suspended for a time or otherwise from further participation in amateur athletics under the jurisdiction of this Federation.[16]

Conceptual weakness apart, this prohibition had little effect on use of performance-enhancing substances by athletes, not least because there were no reliable anti-doping systems, or corresponding detection procedures, in place at the time.[17] And the discoveries and syntheses of increasingly efficient substances for performance enhancement only compounded this situation.

[12]Verroken, "Drug Use and Abuse in Sport," 2; Mazanov and McDermott, "The Case for a Social Science of Drugs in Sport," 277; Møller, *The Ethics of Doping and Anti-Doping*, 35.
[13]Møller, *The Ethics of Doping and Anti-Doping*, 35.
[14]As quoted in ibid., 36.
[15]Note however that doping seems to have been banned in horse races, primarily to protect gamblers from the uncertainty doping introduced into their betting calculations, as early as 1903, with testing occurring from 1910 onwards, as per Verroken, "Drug Use and Abuse in Sport," 2.
[16]As quoted in Brown, *IAAF Medical Manual*, ch. 15, p. 1.
[17]Mazanov and McDermott, "The Case for a Social Science of Drugs in Sport," 277.

The US chemist Fred Koch laid the groundwork in 1927 for the development of synthetic testosterone in 1935.[18] The 1930s and 1940s also saw the development and large-scale production of amphetamines. Due to their ability to combat fatigue and enhance awareness, they were provided to soldiers and pilots among both the Allied Forces and the Axis States during World War II, a state of affairs that seems to have normalized attitudes toward their use in sport.[19] It was not until after the war that the general enthusiasm for this sort of pharmacological performance enhancement started coming under serious question.

2.1.2 The Rise of Anti-Doping Sentiment

Over the last century, sporting events have attracted increasing commercial interests, resulting in, among other things, larger prize rewards and greater publicity for the winners. Where the drive to excel in sport has successively obtained greater spectator interest, corporations have utilized sponsorship opportunities to simultaneously increase brand awareness and help fund the means of the sport to reach out to ever larger numbers of spectators. High-profile sporting events are today not only an opportunity for athletes to attain or maintain national or local sporting pride, but also a prime marketing opportunity for large corporations. A similar strategy also applies to top-level elite athletes, who are commonly seen both inside and outside the sporting context endorsing or using some product or service. Lucrative income from such endorsements presumably constitutes a highly attractive opportunity for many athletes, and is likely to figure, at least incidentally, as an additional reason to seek to attain sporting glory.[20]

The increasing goods at stake for the winners—in addition to the increasingly sophisticated technological tools that can be utilized to more accurately determine winners in terms of millimeters or milliseconds—have contributed to the development of increasingly refined and specific rules and regulations for different sports.[21] This development is spurred on by the general sentiment that sporting competitions ought to be testing certain athlete skills rather than others. Dedication to the sport is, generally,

[18] Todd, "Anabolic Steroids," 92–93.

[19] Dimeo, "The Origins of Anti-Doping Policy in Sports," 33–34.

[20] Cf. Waddington and Smith, *An Introduction to Drugs in Sport*, 71–73; as well as the first three contributions to part 6, "Commercialism, Corruption and Exploitation in Sports," in McNamee, *The Ethics of Sports*.

[21] Cf. Waddington and Smith, *An Introduction to Drugs in Sport*, 68–71.

valued higher than access to technological training assistance. Hard work and toil, to seek to achieve the composition that makes a win possible, are valued over what might be deemed shortcuts to the same goal, such as relying on certain forms of performance-enhancing substances.[22]

As a result, various stipulations are now implemented as to, for instance, the precise dimensions and materials allowed for different sorts of sporting equipment. One recent example of this is the decision by the International Swimming Federation (FINA) to specify those body parts that may be covered by swimsuits, and the materials permitted in swimsuits at swimming competitions, in addition to stipulating that "all FINA approved swimwear ... must be available for all competitors by 1st January of the year of the Olympic Games or FINA World Championships."[23]

The rules and regulations regarding performance-enhancing technologies have seen analogous developments over the past few decades. The perceived need for this is underscored not only by the historical evidence that athletes have long been willing to utilize whatever means were at their disposal to improve performance, but also by more contemporary research supporting the view that the will to win is sufficiently powerful to be potentially subversive. Many athletes, for instance, express a strong hypothetical willingness to trade several years off their life spans in return for significant improvements in their athletic results.[24] Such a state of affairs makes it reasonable to assume that athletes might be tempted to use whatever performance-enhancing technologies they are allowed to, or that they believe they can get away with.

The post-war period provides additional confirmation for such a view. As newer performance-enhancing substances like testosterone and amphetamine became more widely available, there was a sharp increase in their use among athletes.[25] Athletes were also quick to begin utilizing Dianabol, the first commercially produced anabolic steroid, as soon as it became available on the market in 1958.[26]

[22]Waddington and Smith suggest that the traditional English custom of placing wagers on sporting outcomes may have served as a strong underlying motivation for these sorts of value-judgments, as per Waddington and Smith, *An Introduction to Drugs in Sport*, 36–38.
[23]FINA, *By Laws 2009–2013*, § BL8.
[24]Todd, "Anabolic Steroids," 88–89, 91–92.
[25]Houlihan, *Dying to Win*, 34–35; Mazanov and McDermott, "The Case for a Social Science of Drugs in Sport," 278.
[26]Todd, "Anabolic Steroids," 93–94.

At the same time, the post-war period was characterized by a general and gradual move away from the almost unbridled medical enthusiasm of the previous generations. The research of physiologist and epidemiologist Richard Doll, which linked tobacco smoking to lung cancer, highlighted the serious potential health effects of regularly using certain substances.[27] As a result of these sorts of discoveries, US doctors began questioning the health benefits of, among other things, amphetamines, particularly where they feared that their introduction to college-level and other younger athletes might have subsequent wide negative social implications.[28] This sort of view gained important traction as doubts about recreational drug use by non-athletes grew, culminating in US President Nixon's declaration of the "War on Drugs" in 1971.[29]

In the world of sport, the death of Danish cyclist Knud Jensen in 1960 served as a dramatic indication to the public that doping by elite athletes constituted a serious problem. Jensen collapsed during the one hundred km bicycle race at the Summer Olympics in Rome, ostensibly due to heat stroke, although his collapse has been blamed on amphetamine so many times since then that the story has almost taken on the status of legend.[30] No substantial evidence seems to support the amphetamine charge, although it likely contributed to the eventual passing, in 1967, of the CE Resolution on the Doping of Athletes (67/12), an event that signaled the beginning of modern anti-doping legislation.

After English cyclist Tommy Simpson died in the middle of the televised 1967 Tour de France, with post mortem traces of amphetamine in his blood, the International Olympic Committee (IOC)—having done little more than publicly denounce doping during the previous years—began implementing systematic doping tests. The 1972 Munich Olympics saw extensive testing for the first time, resulting in seven positive tests for the likes of ephedrine and amphetamine.[31]

Anabolic steroids were, however, still not on the anti-doping radar at the time, due as much to a lack of knowledge among anti-doping officials about its widespread use as to medical disagreement on whether or not it actually provided any performance-enhancing effects.[32] Nor were there any reliable tests for the detection of blood doping.

[27]Dimeo, "The Origins of Anti-Doping Policy in Sports," 32.
[28]Ibid., 34–35.
[29]Hoberman, "Putting Doping Into Context."
[30]Møller, *The Ethics of Doping and Anti-Doping*, 37–42.
[31]Mazanov and McDermott, "The Case for a Social Science of Drugs in Sport," 279.
[32]Todd, "Anabolic Steroids," 96–97.

This lacuna was exploited by various actors in sport, including the German Democratic Republic (GDR). Due to systematic and forced doping of athletes, beginning in the late 1960s and continuing until the collapse of the country in 1989, the GDR was able to secure a disproportionate number of Olympic and world medals, given the size of its population.[33]

Additionally, many saw the IOC as incapable of backing their anti-doping rhetoric with sufficient action. The time period 1968–96 saw fifty-three positive doping tests during the various Olympic Games, out of approximately 15,400 tests performed,[34] despite acknowledgement from numerous athletes about the endemic proportions of various forms of doping. The president of the IOC during the period 1980–2001, Juan Antonio Samaranch, is widely credited with having successfully commercialized the Olympic Games. Others have, however, raised concerns over his seeming inability to implement effective doping control. John Hoberman goes as far as accusing Samaranch of viewing doping as "primarily a public relations problem that threatened lucrative television and corporate contracts that are now worth billions of dollars," maintaining that his leadership resulted in "an almost total commercializing of the Olympic Games," which contributed to converting the Olympic movement "into an advertising vehicle for the multinational corporate sponsors and American television networks that are the foundation of his power."[35]

This general state of affairs changed dramatically when a *soigneur* (massage therapist and assistant) to the Festina cycling team at the 1998 Tour de France was caught by French customs officials with large quantities of EPO and anabolic steroids in the trunk of his car. The discovery triggered further investigations and police searches, which in turn led to team personnel arrests, negative media publicity, a flurry of doping confessions by various riders, and an unprecedented amount of withdrawals of teams from the race, leaving its reputation shattered.[36] The situation saw significant involvement from politicians intent on tackling the issue of doping in elite sport.[37] And to the general public, it made clear, for perhaps the first time, the truly endemic nature of doping practices in, at least, professional cycling.

[33] See Spitzer, "A Leninist Monster"; Spitzer, "Sport and the Systematic Infliction of Pain."
[34] IOC, *Factsheet*, 2.
[35] Hoberman, "How Drug Testing Fails," 242, 245; see also Waddington and Smith, *An Introduction to Drugs in Sport*, 181–82.
[36] Waddington and Smith, *An Introduction to Drugs in Sport*, 132.
[37] Hoberman, "How Drug Testing Fails," 264–65.

As a direct result of the Festina scandal, and in an attempt to counter its declining image, the IOC convened a "World Conference on Doping in Sport" in Lausanne, Switzerland February 2–4, 1999.[38] The resulting *Lausanne Declaration on Doping in Sport* called for the creation of an "independent international anti-doping agency," with the objective to harmonize the various anti-doping rules and standards in place at the time.[39] As a result, on November 10, 1999, WADA was formed.

2.2 The World Anti-Doping Agency

WADA is composed in equal parts of representatives from the sporting movement and from world governments. Its stated mission is to "promote, coordinate and monitor the fight against doping in sport in all its forms."[40] The mission is explicated in its core defining document, the *World Anti-Doping Code* (hereafter *WADC*), originally implemented in 2004 (hereafter *WADC1*), and revised and re-implemented in 2009 (hereafter *WADC2*). Identified as "fundamental and universal" to WADA's approach, the stated purpose of the *WADC* is to "advance the anti-doping effort through universal harmonization of core anti-doping elements," by being "specific enough to achieve complete harmonization on issues where uniformity is required, yet general enough in other areas to permit flexibility on how agreed-upon anti-doping principles are implemented."[41] The *WADC* contains stipulations on, among other things, the roles and responsibilities of different ADOs and governments in undertaking anti-doping work. These are further detailed in the supplemental and mandatory *International Standards* (such as the *International Standard for Testing*, hereafter *IST*; and the *International Standard for the Protection of Privacy and Personal Information*, hereafter *ISPPPI*), as well as various non-mandatory, but by WADA recommended, "Models of Best Practice and Guidelines."[42]

WADA is responsible for the universal harmonization and implementation of its anti-doping policy, but does not normally undertake practical anti-doping work, such

[38]For a general overview of these developments, see Waddington and Smith, *An Introduction to Drugs in Sport*, ch. 10.
[39]IOC, *Lausanne Declaration on Doping in Sport*, § 4.
[40]WADA, *About WADA*.
[41]WADA, *WADC2*, 11.
[42]Ibid., 12–13.

as anti-doping testing or athlete education, itself. These sorts of responsibilities instead fall on the various ADOs, which WADA defines as those "organizations responsible for adopting, implementing or enforcing anti-doping rules within their authority"; a list that includes the IOC, the International Paralympic Committee, major sporting event organizations, International Federations (IFs), and National Anti-Doping Organizations (NADOs).[43] The two most important for present purposes—insofar as they bear the responsibility for monitoring athlete whereabouts in accordance with the *WADC*—are IFs and NADOs. An IF is the global governing body of a specific sport or discipline, responsible for, among other things, creating the rules of the sport, and organizing global or regional championships within it. A NADO is an entity recognized by a country as "possessing the primary authority and responsibility to adopt and implement anti-doping rules, direct the collection of Samples, the management of test results, and the conduct of hearings" at a national or regional level.[44] As far as anti-doping work is concerned, the jurisdictions of IFs and NADOs can overlap; elite athletes competing at an international level will belong to both the IF of their relevant sport and the NADO of their relevant country or region.

WADA's general anti-doping efforts, and the *WADC* in particular, receive a large part of their moral mandate from the existence of various international anti-doping agreements and declarations, dating back to the 1967 CE Resolution on the Doping of Athletes. The most important among these include the 2003 WADA Copenhagen Declaration on Anti-Doping in Sport, and the 2005 UNESCO International Convention against Doping in Sport. The Copenhagen Declaration—which has been ratified by 193 countries worldwide—was drafted and agreed to by governments as a first political step toward a globally harmonized anti-doping policy framework. The UNESCO Convention—which came into force in 2007 and has so far been ratified by 164 countries worldwide—seeks to ensure this, with a stated purpose of promoting "the prevention of and the fight against doping in sport, with a view to its elimination."[45] To this effect, the Convention stipulates the following for all contracting states:

> States Parties commit themselves to the principles of the [*WADC*] as the basis for the [adoption of appropriate anti-doping measures, such as legislation, regulation,

[43]WADA, *WADC2*, 16.
[44]Ibid., 131.
[45]International Convention against Doping in Sport, art. 1.

> policies or administrative practices]. Nothing in this Convention prevents States Parties from adopting additional measures complementary to the [*WADC*].[46]

WADA's 2009 *WADC2* contains explicit reference to the UNESCO Convention, requiring each government to "take all actions and measures necessary to comply with [it]."[47] Failure to do so has important potential consequences:

> Failure ... to comply with the [UNESCO Convention] ... may result in ineligibility to bid for Events ... and may result in additional consequences, e.g. forfeiture of offices and positions within WADA; ineligibility or non-admission of any candidature to hold any International Event in a country, cancellation of International Events; symbolic consequences and other consequences pursuant to the Olympic Charter.[48]

In addition to this sort of pressure on governments to comply with the stipulations of the *WADC*, WADA also requires governments to "respect arbitration as the preferred means of resolving doping-related disputes."[49] Such arbitration occurs most often at the level of the individual ADO, in deciding on appropriate sanctions for an athlete found to have committed an anti-doping rule violation. Where an athlete disagrees with a final ruling, there is a possibility of appealing the ruling to the Court of Arbitration for Sport (CAS). CAS—which was founded in 1984 as a result of the increasing number of international sports-related disputes—provides an "arbitral jurisdiction devoted to resolving disputes directly or indirectly related to sport."[50] It is independent of governments and sporting organizations, and generally considered the court of last resort for sport cases.

Although WADA has no direct influence over CAS, the latter have consistently upheld the legitimacy of WADA and its *WADC* in the majority of doping cases heard at the court in recent years.[51] In addition, WADA reserves the right to, at any time, appeal the final decisions of any ADO directly to CAS, regardless of whether or not the ADO's internal arbitration mechanisms have been exhausted, as many of those cases demonstrate.[52]

[46]Ibid., §§ 4–5.
[47]WADA, *WADC2*, § 22.1.
[48]Ibid., § 22.6.
[49]Ibid., § 22.3.
[50]CAS, *History*.
[51]See e.g. *WADA v. FILA* 2008/A/1470 (CAS); *WADA v. Pakistan Cricket Board* 2006/A/1190 (CAS).
[52]WADA, *WADC2*, § 13.1.1.

Since the inception of WADA, there have been numerous high-profile doping exposures. In 2003, for instance, the US Anti-Doping Agency (USADA) began investigating Victor Conte—the founder and owner of the Bay Area Laboratory Co-Operative (BALCO)—as the result of an anonymous phone call naming Conte as the source of the steroid tetrahydrogestrinone (THG). The anonymous tip—which later turned out to be from Trevor Graham, former sprint coach of, among others, Marion Jones—was followed by the delivery of a syringe containing THG, for which there were no detection procedures at the time (and which had therefore earned it the nickname "the Clear" among those aware of its existence). A testing procedure for THG was quickly developed, and USADA proceeded to retest a large amount of athlete samples taken at previous competitions. This resulted in a number of positive tests for several athletes, including UK sprinter Dwain Chambers, who was subsequently sanctioned with a two-year ban from athletics.[53]

Similarly, Spanish police began an operation, codenamed *Operacíon Puerto*, against Spanish doctor Eufemiano Fuentes in 2006. Upon raiding his clinic in Madrid, they found blood bags and lists of elite athletes from various different sports. Among others, the lists named cyclists Jan Ullrich and Ivan Basso, who were subsequently excluded from the 2006 Tour de France prior to its start, despite being generally considered favorites to win.[54] During the race itself, American rider Floyd Landis did well until the sixteenth stage, where he lost a full eight minutes. During the seventeenth stage, the very next day, he regained the loss with a sudden burst of energy. His subsequent doping test, which was not revealed until after the race had completed and Landis had been declared the winner of the 2006 Tour, showed that he had elevated levels of testosterone.[55] As a result, Landis was dismissed from his team, stripped of his Tour victory, and banned from cycling for two years. Although initially maintaining his innocence and appealing against the decision, he confessed in 2010 to doping for most of his professional career, through the use of such performance-enhancing technologies as EPO, testosterone, human growth hormone, and blood doping, along with "female hormones and a one-time experiment with insulin."[56] Additionally, Landis implicated several other

[53]Kimball and Dure, *BALCO Investigation Timeline.*
[54]Møller, *The Scapegoat*, 15.
[55]Ibid., 16–17.
[56]Ford, *Landis Admits Doping, Accuses Lance.*

riders as having doped, including his former teammate Lance Armstrong.[57] As a result, WADA promised to investigate the allegations:

> WADA is aware of the serious allegations made by Mr. Landis. We are very interested in learning more about this matter and we will liaise with [USADA] and any other authorities with appropriate jurisdiction to get to the heart of the issues raised. WADA looks forward to these further investigations and enquiries by those responsible.[58]

Armstrong, who had won the Tour a record seven consecutive times during the years 1999–2005, had long been dogged by doping accusations, although he never had a positive doping test recorded against him. As a result of numerous eye witness testimonials from former teammates, such as Landis, USADA in 2012 nevertheless stripped Armstrong of all his competitive results from 1998 to present, and imposed a lifetime ban from cycling on him.[59] At first, he chose not to contest the sanctions: "There comes a point in every man's life when he has to say, 'Enough is enough.' ... For me, that time is now."[60] Then, in January 2013, Armstrong confessed in a television interview to doping during his full run of Tour de France victories.[61] The extent to which these revelations will affect the future of the Tour remain to be seen.

2.2.1 Whereabouts

Although in-competition testing forms an important part of anti-doping monitoring activities, WADA views out-of-competition testing as central to its success. Insofar as "a number of prohibited substances and methods are detectable only for a limited period of time in an athlete's body while maintaining a performance-enhancing effect," WADA views out-of-competition testing as "at the core of effective Doping Control" and "one of the most powerful means of deterrence and detection of doping."[62] This view is an extension of the call for the creation of an international anti-doping agency in the *Lausanne Declaration*, which maintained that "consideration should be given in particular to expanding out-of-competition testing."[63]

[57] Ibid.
[58] As quoted in ibid.
[59] Macur, *Armstrong Drops Fight against Doping Charges.*
[60] Ibid.
[61] BBC, *Lance Armstrong Admits Doping to Win Cycling Titles.*
[62] WADA, *WADC1*, 29; WADA, *Questions and Answers on Whereabouts.*
[63] IOC, *Lausanne Declaration on Doping in Sport*, § 4.

For out-of-competition testing to be effective, it is important for an ADO to not only know where athletes are, but also to be able to test them at those times during which they would be most likely to use any prohibited technologies. To overcome the practical limitations of this, WADA included whereabouts requirements in its original *WADC1*, with supplements, in 2003 (implemented in 2004). These detailed the obligations of ADOs to monitor the whereabouts of their top-level elite athletes, as well as the obligations of the athletes to report their whereabouts to their relevant ADOs.

Prior to considering whereabouts specifically, all ADOs were required to undertake a general evaluation of the potential risk of doping in each sport or discipline, as based on various considerations such as the physical demands of the sport or discipline, any available and relevant doping statistics or research about doping trends within it, and the relevant training periods and competition seasons.[64] This would then be used as the basis for a test distribution plan, in order to ensure that the available resources for testing were allocated in the most efficient manner possible. The plan, to be continuously updated to take account of any relevant changes, would also need to consider the specific case of each individual athlete within the ADO's testing jurisdiction, in order to ensure that testing was focused primarily on those athletes exhibiting behavior that could indicate an increased risk or pattern of doping.[65]

As regards whereabouts, all ADOs were required to establish a registered testing pool (RTP) of athletes, who would, in virtue of their inclusion in the RTP, be subject to the full whereabouts requirements. At a minimum, IFs were required to include in their RTPs all athletes who "compete at a high level of international competition," while NADOs were required to include all athletes who were "part of national teams in Olympic and Paralympic sports and recognised national federations."[66] The ADOs were tasked with setting the exact sport-specific threshold criteria by which to implement this mandate, in order to ensure that the focus for out-of-competition testing would fall on the higher echelons of athletes within any given sport.[67]

The whereabouts obligations for those athletes who were included in an RTP were, to a large extent, determined by their respective ADOs. Although WADA's *WADC1*

[64]WADA, *IST1*, § 4.5.
[65]Ibid., § 4.6.
[66]WADA, *WADC1*, § 5.1.1; WADA, *IST1*, § 4.3.1.
[67]WADA, *WADC1*, 77.

included stipulations on certain minimum "accurate, current location information"—more specifically: name, sport, home address, contact phone numbers, training times and venues, training camps, travel plans, competition schedule, and disability where applicable—that the athletes had to provide to their relevant ADOs, it left it up to the individual ADOs to "define procedures and/or systems" for how to collect, maintain, and monitor athlete whereabouts information.[68] It also granted the ADOs the right to decide, "based on reasonable rules," what would constitute a missed test, and how many whereabouts filing failures or missed tests would constitute an anti-doping rule violation.[69] WADA furthermore allowed significant freedom to the ADOs in determining and implementing proper sanctions for whereabouts rule failures, ranging from three months' to two years' ineligibility, at the ADO's discretion.[70] This flexibility was, ostensibly, due to the "varying circumstances encountered in different sports and countries," and needed to be developed by each ADO in correspondence with the initial doping risk evaluation they would have undertaken for each sport.[71]

2.2.2 Whereabouts Criticism

The original whereabouts requirements received significant media exposure in the wake of high-profile cases of whereabouts filing failures, such as those of Greek sprinters Katerina Thanou and Kostas Kenteris, who were subsequently excluded from the 2004 Athens Olympic Games, and Danish cyclist Michael Rasmussen, who had his team contract cancelled due to whereabouts failures while in the yellow jersey at the 2007 Tour de France (more on which in chapters 6 and 7).[72] Despite such instances arguably demonstrating the need for the system, the requirements nevertheless faced considerable criticism. A 2006 survey of 236 Norwegian elite athletes on various aspects of WADA's anti-doping regulations clearly showed this.[73] Anonymous comments detailing the harshness of the whereabouts requirements included the view that the fact that

[68]WADA, *IST1*, §§ 4.4, 14.3.
[69]WADA, *WADC1*, § 2.4.
[70]Ibid., § 10.4.3.
[71]Ibid., 11.
[72]BBC, *Greek Duo Out of Olympics*; BBC, *Leader Rasmussen Pulled from Tour*.
[73]Hanstad and Loland, "Elite Athletes' Duty to Provide Information On Their Whereabouts"; Hanstad, Skille, and Thurston, "Elite Athletes' Perspectives on Providing Whereabouts Information"; a similar survey was undertaken in the UK in 2007, with highly similar results—for details, see Waddington, "Surveillance and Control in Sport," 260–61.

athletes "can risk exclusion because of this system" was "reprehensible," and the personal experience of having "received written warnings for forgetting to update twice," and feeling, "after I received the letter, almost like a doping sinner."[74] As part of the same study, an Olympic medalist expressed the following sentiment:

> It is a system that is based on everyone being sinners. It is created by people with good intentions and a decent goal, but they miss completely and abuse their power in a way that in no other democratic organ than sports would ever achieve approval. Systems like these belong in very different political systems than that which is called democracy.[75]

Swedish heptathlon athlete Carolina Klüft expressed similar sentiments in a newspaper interview in 2006. There, she maintained that it took her "hours" to complete her whereabouts filings, and that it was "impossible as a human" to subsequently remember what she had registered in the filing, if she would need to make any changes. Half jokingly, she suggested having a chip operated into her arm as a feasible alternative:

> Give me a chip and I'll operate it into my arm. You can have me on GPS, some bloody computer where you can see me all the time. The doping control officials know where I am anyway, so for me it's not a big deal if they also know when I go to the bathroom. Given the amount of time and worry I spend on making sure not to miss any controls, I'd rather have had it that way.[76]

In addition to these concerns, over one third of the surveyed Norwegian athletes stated that it had occurred that they had not been able to update their whereabouts information due to technical problems.[77] Approximately one in five expressed a lack of confidence in the technological implementation of the whereabouts system, and more than 11 percent claimed that they had received a written warning regarding their whereabouts as a result of a technical problem.[78] One participant gave a particularly illustrative comment on this:

> The system for registration is not good enough. I have experienced approximately 5–10 times during the last year that the login on the web does not work. SMS is

[74]Hanstad and Loland, "Elite Athletes' Duty to Provide Information On Their Whereabouts," 6.
[75]Ibid., 7.
[76]Roos, *Operera in ett chip i mig*, author's translation from Swedish.
[77]Hanstad, Skille, and Thurston, "Elite Athletes' Perspectives on Providing Whereabouts Information," 39.
[78]Ibid., 38.

> problematic to send from abroad. It is difficult to reach people to register over the phone because of opening hours, breaks and meetings.[79]

In addition to this sort of criticism, the flexibility inherent in the whereabouts system resulted in a lack of standardization that many, WADA included, found problematic. Where, for instance, two ADOs (such as an IF and a NADO) might have testing jurisdiction over the same athletes, it could be that they would not be able to agree on whether or not, or to what extent, an athlete ought to be subject to sanctions, due to differing stipulations regarding whereabouts filing failures, missed tests, and appropriate sanction lengths. This could lead to a situation where the same athlete might be sanctioned by one ADO, but not by another, resulting in inconsistent rulings regarding competition eligibility. Similarly, two athletes from the same country, both guilty of the same sort of whereabouts filing failures or missed tests, could receive sanctions of different lengths, due to the specific whereabouts stipulations of their respective IFs, which many athletes found unfair.[80]

As a result, and after a lengthy consultation process, WADA implemented revised whereabouts requirements with the new version of the *WADC*, which came into effect on January 2009. It represents an effort by WADA to harmonize the various previously instantiated whereabouts rules across the board into one central piece of regulation. This second version, the *IST2*, underwent minor further revisions in 2011, which were implemented in 2012.[81]

2.3 Current Whereabouts Requirements

WADA's revised whereabouts requirements include definitions of precisely what constitutes an anti-doping rule violation in relation to whereabouts and missed tests, and what potential sanctions can be applied in such cases. Their general form, however, still

[79] Hanstad, Skille, and Thurston, "Elite Athletes' Perspectives on Providing Whereabouts Information," 39; see also Hanstad, "Governance and the Whereabouts System," for an enlightening discussion on the issue, with further sources.

[80] Hanstad and Loland, "Elite Athletes' Duty to Provide Information On Their Whereabouts," 4–5; WADA, *IST3*, 42; WADA, *Questions and Answers on Whereabouts*; see also the various resources at WADA, *Code Review - Archives*, generally, for an exhaustive overview of the commentary received by WADA in drafting their 2009 version of the *WADC*.

[81] Although I reference the third version, *IST3*, in what follows, the wording and status of all the elements of interest herein are identical between the 2009 *IST2* and the 2012 *IST3*.

follows the original *WADC1* and *IST1*, obliging ADOs to undertake a doping risk evaluation for each sport or discipline under their jurisdiction and to create and maintain a corresponding RTP of athletes subject to the full whereabouts requirements, as well as obliging the athletes themselves to submit specific whereabouts information to their relevant ADO.

The new requirements stipulate that an ADO's test distribution plan should still consist of "a considered evaluation of the risk of doping and possible doping pattern for the sport/discipline/nation in question," on the basis of the same criteria as previously (i.e. the physical demands of a sport, relevant doping statistics or research about doping trends, and relevant training periods and competition seasons), with additional consideration of the "history of doping in the sport and/or discipline," and any "information received on possible doping practices."[82] Furthermore, the new rules explicitly stipulate how this doping risk evaluation should help guide the allocation of testing resources for each ADO, rather than leaving it to the interpretation of the ADO, as previously:

> In sports and/or disciplines with a high risk of doping Out-of-Competition, Out-of-Competition Testing shall be made a priority, and a substantial portion of Testing shall be conducted Out-of-Competition. However, some material amount of In-Competition Testing shall still take place. For those sports and/or disciplines where there is a low risk of doping Out-of-Competition, In-Competition Testing shall be made a priority, and a significant amount of Testing shall be conducted In-Competition. However, some material amount of Out-of-Competition Testing shall still take place.[83]

This sort of test distribution planning still allows a certain degree of flexibility for the ADOs. A NADO is, for instance, not required to include in their RTP athletes from those sports or disciplines with a sufficiently low risk of doping, in order to instead focus their testing resources on those sports or disciplines with a higher risk of doping.[84] Note, however, that where such athletes compete at a sufficiently high international level, they will nevertheless be subject to WADA's whereabouts requirements in virtue of being part of their IF's RTP. All ADOs, both NADOs and IFs, are required to create and maintain an RTP of those athletes competing at a sufficiently high sport-relative level to be made subject to the whereabouts requirements, and all ADOs are further required to ensure

[82]WADA, *IST3*, §§ 4.3.1–4.3.2.
[83]Ibid., §§ 4.3.5–4.3.6.
[84]Ibid., § 4.4.4.

that at least some of their testing is performed out-of-competition, as per the above quote, regardless of a sport's particular doping risk profile.

The specific stipulations regarding an ADO's criteria for selecting which athletes to include in their RTP are also more extensive than in the original rules. ADOs are now required to make their respective criteria public, along with an up-to-date list of those athletes included in their RTP on the basis of those criteria.[85] The criteria—and, subsequently, the number of athletes in an ADO's RTP—will differ from sport to sport. But at a minimum, each IF is expected to include in their RTP all athletes who "compete regularly at the highest level of international competition (e.g. candidates for Olympic, Paralympic or World Championship medals), determined by rankings or other suitable criteria, "while each NADO is expected to include in their RTP all athletes who have been included in the RTP of their IFs, or who "perform at Olympic/Paralympic or World Championship level and may be selected for such events."[86] In addition, ADOs with jurisdiction over team sports may choose to define the criteria for inclusion in their RTP by reference to teams, rather than to individual athletes (although the latter are still responsible for ensuring both that their in-team and away-from-team whereabouts are correctly filed). Note also that these are merely the minimum requirements WADA levies against ADOs—the latter are allowed to develop more and broader athlete testing pools than just the RTP, where the affected athletes are then subject to stricter or "lesser" whereabouts requirements, as befits the situation.[87]

In addition to this allocation of testing resources within an RTP, WADA also requires ADOs to develop a strategy for determining which individual athletes to subject to no advance notice out-of-competition doping tests. For this purpose, WADA recommends a combination of random selection, weighted random selection (where the chance of an athlete being randomly selected is made to correspond to some pre-determined ranking criteria), and target testing.[88] Although all three methods are viable, the *WADC2* stipulates that the latter is to be made a "priority."[89] Target testing is testing "based on the intelligent assessment of the risks of doping and the most effective use of resources to ensure optimum detection and deterrence."[90] This is to be established by any of a num-

[85]Ibid., § 11.2.
[86]Ibid., 45.
[87]Ibid., 43.
[88]Ibid., § 4.4.
[89]WADA, *WADC2*, § 5.1.3.
[90]WADA, *IST3*, § 4.4.2.

ber of different factors, including physiological (such as abnormal blood parameters or injury), behavioral (such as going into or coming out of retirement, withdrawing from expected competitions, or the submission of whereabouts information that indicates a risk of doping), historical (such as sudden major performance improvements, moves from junior to senior level, or prior doping test results), and environmental (such as important financial incentives, association with third parties with a history of involvement in doping, or reliable information from other parties).[91]

The whereabouts requirements for athletes stipulate that all athletes who are chosen by their relevant ADO for inclusion in the latter's RTP—and are therefore subject to the requirements—must make a whereabouts filing with their ADO prior to each annual quarter. The filing must contain, among other things, the following:

1. A complete mailing address.
2. The consent of the athletes to the sharing of their whereabouts information with other ADOs with the authority to test them.
3. For each day of the subsequent quarter, the full residential address of the athletes (at home, at hotels, etc.).
4. For each day of the subsequent quarter, the name and address of every location used by the athletes for regular activities (training, work, school, etc.), as well as the expected time-frames for those activities.
5. For the subsequent quarter, the athletes' competition schedule.[92]

In addition to this, the rules also require the athlete to specify, for the subsequent quarter, "one specific 60-minute time slot between 6 a.m. and 11 p.m. each day where the Athlete will be available and accessible for Testing at a specific location."[93] This requirement does not preclude the possibility of testing between 11 p.m. and 6 a.m., it merely relieves athletes of the possibility of being charged with a *missed test* during that time period, or indeed any time period outside the specified sixty minutes.[94]

[91]WADA, *IST3*, § 4.4.2.
[92]Ibid., § 11.3.1.
[93]Ibid., § 11.3.2.
[94]Ibid., § 11.4.

There are various ways in which an athlete may fall foul of these rules. Particularly egregious instances, such as an athlete knowingly supplying fraudulent whereabouts information, may be considered under doping violation headings other than whereabouts, like sample evasion, or tampering or attempted tampering with a doping control.[95] Most will, however, fall under the whereabouts rubric, according to which any three *whereabouts failures* within an eighteen-month period (starting from the date of the first whereabouts failure) constitute an anti-doping rule violation, and result in a subsequent suspension of the athlete for a time period of between one and two years, depending on the athlete's "degree of fault."[96]

A whereabouts failure is defined as either a missed test or a filing failure. A missed test only concerns an athlete's daily sixty-minute time slot, as already noted. It applies to any instance where a doping control officer is unable to locate the athlete for testing during the time slot, despite undertaking whatever is "reasonable in the circumstances (i.e. given the nature of the specified location) to try to locate the Athlete, short of giving the Athlete any Advance Notice of the test."[97]

A filing failure arises whenever athletes have failed to provide or update "accurate and complete" whereabouts information. This can occur in one of three ways. First, it may be that an athlete simply does not provide whereabouts information in advance, as required. Second, it may be that the provided whereabouts information is obviously inaccurate or otherwise inadequate to allow a doping control officer to locate the athlete, in which case it will constitute a filing failure prior to any attempt to locate the athlete. Third, it may be that the provided whereabouts information is inadequate to allow a doping control officer to locate the athlete, but that this only becomes obvious once any such attempt is made (outside the athlete's sixty-minute time slot).[98]

Although individual athletes are allowed to delegate whereabouts filings and updates to third parties (trainers, coaches, teams, etc.), they remain "ultimately responsible at all times for making accurate and complete Whereabouts Filings" and "personally responsible at all times for ensuring [they are] available for Testing at the whereabouts declared on [their] Whereabouts Filings," regardless of whether or not they "made that

[95]WADA, *IST3*, § 11.3.4; WADA, *WADC2*, §§ 2.3, 2.5.
[96]WADA, *WADC2*, §§ 2.4, 7.4, 10.3.3.
[97]WADA, *IST3*, § 11.4.3.
[98]Ibid., 49–50.

filing personally or delegated it to a third party (or a mixture of the two)."[99] WADA is adamant that delegation to third parties can not function as a defense to an allegation of a missed test or filing failure. This is similar to the strict liability criterion for the presence of any prohibited substances in an athlete's sample, which specifies that there is no need to demonstrate "intent, fault, negligence or knowing use" in order to hold an athlete liable for the adverse sample.[100]

For these reasons, it is in the interest of the athletes themselves to ensure that they provide sufficient whereabouts information for any doping control officer to be able to locate them, and gain access to where they are, for testing. If they are unsure what their whereabouts will be for certain periods during a forthcoming quarter, or if their whereabouts change unexpectedly, they are required to update them as and when they gain certainty of what they will be, so long as the reporting of the changes occurs in advance of the changes themselves.[101] But although it is possible to update one's location for the daily sixty-minute time slot up until the start of that time period, doing so in a manner regarded as suspicious by the ADO with testing jurisdiction is likely to lead to either an accusation of violating the rules against sample evasion, or becoming the subject of target testing due to behavior that indicates an increased risk or likelihood of doping.[102]

In return for these requirements from the athletes, the ADOs are required to (*a*) inform all athletes who are made part of their RTP not only of their inclusion in the latter, but also of their corresponding responsibilities and liabilities under the system, (*b*) send a notice to any athlete deemed to have committed a whereabouts failure within fourteen days of it taking place, giving them the relevant details about the instance and inviting a response within fourteen days of receipt of the notice, and (*c*) give any athlete deemed to have committed a whereabouts failure the opportunity to demand an administrative review where they may protest the judgment of the ADO.[103]

Furthermore, all ADOs with testing jurisdiction must establish "a workable system for the collection, maintenance and sharing of Whereabouts Filings."[104] WADA prefers

[99]WADA, *IST3*, § 11.3.7.
[100]WADA, *WADC2*, § 2.1.1; for general discussion on the ethical difficulties of this form of strict liability, see the contributions to the first half of McNamee and Møller, *Doping and Anti-Doping Policy in Sport*.
[101]WADA, *IST3*, § 11.4.2.
[102]Ibid., 53–54.
[103]Ibid., §§ 11.3.5, 11.6.2–11.6.3, 11.7.
[104]Ibid., § 11.7.1.d.

ADOs to use its Anti-Doping Administration and Management System (ADAMS)—a free web-based database system available in numerous languages—or a similar on-line system "capable of recording who enters information and when," but also allows the use of fax, e-mail, and SMS text messaging wherever this is not feasible.[105] Regardless of which system any one ADO decides to utilize, WADA requires ADOs who share testing jurisdiction over an athlete to share all relevant athlete whereabouts information with each other, and to recognize each other's findings with regard to that athlete.[106]

In addition, WADA specifies the manner in which ADOs are to make public disclosures about whereabouts failures. Specifically, where an athlete is found to have committed a whereabouts failure, ADOs are prohibited from disclosing that information "beyond those persons with a need to know," except for in those instances where the athlete is found to "have committed an anti-doping rule violation under [*WADC2*] article 2.4 based on (among other things) such Whereabouts Failure."[107] In other words, a whereabouts failure may not be publicly disclosed unless it either (*a*) is sufficiently serious to amount to an anti-doping rule violation, such as sample evasion, in and of itself; or (*b*) is the third whereabouts failure within any eighteen-month period, thereby amounting to an anti-doping rule violation on the basis of the whereabouts rules. On the other hand, where an athlete is found to have committed any such anti-doping rule violation, including one consisting of three whereabouts failures within eighteen months, the relevant ADO is required to publicly disclose the details of the case within twenty days of finding the athlete in breach of the rules. Such public disclosure is stipulated as consisting of, at a minimum, "placing the required information on the Anti-Doping Organization's Web site and leaving the information up for at least one (1) year."[108]

2.3.1 Support

WADA does acknowledge that their whereabouts requirements are "burdensome," yet maintains that they are "critically important to clean sport."[109] Various organizations and individuals have spoken out in support of this view, in terms largely analogous to

[105] Ibid., § 11.7.
[106] Ibid., § 11.7.
[107] Ibid., § 11.6.4; the section also specifies an exception to the rule in cases of anonymized whereabouts information used for the presentation of whereabouts statistics.
[108] WADA, *WADC2*, § 14.2.4.
[109] WADA, *Whereabouts Requirements*, 1.

WADA's own justification of it, i.e. that it is a (tiresome) necessity that is nevertheless acceptable on the basis of the goals of anti-doping. The IAAF, for instance, which implemented similar whereabouts requirements of its own as early as 1997, has expressed its unreserved support for the system, stating that although it acknowledges "the burden placed upon athletes," it nevertheless "believes that the whereabouts system ... is both proportionately fair as well as absolutely mandatory for the effective fight against doping in sport."[110]

Some elite athletes affected by the rules have expressed similar opinions. Swiss tennis player Roger Federer stated that "I know it's a pain, but I would like it to be a clean sport, and that's why I'm OK with it."[111] French cyclist Thomas Voeckler maintained that "giving your whereabouts is demanding, but it is normal to request top athletes from all sports to do it," and that "if it takes this kind of efforts to make sport more credible, everybody should contribute to this system."[112] UK swimmer Kate Haywood noted the initial difficulty of the system, stating that "when it first came in it was a bit of a pain but once you have done it the first time it is pretty easy."[113] Finally, German cycler Sabine Spitz expressed stronger support for the requirements by directly criticizing potential detractors of the system:

> I do not understand why the new whereabouts rules create so much controversy. For clean athletes there is no issue whatsoever. It strengthens chances to catch cheats. The objective of the rule is to protect clean athletes. Submitting whereabouts takes time, but whereabouts can always be updated. Intelligent testing is crucial. To protect clean sport, athletes need to accept it and contribute to this system. Anti-doping protects athletes' and sport's credibility.[114]

The academic debate has also seen analogous standpoints. Dag Vidar Hanstad and Sigmund Loland have argued that the whereabouts requirements are, ethically speaking, on a par with, or less problematic than, everyday surveillance, for various reasons:

> Everyday surveillance of individuals is far more extensive, ... concealed, and ... problematic. The WADA system is described in detail both when it comes to its contents and consequences, and it requires active participation from the person

[110]IAAF, *IAAF Opinion On "New" Whereabouts Requirements.*
[111]WADA, *Athlete Testimonies on Whereabouts System*, 3.
[112]Ibid., 3.
[113]Ibid., 4.
[114]Ibid., 5.

> being watched. Hence, the system does not seem to involve undue violations either on principles of justice or on the grounds of athletes' autonomy and right to self-determination.[115]

Despite positions like the above, there have nevertheless been numerous objections to the revised whereabouts requirements, many of which stem from concerns about the privacy of elite athletes. These concerns are engendered by any of a host of underlying considerations, including the aforementioned worries about the robustness of the technology used to store athlete whereabouts information or the demands on the time of the affected athletes. In addition, some have expressed reservations about how far out of proportion the requirements seem to be in relation to the actual risks of wrongdoing, when compared with other social practices. Others have argued that the requirements are not compatible with existing law. The following section presents a brief sample of these sorts of arguments.

2.3.2 Privacy Concerns

There are various instances of criticism against WADA's revised whereabouts requirements. UK tennis player Andy Murray has, for instance, expressed the following view:

> These new rules are so draconian that it makes it almost impossible to live a normal life. ... I may miss a flight or a flight could be delayed, yet I have to let WADA know exactly where I will be, even when I am resting. They even turned up at my hotel in Miami while I was on holiday. Tennis has not got a big problem with drugs. I support drug testing and strongly condemn any use of drugs in sport, but there has to be a more realistic and practical way to deal with the problem with tennis players.[116]

The most legally and ethically important critique, however, has been the claim that the revised whereabouts requirements invade the privacy of elite athletes. This claim has taken various forms. Tennis player Rafael Nadal has, for instance, maintained that the whereabouts requirements show "a lack of respect for privacy":

[115] Hanstad and Loland, "Elite Athletes' Duty to Provide Information On Their Whereabouts," 9; note, however, that Hanstad later presents a more ambivalent view of the whereabouts requirements in Hanstad, "Governance and the Whereabouts System."

[116] Eason, *Andy Murray Criticises New Anti-Doping Rules.*

> Even my mother or my uncle do not know where I am sometimes, so having to send a message or to be scared all day in case there is a last-minute change seems to me to be a complete exaggeration. ... These are things that completely have to change, and there is a unanimous voice on that in the locker room. It is an intolerable hunt. We have proved that we are a clean sport. You can count (doping) cases with one hand.[117]

In response to concerns of this sort, WADA has argued that they are based primarily on a misunderstanding of the whereabouts requirements, and that the affected athletes will come to terms with the changes in due course:

> Once things settle down then you find that people say "well, we're doing this to make sure there is integrity in our sport and people stay clean, and we accept the responsibility on our shoulders to make sure people comply."[118]

The criticism has, however, persisted. Several international sporting federations have voiced concerns about privacy similar to those voiced by the athletes themselves. The International Federation of Association Football (FIFA) and the Union of European Football Associations (UEFA) have, for instance, jointly opposed WADA's revised whereabouts requirements, arguing not only that the training regimes of team sports differ to a sufficient extent from individual sports to warrant separate sorts of whereabouts requirements, but that the requirements themselves amount to an invasion of player privacy:

> FIFA and UEFA do not accept that controls be undertaken during the short holiday period of players, in order to respect their private life. ... FIFA and UEFA want to draw attention to the fact that, both on a political and juridical level, the legality of the lack of respect of the private life of players, a fundamental element of individual liberty, can be questioned.[119]

Similarly, Shashank Manohar, president of the Board of Control for Cricket in India (BCCI), enumerated three reasons for why the BCCI rejected WADA's revised whereabouts requirements, and why, as a result, professional Indian cricketers refused to sign up to the requirements:

[117]Eason, *Andy Murray Criticises New Anti-Doping Rules.*
[118]As quoted in BBC, *Athletes Air Issues Over Testing.*
[119]FIFA, *FIFA and UEFA Reject WADA "Whereabouts" Rule.*

> The players ... cannot disclose their whereabouts with a security cover. Secondly, the privacy of an individual cannot be invaded and thirdly, our constitution gives a guarantee regarding an individual's privacy. You cannot invade ... somebody's privacy 24 hours a day for 365 days.[120]

This official rejection of the whereabouts requirements, in combination with the political weight of the BCCI within the cricket world, has resulted in the ICC formulating its own whereabouts requirements, distinct from WADA's. According to the ICC reformulation, elite-level cricket players are divided into two groups, with different whereabouts requirements applied to each. Those athletes who belong to the ICC's *international registered testing pool* (IRTP) are subject to WADA's full whereabouts requirements, while those athletes who belong to their *national player pool* (NPP) are instead subject to the ICC's own crickets whereabouts requirements.[121] The NPP includes the following:

> [E]leven Players from each of the National Cricket Federations ranked in the top eight men's One Day International Match rankings ... , selected as of dates specified by the ICC. [These are] the wicket-keeper who has played the most One Day International Matches for that team in the twelve months prior to the NPP Review Date in question; ... the five highest-ranked bowlers in that team ... as at the NPP Review Date in question; and ... the five highest-ranked batsmen in that team ... as at the NPP Review Date in question.[122]

The athletes included in the NPP are required to submit limited whereabouts information to the ICC in the month before that information becomes relevant. Specifically, the information must consist of the full details—i.e. the locations, addresses, dates, and times—of the time spent with their team while training or playing domestic or international matches, as well as the dates and addresses of the places the athlete stays overnight with their team during the same period.[123] Unlike WADA's regulations, however, an athlete's National Cricket Federation (NCF) is responsible for submitting the information to the ICC in the case of international matches, and is nominable by the athlete

[120] As quoted in Indian Express, *BCCI Rejects Anti-Doping Clause, Stands By Its Players*; for a more exhaustive account of critical responses from various athletes and sport federations, see Waddington, "Surveillance and Control in Sport," 261.

[121] ICC, *The International Cricket Council Anti-Doping Code*, § 3.

[122] Ibid., § 2.1; for clarification, the NPP comprises eleven players from eight countries, or a total of eighty-eight players globally.

[123] Ibid., § 2.4.

for the same duty in the case of domestic matches.[124] Where there is a filing failure in any such scenario, it is the NCF, rather than the individual athlete, that faces sanctions; three NCF filing failures within any twelve-month period result in a fine for the NCF of 10,000 US dollars.[125]

Individual athletes only face sanctions where they have any combination of three missed tests and/or filing failures (that is, where they have not delegated responsibility for the submission of their whereabouts information to their NCF) within any twelve-month period. The sanction in question consists of being moved up to the IRTP, the criteria for inclusion in which are any of the following:

> 1. Any Player who has been found to have committed an anti-doping rule violation. ... Such [a] Player shall ... remain in the IRTP until any final appeal decision or other decision exonerating the Player of any anti-doping rule violation, or (in the absence of any such decision) until six months after any period of Ineligibility imposed on the Player has expired, or (where no period of Ineligibility was imposed on the Player) until he/she has been in the IRTP for six months.
> 2. Any Player in the NPP who has not played ... either an International Match or a Domestic Match for a continuous period of three months and, at the expiry of the continuous period of three months, does not provide to the ICC a written declaration from the National Cricket Federation's Chief Medical Officer that he/she is fit to play (at that date) in an International Match. Such [a] Player shall ... remain in the IRTP until the earlier of: (a) the date he/she next plays ... [a] Match; or (b) the date he/she is able to provide to the ICC a written declaration from the National Cricket Federation's Chief Medical Officer that he/she is fit to play in an International Match.
> 3. Any Player in the NPP who is declared ... to have committed three NPP Player Violations within any twelve month period. Such [a] Player shall ... remain in the IRTP until a continuous period of three months has passed in which the Player has not committed a Filing Failure or Missed Test.[126]

Although WADA's whereabouts rules allow for the creation of various testing pools for athletes competing at different levels within a sport, they nevertheless require ADOs to subject a certain amount of their top-level athletes to the full whereabouts require-

[124]ICC, *The International Cricket Council Anti-Doping Code*, §§ 2.6–2.7.
[125]Ibid., § 2.14.
[126]ICC, *The International Cricket Council Anti-Doping Code*, § 3.1; see also ICC, *About the ICC Whereabouts Programme*, for a schematic overview of the manner in which the ICC's NPP and IRTP interact.

ments.[127] The ICC has instead, and in direct contravention of WADA's regulations, defined a pool of athletes subject to the full whereabouts requirements that may, at any given time, be altogether empty of any athletes. In this respect, the IRTP of the ICC constitutes a significant departure from the global harmonization inherent to WADA's anti-doping rules.

Various scholars have also criticized WADA's revised whereabouts requirements, on a number of different bases. Verner Møller has, for instance, and contrary to the earlier claims of Hanstad and Loland, argued that the surveillance to which elite athletes are subjected as part of the whereabouts system is difficult to ethically defend:

> If an athlete is included in the registered testing pool at the age of 20 and continues his career at the highest level until the age of 35, he will have been obliged to remain at a specified site for 5475 h or the equivalent to 228 full days. In other words, athletes who are guilty of nothing other than 15 years of athletic excellence have to accept a total of more than 7 months of house arrest. Furthermore, not only do they have to accept a rigorous surveillance regime whereby they have to report any plan and any change of plan to the anti-doping authorities in advance, they must also accept the stress that comes with the knowledge that a few lapses of memory can result in a ban that could potentially end their career since any combination of three filing failures or missed tests over a rolling period of 18 months amount to an anti-doping rule violation.[128]

Others have raised jurisprudential concerns with WADA's whereabouts requirements. For instance, Adam Pendlebury and John McGarry have argued that the requirements constitute a legally disproportionate response to a legitimate problem, possibly amounting to a violation of European athletes' human right to privacy.[129]

Establishing the strength of these various legal and ethical privacy-based objections to WADA's whereabouts requirements necessitates a closer investigation of general legal and ethical considerations pertaining to privacy. The next chapter sets the framework for handling the former issue (in the context of law in the UK), while the subsequent chapter does the same for the latter ethical issue. Only once a clearer understanding of the law and ethics of privacy is in place, does it become possible to assess in a valid

[127] WADA, *IST3*, §§ 4.4.4, 11.1.6.
[128] Møller, "One Step Too Far," 178.
[129] Pendlebury and McGarry, "Location, Location, Location"; cf. also Halt, "Where Is the Privacy in WADA's 'Whereabouts' Rule?"

manner the legal and ethical acceptability of the whereabouts requirements in relation to privacy.

— 3 —

Privacy Law in the UK

Although there is no legal right to privacy as such in UK law, there is nevertheless a patchwork of legal privacy protections. These arise not only from legislation and common law principles—most notably the equitable doctrine of breach of confidence—but also from the incorporation of European legal positions into UK law. EU law on data protection and working time, and CE human rights law, constitute some of the most important of these influences, helping to give shape to and direct the future development of legal privacy protections in the UK. The aim of this chapter is to provide an overview of this legal terrain, in order to subsequently establish, in chapter 7, the legal acceptability of WADA's whereabouts requirements in relation to it.

3.1 Legal Privacy Protections Prior to 1998

English common law does not explicitly recognize any general right to privacy. As in any common law system, there are two primary modes by which such a right might have come to be recognized: judicial extension of common law principles or parliamentary legislation. History has, however, instead demonstrated only gradual and piecemeal expansions of each, in order to remedy what was commonly considered the most serious flaws in existing privacy protections at the time. As a result, UK legal privacy protections today consist of a patchwork of legal principles, practices, and parliamentary legislation, in addition to European and other international treaties, as opposed to any unified and

discrete area of law. This patchwork system can be roughly classified into three broad but non-exclusive domains, ordered here by approximate historical primacy (the first being the earliest to be developed):

1. There are several forms of protection of personal physical space and goods. These arise, in particular, in relation to the law concerning trespass, nuisance, and harassment.

2. There are protections against the public dissemination of information about an individual. This information may be false, in which case it is covered by defamation law. Or it may be true, in which case it could be covered by, for instance, the law on blackmail or the equitable doctrine of breach of confidence, depending on the circumstances in which a case arises.

3. There are protections against the arbitrary collection and misuse of personal information, which include cases where no dissemination of the information need have occurred. This area is covered by more recent data protection and surveillance legislation.

Numerous forces have affected the development of these various areas of privacy law. Apart from international political influences, there is, for instance, significant and long-standing political pressure from a powerful British press lobby against the development of any general right to privacy; various media representatives have repeatedly expressed concerns and warnings that increased legal protections of privacy will inevitably involve an undermining of free speech.[1] To this situation, one might add a pervasive celebrity tabloid culture, public skepticism toward some of the more unscrupulous newspaper exposés, and increasing public concerns about such privacy-related issues as national identification cards and CCTV surveillance.[2]

Parliament's passing of the HRA 1998 is perhaps one of the most important sources of the more recent developments in English privacy law. The HRA 1998 stipulates that UK courts are required to take the ECHR—which includes the explicit stipulation of

[1] For a comprehensive, if somewhat dated, overview of such claims, see Markesinis, "Our Patchy Law of Privacy," 807–8.

[2] For an empirical overview of the claim that the British public is increasingly concerned about privacy, see Morrison and Svennevig, *The Public Interest, the Media and Privacy*.

a qualified right to private and family life—into consideration in determining the outcomes of the cases they hear.[3] Doing so has resulted in an expansion of the traditional range of application of the equitable doctrine of breach of confidence, rendering it more proximate to a general legal right to privacy than its original contractual scope would suggest. Other privacy-related areas of UK law have seen similar European influences from EU (as opposed to CE) law, including through data protection principles and legal limits to working time. None of this is, however, to suggest that legal protections of privacy were incorporated into UK law merely as a result of these sorts of recent European legal influences. The debate regarding the recognition of legal privacy protections in the UK is a longstanding one.

3.1.1 Protections of Confidence

Legal protections against breaches of confidence, or confidentiality, have long constituted one of the primary means of safeguarding privacy in English law. The English Court of Chancery was the primary driving force behind the initial expansion and refinement of this area of law. One of the earliest of these developments was the stipulation of confidence between different specific parties. *Legal professional privileges*, which protect all communications between professional legal advisors and their clients from being disclosed, unless by the express permission of a client, date at least to 1576.[4] Similarly, English courts recognized *spousal privileges*, protecting communications between spouses by prohibiting them from testifying against each other, just some years later.[5]

Beyond these and other related legal privileges, a number of further legal protections of personal information evolved over the years.[6] The most important of these early developments pertained to the protection of personal correspondence, seen as a subset of property law. In *Pope v. Curl*[7]—a case involving an attempt to publish letters from Jonathan Swift, Alexander Pope, and others—the Lord Chancellor argued that the receiver of any personal letters had no right to publish them without the original author's

[3] HRA 1998, § 2.
[4] *Berd v. Lovelace* [1576] Cary 62, 21 ER 33.
[5] *Bent v. Allot* [1579] Cary 94, 21 ER 50; although this was repealed by the implementation of the Police and Criminal Evidence Act 1984, art. 80.
[6] For a more exhaustive overview, see Richards and Solove, "Privacy's Other Path," 133–45; for an overview of the historical development of English blackmail law, see Alldridge, "'Attempted Murder of the Soul'."
[7] (1741) 2 Atk. 342, 26 ER 608.

permission. Later cases strengthened this view, notably *Gee v. Pritchard*,[8] which involved the attempted publication of personal letters by an individual formerly close to their writer. This decision effectively cemented the earlier view of Yates, J, in a dissenting opinion at the Court of King's Bench, that "every man has a right to keep his own sentiments" and "to judge whether he will make them public, or commit them only to the sight of his friends."[9]

More significantly, the English courts began recognizing *duties of nondisclosure* in the eighteenth century. These were presumed to apply to a number of *confidential relations*, understood as those relations in which one party confided in another in a way that left them vulnerable should the second party break the trust. Where the aforementioned legal privileges concerned only a prohibition on certain forms of testament in court, and protections of personal correspondence constituted a small subset of property law, duties of nondisclosure eventually grew from an initially primarily property-based view to a general prohibition against the divulging of any confidential information to unauthorized third parties.[10]

Although the origins of the common law of confidence are somewhat obscure, one of the earliest documented cases to establish something like a breach of confidence (though not in those exact terms) was *Queensberry v. Shebbeare*,[11] where the court found that a manuscript freely given by an author to another could not be published unless it had been so given for the express purposes of publication. Later, in *Yovatt v. Winyard*,[12] the court used the terminology of *breach of confidence* for possibly the first time. In the case, the defendant had been employed by the plaintiff as an assistant in a veterinary medicine practice. Where he had surreptitiously copied the plaintiff's medicine recipes from the latter's personal books, to subsequently make a profit selling the recipes to others, the Lord Chancellor found that there had been a "breach of trust and confidence."[13] Essentially the same wording was used some years later in *Abernethy v. Hutchinson*,[14] a case involving an attempt by the medical journal *The Lancet* to

[8](1818) 2 Swans. 402, 36 ER 670.
[9]*Millar v. Taylor* (1769) 4 Burr. 2303, 98 ER 201, 242.
[10]Further elucidation of these developments can be found in Seipp, "English Judicial Recognition of a Right To Privacy," 337–45, 357–62; for the definitive treatment of breach of confidence in English law, see Gurry, *Breach of Confidence*.
[11](1758) 2 Eden 62, 21 ER 33.
[12](1820) 1 Jac. and W. 394, 37 ER 425.
[13]Ibid., 426.
[14](1825) 1 H. and Tw. 28, 47 ER 1313.

publish transcripts, by an unknown medical student, of a series of lectures held by Mr. Abernethy, a "distinguished surgeon," at St. Bartholomew's Hospital. The court found that there was a "breach of contract or of trust" by the student in question, eventually finding in favor of the plaintiff.[15]

One of the most important cases in the development of the equitable doctrine of breach of confidence was *Prince Albert v. Strange*,[16] from 1849. It has had a significant impact on later English common law, not least due to its famous plaintiffs. But its outcome also contributed to the subsequent development of a legal right to privacy in the US (as detailed in the following chapter). The case concerned specific drawings and etchings made by Queen Victoria and her husband Prince Albert for their own personal use and amusement. An employee of the printer commissioned to make impressions of the etchings for the royal family had, without his employer's consent or knowledge and "in violation of the confidence reposed in him," taken some of the impressions for himself.[17] After being sold, they had eventually come into the ownership of the defendant, who had intended not only to exhibit the impressions, but had also printed a catalog describing them to potential buyers. The queen and her husband had sued for the prevention of the exhibition and the publication of the catalog.

On appeal, Lord Cottenham, LC, ruled in their favor, maintaining that "privacy is the right invaded."[18] As the facts of the case were novel, the court claimed "an original and independent jurisdiction."[19] Rather than granting an injunction on the basis of invasion of privacy, however, it deferred to property and confidence law, maintaining, first, that Prince Albert had a literary property right to his unpublished works, i.e. a right to keep them from being published as a means of protecting his "private use and pleasure," and second, that confidence law sufficed to prohibit publication of the catalog, insofar as Strange's possession of the impressions had "originated in a breach of trust, confidence, or contract."[20]

This distinction, between property and confidence law, was strengthened in the subsequent case of *Morison v. Moat*.[21] In the case, two sons had inherited from their de-

[15]Ibid., 1317.
[16](1849) 1 Mac. and G. 25, 41 ER 1171.
[17]Ibid., 1172.
[18]Ibid., 1179.
[19]Ibid., 1179.
[20]Ibid., 1178–79.
[21](1851) 9 Hare 241, 68 ER 492.

ceased father the rights to the recipe and prescription for preparing a medicine formulated by him, by the name of *Morison's Universal Medicine.* The son of the father's also deceased business partner had, "by breach of faith or of contract" of his father, received a copy of the same recipe, and had subsequently produced and sold the medicine in question under its original name and for his own profit. In finding for the plaintiffs, the court suggested that breach of confidence, as an equitable remedy, was entirely separate from the issue of property rights:

> That the Court has exercised jurisdiction in cases of this nature does not, I think, admit of any question. Different grounds have indeed been assigned for the exercise of that jurisdiction. In some cases it has been referred to property, in others to contract, and in others, again, it has been treated as founded upon trust or confidence, meaning, as I conceive, that the Court fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces against a party to whom a benefit is given the obligation of performing a promise on the faith of which the benefit has been conferred.[22]

This distinction was cemented in the 1888 case of *Pollard v. Photographic Co.*[23] In the case, a woman had commissioned a photographer to take photographs of herself and her family for her personal use. The photographer had subsequently utilized copies of the negatives to produce Christmas cards featuring the woman, for public sale on display in his shop window. North, J, of the newly formed Chancery Division of the High Court of Justice, granted an injunction against the exhibition and sale of the cards, arguing that although the photographer maintained a property right in the negatives, and although the plaintiff could not utilize copyright statute in her favor (insofar as she had not registered any copyright in the photograph), there had nevertheless been a breach of an implied contract by the photographer not to so utilize the negatives, as well as a breach of the confidence the woman, as a customer of his, had placed in him.[24] In considering the limits to such legal privacy protections, however, the court maintained that if the photographs had been taken "on the sly," there would have been "no contract or consideration to support a contract," and hence no available legal redress.[25]

There were various further developments in confidence law throughout the twentieth century. In 1948, the English courts explicitly recognized the existence of an eq-

[22] *Morison*, 498.
[23] [1888] Ch. D. 345 (Ch.)
[24] Ibid., 349, 352.
[25] Ibid., 346.

uitable doctrine of confidence as entirely independent from that of contract.[26] Some years later, in *Argyll v. Argyll*, the Chancery Division ruled that the same law applied to personal confidences as well as commercial ones. In the subsequent case of *Coco v. Clark*,[27] the court systematized this legally novel notion of confidence. In his judgment in the case, Megarry, J, noted that for a breach of confidence to apply separate from contract, certain criteria needed to be fulfilled. These included the criteria that the relevant information needed to have "been imparted in circumstances importing an obligation of confidence," and that it needed to have a "necessary quality of confidence about it."[28]

The former criterion considers the relationship between the plaintiff and defendant in breach of confidence cases. The English and UK courts have found this sort of "obligation of confidence" not only in various professional relationships—such as those between trade partners, doctors and patients, employers and employees, and fiduciaries and beneficiaries—but also in various personal relationships, such as those between spouses, lovers, and even friends.[29] Furthermore, the same obligations are taken to apply to third parties, even where not themselves responsible for the original breach of confidence (as in *Prince Albert*), whenever "a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential."[30]

The latter criterion, regarding the "necessary quality of confidence," was further refined in *A-G v. Observer Ltd.*,[31] a case involving the attempted publication by a former MI5 British secret service agent of his memoirs. Lord Goff, in his opinion, clarified the potential limitations to consider in establishing whether there was a necessary quality of confidence. First, the information in question must be rightly confidential, i.e. "once it has entered what is usually called the public domain ... then, as a general rule, the principle of confidentiality can have no application to it." Second, it must not consist of "useless information" or "trivia." Third, the interest in confidence must not be outweighed by a public interest in its disclosure.[32]

[26] "The obligation to respect confidence is not limited to cases where the parties are in contractual relationship," *Saltman Engineering Co. v. Campbell Engineering Co.* [1963] 3 All ER 413 (CA), 414.
[27] [1968] FSR 415 (Ch.)
[28] Ibid., 419.
[29] *Boardman v. Phipps* [1967] 2 AC 46 (HL); *Faccenda Chicken Ltd. v. Fowler* [1987] Ch. 117 (CA); *Stephens v. Avery* [1988] Ch. 449 (Ch.); *Campbell v. Mirror Group Newspapers Ltd.* [2004], UKHL 22 [2004] 2 AC 22, ¶ 1035.
[30] *Campbell*, ¶ 14.
[31] [1990] 1 AC 109 (HL).
[32] Ibid., 282.

In the supporting argument for these prescriptions, Lord Goff departed, in a subtle but drastic way, from previous common law (no cases were cited in support of his claim), in maintaining that an action for breach of confidence could be brought even where the information disclosed was discovered entirely by accident:

> It is well settled that a duty of confidence may arise in equity independently of such cases [where there is a contractual relationship between the parties]; and I have expressed the circumstances in which the duty arises in broad terms, not merely to embrace those cases where a third party receives information from a person who is under a duty of confidence in respect of it, knowing that it has been disclosed by that person to him in breach of his duty of confidence, but also to include certain situations, beloved of law teachers—where an obviously confidential document is wafted by an electric fan out of a window into a crowded street, or where an obviously confidential document, such as a private diary, is dropped in a public place, and is then picked up by a passer-by.[33]

This notion found further support in the opinion of Laws, J, in *Hellewell v. Chief Constable of Derbyshire*,[34] who argued as follows:

> If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent disclosure of the photograph would, in my judgment, as surely amount to a breach of confidence as if he had found or stolen a letter or diary in which the act was recounted and proceeded to publish it.[35]

These considerations represent an almost complete reversal from the view presented a century earlier in *Pollard*; that publication of a (non-defamatory) photograph taken surreptitiously in a public place would not be actionable at law. Although the newer contrary views were only expressed obiter, they nevertheless helped to set the stage for the expansion of the doctrine of breach of confidence that followed from Parliament's enacting of the HRA 1998 (to be discussed in further detail below). Even prior to this development, however, there were various further strands of the UK legal discussion on privacy, beyond that pertaining to just confidence law.

[33] *A-G v. Observer*, 281.
[34] [1995] All ER 473 (QB).
[35] Ibid., 476.

3.1.2 Judiciary Privacy Considerations

Outside the law of confidence, numerous cases in the twentieth century saw the English and UK courts inclined to resolve privacy concerns through more or less novel applications of existing law, while explicitly or implicitly declining to recognize any general right to privacy. The case of *Tolley v. JS Fry and Sons Ltd.*[36] is an early example of this. It was brought by an amateur golfer, whose caricature had been used in an advertisement by a chocolate manufacturer. Given the nature of amateur golf at the time, the plaintiff feared that the use of his portrait might suggest that he had been paid for it, which could have undermined his amateur status. As a result, he sued the chocolate manufacturer for defamation. Upon reaching the Court of Appeal, Greer, LJ, reiterated the sentiment expressed earlier in *Pollard*, stating in his opinion that:

> In my judgment the defendants ... acted in a manner inconsistent with the decencies of life, and in doing so they were guilty of an act for which there ought to be a legal remedy. But unless a man's photograph, caricature, or name be published in such a context that the publication can be said to be defamatory within the law of libel, it cannot be made the subject-matter of complaint by action at law.[37]

The case provoked further debate, then Cambridge law professor Percy Winfield penning an article calling for the explicit recognition of a right to privacy in UK law, whether by parliamentary legislation or judicial reform:

> [The House of Lords] might hold the wrong to be defamation. ... Alternatively and preferably, they might hold the defendant's act to be a tort *sui generis*,—offensive invasion of personal privacy.[38]

Although the case did reach the House of Lords, Winfield's pleas fell on deaf ears, their Lordships instead finding remedy in said defamation.[39] This sentiment was echoed too in *Bernstein v. Skyviews & General Ltd.*[40] The defendant had photographed the plaintiff's country house from an airplane, without the knowledge of the latter, who

[36] [1930] 1 KB 467 (CA).
[37] *Tolley* [1930], 478
[38] Winfield, "Privacy," 39.
[39] *Tolley v. JS Fry and Sons Ltd.* [1931] AC 333 (HL); David Seipp suggests that the failure of Winfield's article explains why subsequent calls for a right to privacy have instead been targeted primarily at Parliament, in Seipp, "English Judicial Recognition of a Right To Privacy," 327; notable academic examples of the latter include Dworkin, "Privacy and the Press"; Markesinis, "Our Patchy Law of Privacy"; Samuels, "Privacy."
[40] [1978] QB 479 (QB).

had subsequently sued for trespass and/or invasion of privacy. Although Griffiths, J, was generally sympathetic to the plaintiff's concerns, he found in favor of the defendant, arguing that occasionally flying an aircraft in the airspace above a piece of private property would not amount to trespass.[41] He gave no consideration to the separate charge of invasion of privacy, although he noted briefly that "constant surveillance" of an individual by aircraft might, as a "monstrous invasion of his privacy," be an actionable nuisance.[42]

This judicial disinclination to recognize a separate and general right to privacy in English law was given its seminal formulation in the 1979 High Court case *Malone v. Metropolitan Police Comr.*[43] In the case—which concerned the authorized tapping of a suspected criminal's telephone conversations—council for the plaintiff argued for a common law recognition of at least a specific right to privacy with respect to the holding of telephone conversations "in the privacy of one's home without molestation." Sir Robert Megarry, V-C, expressed sympathy for the fact that the loss of privacy the plaintiff had suffered amounted to a violation of his rights under European law.[44] But he maintained that the lack of any relevant UK legislation (at the time) made it impossible for the court to recognize those rights as legally binding. Noting that the topic was "plainly suitable for legislation [by Parliament]," he argued that the court did not have a sufficient mandate to implement such recognition at its own behest:

> It is no function of the courts to legislate in a new field. The extension of the existing laws and principles is one thing, the creation of an altogether new right is another. ... No new right in the law, fully-fledged with all the appropriate safeguards, can spring from the head of a judge deciding a particular case: only Parliament can create such a right.[45]

This statement has been frequently and approvingly cited in later cases as illustrative of the English judicial view on privacy.[46] It also aligns closely with the view of the court in *Kaye v. Robertson*,[47] one of the most infamous English privacy cases prior to the HRA

[41] *Bernstein*, 488.
[42] Ibid., 489.
[43] [1979] Ch. 344 (Ch.)
[44] This was furthermore ruled to be the case in the subsequent *Malone v. UK* [1984] ECHR 8691/79.
[45] *Malone*, [1979] 372, 379
[46] See e.g. *R v. Khan (Sultan)* [1997] AC 558 (HL), 565; *Wainwright v. Home Office* [2003] UKHL 53, [2004] 2 AC 406, ¶ 19.
[47] [1991] FSR 62 (CA).

1998. Well-known actor Gordon Kaye had been recovering in hospital after extensive head surgery following an automobile accident. After several days on life support, followed by a period in intensive care, he was moved to a private room. A journalist from the tabloid newspaper *Sunday Sport* surreptitiously gained access to Kaye's room and interviewed and photographed him prior to being ejected by hospital security. Kaye could not recollect the incident fifteen minutes later.

Through personal acquaintances, Kaye sought an injunction to prohibit the tabloid from publishing the interview, on the basis of malicious falsehood, libel, passing off, and trespass to the person. The court disagreed with all the claims except that of malicious falsehood, granting an injunction only on any implication by the tabloid that the interview and photographs had been consented to, rather than on publication of the interview itself. All three judges were in agreement, however, that the case constituted a particularly heinous illustration of the need for parliamentary legislation on privacy. Speaking obiter, Glidewell, LJ, argued that "the facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals."[48] Bingham, LJ, concurred, noting that the invasion of privacy that Kaye had suffered, "however gross, does not entitle him to relief in English law."[49] Highlighting the opportunity to draw on the wealth of experience provided by US privacy law, Leggatt, LJ, concluded:

> We do not need a First Amendment to preserve the freedom of the press, but the abuse of that freedom can be prevented only by the enforcement of a right to privacy. This right has so long been disregarded here that it can be recognised now only by the legislature. ... It is to be hoped that the making good of this signal shortcoming in our law will not be long delayed.[50]

3.1.3 Parliamentary Privacy Considerations

By the time of *Kaye*, numerous right to privacy bills had already been discussed in Parliament, although none of them had been passed.[51] For instance, Brian Walden, MP,

[48] Ibid., 66.
[49] Ibid., 70.
[50] Ibid., 71.
[51] For detailed discussion of such attempts prior to the 1980s, including press responses, see Pratt, *Privacy in Britain*; and Seipp, "English Judicial Recognition of a Right To Privacy," 345–50; for slightly more

introduced a right to privacy bill already in 1969. Though it was not the first, it garnered sufficient support to bring about the formation of a committee to investigate the issue, chaired by Sir Kenneth Younger.[52] The committee found, in their report, that although they could not recommend the creation of a general right to privacy, they did suggest a need for, among other things, greater public scrutiny of press practices, by an increase in the number of non-press lay members on the Press Council, the then self-regulatory organization of the British press.[53]

Although this recommendation was implemented, the 1980s saw a general increase in concern regarding the ability of the press to properly self-regulate. As a result, the issue of privacy legislation was revisited in 1989, when John Browne and Tony Worthington, MPs, introduced a new right to privacy bill, this time directed only against privacy intrusions by the press. Again, Parliament formed a committee to investigate, this time chaired by David Calcutt, QC. The final committee report found that although it was "satisfied that it would be possible to define a statutory tort of infringement of privacy," it did not deem it necessary to legislate any such tort.[54] Instead, the report recommended the creation of a crime of physical intrusion, in order to provide protection from the circumstances of cases like the then recent *Kaye*.[55] Furthermore, the report argued that the press ought to set up a complaints body in place of the inefficient Press Council, specifying that if the body could not "be made to work effectively" within eighteen months, it should be replaced by a statutory tribunal.[56]

The Calcutt report directly resulted in the subsequent formation of the Press Complaints Commission (PCC) in early 1991. The legislative suggestions of the report were, however, not implemented. Nor were they implemented when Calcutt, in 1993, authored a second report finding that the PCC had failed in its self-regulation and that further legislative protection of privacy was needed:

up-to-date accounts, see Krotoszynski, "Autonomy, Community, and Traditions of Liberty," 1404–7; and Samuels, "Privacy," 123–24.

[52]Pratt, *Privacy in Britain*, 183–84; Seipp, "English Judicial Recognition of a Right To Privacy," 347; see also Dworkin, "The Younger Committee Report on Privacy," for a critical overview of the specific recommendations of the committee.

[53]Younger, *Report of the Committee on Privacy*, ¶¶ 661–67; Pratt, *Privacy in Britain*, 198; Dworkin, "The Younger Committee Report on Privacy," 404–5.

[54]Calcutt, *Report of the Committee on Privacy and Related Matters*, 46–50.

[55]Ibid., 49–50.

[56]Ibid., 73.

> The Press Complaints Commission ... does not, in my view, hold the balance fairly between the press and the individual. ... As constituted, it is, in essence, a body set up by the industry, financed by the industry, dominated by the industry, and operating a code of practice devised by the industry and which is over-favourable to the industry.[57]

Calcutt's recommendations were not followed; the PCC was not replaced by a new organization. Intead, it remains as the primary self-regulatory body of the British press to this day, although its continued existence has been cut short by various recent scandals. Primary among these, the discovery of "phone hacking" practices at the now defunct *News of the World* newspaper, eventually led Prime Minister David Cameron to call for the scrapping of the PCC, and its replacement by a body less "ineffective and lacking in rigour."[58] As a result, Lord Hunt, Chairman of the PCC since October 2011, announced his intention to replace the body with a new independent regulator that, unlike the PCC, would have the legal mandate necessary to ensure that its decisions are followed by the press.[59] More recently, Leveson, LJ, of the Court of Appeal published a report commissioned by Prime Minister Cameron to investigate the same issues. In the report, Leveson recommends the disbanding of the PCC and its replacement by an entirely independent regulatory body, backed by relevant legislation.[60] Although various press editors have noted their concerns that such a system could be used to infringe press freedom,[61] it is still too early to tell what effects the report might have.

In any event, the various instances in which Parliament has declined to legislate a general right to privacy over the years is largely analogous to the courts' disinclination to recognize any such right. They have, however, stepped in at other times to revise legislation on specific privacy issues. For instance, the lack of legal remedy for the phone-tapping suffered by the plaintiff in *Malone*, and the subsequent chiding the UK received from the European Court of Human Rights (ECtHR), led directly to Parliament passing the Interception of Communications Act 1985 (IOCA 1985). The act limited the power of the police to perform wiretaps, requiring a judicial review of each wiretapping case in advance.[62]

[57] Calcutt, *Review of Press Self-Regulation*, xi, see also xi–xiv generally.
[58] As quoted in BBC, *Phone hacking*.
[59] PCC, *Towards a New System of Self-Regulation*.
[60] Leveson, *An Inquiry into the Culture, Ethics and Practices of the Press*.
[61] BBC, *Press "Need to Act" after Leveson*.
[62] IOCA 1985, esp. §§ 1–4; for further commentary, see Krotoszynski, "Autonomy, Community, and Traditions of Liberty," 1410–11; McCamus, "Celebrity Newsgathering and Privacy," 1196.

In a similar manner, the Police Act 1997 was introduced to restrict the bugging of private properties by the police, in direct response to *R v. Khan (Sultan).*[63] The central contention of the House of Lords case concerned the admissibility of evidence obtained in a potentially unlawful manner. Insofar as their Lordships had declared unlawfully obtained evidence admissible (in certain situations), they had seen it unnecessary to make any further declarations as to whether the bugging amounted to an unlawful invasion of privacy or not.[64]

The Court of Appeal took a significantly more assertive line in *Khorasandjian v. Bush.*[65] The case concerned an eighteen-year old woman receiving frequent harassing phone calls from a male prior acquaintance to her mother's home, where she was resident at the time. At Barnet County Court, the presiding judge had granted an injunction forbidding the defendant from "harassing, pestering or communicating" with the plaintiff. The defendant appealed, on the basis that the injunction "did not reflect any tort known to the law," insofar as the tort of private nuisance was interpreted as enjoyment of a person's property, and the plaintiff had no proprietary interest in her mother's home.[66] Dillon, LJ, disagreed, arguing as follows:

> To my mind, it is ridiculous if in this present age the law is that the making of deliberately harassing and pestering telephone calls to a person is only actionable in the civil courts if the recipient of the calls happens to have the freehold or a leasehold proprietary interest in the premises in which he or she has received the calls.[67]

Although the court found in favor of the plaintiff, this expansion of private nuisance was explicitly overturned in a later case before the House of Lords, restricting the bringing of a tort of private nuisance to the actual property owner.[68] Again, Parliament stepped in to fill the resulting legal lacuna, this time by way of the Protection from Harassment Act 1997.

It is worth noting that Parliament has also, at times, enacted legislation that has been taken by some to pose a direct threat to personal privacy. Such concerns have, for instance, arisen in relation to the Regulation of Investigatory Powers Act 2000 (RIPA

[63] [1997] AC 558 (HL).
[64] *Khan (Sultan)*, 571; see also McCamus, "Celebrity Newsgathering and Privacy," 1196.
[65] [1993] QB 727 (CA).
[66] Ibid., 733.
[67] Ibid., 733.
[68] *Hunter v. Canary Wharf Ltd.* [1997] AC 655 (HL).

2000), which repealed the IOCA 1985, and which set out certain powers of, among other things, the surveillance and interception of communications of individuals in the UK. The act—which was enacted primarily as a means of granting law enforcement agencies wide-ranging power to tackle terrorism and organized crime, including through covert surveillance and the interception of emails and internet usage—has been dubbed a "snoopers' charter" by critics, who allege that it grants extensive powers, without sufficient oversight, and that it could be used to unacceptably invade the privacy of individuals.[69]

Regardless, the piecemeal development of the law on privacy has taken a somewhat new direction following the enacting of the HRA 1998. In effect, the act handed the responsibility of creating a common law right to privacy to the UK judiciary, who were required not only to consider European human rights legislation in their decisions, but to make it applicable within existing principles of common law. The overall effect of this has been the expansion of the doctrine of breach of confidence in order to accommodate much of the European human right to privacy. Proper appreciation of this development, however, requires some initial historical background.

3.2 A Human Right to Privacy

Following in the wake of the World War II, the CE formed in 1949, with the stated aim of achieving "greater unity" for its member states in "economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms."[70] As one element of this task, the CE drafted the ECHR in 1950, in part as a regional response to the signing of the Universal Declaration of Human Rights (UDHR) in 1948. Sir David Maxwell-Fyfe, MP—lawyer and prosecutor at the Nuremberg Trials—oversaw the development of the ECHR, ensuring a significant British stake in the way it was formulated.[71] The UK, as one of the founding members of the CE, ratified the ECHR in 1950, and it entered into force in 1953.[72]

[69] Cf. Herbert, *Zero Privacy*.
[70] Statute of the Council of Europe, art. 1.
[71] Marston, "The United Kingdom's Part in the Preparation of the European Convention on Human Rights, 1950."
[72] CE, *The Convention in 1950*.

Ratification of the ECHR remains a condition of membership for any country seeking to join the CE.[73]

The arguably most important element of the ECHR—and that which took it significantly beyond the declarative nature of the UDHR—was its call for the establishment of an international court for adjudicating purported human rights violations within its jurisdiction. This court, the ECtHR, began functioning in 1959. Originally, it formed one part of a tripartite system. The European Commission of Human Rights would perform a preliminary examination of all ECHR cases brought by individuals or member states. If a case was deemed admissible under the ECHR, the Commission would produce a report on the facts of the case with a non-binding opinion. The Commission and/or the member state accused of a human rights violation could then choose to refer the case to the ECtHR for a binding judgment; otherwise it would be decided by the Committee of Ministers.[74]

The member states of the CE originally numbered just ten, all West European. Since its inception, however, the CE has grown to include practically all of Europe, with a significant boost in membership in the 1990s, following the fall of Communism in Central and Eastern Europe. In order to deal more efficiently with the resulting dramatic increase in the number of people and member states over which the ECtHR had jurisdiction, the ECHR was amended in 1998. This amendment—Protocol 11—led to two important changes. First, the tripartite system was replaced by a single full-time court, of the same name as before, with the aim of thereby reducing the typical time it would take for a case to reach conclusion. Second, and as a result, individuals were granted the ability to petition the court directly, without first needing their case referred by any Commission-like body.[75] The hope was that these changes would not only make the ECtHR truly accessible to all individuals within its jurisdiction, but that a more efficient system would help clear the existing backlog of "approximately 4–5,000 cases."[76]

The ECtHR has, however, been something of a victim of its own success. According to the ECHR, member states are committed not only to secure the rights established in the ECHR to all individuals within their jurisdiction, but to furthermore "abide by the

[73]Statute of the Council of Europe, art. 3.
[74]ECtHR, *50 Years of Activity*, 3.
[75]Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, arts. 29, 34–35.
[76]Reid, *A Practitioner's Guide to the European Convention on Human Rights*, 17.

final judgments of the court in any case to which they are parties."[77] This has created an unprecedented possibility for individuals to bring a case against their own, or some other European, country, at a supra-national level, provided they have exhausted the available domestic remedies pertaining to their complaint.[78] This state of affairs has resulted in a steady rise in the number of cases brought before the court every year. There were more unique cases in 2008 alone (49,900 total) than in the entire forty-year period 1958–1998 (45,000 total).[79] As a result, on the latest count, the backlog now stands at over 160,000 unheard cases.[80]

Although somewhat worrying from the point of efficiency, these numbers are a powerful indication of how well-established the ECtHR has become. They reflect the willingness of wronged individuals in Europe to seek justice at a distant, supra-national level, when they are of the opinion that their national law is not able provide a sufficient remedy. They also indicate the extent to which people feel that the judgments of the ECtHR are respected by the CE member states. The authority of the ECtHR is further evident in the fact that the EU recently became a signatory to the ECHR. As a unique legal organization separate from its individual member states and with its own legal order—adjudicated by the Court of Justice of the European Union (CJEU)—doing so submits the EU's legal system to "independent external control," by allowing residents within the EU to bring purported human rights violations against the EU itself.[81]

In the ECHR, article 8 defines a right to privacy. It reads as follows:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[82]

[77] ECHR, art. 46(1).
[78] Ibid., art. 35.
[79] ECtHR, *50 Years of Activity*, 4.
[80] CE, *Reform of the European Court of Human Rights.*
[81] CE, *EU accession to the European Convention on Human Rights.*
[82] ECHR, art. 8; compare to the UDHR, which specifies that no person "shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation"; this is repeated almost verbatim in the UN International Covenant on Civil and Political Rights, art. 17.

In hearing article 8 cases, the ECtHR adopts a two-stage approach. The first stage establishes whether or not a given case pertains to a person's article 8 right, i.e. if it violates the right set out in article 8.1. Only if this is found to be the case will the court then proceed to the second stage, which consists of determining whether or not the violation of article 8.1 might nevertheless be justified by any of the exceptions noted in article 8.2.[83] The right set out in article 8.1 is, in other words, qualified; where there is sufficient justification, as stipulated in article 8.2, a violation of the right is considered legally acceptable.

This two-stage approach is not an entirely straightforward affair. Given the ECtHR's international jurisdiction, and the various cultural and social mores of the many European societies and individuals whose rights it protects, the court has adopted a certain degree of flexibility in its judgments on a number of articles, including article 8, by taking into account the specific cultures of the member state at trial, wherever necessary. This allows the ECtHR to rule according to the cultural particulars of each case, rather than attempting to impose any single universal view on all its member states.

This flexibility, referred to as the *margin of appreciation*,[84] is not stipulated in the ECHR itself, but has instead arisen as a general principle in the work of the ECtHR over the years.[85] As regards the protection of personal privacy, it is central to the interpretation of the various exception conditions listed in article 8.2, such as the "protection of health and morals"-clause, in any given case. Depending on the legal and social realities within the CE member state brought to trial, the ECtHR can exercise the margin of appreciation in order to establish a final judgment that, although applicable to that context, need not be prescriptive for other member states facing similar situations.

The margin of appreciation, and its relation to privacy, was discussed in some detail in *Dudgeon v. UK*.[86] The case was brought by a homosexual man, who maintained that the criminalization of consensual homosexuality at the time in Northern Ireland, where he was resident, constituted a violation of his article 8 right to a private life. Although the court recognized that there was a particularly wide margin of appreciation in relation to the mores of a country or region, they nevertheless found that, insofar as the case concerned a "most intimate aspect of private life," there "must exist particularly serious

[83] Kilkelly, *The Right to Respect for Private and Family Life*, 8–9.
[84] From the French *marge d'appréciation*.
[85] Greer, *The Margin of Appreciation*, 5.
[86] [1981] ECHR 7525/76.

reasons before interferences on the part of the public authorities can be legitimate for the purposes of article 8(2)."[87]

This judgment highlights another feature of the ECtHR's interpretation of article 8. Although the article could conceivably be construed in only a narrow fashion, corresponding to something like a right to be free from unlawful searches by officials, the ECtHR has instead chosen to give the right a relatively broad interpretation:

> The concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can sometimes embrace aspects of an individual's physical and social identity. Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by article 8. Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world.[88]

This view has been reiterated on a number of occasions, with the ECtHR further maintaing, among other things, that the protection of private and family life includes a requirement that "may involve the authorities adopting measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves."[89] It therefore gives rise to a positive obligation under human rights law. That is, it requires a member state's public authorities to have policies and procedures in place to prevent breaches of article 8 even where there is no involvement by a public authority. This phenomenon is recognized, to a certain extent, in the HRA 1998, as discussed below.

In addition to these considerations, article 8's protection of an individual's right to respect for private and family life is not confined solely to those acts performed in private, but can also pertain to certain acts performed in public, where these are nevertheless considered to be subject to a reasonable expectation of privacy.[90] In this manner, the ECHR provides a broad legal protection of privacy to all individuals within the CE.

[87] Ibid., ¶ 52.
[88] *Pretty v. UK* [2002] ECHR 2346/02, ¶ 61.
[89] *Moreno Gomez v. Spain* [2004] ECHR 4143/02, ¶ 55.
[90] See e.g. *Peck v. UK* [2003] ECHR 44647/98; *Von Hannover v. Germany* [2004] ECHR 59320/00, discussed in further detail below

3.2.1 The Human Rights Act 1998

The UK government gave two primary reasons for the enacting of the HRA 1998. The first was the "inordinate delay and cost" that bringing a case before the ECtHR involved. This was to be avoided, where possible, by instead allowing the British people to claim their ECHR rights in domestic courts, thereby sparing time and expense.[91] The second reason was that the act was understood to have implications for the subsequent development of jurisprudence, thereby bringing UK law closer into line with the vision set out in the ECHR. This, the Home Office argued, was desirable. Given its stake in the original drafting of the ECHR, the UK government had originally assumed that the rights were already sufficiently protected in UK law to obviate any explicit incorporation via legislation.[92] This assumption was not borne out by the "number of cases in which the [ECtHR] have found that there have been violations of the Convention rights in the United Kingdom."[93]

As a result, the HRA 1998 was drafted to "give further effect to [ECHR] rights in domestic law."[94] As already noted, one the most significant developments in English common law following the enacting of the HRA 1998 has been the gradual expansion of breach of confidence to cover much of the protection provided by article 8 of the ECHR. What originally began as a means of, primarily, regulating certain contractual obligations in trade, is now on the verge of bifurcating into two separate pieces of law: (*a*) its traditional contractual ambit, and (*b*) broad legal protection of the individual against public dissemination of personal facts.

The HRA 1998 is primarily a *vertical* piece of legislation, allowing individuals to bring an ECHR-based action against UK public authorities. However, it also provides a limited *horizontal effect*, allowing individuals to claim their ECHR rights in cases that do not involve any public authority. Parliament is adamant that this horizontal effect is limited in scope. Where a case is brought to court by some previously established cause of action, the act will apply to both parties, but the HRA 1998 does not, in and of itself, create any new cause of action:

[91] Home Office, *Rights Brought Home*, § 1.14.
[92] Ibid., § 1.11.
[93] Ibid., § 1.16.
[94] Ibid., § 3.8.

> The lack of a cause of action to bring a case to court would mean that in many cases "horizontal" application of [ECHR] rights would be of little assistance to victims of a breach of [ECHR] rights by a provider of a public service which was not a public authority.[95]

Douglas v. Hello![96] was the first case to take advantage of these general developments. Actors Michael Douglas and Catherine Zeta-Jones had sought an emergency injunction against *Hello!* magazine to prohibit the latter from publishing photographs taken surreptitiously at their wedding, as they already had an exlusive deal to that effect with *OK!* magazine. Although an interim injunction was at first granted, the decision was reversed by the Court of Appeal, which argued that the claimants' interests were sufficiently protected by the possibility of damages at trial, on the basis of a breach of confidence by the covert photographer. Sedley, LJ, did note, in his opinion, that traditional breach of confidence doctrine was not easily applied to the case, insofar as there was no established relationship between the covert photographer and the couple to give rise to issues of confidence.[97] Nevertheless, he argued that, given the "increasingly invasive social environment," together with the enacting of the HRA 1998, it was safe to conclude that the law "no longer needs to construct an artificial relationship of confidentiality between intruder and victim," but that it could instead "recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy."[98] Keene, LJ, in his opinion, agreed with this sentiment, clarifying the manner in which the doctrine of breach of confidence had developed since the enacting of the HRA 1998 to accommodate (most of) the protection afforded to privacy by the ECHR:

> Whether the ... liability is described as being for breach of confidence or for breach of a right to privacy may be little more than deciding what label is to be attached to the cause of action, but there would seem to be merit in recognising that the original concept of breach of confidence has in this particular category of cases now developed into something different from the commercial ... relationships with which confidentiality is mainly concerned.[99]

[95]Joint Committee on Human Rights, *Seventh Report*, ¶ 88.
[96][2001] QB 967 (CA).
[97]Ibid., 998.
[98]Ibid., 997, 1001.
[99]Ibid., 1012.

The courts were quick to adopt this extension of breach of confidence. The case of *Venables v. News Group Newspapers*[100] concerned two boys who had, at the age of ten, murdered a two-year old boy. During their subsequent detention, the courts enjoined the press from reporting on the two. Upon turning eighteen, and being scheduled for release, the boys sought a continuation of the injunction to prevent publication of any personal details about themselves. Relying on the discussion in *Douglas*, Dame Butler-Sloss, P, granted an injunction on the basis of confidence, maintaining that insofar as publication of such details could lead to "grave and possibly fatal consequences," it sufficed to restrict the press from any such publication "independently of a transaction or relationship between [the] parties."[101]

This view was strengthened in *Campbell v. Mirror Group Newspapers Ltd.* The case concerned the international super-model Naomi Campbell, who was photographed leaving a Narcotics Anonymous meeting and was subsequently made the subject of a tabloid story purporting to detail her fight against drug addiction. Where the trial court had initially awarded her £3,500 in damages, and the Court of Appeal had reversed this judgment, the House of Lords, by a slim majority of three to two, overturned the reversal. Although the court was divided on the merits of the appeal, there was agreement among their Lordships that an extended notion of confidence applied to cases of this kind, as summarized succinctly by Lord Hoffman:

> In recent years ... there have been two developments of the law of confidence, typical of the capacity of the common law to adapt itself to the needs of contemporary life. One has been an acknowledgement of the artificiality of distinguishing between confidential information obtained through the violation of a confidential relationship and similar information obtained in some other way. The second has been the acceptance, under the influence of human rights instruments such as [article 8 of the ECHR], of the privacy of personal information as something worthy of protection in its own right.[102]

Their Lordships furthermore agreed that where the privacy of individuals is to be so protected, it must be weighed against the protection of freedom of speech and press (as articulated in article 10 of the ECHR). This constituted a reiteration of the position of the courts in several earlier cases, such as *X (formerly known as Mary Bell) v. O'Brien*,[103]

[100] [2001] Fam. 430 (F).
[101] Ibid., 462.
[102] *Campbell*, ¶ 46.
[103] [2003] EWHC 1101 (QB), [2003] All ER 282.

which concerned the potential publication of the identities of a woman—who at the age of eleven had killed two young children—and her daughter. Dame Butler-Sloss, P, in granting an injunction "contra mundum," referred to a "necessary balancing exercise between the need to protect confidentiality and the need to pay proper respect to the right of freedom of expression."[104] Similarly, in *A v. B plc.*,[105] a case involving an attempt to enjoin the publication of details of a Premiership footballer's (Gary Flitcroft's) extra-marital affairs, Lord Woolf, CJ, specified, broadly, the way in which such a balancing ought to take place:

> There is a tension between the two articles which requires the court to hold the balance between the conflicting interests they are designed to protect. This is not an easy task but it can be achieved by the courts if, when holding the balance, they attach proper weight to the important rights both articles are designed to protect. Each article is qualified expressly in a way which allows the interests under the other article to be taken into account.[106]

Lord Woolf denied the injunction, ruling that the sort of relationships Flitcroft had engaged in were not sufficiently stable to justify judicial interference with freedom of press in the form of any injunction.[107] The courts have since reconsidered this sort of view, which accords the press a prima facie right to publication, due to case law from the ECtHR in Strasbourg. For instance, in *Von Hannover v. Germany*,[108] Princess Caroline of Monaco had sought to prevent German newspapers from publishing photos of her engaging in various daily activities in public, such as shopping, horseriding, and skiing. The German courts had found that she, in virtue of her public profile, could not hold any reasonable expectation of privacy while in public. The ECtHR unanimously rejected this view, ruling that Germany had breached its positive obligations to protect the princess's private life in accordance with article 8 of the ECHR. Although they recognized that publication of details of the private lives of famous individuals may at times be justified—particularly in the case of politicians—they maintained that where the sole purpose of publication was "to satisfy the curiosity of a particular readership regarding the details of the applicant's private life," there was not sufficient public interest to justify the breach of privacy inherent in doing so:

[104]Ibid., ¶ 58.
[105][2002] EWCA Civ. 337, [2003] QB 195.
[106]Ibid., ¶ 6.
[107]Ibid., ¶¶ 45–50.
[108][2004] ECHR 59320/00.

> The public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded and despite the fact that she is well known to the public. Even if such a public interest exists, as does a commercial interest of the magazines in publishing these photos and these articles, in the instant case those interests must, in the Court's view, yield to the applicant's right to the effective protection of her private life.[109]

These developments encompass a view of privacy as a public interest in its own right, rather than privacy as in direct opposition with public interest:

> In deciding whether a right has been infringed, and in assessing the relative worth of competing rights, it is not for judges to make individual moral judgments or to be swayed by personal distaste. It is not simply a matter of personal privacy versus the public interest. The modern perception is that there is a public interest in respecting personal privacy. It is thus a question of taking account of conflicting public interest considerations and evaluating them according to increasingly well recognised criteria.[110]

In light of the ruling in *Von Hannover*, there has been speculation about the potential outcome of prior cases had they been heard since. For instance, Sedley, LJ, has recently maintained, extra-judicially, that *Von Hannover* makes it "extremely doubtful whether [*A v. B*] could now be decided as it was."[111] The Court of Appeal has concurred, Buxton, LJ, arguing in *McKennitt v. Ash*[112]—a case brought by a Canadian folk musician seeking to enjoin the publication of a book containing details about her life—that "the width of the rights given to the media by *A v. B* cannot be reconciled with *Von Hannover*."[113]

Its effects are also highly visible in recent case law, such as *Mosley v. News Group Newspapers Ltd.*[114] The case concerned the former president of the Fédération Internationale de l'Automobile, after he had been made the subject of a *News of the World* tabloid exposure publishing details, images, and an online video of his masochistic sexual activities. The event had been covertly photographed and filmed by one of the female participants. Mosley took the tabloid to court, claiming that his right to privacy, as enshrined in the ECHR, had been breached by the publication, and that this amounted to

[109] *Von Hannover*, ¶ 77; this view is in line with earlier rulings by the ECtHR, such as *Peck*.
[110] *Mosley v. News Group Newspapers Ltd.* [2008] EWHC 1777 (QB), [2008] All ER 322, ¶ 130.
[111] Webb, *Curbs On a Modern Miller's Tale*.
[112] [2006] EWCA Civ. 1714, [2008] QB 73.
[113] Ibid., ¶ 62.
[114] [2008] EWHC 1777 (QB), [2008] All ER 322.

a joint breach of confidence and "unauthorised disclosure of personal information."[115] For such a case to succeed, the court argued in line with the above prescriptions, it would need to be shown not only that there would have been a "reasonable expectation of privacy," but that the interests in privacy outweighed those of free expression.[116] This was deemed to be the case, Eady, J, reaching the following conclusion:

> When the courts identify an infringement of a person's article 8 rights ... it is right to afford a remedy and to vindicate that right. The only permitted exception is where there is a countervailing public interest which in the particular circumstances is strong enough to outweigh it. ... It is yet to be determined how far that doctrine will be taken in the courts of this jurisdiction in relation to photography in public places. If taken literally, it would mean a very significant change in what is permitted. It would have a profound effect on the tabloid and celebrity culture to which we have become accustomed in recent years.[117]

Although Eady in the end awarded Mosley an unprecedented £60,000 in damages, he refused to grant an interlocutory injunction against the defendant, on the basis that the online stories and video had already been viewed hundreds of thousands of times.[118] Mosley subsequently filed an application to the ECtHR, claiming that the UK was in breach of his article 8 right to respect for privacy in failing to impose a duty on the *News of the World* to notify him in advance of publication of the story. The case, which was only recently heard, ruled that there had been no breach of Mosley's article 8 right to private life.[119]

Regardless, the success of Mosley in the High Court has spawned a flurry of similar cases in recent years, which include the granting not only of injunctions, but also of what are commonly referred to as *super-injunctions*, which prohibit the press from even mentioning the existence of the court order. Given the lack of any specific parliamentary guidance for the development of this area of privacy law beyond the general provisions of the HRA1998, the courts have instead tended to rely relatively directly on ECtHR judgments such as *Von Hannover*. In their interpretation and application of the European jurisprudence, there have thus been numerous instances where newspapers have been enjoined from reporting on any details of a case. These have, nevertheless,

[115]Ibid., ¶ 3.
[116]Ibid., ¶ 7.
[117]Ibid., ¶ 131.
[118]Ibid., ¶¶ 32, 236.
[119]*Mosley v. UK* [2011] ECHR 48009/08.

come to light in a variety of means, including when the court has refused to continue an existing super-injunction,[120] when the details of the injunction have been reported in another legal jurisdiction such as Scotland or the US, when the injunction has been revealed through parliamentary privilege, or when the details have been disseminated in contempt of court.

All of the last three instances occured in relation to an affair between English footballer Ryan Giggs and Welsh glamor model Imogen Thomas. Giggs sought to enjoin English newspaper *The Sun* against revealing the details of their relationship. On April 14, 2011, the High Court granted a temporary injunction to that effect. On May 8 the same year, an account on the website Twitter was created and used to post the details of several anonymized privacy injunctions, including that of Giggs, which was subsequently reported in various media outlets outside England, including on the front page of the print edition of the *Sunday Herald* in Scotland, on May 22. This was done despite the (English) High Court judgment, on May 16, finding in favor of the claimant and citing article 8 of the ECHR as the basis for the court's decision to enjoin the English press from identifying Giggs in relation to the relationship.[121] Eady, J, argued as follows:

> It will rarely be the case that the privacy rights of an individual or of his family will have to yield in priority to another's right to publish what has been described in the House of Lords as "tittle-tattle about the activities of footballers' wives and girlfriends."[122]

On May 23, John Hemming, MP, utilized parliamentary privilege (i.e. legal immunity in one's duties as a legislator) to name Giggs as the CTB of the case.[123] When *The Sun* on the very same day attempted to have the injunction lifted, Eady, J, refused the application, again citing the importance of privacy and the lack of any substantial public interest in the case. In 2012, Giggs finally consented to the court naming him in proceedings.[124]

The situation arising in relation to the Giggs case—namely that of widespread knowledge about the individual in question, despite there being an injunction on English

[120] See e.g. *Hutcheson (previously known as "KGM") v. News Group Newspapers Ltd.* [2011] EWCA Civ. 808.
[121] *CTB v. News Group Newspapers Ltd.* [2011] EWHC 1232 (QB), [2011] All ER 142.
[122] Ibid., ¶ 33.
[123] HC Debate, May 23, 2011, vol. 528, col. 638.
[124] *Giggs (previously known as "CTB") v. News Group Newspapers Ltd.* [2012] EWHC 431 (QB), [2012] All ER 93.

newspapers against reporting this information—was unique in its specifics. Nevertheless, general concerns about super-injunctions have led to the publication of a judiciary report by a committee headed by Lord Neuberger, MR. The report found, among other things, that super-injunctions should "only be granted when they are strictly necessary," and not in such a manner that they became permament.[125] Although it thereby took the position that there was a risk of overusing super-injunctions, it provided no judicial specification of precisely how to draw any boundary for such strict necessity.

3.3 Other European Influences

The UK is, in virtue of its status as a founding member of the CE, and an early accession member to the EU, subject to a variety of European laws and treaties. While these impose various legal recommendations and requirements, the areas of data protection and working time limitations are particularly pertinent to the question of athlete whereabouts. I treat them briefly, in turn, below.

The EU is comprised of a set of European countries that share in certain economic and political aims, and that have agreed to follow EU law, as per the original 1957 Treaty establishing the European Economic Community, and its subsequent amendments as the Treaty on the Functioning of the European Union (most recently amended, in 2007, by the Treaty of Lisbon). EU law is based on the various EU treaties, as well as its regulations and directives. According to the Treaty of Rome 1957, member states are required to apply this law, either directly or indirectly, within their own jurisdictions; failure to do so risks proceedings against the member state in question by the European Commission. The judicial authority of the EU is the CJEU; in addition to ensuring that member states comply with EU law, it is responsible for ensuring the legality of the acts of EU institutions and interpreting EU law when requested to do so by national courts and tribunals.[126] As a member of the EU, the UK is required to recognize EU law within its own jurisdiction, whether through legislation or judicial application.

There are various areas of contention between the EU and WADA. The Sports Commission of the European Union has, for instance, questioned the legality of WADA's data protection policies, in relation to the revised whereabouts requirements and their

[125]Neuberger, *Report of the Committee on Super-Injunctions.*
[126]CJEU, *General Presentation.*

implementation in the EU. Among several points of concern, the Commission voiced their reservations regarding the process by which athlete whereabouts data was transmitted to WADA's database in Canada.[127] At the time of their coming into force, then EU Sport Commissioner Jàn Figel stated these concerns, requesting that WADA wait with the implementation of the new whereabouts requirements:

> I would urge the president of WADA for the sake of clarity and cohesion between many stake holders [to] put on hold this article and await the opinion of our working party on this and then make a final decision. ... It is better to delay this decision since anti-doping policy deserves sensitivity and time. The reward would be very high for the credibility of WADA and the competitions. It would show more fairness in dealing with sportsmen and women.[128]

Similarly, concerns have also been raised that the whereabouts requirements fall foul of EU law governing restrictions on maximum working time and minimum rest periods for employees. The International Federation of Professional Footballers (FIFPro) have considered raising a legal challenge against the requirements on this basis.[129] It has also been the subject of academic consideration:

> A strong case can be made that the new "whereabouts" rule clearly infringes on this right [to a weekly rest period]. Under the rule, an athlete is subject to a potential no-notice drug test for one hour out of every day, 7 days a week, 365 days a year. By having to provide information on where the athlete can be located during this sixty-minute time period, the athlete is essentially put "on call" every day. There is no point in time when the athlete would be able to enjoy an uninterrupted twenty-four hours of rest and relaxation as guaranteed by [EU law]. The athlete must be present at the "specified location" during the "specified time" no matter what. WADA's new "whereabouts" rule requires compliance every day and clearly obstructs an athlete's right to a weekly rest period.[130]

I discuss the legality of WADA's whereabouts requirements, in relation to the above sorts of issues, in further detail in chapter 7. The purpose of the current section—as of the chapter as a whole—is to provide an initial overview of the general legal terrain.

[127] Article 29 Working Party, *Opinion 3/2008*; Article 29 Working Party, *Second Opinion 4/2009*.
[128] As quoted in Ennis, *Doping-EU Regulator Wants "Whereabouts" Rule On Hold*.
[129] FIFPro, *Legal Threat to Anti-Doping Code*.
[130] Halt, "Where Is the Privacy in WADA's 'Whereabouts' Rule?" 284.

3.3.1 Data Protection

In 1980, the OECD published its recommendations for the protection of personal data, consisting of various principles dictating reasonable limitations to the processing of personal data.[131] Although the OECD guidelines were non-binding, they were eventually implemented in EU law through the adoption of the European Data Protection Directive 1995 (EDPD 1995).[132] Briefly, the directive stipulates a "right to privacy with respect to the processing of personal data,"[133] with the latter defined as follows:

> "Personal data" shall mean any information relating to an identified or identifiable natural person ("data subject"); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.[134]

The EDPD 1995 sets out the general conditions that must be met in order to allow for the legal processing of such personal data. According to the directive, personal data may only be processed with the consent of the data subject, unless there are other overriding concerns (such as prior legislation, or national or public security).[135] Furthermore, it falls on the processor of any personal data to ensure that the data are processed fairly, collected and used for the specified purposes only, relevant to the purposes of collection and processing, accurate and up-to-date, and stored no longer than is necessary for the specified purposes; in addition to communicating to the data subject the processor's identity, the purposes of processing, and any further relevant information.[136]

Finally, the EDPD 1995 grants data subjects a right of access to the personal information held about them by data processors, as well as a right to object to, among other things, the use of their personal data for the sake of direct marketing.[137] More specifically, the EDPD 1995 forbids the transfer of data to countries outside the EU, unless the data subject has explicitly consented or sufficient protection is otherwise in place.[138]

[131] OECD, *OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*, §§ 7–14.
[132] Council Directive 95/46/EC [1995] OJ L281/31.
[133] EDPD 1995, art. 1.1.
[134] Ibid., art. 2.a.
[135] Ibid., arts. 7, 13.
[136] Ibid., arts. 6, 10.
[137] Ibid., arts. 12, 14.
[138] Ibid., ch. IV.

The EDPD 1995 was implented in the UK through the passing of the Data Protection Act 1998 (DPA 1998), a UK Act of Parliament that defines the law on the processing of the data of identifiable living people.[139] It consolidates and replaces previous legislation such as the Data Protection Act 1984 and the Access to Personal Files Act 1987, and was enacted in order to bring UK law into line with the requirements of the EDPD 1995.

More specifically, the DPA 1998 establishes the legal requirements pertaining to data collection and processing within the UK, in effect granting individuals the possibility of controlling the use by others of their personal information. The act defines various data protection principles, and also enunciates the entitlements and rights of individuals in respect to their personal data. Briefly, and in general, individuals in the UK are entitled to be informed about the processing of any of their personal data, a description of the personal data processed, the purposes of the data processing, the recipients of the processed data, and information about the source of the data. This entitlement must be met, barring overriding concerns (such as national security, crime, or taxation), where an individual has submitted a formal request, and paid any "subject access fee," to the data controller for the relevant information.[140] Furthermore, and again in general, individuals in the UK have the right to at any time require that their personal data is not processed for the purposes of direct marketing, not processed for any purposes "likely to cause substantial damage or substantial distress to him or to another" where that damage or distress would be considered unwarranted, and that it be corrected if it is inaccurate (as to matters of fact).[141]

In addition, any organization seeking to process the personal data of individuals in the UK must be officially registered with the Information Commissioner's Office (ICO), a non-departmental public body that reports directly to Parliament and is taxed with regulating adherence to, educating about, and resolving problems regarding the DPA 1998 and related pieces of legislation. Failure to register is classed as an offence, as is failure to abide by the act.[142] The ICO is an active body, dealing with a multitude of individual complaints and cases, and ultimately behind a spate of well-publicized events,

[139]Note also that although the ECtHR hears cases against member states of the CE for purported breaches of the rights stipulated in the ECHR, it also recognizes in its decisions the rights set forth in the EDPD 1995 for those EU member states to which the latter applies, as per *S v. UK* [2008] ECHR 30562/04, ¶ 50.

[140]DPA 1998, § 7.

[141]Ibid., §§ 10–11, 14.

[142]Ibid., § 21.

from various prosecutions over the illegal processing of personal data to the public release of controversial UK MP expenses.[143]

3.3.2 Working Time Restrictions

The EU legislated on working time restrictions for workers within its member states as early as 1993.[144] After several amendments,[145] EU lawmakers consolidated the law into a replacement directive in 2003: the European Working Time Directive 2003 (EWTD 2003).[146] The new directive stipulates various legal restrictions on working time, for the purpose of protecting workers' health and safety. More specifically, it requires EU member states to recognize certain minimum daily, weekly, and annual rest periods, in addition to maximum limitations on weekly working hours.[147]

According to the EWTD 2003, workers are entitled to (*a*) a rest period of at least eleven consecutive hours during every twenty-four-hour period; (*b*) a further rest period of at least twenty-four consecutive hours during every seven-day period; and (*c*) at least four weeks of paid annual leave.[148] In addition, the maximum average weekly working time, including overtime, is set to forty-eight hours.[149] "Working time" is defined in the directive as "any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice," while "rest period" is defined as any period that is not working time.[150]

The UK legislated working time restrictions in 1998, in response to the 1993 version of the EU directive. The delay was due to significant political opposition from the UK in response to the original directive. It was not until the 1996 European Court of Justice (ECJ; the highest court of the CJEU) case against the Council of the European Union (CEU) that the EU found the UK legally obliged to implement the details of the directive. The success of the directive, the court argued, "necessarily presupposes

[143] See ICO, *Introduction to the ICO*, and links from there.
[144] Council Directive 93/104/EC [1993] OJ L307/18.
[145] As specified in Directive 2000/34/EC [2000] OJ L195/41.
[146] Directive 2003/88/EC [2003] OJ L299/9, EWTD 2003.
[147] Ibid., ¶ 5.
[148] Ibid., arts. 3, 5, 7.
[149] Ibid., art. 6.
[150] Ibid., arts. 2.1–2.2.

Community-wide action," since otherwise it would, "as in this case, [leave] the enactment of the detailed implementing provisions required largely to the Member States."[151]

The resulting legislation, the Working Time Regulations 1998 (WTR1998), implemented the specifics of the EWTD 1993, although it differed from the latter in allowing exceptions from the forty-eigh-hour maximum weekly working time limit.[152] These would occur where employees would agree with their employer in writing that the maximum weekly working time limit did not apply to them, where the employer would maintain up-to-date records on affected employees, and where the employer would provide any official health and safety inspector access to those records and any further information requested.[153] Such exceptions would apply for a specified time period or indefinitely, as agreed between the employees and employer, and subject to no less than seven days' written notice where an employee would seek to terminate the agreement.[154] The WTR 1998 has since been amended numerous times, in order to ensure that it reflects developments at the European level, as through the amendments to EWTD 2003. It still retains, however, the possibility of exceptions from the forty-eight-hour maximum weekly working time limit, as in the original.

The UK Health and Safety Executive (HSE) is taxed with monitoring employer compliance with the WTR 1998, in a similar role to that of the ICO in the context of data protection legislation. The HSE was, however, created prior to the WTR 1998, as a result of the Health and Safety at Work etc. Act 1974, to regulate and enforce certain minimum standards of workplace safety, health, and welfare. In relation to working time limits, the HSE is, among other things, responsible for the enforcement of the maximum weekly working time limit, as well as the possible exceptions to that limit.[155]

In summary, there are a host of different legal privacy protections in England—some of which are still undergoing extensive development—although there is still no explicit legal general right to privacy as such. While only some of these areas of law are directly relevant to WADA's whereabouts requirements, they all inform common interpretations of and judgments about privacy among the general public. The conceptual situation is, however, made more complex by a variety of further factors. Foremost among

[151] *UK v. CEU* [1996] ECR I-05755, ¶ 47.
[152] WTR 1998, SI 1998/1833.
[153] WTR 1998, § 5.
[154] Ibid., § 5(2).
[155] HSE, *The Working Time Regulations.*

these is the contingent historical fact that serious philosophical treatment of privacy is—in at least English-speaking philosophy—almost exclusively limited to particular concerns arising from the context of US legal developments over the past fifty years or so. For this reason, it is impossible to appreciate the impact and importance of much of the philosophical discussion without an initial overview of its roots in US law. The following chapter addresses this issue, as a foundation for the subsequent development of an account of privacy suited to the whereabouts context.

— 4 —

The Conceptual History of Privacy

Contemporary concerns about privacy, when expressed in English, share an interesting etymological quirk. Privacy has long been discussed by the judiciary in a number of countries, including the UK, but philosophical treatment of it (in at least the English-speaking world) is an almost uniquely American phenomenon, arising in response to historical expansions in the US legal interpretation of privacy. This philosophical discussion is fractured and indeterminate. But it has, in virtue of its near monopoloy on robust accounts of privacy, influenced interpretations of the term globally. Roughly, these can be divided into two groups: what I will call *narrow* accounts of privacy restrict their treatment of the concept to certain types of personal information, while *wide* accounts maintain that there is more to privacy than just personal information.

4.1 Conceptual Origins

There are a multitude of different uses of *privacy* and its near cognates. Many of these are largely irrelevant to present purposes; *private* as a military rank, as an indication of a person not holding public office (as in *private citizen*), or as a designator of that which is not provided by the state or some equivalent public body (as in *private sector*). The interest here lies instead with privacy and private as designators of that which is, in common parlance, "nobody else's business."

Although this notion is not sufficiently specific to be used as the basis for a robust account of privacy—not least because "nobody else's business" can be reasonably in-

terpreted in a number of different ways—it nevertheless corresponds to the intuitive discomfort many people feel about various sorts of harms. The concern also seems to be on the rise among the public generally, as surveillance technologies continue to be developed:

> In recent years, surveillance has become an increasingly salient political issue in the United States. ... Generally speaking, the polls show that concern about threats to personal privacy has been growing in recent years. Although the public was temporarily willing to expand the government's investigative powers in the aftermath of the September 11, 2001, terrorist attacks, support for most forms of surveillance has declined.[1]

In order to establish the normative force of such concerns—whether in relation to the general public or to elite athlete whereabouts requirements—it is crucial to first establish a clear idea of what, precisely, is being objected to, in order to assess its legal and ethical acceptability. While there are a multitude of scholarly accounts of privacy that purport to do just that, few of them agree on the specifics. As a result, there is a risk of skepticism about the utility of the concept of privacy generally. I provide an overview of the most important scholarly accounts of privacy below, beginning with the origins of the discussion in the historical distinction between public and private.

4.1.1 Early History

There is a well-documented tendency, among both humans and animals, to at times seek solitude or concealment from other individuals, whether through territorial behaviors, selective concealment (of e.g. body parts), or the regulation of social taboos.[2] Such findings suggest that, cultural variations notwithstanding, all people (and many animals) share a strong and primeval drive to control the extent to which they expose themselves to others, whether in actions or words. Although different groups express this drive in different ways, it tends to amount to a similar functional distinction, between those matters considered rightly public and those considered rightly private, relative to the context.

[1] Best, Krueger, and Ladewig, "Privacy in the Information Age"; cf. also Katz and Tassone, "Public Opinion Trends"; DeCew, *In Pursuit of Privacy*; and, for a similar overview of privacy concerns in the UK context, Morrison and Svennevig, *The Public Interest, the Media and Privacy*.

[2] See e.g. Mead, *Coming of Age in Samoa*; Westin, *Privacy and Freedom*; Altman, *The Environment and Social Behavior*; DeCew, *In Pursuit of Privacy*, 11–13.

Various scholars have reflected upon this disctinction, between normatively loaded notions of public and private.[3] The original Hippocratic Oath, for instance, from around 400 BCE, includes the following section:

> What I may see or hear in the course of the treatment or even outside of the treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself, holding such things shameful to be spoken about.[4]

Aristotle, in turn, separated the *polis*—the public realm of political activity—from the *oikos*—the private realm of the family. The *oikos*, consisting of certain primary relations (husband-wife, father-child, master-slave), constituted, according to Aristotle, the individual units of the *polis*, with the man of the house serving as the intermediary between the two.[5]

John Stuart Mill proposed a related distinction, between *other-regarding* and *self-regarding* activities. Government authority, in his view, had jurisdiction over the former, but not over the latter, insofar as self-regarding activity concerned "the interests of no persons besides [oneself]."[6] Such a division, although similar in form to Aristotle's, differed from the latter's in its explicit focus on the individual, rather than the family, as well as in its explicit emphasis on the normative importance of governmental non-interference with any self-regulating activity.

John Locke applied a similar normative distinction to the realm of economics, arguing that although the world, in a state of nature, belonged equally to all, rightful private property was achieved by one's own toil:

> Though the earth and all inferior creatures be common to all men, yet every man has a property in his own person; this nobody has any right to but himself. The labour of his body and the work of his hands we may say are properly his. Whatsoever, then, he removes out of the state that nature hath provided and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property.[7]

[3]For a more thorough overview of different interpretations of the public-private distinction, see Gavison, "Feminism and the Public/Private Distinction," 4–9; cf. also DeCew, *In Pursuit of Privacy*, 9–11.
[4]As given in Edelstein, *The Hippocratic Oath*, 3.
[5]Aristotle, *Politics*, §§ 1253b1–14, 1260b8–27; Roy, "*Polis* and *Oikos* in Classical Athens."
[6]Mill, *On Liberty*, 135.
[7]Locke, *Of Civil Government*, 15–16.

This narrow selection of historical views about the distinction between private and public is sufficient to illustrate the variety of conceptually separate but overlapping interpretations of the distinction. Explicit discussion about privacy itself, however, only began in earnest at the end of the nineteenth century, followed by the development in US law of a general tort right to privacy. Serious subsequent philosophical treatment of the topic, from the late 1960s onward, grew from reflections on the US Supreme Court's extension of privacy to range over certain legal instances concerning, particularly, contraception and procreative rights. This philosophical discussion has been broad and varied, but any attempt to appreciate the source and main thrust of its form and content requires a closer initial investigation into its underpinnings in US law.

4.1.2 Warren and Brandeis

As noted in the previous chapter, common law protections of privacy in England developed significantly throughout the nineteenth century. Nevertheless, by the end of the century, important concerns remained. As North, J, noted in *Pollard*, there was, at the time, no legal redress for non-defamatory photographs taken surreptitiously.[8] In the US—which at the time still derived much of its law from English legal cases and considerations—this was made all the more pressing by two then recent non-legal developments.

First, Eastman Dry Plate Company introduced their Kodak camera in 1888. This was an inexpensive and widely popular roll film camera that allowed simple pointing and snapping, making it significantly easier to take covert photographs than with the bulkier and more conspicuous (and significantly more expensive) plate cameras of the day.[9] Second, the publication ranges of so-called *yellow papers*—i.e. newspapers seeking to increase sales by resorting to exaggeration, gossip, and sensationalism—were expanding rapidly. And where a newspaper would choose to write about an individual, there was very little in the way of legal remedies—apart from protections against outright libel and slander—to stop them from doing so, regardless of the perceived newsworthiness of the information thus divulged.[10]

[8] *Pollard*, 346.

[9] The camera was so successful that the company subsequently changed its name to the Eastman Kodak Company: Jenkins, "Technology and the Market."

[10] For a brief historical discussion of yellow papers and their influence on the development of legal privacy protections in the US, see Solove, Rotenberg, and Schwartz, *Privacy, Information, and Technology*, 9–10.

It was in this historical context that Samuel Warren and Louis Brandeis penned their seminal 1890 article "The Right to Privacy." In their view, instantaneous photography and the yellow press had jointly "invaded the sacred precincts of private and domestic life; and ... threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.' "[11]

Their article, which led to the creation of various US privacy torts and marked the starting point for subsequent scholarly discussion of privacy, is still central to that discussion today.[12] An indication of its position in US law can be gleaned from the fact that it was cited recently, more than a century after its publication, by the majority of Supreme Court justices—among those both in concurrence and in dissent—in a recent case.[13]

In response to the concerns that Warren and Brandeis shared about instantaneous photography and the yellow press, they argued that although there was no explicitly recognized legal right to privacy thereto, its general principle was nevertheless implicit in the development of English and US common law up to that point. What had originally served as a primitive notion of a right to life—understood merely as a right to one's physical self and property—had expanded, they maintained, to include various rights pertaining to more than just the physical being of the individual. These included protections from assault (as opposed to just from battery), from nuisance, and from slander and libel; as well as protections of both tangible and intangible property, such as trademarks, and literary and artistic works. A legal right to privacy was, in the authors' opinion, merely the next stage of this natural expansion of the common law.[14] Recognizing this in the courts would not, they argued, amount to a case of judicial legislation:

> The application of an existing principle to a new state of facts is not judicial legislation. To call it such is to assert that the existing body of law consists practically of the statutes and decided cases, and to deny that the principles (of which these

[11] Warren and Brandeis, "The Right to Privacy," 195.

[12] It has been referred to by various epithets, including "one of the most brilliant excursions in the field of theoretical jurisprudence," by Adams, "The Right of Privacy, and Its Relation to the Law of Libel," 37; the "most influential law review article of all," by Kalven, "Privacy in Tort Law," 327; and "momentous," by Richards and Solove, "Privacy's Other Path," 127.

[13] *Kyllo v. US* 533 US 27 (2001), concerning the use by law enforcement authorities of a thermal-imaging device to detect heat patterns emanating from a person's home.

[14] Warren and Brandeis, "The Right to Privacy," 193–96.

> cases are ordinarily said to be evidence) exist at all. It is not the application of an existing principle to new cases, but the introduction of a new principle, which is properly termed judicial legislation.[15]

To overcome what they viewed as the primary limitations of the law at the time with regard to the issue, the authors maintained that the right to privacy expanded beyond the traditional relationship-focus of confidence law, instead amounting to a right "to each individual ... of determining, ordinarily, to what extent his thought, sentiments, and emotions shall be communicated to others."[16] This right, interpreted as part of "the more general right of the individual to be left alone," was strongly individualistic; instead of focusing on what individuals may owe each other in terms of trust, as in confidence law, their new account sought to demarcate a domain of "inviolate personality" around each individual, to be protected by the law.[17] Such an interpretation—what has since been termed "a right against the world to protect hurt feelings"—constitutes, in its explicit restriction to the sole individual, the foundation for the modern US legal interpretation of privacy.[18]

Warren and Brandeis reached this account through a novel reading of *Prince Albert*. The court in *Prince Albert* had ruled in favor of the plaintiffs, finding that exhibition and publication of the Prince's etchings were prohibited on the grounds of both literary property and confidence. Where common law literary copyright amounted to, in the Lord Chancellor's opinion, the protection of people's "private use and pleasure" of their unpublished work, Warren and Brandeis argued that this form of intellectual property protection was "but [an instance] and [application] of a general right to privacy."[19] Confidence did not suffice, in their view, for such protection, insofar as it "would not support the court in granting a remedy against a stranger," i.e. it would not protect against the sorts of recent technological advances they were concerned with.[20] Instead, the "private use and pleasure" referred to by the Lord Chancellor amounted, in their view, to an explicit recognition of the applicability of existing legal principles to the protection of individual privacy. In this manner, Warren and Brandeis took the Lord Chancellor's

[15]Warren and Brandeis, "The Right to Privacy," 213n1.
[16]Ibid., 198.
[17]Ibid., 205, 211.
[18]Richards and Solove, "Privacy's Other Path," 132.
[19]*Prince Albert*, 1178; Warren and Brandeis, "The Right to Privacy," 198.
[20]Warren and Brandeis, "The Right to Privacy," 211.

reference to "private use and pleasure" and used it to turn *Prince Albert* from a case concerning property rights to one concerning the protection of personal feelings from undesired publicity.[21]

Warren and Brandeis's implicit interpretation of privacy has proved important to subsequent philosophical discussion, despite the fact that they at no point provided any definition for privacy, nor, for that matter, explained or justified the source of its value (being to "protect people's dignity"). They spoke, at some length, about the press contributing to an unacceptable spreading of "idle gossip," and maintained that "of the desirability—indeed of the necessity—of some ... protection [of privacy], there can, it is believed, be no doubt," but they made no attempt to either posit or describe a definition of any sort.[22]

This conceptual lacuna has not hindered later authors from attributing to Warren and Brandeis different definitions of privacy, typically read merely as "being let alone."[23] Such a definition has obvious conceptual problems: it is easy to imagine situations in which an individual maintains privacy despite not being let alone (such as if they are hit in the head with a brick), or perhaps even in which they have no privacy despite being let alone (such as, arguably, if they are subject to certain forms of covert surveillance).[24] This is, however, not a particularly charitable reading of Warren and Brandeis.[25] They maintained that a right to privacy was evident in an individual's right to determine "to what extent his thoughts, sentiments, and emotions shall be communicated to others," insofar as "no other has the right to publish [a person's] productions in any form, without his consent."[26] Such an interpretation seems to suggest a notion of privacy that emphasizes personal control, rather than a simple matter of determining whether or not a person is being let alone.

Little can be said with absolute certainty, however, of the specifics of their preferred account of privacy. What can be noted with more confidence is their position, throughout their article, that (*a*) privacy is a matter of the individual against larger groupings

[21] Cf. Richards and Solove, "Privacy's Other Path," 131.

[22] Warren and Brandeis, "The Right to Privacy," 195–96.

[23] See e.g. Parent, "Privacy, Morality, and the Law," 271; Archard, "The Value of Privacy," 14; S. Davis, "Is There a Right to Privacy?" 451.

[24] Thomson, "The Right to Privacy," 295; Parent, "Privacy, Morality, and the Law," 272; S. Davis, "Is There a Right to Privacy?" 451.

[25] Cf. Gavison, "Privacy and the Limits of Law," 437n48, 461n120; Austin, "Privacy and the Question of Technology," 122.

[26] Warren and Brandeis, "The Right to Privacy," 198–99.

in society (as opposed to e.g. one individual against another), and (*b*) privacy is in direct opposition to the interests of the press (particularly in its more populist guises) in reporting on the affairs of individuals. They recognized that, by their account, it would become necessary to balance the interests of privacy against the interests of free speech, arguing that the former could not be used to "prohibit any publication of matter which is of public or general interest," which they saw as in practice restricted to the question of suitability for public office or some similar public position.[27] Likewise, they maintained that if any individual would choose to make something public, or consent to its being made public by another, that which was made public could receive no further legal protection on the basis of privacy. In response to the question of where to draw the line, practically, between private and public—whether, for instance, telling a friend a secret would legally constitute making the secret public or not—Warren and Brandeis argued that "a private communication of circulation for a restricted purpose is not a publication within the meaning of the law."[28] While this position seemed to allow for the expansion of privacy to concern not just individuals but also their intimate or secret relations, it gave no further consideration to the specifics of precisely where to draw the line. This was an issue Warren and Brandeis left for the US courts to develop as a matter of legal practice.

In any event, their novel reading of *Prince Albert*—shifting its focus from confidence to privacy, and arguing that the latter was the only means by which to protect people's dignity in light of recent technological advances—effected a fundamental shift in US privacy law, diverting it away from the thereto ongoing development of confidence protection. This shift was recognized by US courts in an initially piecemeal fashion, no doubt gaining some momentum from Brandeis's subsequent appointment in 1916 as an Associate Justice of the US Supreme Court.[29]

[27] Warren and Brandeis, "The Right to Privacy," 214–16.

[28] Ibid., 218.

[29] One of his most celebrated opinions occurred in his dissent in *Olmstead v. US* 277 US 438 (1928), where he argued that "the makers of our Constitution ... conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man," at 478; for an overview of the relevant US legal developments in the first half of the twentieth century, see Prosser, "Privacy," 383–89; Richards and Solove, "Privacy's Other Path," 146–48.

4.1.3 Prosser and the US Privacy Torts

The first case in the US to recognize a legal right to privacy was the 1905 *Pavesich v. New England Life Insurance Co.*[30] Unlike Warren and Brandeis's account of a right to privacy as inherent in common law development, the court in *Pavesich* sought to base the right on a number of foundations, including that it was "derived from natural law" and "embraced within the right of personal liberty."[31]

Warren and Brandeis had a significant impact on a host of cases in subsequent US law, but it was not until William Prosser published his article "Privacy" in 1960 that the US right to privacy was systematized into something resembling a coherent piece of common law. Noting, in the article, that there had been over three hundred privacy cases since Warren and Brandeis's "The Right to Privacy," Prosser sought to clarify the defining factors of the relevant law.[32] In so doing, he explicitly identified four separate torts:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation ... of the plaintiff's name or likeness.[33]

Although Prosser was primarily attempting to construct a taxonomy of privacy law in the US, he also had significant concerns about its unregulated and sporadic development thereto, insisting that there were "dangers" in its ongoing expansion into various different areas of law, and that it was "high time that we realize what we are doing, and give some consideration to the question of where, if anywhere, we are to call a halt."[34] In unifying the tort of privacy in this manner, Prosser came to have a profound influence on later developments in US common law. His involvement as a reporter for the *Second Restatement of Torts* only strengthened this influence.[35] In utilizing his four-part taxonomy in the *Restatement*, Prosser's formulations, by explicitly simplifying and restricting

[30] 50 SE 68 (GA 1905).
[31] Ibid.
[32] Prosser, "Privacy," 388.
[33] Ibid., 389.
[34] Ibid., 423.
[35] American Law Institute, *Restatement (Second) of Torts*, § 652.

existing privacy case law, have become definitive and accepted across practically the entire US.[36] Where Warren and Brandeis had initiated the move away from confidence, Prosser effectively ossified it.[37] And although there have been legal challenges to his scheme,[38] it remains largely intact to the present day, and has had a significant impact on subsequent privacy cases.[39]

This is, however, not to maintain that the interpretation and application of the common law right to privacy in the US courts has been entirely uniform. Significant differences arise in, for instance, the manner in which the courts draw the distinction between public and private. Some of the courts have been inclined to take a more or less binary and mutually exclusive view of the two, assuming that once something is in the public domain, broadly construed, it can no longer be considered private in any sense. In *Nader v. General Motors Corp*,[40] Ralph Nader—an author and lecturer on automobile safety (as well as a later political activist and US presidential candidate)—claimed that General Motors had violated his right to privacy in conducting a "campaign of intimidation" against him in light of a book that he was about to publish—titled "Unsafe at Any Speed," about the safety and design of the defendants' automobiles. As part of this "campaign," General Motors had, among other things, interviewed various acquaintances of Nader's, questioning them about his "political, social, racial and religious views; his integrity; his sexual proclivities and inclinations; and ... his personal habits."[41] Insofar as any factual information General Motors received from such interviews was due to Nader previously having divulged the information freely to those acquaintances, the court found that there had been no violation of his right to privacy. In their view, the information "could hardly be regarded as private," insofar as the divulging of any information to others necessitated an assumption of the "risk that a friend or acquaintance in whom [one] had confided might breach the confidence."[42]

This illustrates a highly stark view of the public-private distinction. Most judgments treating analogous cases do so on the basis of arguably less intentionally insidious prac-

[36] Richards and Solove, "Privacy's Other Path," 150–51.

[37] Note that there has been a highly limited development of confidence law in the US as well, entirely separate from that of privacy. For an overview, see ibid., 151–53, 156–58.

[38] See for instance *Florida Star v. BJF* 491 US 524 (1989).

[39] For an overview, see Richards and Solove, "Prosser's Privacy Law."

[40] 255 NE 2d 765 (NY Ct. App. 1970).

[41] Ibid., 767.

[42] Ibid., 770. Note, however, that the court did subsequently find an invasion of Nader's privacy on the basis of other actions by General Motors than those listed here.

tices. For instance, in *Duran v. Detroit News Inc*[43]—concerning a Colombian judge who had previously indicted the infamous drug lord Pablo Escobar in Colombia, but had, due to death threats, resigned from the bench there and moved with her husband to Detroit—the Michigan Court of Appeal found that the publication in a newspaper of the judge's Detroit home address did not amount to the revealing of any private information. In her function as Colombian consul in Detroit, the plaintiff had handed out business cards with her name on them where she had deemed it appropriate. She had also signed the lease for her apartment, and introduced herself to her neighbors, using her real name (although she kept an unlisted telephone number, did not join any clubs or organizations, and did not attend public events). As a result, insofar as her identity was already "open to the public eye," the court denied any violation of a right to privacy.[44]

Other cases have seen judgments in direct opposition to these sorts of construals of the public-private distinction, arguing that there can still be a reasonable expectation of privacy even where some personal information is available to many others. Thus, for instance, in *Times Mirror Co v. Superior Court*,[45] a reporter from the Los Angeles Times had written the then governor of California, requesting, under local public records legislation, copies of his "appointment schedules, calendars, notebooks and any other documents that would list [the governor's] daily activities as governor from [his] inauguration in 1983 to the present [1988]."[46] The governor's office refused to comply, on the basis, roughly, that the information was private. The court concurred, stating that disclosing "every private meeting or association of the Governor ... is to deny human nature and contrary to common sense and experience."[47] The fact that several members of the governor's office, as well as many outside it (such as those with whom the governor would meet), were privy to the information did not suffice, in the court's opinion, to consider it non-private.

Note also that not all scholars have been satisfied with Prosser's enumeration of the privacy rights. Edward Bloustein argued, shortly after Prosser's original treatment of the issue, against his separation of the right into four torts. Bloustein maintained that a

[43] 504 NW 2d 715 (Mich. Ct. App. 1993).
[44] Ibid., 720.
[45] 53 Cal. 3rd 1325 (CA 1991).
[46] Ibid., 1329.
[47] Ibid., 1345.

"common thread runs through" a number of legal cases concerning privacy, including not only the four torts noted of Prosser's, but various other civil and criminal wrongs such as peeping, wiretapping, eavesdropping, and public disclosure of confidential information by the government.[48] He identified this common thread as offense to a "reasonable sense of personal dignity," liberty, and individualism, maintaining that the affront was brought about by, among other things, "physically intruding on personal intimacy and by using techniques of publicity to make a public spectacle of an otherwise private life."[49]

This sort of view is strengthened by the fact that subsequent developments in US law have often been inclined to treat cases concerning Prosser's privacy torts as linked to, in particular, the protections provided by the Fourth and Fifth Amendments of the US Constitution (against unreasonable searches and seizures, and against abuse of government authority in legal procedures, respectively).[50] Brandeis had, for instance, in *Olmstead* argued that wiretaps on telephones ought to be covered by Fourth Amendment law. Although he was in dissent in the case, the Supreme Court eventually overturned the judgment in the 1967 cases *Berger v. New York* and *Katz v. US*,[51] arguing in line with Brandeis's recommendations from almost forty years earlier, that Fourth Amendment protection against wiretaps and transmission eavesdropping was necessitated by privacy concerns.[52]

4.1.4 The Constitutional Right to Privacy

The most dramatic expansion of the US legal interpretation of privacy, however, does not concern this sort of application of Fourth and Fifth Amendment law to the protection of personal information. In the landmark 1965 case of *Griswold v. Connecticut*,[53] the Supreme Court ruled that the US Constitution protects a different sort of right to privacy, one that invalidated Connecticut state statute against the provision of contraceptives to married couples. Although the Bill of Rights never explicitly mentions privacy, Douglas, J, writing for the court, famously defended a "penumbral right of 'pri-

[48]Bloustein, "Privacy as an Aspect of Human Dignity," 1000–1001.
[49]Ibid., 1002–3.
[50]See e.g. DeCew, *In Pursuit of Privacy*, 18.
[51]388 US 41 (1967); 389 US 347 (1967).
[52]Cf. DeCew, *In Pursuit of Privacy*, 18–21.
[53]381 US 479 (1965).

vacy and repose' " that "emanated" from "those guarantees [of the Bill of Rights] that help give them life and substance."[54] This novel right to privacy protected, in Douglas's opinion, a "zone of privacy" belonging to each married couple, and to their doctor in advising them on contraceptive possibilities.[55] He argued that the zone arose from the guarantees provided by, among others, the First and Third Amendments (concerning the freedom of speech—including the freedom to teach and give information—and the protection of an individual's home, respectively), in addition to those of the Fourth and Fifth.[56]

Although most of the Supreme Court Justices concurred with Douglas's judgment about this sort of "penumbral" constitutional right to privacy, they proceeded to give a wide range of different justifications for it. Goldberg, J, argued for a right to privacy on the basis of the Ninth Amendment, stating that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[57] Harlan and White, JJ, instead argued for the right on the basis of the due process clause of the Fourteenth Amendment.[58]

Regardless of its specific justification, the constitutional right to privacy was expanded a number of times, and was used, among other things, for striking down state statutes forbidding interracial marriage, as well as the possession of "obscene" materials in one's home.[59] In *Eisenstadt v. Baird*,[60] Brennan, J, maintained that the right to privacy in respect of contraception and sexual choice applied to all individuals, regardless of their marital status:

> If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwanted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[61]

This view was also responsible for the judgment, in the 1973 landmark Supreme Court case of *Roe v. Wade*,[62] that a woman's decision to have an abortion was protected

[54] Ibid., 484–85.
[55] Ibid., 485.
[56] Ibid., 484.
[57] Ibid., 488–93.
[58] Ibid., 500–502.
[59] *Loving v. Virginia* 388 US 1 (1967); *Stanley v. Georgia* 394 US 557 (1969).
[60] 405 US 438 (1972).
[61] Ibid., 453.
[62] 410 US 113 (1973).

by the constitutional right to privacy. Of more immediate conceptual interest, the court attempted to provide a comprehensive definition of privacy in *Whalen v. Roe*,[63] an unrelated case concerning New York statutes that required the collection and storage of information pertaining to all Schedule II drug prescriptions (concerning, among other things, opiates). The statutes stipulated that the information must include the name of the prescribing doctor, the pharmacy dispensing the drug, the name and dosage of the drug, and the name, address, and age of the patient receiving it.[64] Specifically, the court recognized the dual nature of the US legal right to privacy, noting that one aspect of it concerned "the individual interest in avoiding disclosure of personal matters," while the other concerned "the interest in independence in making certain kinds of important decisions."[65]

Numerous legal scholars have argued that the lack of consensus for the specific justification of the constitutional right to privacy in *Griswold*, and the explicit recognition of the dual nature of the US right to privacy in *Whalen*, illustrate conceptual confusion on the part of the Supreme Court justices.[66] Specifically, there are claims that it is not only possible to successfully distinguish the tort right to privacy (including the Fourth Amendment protection against wiretaps and similar) from the constitutional right to privacy following from *Griswold*, but that the latter does not rightly concern privacy at all, pertaining instead to *autonomy* or *liberty* or some similar value. Louis Henkin constructs such an argument:

> What the Court has been talking about is not at all what most people mean by privacy. None of the recent cases, and none of the older cases the Court cited (except those dealing with search and seizure under the Fourth Amendment) ... deals with any of the matters that are the subject of the now massive literature on privacy. In [the *Griswold* line of cases], the Court was not talking about my freedom from official intrusion into my home, my person, my papers, my telephone; about my right to be free from official surveillance or accosting, ... [or] from being mentioned and publicized, or having data about me collected. ... The Court has been vindicating not a right to freedom from official intrusion, but to freedom from official regulation.[67]

[63] 429 US 589 (1977).
[64] Ibid., 589.
[65] Ibid., 599–600. The court ultimately found that the case in question activated both concerns, although not to an extent that required striking down the New York statutes.
[66] See e.g. Gross, "The Concept of Privacy"; Ely, "The Wages of Crying Wolf"; Posner, "Uncertain Protection of Privacy by the Supreme Court."
[67] Henkin, "Privacy and Autonomy," 1424–25.

These sorts of jurisprudential concerns—about the appropriate range of privacy protections in US law—have given rise to a parallell debate in philosophy regarding the proper scope of the concept of privacy. As the latter issues are more directly pertinent to the construction of an account of privacy relevant to the whereabouts context in the UK, it is to them I now turn.

4.2 Narrow Accounts of Privacy

There is no uncontroversial philosophical account of privacy; views differ widely on what, specifically, the term is supposed to encapsulate. This state of affairs has given rise to some skepticism about the concept itself. As Lillian BeVier maintains, "privacy is a chameleon-like word, used denotatively to designate a wide range of wildly disparate interests" and "connotatively to generate goodwill on behalf of whatever interest is being asserted in its name."[68] Or, as Judith Jarvis Thomson writes, "the most striking thing about the right to privacy is that nobody seems to have any very clear idea of what it is."[69] There are presumably a number of reasons for this general state of affairs, but a large part of it is specifically due to the various different strategic approaches available to philosophers, and the lack of any meaningful consensus on which approach is best suited to the explication of any given phenomenon. I discuss these issues, and the problems entailed by them in relation to the privacy discussion, in more detail in the following chapter.

At this stage of the inquiry, the purpose is merely to provide an overview of the philosophical debate on privacy, as a foundation for subsequent argumentation. Given the depth and breadth of the debate, this overview is necessarily selective, but it purports to be illustrative of the general discussion. More specifically, I separate the most important philosophical accounts of privacy into two rough groups. What I term *narrow* accounts of privacy are those that, in one manner or another, restrict their interpretations of privacy to certain aspects of personal information. What I term *wide* accounts of privacy are those that, again in some manner or other, include more than just personal information in their definitions.[70]

[68] BeVier, "Information about Individuals in the Hands of Government," 458.
[69] Thomson, "The Right to Privacy," 295.
[70] For similar distinctions, see DeCew, *In Pursuit of Privacy*; Parent, "Review of Decew, Judith Wagner. *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology*," 437.

This distinction corresponds, at least roughly, to the jurisprudential debate on the expansion of the US legal interpretation of privacy in the *Griswold* line of cases. Narrow accounts reject this expansion, insofar as it represents an attempt to apply the concept of privacy to more than just personal information. Wide accounts, on the other hand, may support the legal expansion, at least where it corresponds to some constitutent element of their account (although it need not do so).

The most important narrow accounts of privacy are, in turn, subdivisible into two general categories. The first view, as espoused by, for instance, Alan Westin, Charles Fried, and James Rachels, contends that privacy is best interpreted as the control of personal information. The second, most succinctly formulated by W. A. Parent, and more recently revised and expanded by Steven Davis, contends that privacy is best interpreted in terms of the possession of personal information.[71]

4.2.1 Control

Building on Westin's 1967 definition of privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others," Fried defines privacy as "the control we have over information about ourselves."[72] In his view, it is the ability to grant or deny access to this information to others that constitutes privacy. The information is furthermore subject to "modulations" in quality; i.e. Fried does not consider all instances of personal information equivalent in normative status:

> We may not mind that a person knows a general fact about us, and yet feel our privacy invaded if he knows the details. For instance, a casual acquaintance may comfortably know that I am sick, but it would violate my privacy if he knew the nature of the illness. Or a good friend may know what particular illness I am suffering from, but it would violate my privacy if he were actually to witness my suffering from some symptom which he must know is associated with the disease.[73]

Although beginning from similar worries to Warren and Brandeis—that "increasingly sophisticated scientific devices" are making possible more worrying intrusions

[71] Cf. also Archard, "The Value of Privacy," for a similar account of privacy as the possession of personal information.

[72] Westin, *Privacy and Freedom*, 7; Fried, "Privacy," 482; he espouses essentially the same definition in Fried, *An Anatomy of Values*, 140.

[73] Fried, "Privacy," 483.

into privacy—Fried diverts from previous authors in focusing not on concrete examples of how privacy is being invaded, nor on suggestions for how to better protect against such invasions, but instead exclusively on the philosophical basis of a right to privacy; in his own words, the "reasons why men feel that invasions of that right injure them in their very humanity."[74]

These reasons, he maintains, are based on the inherent value of privacy. Fried expresses dissatisfaction with instrumental analyses of this value, insofar as these purportedly render privacy overly "vulnerable." Instead he seeks to assign to privacy some form of intrinsic value, maintaining that it is "necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and trust."[75] Insofar as these relations appear, at least to Fried, to be fundamentally important to our general notion of personhood, he surmises that privacy is at least indirectly necessary for our "notion of ourselves as persons among persons."[76] On this view, intimate relationships, by their very nature, require privacy in order to be at all possible:

> To be friends or lovers persons must be intimate to some degree with each other. But intimacy is the sharing of information about one's actions, beliefs, or emotions which one does not share with all, and which one has the right not to share with anyone. By conferring this right, privacy creates the moral capital which we spend in friendship and love.[77]

There are concerns with Fried's analysis that are worth noting. First, Ruth Gavison points out that, contrary to his claims, Fried in fact does treat privacy in an at least partly instrumental manner, granting it value in virtue of its purported ability to provide certain other relations that we tend to value highly.[78] Fried is not entirely forthcoming on this matter, stating merely that "privacy is much more [than] just a possible social technique for assuring this or that substantive interest."[79] Perhaps he means to support an implicit distinction, not between purely intrinsic and instrumental values, but between some specific cut-off point of instrumentality along a range of possibilities. By

[74]Fried, "Privacy," 475; cf. also Rachels, "Why Privacy Is Important," 325: "Even married couples whose sex-lives are normal (whatever that is), and so who have nothing to be ashamed of, by even the most conventional standards, and certainly nothing to be blackmailed about, do not want their bedrooms bugged."
[75]Fried, "Privacy," 477.
[76]Ibid., 478.
[77]Ibid., 484.
[78]Gavison, "Privacy and the Limits of Law," 442n67.
[79]Fried, "Privacy," 477.

alluding to the possibility of viewing privacy as "just a possible social technique," Fried leaves open the possibility of a more refined distinction, one that might have rendered his account of privacy separable from more explicitly and thouroughly instrumental accounts. This remains, however, a mere possibility; as it stands, there is nothing in his writing to directly defend such a notion.

Second, numerous scholars have raised challenges against the notion that privacy is necessary for intimate relations of the various sorts Fried lists. As Davis argues:

> What is important for friendship, love, and trust is not necessarily the sharing of personal information, but caring about and caring for others, meeting one's obligations to them, doing things for them, etc.[80]

Along a similar line, Jeffrey Reiman objects to Fried's "market conception of personal intimacy," so dubbed because its value lies "not merely in what I have but essentially in what others do not have."[81] In Reiman's view, Fried's concept of privacy is not able to account for the fact that it does not seem necessary to maintain that the value of personal relations are born out of their exclusiveness "rather than because of their own depth or breadth or beauty."[82] Instead, Fried's view "overlooks the fact that what constitutes intimacy is not merely the sharing of otherwise withheld information, but the context of caring which makes the sharing of personal information significant."[83] He offers the following thought experiment as an illustration of his concerns:

> If two analysts decided to psychoanalyze one another alternately—the evident unwisdom of this arrangement aside—there is no reason to believe that their relationship would necessarily be the most intimate one in their lives, even if they revealed to each other information they withheld from everyone else, lifelong friends and lovers included. And this wouldn't be changed if they cared about each other's well-being. What is missing is that particular kind of caring that makes a relationship not just personal but intimate.[84]

Like Reiman, Parent argues that Fried's conception of intimacy is "skewed," insofar as it exclusively focuses on the sharing of information. On the contrary, according to

[80] S. Davis, "Is There a Right to Privacy?" 462.
[81] Reiman, "Privacy, Intimacy, and Personhood," 32.
[82] Ibid., 32.
[83] Ibid., 33.
[84] Ibid., 33.

Parent, intimacy also involves "the sharing of one's total self—one's experiences, aspirations, weaknesses, and values."[85] On Parent's account, Fried's mistake lies in his failing to supply an argument in favor of the claim that intimate relationships "cannot survive the loss of privacy."[86]

In addition to these specific criticisms of Fried's account of privacy, there are also more general criticisms of the idea that privacy is essentially about the control of personal information. First, control does not seem to be a sufficient condition for privacy. As Parent argues, people who voluntarily divulge all sorts of personal information about themselves to others are "exercising control, in a paradigm sense of the term," while nevertheless losing (in the sense of relinquishing) some of their privacy.[87]

Second, control also does not seem to be a necessary condition for privacy. As Davis notes, it is legal in the US, under certain specific circumstances, to tap somebody's telephone. But the existence of this law, and the lack of control it entails for all individuals in the US, does not in and of itself thereby diminish their privacy:

> Let us imagine a particular US citizen whose telephone has not been tapped and who has done nothing to warrant his telephone's being tapped. The very existence of the law means that his capacity to determine when, how and to what extent information about him is to be communicated to others is diminished, since it is possible that his telephone could be tapped without his permission.[88]

Gavison argues, in similar terms, that control theories suffer from a fatal ambiguity in their notion of control. On a weaker interpretation of the term, voluntary disclosure of personal information is an exercise in control, thereby falling victim to Parent's sufficiency counterexample. On a stronger interpretation, the very same act constitutes a loss of control, insofar as "the person who discloses loses the power to prevent others from further disseminating the information."[89] As an interpretation of privacy, this is,

[85] Parent, "Privacy, Morality, and the Law," 275.

[86] Parent, "Privacy, Morality, and the Law," 275; cf. also Posner, "The Right of Privacy," 408: "As for love and friendship, they, of course, exist and flourish in societies where there is little privacy." it is worth noting that Fried himself has acknowledged that there seems to be something to these criticisms, stating that he is "prepared to grant" some of the attacks on his earlier view, in Fried, "Privacy," 426. What this ultimately makes of his position is less clear.

[87] Parent, "Privacy, Morality, and the Law," 273.

[88] S. Davis, "Is There a Right to Privacy?" 452; Parent, "A New Definition of Privacy for the Law," 327, raises similar points; as does Austin, "Privacy and the Question of Technology," 126.

[89] Gavison, "Privacy and the Limits of Law," 427.

in Gavison's view, self-defeating, insofar as it makes it impossible to distinguish actual losses of privacy from mere threatened or possible losses of privacy, as in Davis's necessity counterexample.[90]

Lisa Austin notes a further difficulty, maintaining that control theories of privacy beg the question. To accept a definition of privacy as control of personal information is, she argues, to assume that there is an entitlement to such personal information. But "rather than presuppose such an entitlement, a theory of privacy needs to justify it," insofar as holding any subsequent normative value of privacy hostage to control (understood as choice) is to muddle any potential distinction between privacy and autonomy.[91]

4.2.2 Possession of Personal Information

In a 1983 article entitled "Privacy, Morality, and the Law," Parent argues for a novel account of privacy, while nevertheless keeping it restricted to a narrow basis of personal information. He defines "personal information" as consisting of,

> facts which most persons in a given society choose not to reveal about themselves (except to close friends, family, ...) or of facts about which a particular individual is acutely sensitive and which he therefore does not choose to reveal about himself, even though most people don't care if these same facts are widely known about themselves.[92]

Further to this, Parent defines "documented" personal information as those personal facts belonging to the public record; that is, he does not consider the term to include medical or other records that are not available for public consumption. Given these explanations, he defines privacy as,

> the condition of not having undocumented personal knowledge about one possessed by others. A person's privacy is diminished exactly to the degree that others possess this kind of knowledge about him.[93]

Parent excludes documented personal knowledge from his account of privacy, insofar as he is loath to maintain that an individual could have their privacy invaded by

[90] Gavison, "Privacy and the Limits of Law," 426–27.
[91] Austin, "Privacy and the Question of Technology," 126–27; Parent, "Privacy, Morality, and the Law," 273–74 also makes a similar point.
[92] Parent, "Privacy, Morality, and the Law," 270.
[93] Ibid., 269.

another person gaining knowledge about them from something like an article in an old newspaper: "what belongs to the public domain cannot without glaring paradox be called private; consequently it should not be incorporated within our concept of privacy."[94]

In defining the value of privacy, Parent is adamant that one must first distinguish privacy from other closely related but separate values, such as solitude or liberty, so that the latter are not mistaken for the former. On the basis of his account of privacy, he then proceeds to give three reasons why privacy ought to be considered valuable "in societies like ours":

1. Obtaining sensitive personal knowledge about another is to acquire power over that person which can be used to their disadvantage through exploitation.

2. Given the variants of intolerance in existence in societies like ours, sensitive personal information may become the object of "scorn and ridicule."

3. The "liberal ethic" mindset—widespread in societies like ours—that individuals ought not to be treated like "mere property of the state," leads to the conviction that some personal facts about one's life are simply not other people's business.[95]

Criticism of Parent's account tends to center around its counterintuitiveness in the face of specific cases. Davis, for instance, claims that Parent's distinction between private and public is too stark, insisting that it is the "ready availability" to others of personal information that matters, not whether it has ever been part of the public domain. He imagines a rabbi whose eating, long ago, of blood pudding (a non-kosher food) was publicized in the local newspaper. Insofar as the newspaper article chronicling the event is, in the example, only available in the dusty local library archives, Davis is willing to claim that the rabbi's privacy concerning this event has, over the years, been restored, thus suggesting that the requirement that all private information be "undocumented" is too strong.[96]

[94]Ibid., 271.
[95]Ibid., 276–77.
[96]S. Davis, "Is There a Right to Privacy?" 453–54.

Judith DeCew also objects to Parent's insistence that private information must necessarily be undocumented. She insists that Parent is unable to, for instance, account satisfactorily for cases involving personal information that has been documented through the perpetration of a moral wrong:

> A news agency, for example, surreptitiously taps an entertainer's telephone and subsequently publishes revealing information about that person's sex life or drug use. Given Parent's definition of privacy, once that information becomes part of the public record there is no violation of privacy in repeated publication of the information. The entertainer has no recourse for future protection; the information is no longer private even if the original disclosure was an error or a moral wrong.[97]

Davis also has some misguided criticisms of Parent, that, to a limited extent, guide his own investigation of privacy. For one, he maintains that Parent's definition "turns on something being in the public record," such that, Davis claims, Parent is unable to account for the loss of privacy that occurs "if a government agency comes to obtain personal information about [someone], but does not put it into the public record."[98] This is, however, based on a misreading of Parent's definition of privacy as "not having undocumented personal knowledge about one possessed by others." If the government, in Davis's example, possesses undocumented personal knowledge about the person in question, then that person—in accordance with Parent's definition and in contradiction to Davis's claim—suffers a loss of privacy. On Parent's view, undocumented personal information does not become documented simply in virtue of somebody else acquiring it—it only becomes documented if it is published, broadcast or otherwise brought into the public domain.[99] Or, to phrase the same point in a different manner, Parent's definition does not require that all losses of privacy involve undocumented information becoming documented; documentation is sufficient but not necessary for a loss of privacy.

Second, Davis suggests that a loss of privacy can occur without any knowledge of personal information, as required by Parent, suffice (something like) justifed true beliefs about personal information:

[97] DeCew, *In Pursuit of Privacy*, 30.

[98] S. Davis, "Is There a Right to Privacy?" 454.

[99] In Parent, "Privacy, Morality, and the Law," 271, Parent defines information belonging to the public record as "information to be found in newspapers, court proceedings, and other official documents open to public inspection." cf. also Parent, "A New Definition of Privacy for the Law," 308; Parent, "Recent Work on the Concept of Privacy," 347.

> Suppose that Joe sees Sam in the park with a woman who is not his wife. Joe walks quickly so that he can eavesdrop on their conversation. From the way that they are talking together, Joe correctly surmises that Sam is having an affair with her. Joe is not certain that this is the case and for this reason does not know that Sam is having the affair. Despite his doubts, Joe reports what he believes about Sam to his friends. Word gets back to Sam who can rightly regard Joe to have invaded his privacy by eavesdropping on his conversation and to take it that he has suffered a loss of his privacy with respect to the information that he is having an affair with the woman.[100]

This case, however, does not suffice as a counterexample to Parent's account. That Joe is uncertain about his conclusions regarding the affair between Sam and the woman does not change the fact that he, in virtue of eavesdropping, has acquired knowledge of at least some sort of personal information, such as (some of) the specific words exchanged between Sam and the woman. Whether he knows or merely believes that Sam is having an affair seems less pertinent to the question, insofar as the loss of privacy, on Parent's view, occurs not in virtue of the specific conclusions Joe draws about Sam and the woman, but in virtue of the fact that he entertains sufficient knowledge—gathered by eavesdropping—to be able to draw a conclusion to begin with, whether certain or uncertain.

In any event, in trying to avoid what he, in this fashion, sees as the primary flaws of Parent's account, Davis constructs his own account of privacy as the possession of personal information. Like Parent, Davis defines privacy on the basis of personal information, which he glosses as follows:

> In society T, p is personal information about S [if and only if] most people in T would not want anyone, other [than] him/herself, to be in an informational state with respect to q where q is information about them which is similar to p, or S is a very sensitive person who does not want anyone, other than him/herself, to be in an informational state with respect to p. In both cases, an allowance must be made for information that most people or S make available or would make available to a limited number of other people or to a certain subset of people.[101]

He defines privacy in the following manner:

> In society T, S, where S can be an individual, institution, or a group, [possesses] privacy with respect to some information, p, and some individual, U, if and only if:

[100] S. Davis, "Is There a Right to Privacy?" 454.
[101] Ibid., 455.

(a) p is personal information about S.

(b) U is not in an informational state with respect to p nor is the information, p, readily available to U.[102]

This definition, Davis notes, says nothing of what it is to suffer a loss of privacy (as opposed to simply not having privacy). Privacy is lost, on Davis's view, under the following circumstances:

> In society T, S, where S can be an individual, institution, or a group, loses privacy with respect to some personal information, p, and some individual, U, at t_1 if and only if:
>
> (a) At t_0 U is not in an informational state with respect to p nor is the information, p, readily available to U.
>
> (b) At t_1 U is in an informational state with respect to p or the information, p, is readily available to U.[103]

In this manner, Davis constructs a semi-formal account of privacy in the image of Parent's. Despite revising those features of Parent's account that Davis sees as detrimental to the view of privacy as the possession of personal information, however, his account still falls victim to some of the same counterexamples.

Thomas Scanlon, in discussing the views of Thomson several years prior to the publication of Parent's article, argues that privacy harms may arise even where no personal information seems to be involved:

> If you press personal questions on me in a situation in which this is conventionally forbidden, I can always refuse to answer. But the fact that no information is revealed does not remove the violation, which remains just as does the analogous violation when you peek through my bathroom window but fail to see me because I have taken some mildly inconvenient evasive action.[104]

This is a particular problem for Parent and Davis in light of their mutual insistence that privacy is diminished only when others come to possess personal information about an individual. Parent has responded to such concerns by explicitly arguing that the actions of the interrogator in the example are "most accurately condemned not in

[102] S. Davis, "Is There a Right to Privacy?" 455.
[103] Ibid., 456.
[104] Scanlon, "Thomson on Privacy," 317.

the language of privacy but as invasions of [a person]'s personal security and peace of mind."[105] But such a response is unsatisfactory; Parent offers no principled argument for the view that "personal security" and "peace of mind" are not, for instance, essential, or at least potential, components of privacy, other than that they do not cohere with his aforementioned definition of privacy.[106]

A related difficulty arises from a deeper concern about the views of Parent and Davis, concerning their explicit stipulation that personal information is the sort of information that "most people" in a given society are unwilling to share with others (save a select few). Such a view can perhaps adequately account for many traditional privacy concerns, and is particularly well considered in how it relativizes the normative value of privacy to the social mores of a society, thereby rightfully allowing specific privacy concerns to differ in normative strength across cultures. But it struggles to account for the discomfort many people today experience with regard to the currently available technologically enhanced ability to construct data profiles of individuals on the basis of countless, discrete pieces of personal information that do not themselves fall within such an interpretation of personal information, and are therefore excluded from the heading of privacy under Parent's and Davis's accounts.

Helen Nissenbaum, for instance, has argued for the ethical importance of recognizing what she terms "privacy in public."[107] She considers various privacy concerns that are grouped around the claim that personal information that is neither intimate nor sensitive, and that already exists in the public domain, may nevertheless give rise to privacy harms when shifted from one informational context to another, or when aggregated into a sufficiently comprehensive profile on an individual.

First, Nissenbaum maintains that most people have a "robust sense of the information about them that is relevant, appropriate, or proper to particular circumstances, situations, or relationships."[108] Thus, for instance, where people may speak to their doctor about details regarding their health, or with their friends about some recent piece of gossip pertaining to their social circle, it is usually considered improper or impolite to discuss these in the opposite contexts. When these social conventions are respected,

[105]Parent, "Review of Decew, Judith Wagner. *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology*."
[106]I discuss the question of the extent to which common use of a term ought to figure in constructing an account of some phenomenon in more detail in the following chapter.
[107]Nissenbaum, "Protecting Privacy in an Information Age."
[108]Ibid., 580.

Nissenbaum claims that the "contextual integrity" of the information is maintained.[109] Contextual integrity also applies, in her view, to non-sensitive personal information, to the extent that such information can, through a shift in context, develop into a privacy concern. She notes, as examples, the copying of one's home address from driver's records, to be used for purposes unrelated to one's driving, or when "information about your supermarket purchases is sold to a list service for magazine subscriptions."[110]

Second, although people freely (and often unknowingly) divulge vast amounts of non-sensitive information about themselves, there is generally a certain assumption of the discreteness of the information. Such an assumption is undermined when information bureaus mine details about individuals in order to establish,

> comprehensive profiles ... that would indicate such things as: purchasing power (credit card activity index, estimated income, fixed payments, etc.), purchasing activity (active accounts, bank debits, etc.), shopping data, and demographic data (job, marriage status, dwelling type, gender, market segment, etc.).[111]

The financial value of personal profiles compiled in this fashion lies in the power of various algorithms and statistical models to construct, on the basis of the available data, "a richer portrait of the individual than even the bits taken together ... as it may include not only information explicitly given but information inferred from that which has been given."[112] This state of affairs has, Nissenbaum notes, only expanded with the further possibilities of electronic surveillance, in the ability to view and record people's online behavior, and even to match this with information about the corresponding physical behavior of the person. Large electronic databases make information about individuals much easier to store, organize, and access:

> In the public arena, people have become targets of surveillance at just about every turn of their lives. In transactions with retailers, mail order companies, medical care givers, daycare providers, and even beauty parlors, information about them is collected, stored, analyzed and sometimes shared. Their presence on the planet, their notable features and all their momentous milestones are dutifully recorded by agencies of federal, state and local government including birth, marriage, divorce,

[109]Nissenbaum, "Protecting Privacy in an Information Age," 581; Schoeman, "Privacy and Intimate Information," 408, expresses a similar view.
[110]Nissenbaum, "Protecting Privacy in an Information Age," 585.
[111]Ibid., 586.
[112]Ibid., 589.

> property ownership, driver's licenses, vehicle registration, moving violations, parenthood, and, finally, their demise. Into the great store of information, people are identified through name, address, phone number, credit card numbers, social security number, passport number, and more; they are described by age, hair color, eye color, height, quality of vision, mail orders and on site purchases, credit card activity, travel, employment history, rental history, real estate transactions, change of address, ages and numbers of children, and magazine subscriptions. The dimensions are endless.[113]

Proponents of traditional accounts of privacy have, in Nissenbaum's view, been unable or unwilling to recognize the importance and validity of these sorts of concerns for a few reasons. First, the traditional view of *public* and *private* presumes the two to be mutually exclusive.[114] Such a view is inherent to many explications of this distinction, such as Aristotle's or Mill's noted above. Second, this mutual exclusiveness is often treated as normatively definitive, such that anything belonging to the *public* category is not considered to qualify for legal or ethical protection under the rubric of privacy.[115] This sort of interpretation is noticeable in various legal cases, such as *Nader*, as well as some philosophical accounts of privacy, most notably Parent's.[116] Finally, and as already indicated above, many philosophical accounts of privacy have failed to stay abreast of those technological developments that carry a potential to impact on privacy. Prior to the advent of widespread electronic surveillance, for instance, traversing the public arena would not necessarily diminish one's overall anonymity. Or, at the very least, people could be reasonably confident that those individuals who might make note of some aspects of them would nevertheless only hold discrete, non-aggregated pieces of information about them. Even explicitly public records, like those held by governments, were often only accessible by going to the trouble of locating, travelling to, and requesting the relevant physical files from the place where they were stored.[117]

The notion that the concerns Nissenbaum identifies are taken seriously by society at large is supported by, among other things, extensive legal protections of personal data. Legislation such as the EU EDPD 1995 and the UK DPA 1998 was introduced with the

[113]Nissenbaum, "Protecting Privacy in an Information Age," 561; cf. also Kosinski, Stillwell, and Graepel, "Private Traits and Attributes Are Predictable from Digital Records of Human Behavior."
[114]Nissenbaum, "Protecting Privacy in an Information Age," 568–70.
[115]Ibid., 571–75.
[116]Solove, *The Digital Person*, 42–44, refers to this view as the "secrecy paradigm."
[117]Nissenbaum, "Protecting Privacy in an Information Age," 575–78.

express purpose of limiting these forms of harm. Even the US, which has no overriding general data protection legislation similar to that of the EU or UK, has nevertheless implemented a patchwork of legal protections in the form of legislation on specific data security issues, in addition to common law precedents. For instance, in *US Dept. of Justice v. Reporters Comm. for Freedom of the Press*,[118] the court would not allow the disclosure of FBI rap sheets to a CBS news correspondent, arguing as follows:

> There is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.[119]

Furthermore, there is a widespread view among legal and philosophical scholars that "privacy in public," of the sort Nissenbaum notes, is, at the very least, a phenomenon that needs to be more carefully considered prior to any judgment on the suitability of its inclusion in an account of privacy.[120] Until that is done, it constitutes an important problem for views such as those of Parent and Davis, which restrict privacy not just to personal information, but to *sensitive* personal information.

4.3 Wide Accounts of Privacy

There are two primary alternatives to narrow accounts of privacy in the philosophical discussion. The first is to deny that privacy is a useful concept altogether. Thomson argues, in her 1975 paper "The Right to Privacy," that privacy is an unhelpful concept because it adds nothing of value to the discussion that can not already be described in other terms like "autonomy" and "trespass" (for this reason her view is often referred to as a "reductionist" view of privacy).[121] Asking herself what, if anything, is unique to a right to privacy, she constructs what she terms a "simplifying hypothesis": in her view, the right to privacy is actually a non-distinct and "derivative" group of rights over-

[118] 489 US 749 (1989).
[119] Ibid., 764.
[120] See e.g. Austin, "Privacy and the Question of Technology"; McFee, *Ethics, Knowledge and Truth in Sports Research*, 152–54; Solove, "A Taxonomy of Privacy," 505–20, 536–38.
[121] Thomson, "The Right to Privacy," 295; previous arguments in a similar vein, albeit with a legal focus, include Kalven, "Privacy in Tort Law"; and F. Davis, "What Do We Mean by 'Right to Privacy'?"

lapping other rights, such as those pertaining to property ownership or to one's own person.[122]

Numerous scholars have objected to Thomson's portrayal.[123] They frequently note that Thomson provides no compelling argument for the notion that privacy is somehow "derivative" from other values, rather than vice versa:

> [Thomson's argument] requires the recognition of a plethora of rights whose status is very dubious indeed. Do we really believe ... that people have rights not to be looked at and listened to? Is there a general right not to have one's property looked at? Thomson claims that we waive these basic rights all the time, for example when we go out in public, but do we usually think of ourselves as doing so? Do we need to say this? ... One is inevitably led to ask whether it wouldn't be more reasonable and intelligible to talk about a fundamental right to privacy which may or may not afford protection in particular circumstances to persons who don't want to be seen or heard or who don't want their belongings observed.[124]

The other common response is to claim that the narrow accounts, in virtue of their conceptual narrowness, exclude important elements of privacy that ought to figure as part of any comprehensive account of the phenomenon. While there may be other ways of constructing this sort of wide accounts, the two I focus on here share a disjunctive structure, defining privacy as "*a* or *b* or *c*," although they differ in precisely which values they assign to the variables in the disjunction. Gavison argues that privacy consists of limitations on access to a person, in the form of secrecy, anonymity, or solitude. DeCew, in turn, maintains that privacy is a "cluster concept", consisting of informational privacy, accessibility privacy, and expressive privacy.

4.3.1 Limited Access

Gavison defines privacy as "a limitation of others' access to an individual," calling *perfect* privacy when an individual "is completely inaccessible to others."[125] She divides the latter notion into three independent components, claiming that in perfect privacy, nobody has any information about a given person (*secrecy*), nobody pays any attention to

[122] Thomson, "The Right to Privacy," 306, 312.

[123] Scanlon, "Thomson on Privacy"; Reiman, "Privacy, Intimacy, and Personhood"; Gavison, "Privacy and the Limits of Law," 460; Parent, "Privacy, Morality, and the Law," 278–80; Parent, "Recent Work on the Concept of Privacy," 349–50.

[124] Parent, "Recent Work on the Concept of Privacy," 350.

[125] Gavison, "Privacy and the Limits of Law," 428.

that person (*anonymity*), and nobody has any physical access to that person (*solitude*). Noting that perfect privacy, like a total loss of privacy, is presumably an impossibility (as well as an undesirability) in most societies, she nevertheless relies on the notion of it to define a loss of privacy as "others obtain[ing] information about an individual, pay[ing] attention to him, or gain[ing] access to him."[126] Gavison maintains that this sort of disjunctive interpretation of privacy—as opposed to a definition focused on any one of the three aspects—accords better with common judgments about what constitutes a loss of privacy than do alternative philosophical accounts.

As regards the value of privacy, Gavison argues that the ideal degree of privacy is one that strikes a balance between the undesirable extremes of a total loss of privacy and perfect privacy. Having noted this, she argues that the question of value is best approached by investigating the functions of privacy. Although this will, inevitably, render any specification of the notion's value instrumental, Gavison claims that this is preferable to the difficulties involved in attempting to defend a notion of privacy as ultimately valuable.[127] Recognizing that a functional analysis of the value of privacy constitutes an enormous task, she is nevertheless adamant about the importance of undertaking empirical studies regarding the links between privacy and other notions such as "a healthy, liberal, democratic, and pluralistic society; individual autonomy; mental health; creativity; and the capacity to form and maintain meaningful relations with others."[128]

In the absence of these sorts of empirical studies, Gavison maintains that instrumental arguments for privacy must instead guide the inquiry, beginning "by seeking to identify those features of human life that would be impossible—or highly unlikely—without some privacy."[129] She sketches four instrumental arguments of this sort. First, privacy seems to be a necessary context for the performance of other activities that are deemed essential. Thus, for instance, Gavison approvingly cites Reiman's argument that privacy "is necessary to the creation of *selves* out of human beings," insofar as "a self is at least in part a human being who regards his existence—his thoughts, his body, his actions—as his *own*."[130] Likewise, although maintaining that Fried's account of intimacy as the sharing of personal information is not entirely satisfactory,[131] Gavison nevertheless ap-

[126]Gavison, "Privacy and the Limits of Law," 428.
[127]Ibid., 441–42.
[128]Ibid., 442.
[129]Ibid., 443.
[130]Reiman, "Privacy, Intimacy, and Personhood," 39.
[131]Gavison, "Privacy and the Limits of Law," 446n77.

provingly notes the contextual nature of his overall argument that privacy is necessary for love and friendship.

Second, to the extent that privacy grants a certain freedom from physical access, Gavison maintains that it may be necessary for those activities that require concentration, "such as learning, writing, and all forms of creativity."[132] Furthermore, the ability to refrain from being observed seems to facilitate not only solitary relaxation, but also intimacy between individuals.

Third, privacy, Gavison claims, may promote liberty of action, in virtue of preventing "interference, pressures to conform, ridicule, punishment, unfavorable decisions, and other forms of hostile reactions" to one's behavior.[133] Privacy, in such a context, seems to link to various goals, such as freedom from censure and ridicule, the promotion of autonomy—understood as the ability to make and exercise an independent ethical judgment—and the promotion of human relations—understood as the ability to create or accept different roles for different contexts and relationships, as well as the ability to divulge aspects of oneself to those "highest in one's emotional hierarchy."[134]

Finally, Gavison presents a broader argument, on the basis of the previous purported link between privacy and liberty of action, that maintains that privacy may "both indicate the existence of and contribute to a more pluralistic, tolerant society."[135] First—and foreshadowing the views of Thomas Nagel some eighteen years later, in his article "Concealment and Exposure" (where no reference to her is made)—Gavison argues that the absence of a general consensus on questions regarding the limits of tolerance and acceptance indicates that "privacy must be part of our commitment to individual freedom and to a society that is commited to the protection of such freedom."[136] Second, given that democratic societies are based on the notion that individual citizens are to participate in political decision-making on the basis of their own preferences, privacy, as conducive to autonomy, seems to be crucial for the functioning of democracy. Finally, albeit somewhat more hesitantly, Gavison claims that privacy may yield more talent being put to use for the greater good, insofar as some talented individuals may feel nervous

[132]Ibid., 447.
[133]Ibid., 448.
[134]Ibid., 448–50.
[135]Ibid., 455.
[136]Ibid., 455.

about the idea of e.g. seeking public office in a society that does not respect individual privacy.[137]

Parent and Davis are both critical of Gavison's definition of privacy. Much of their criticism is, however, misguided, ignoring the details of Gavison's tripartite definition. Parent, for instance, maintains that if access is meant to be interpreted as "physical access," then the subsequent concept of privacy does not mesh well with common interpretations of privacy, while if it is instead meant to be interpreted as "acquisition of personal knowledge," it succumbs to the following thought experiment:

> A taps B's phone and overhears many of her conversations, including some of a very intimate nature. Official restraints have been imposed on A's snooping, though. He must obtain permission from a judge before listening in on B. This case shows that limitation of cognitive access does not imply privacy.[138]

Davis approvingly cites this counterexample, and seeks to further strengthen the case against limited access views with a thought experiment meant to show that even unlimited access to personal information need not result in a loss of privacy:

> Suppose that you record the details of your daily activities in a diary that you bring to my house. You forget to take the diary with you when you leave, but the next day you come to pick it up. I had no idea that you had left the diary in my house and hence, I did not look at it. While the diary was in my house, however, I had unlimited access to the information in the diary. Since I was unaware that it was in my house and did not look at it, you have not lost any of your privacy with respect to the information in the diary.[139]

Both these cases, however, attack an overly simplistic reading of Gavison's account. In defining a loss of privacy as "others obtain[ing] information about an individual, pay[ing] attention to him, or gain[ing] access to him," the disjunctive formulation of the definition is meant to indicate that a loss of privacy occurs when any one of the three criteria is fulfilled, regardless of whether the other two criteria are at all relevant to the case at hand. In other words, the three criteria are all independently sufficient for a loss of privacy, but none of them is independently necessary. Gavison presumably takes them to be mutually necessary, in the sense merely of constituting an exhaustive

[137] Gavison, "Privacy and the Limits of Law," 455.
[138] Parent, "Privacy, Morality, and the Law," 274.
[139] S. Davis, "Is There a Right to Privacy?" 453.

list of the possible types of cases involving a loss of privacy, but that is an altogether different matter.

Thus, when Davis maintains that there is no loss of privacy in a case where one individual has had unlimited access to another's diary, but did not look at it, Gavison would presumably agree; insofar as there has been no particular occurrence of "obtaining information about an individual," there has been no loss of privacy on the first part of her definition. But equally, by not looking at the diary, the first person has neither "paid attention to" nor "gained access" to the owner of the diary, particularly where the last element of the definition, "gaining access," concerns physical access, as per Gavison's gloss of her own definition.

Equally, maintaining that a loss of privacy occurs when a person's phone is tapped, despite the fact that there may be limited access on the possibility of tapping another's phone, is also in line with Gavison's definition. Insofar as information about the person whose phone was tapped has been obtained, limitations on access or not, a loss of privacy will presumably still have occurred, as per both the first and the second element of her definition. It seems that what Parent and Davis are objecting to is an interpretation of Gavison's first remarks on a definition of privacy, taken at face value. Where she initially states that "in its most suggestive sense, privacy is a limitation of others' access to an individual,"[140] Parent and Davis seem to have ignored her subsequent refinement of this initial suggestion, instead presuming "limitation of access," with its inherent ambiguity and vagueness, to tell the complete story.

Potentially more problematic for Gavison's view is its incompatibility with the *Griswold* line of Supreme Court privacy cases, concerning the ability of individuals to make certain important life choices. The case of *Griswold* itself was, for instance, brought by the executive director of the Planned Parenthood League of Connecticut, against the state of Connecticut, after it had found her guilty of breaking state law in opening a birth control clinic. As already noted, the Supreme Court argued that the relevant state statute was unconstitutional, as it interfered with a "zone of privacy" belonging to married couples, although the case did not concern any such married couple in particular. The privacy of married couples in the state was therefore, in the court's view, violated not by the state collecting information about them, making them the focus of attention,

[140]Gavison, "Privacy and the Limits of Law," 428.

or having physical access to them, but by imposing certain restrictions on their procreative choices. Although Gavison could argue that there would be a loss of privacy if a couple were made the focus of attention in virtue of the state filing a case against them on the basis of its contraception laws, this does not correspond to the Supreme Court's interpretation of the privacy harm in question in *Griswold*, nor does it correspond to or account for concurring common judgments.[141]

Gavison explicitly acknowledges this restriction, arguing that expanding one's concept of privacy to range over such cases risks watering down the concept to the point that it interferes with the concept's "usefulness":

> If the concepts we use give the appearance of differentiating concerns without in fact isolating something distinct, we are likely to fall victims to this false appearance and our chosen language will be a hindrance rather than a help.[142]

She suggests that while privacy interpreted as "being let alone" is broad enough to include the sentiments evident in the *Griswold* line of cases, it fails by being overly broad, in "covering almost any conceivable complaint anyone could ever make."[143] DeCew's account of privacy, the final philosophical account to be considered here, takes issue with this view, arguing that it is in fact possible to define a useful and distinct concept of privacy that succeeds in accounting for both the US tort and constitutional rights, in addition to general common judgments about privacy cases.

4.3.2 A Cluster Concept

DeCew presents a wider account of privacy than that found in any of the foregoing. Her explicit aim, in so doing, is to align her account not only with the broad US legal interpretation of the term, but also with people's "intuitive notion of privacy."[144] She begins with an admittedly "vague" notion that the "realm of the private [is] whatever is not generally—i.e. according to a reasonable person under normal circumstances, or according to certain social conventions—the legitimate concern of others."[145] Such a gloss follows Parent's and Davis's accounts in relativizing privacy to certain social

[141] Cf. Solove, "Conceptualizing Privacy," 1105.
[142] Gavison, "Privacy and the Limits of Law," 437.
[143] Ibid., 438.
[144] DeCew, *In Pursuit of Privacy*, 42.
[145] Ibid., 58, 62.

norms, thereby allowing for differences in ethical judgments about privacy between different cultural contexts.

More specifically, DeCew maintains that privacy claims can be identified as those at stake when "intrusion by others is not legitimate *because* it jeopardizes or prohibits protection of a realm free from scrutiny, judgment, and the pressure, distress, or losses they can cause."[146] Such claims arise in relation to one of three different aspects of privacy that are "related based on historical links, linguistic use, and similarity of justification."[147] These three aspects together form what DeCew calls her "cluster concept" of privacy.

The first, "informational privacy," corresponds to the personal information focus of the narrow accounts of privacy considered above, as well as to that of US tort and Fourth Amendment privacy law. DeCew takes it to include information about a person's daily activities, lifestyle, and financial, medical, and academic records.[148] The second, "accessibility privacy," concerns the informational and physical accessibility of a person, and corresponds roughly to Gavison's limited access account of privacy, with a particular focus on its second and third disjunctive elements (regarding anonymity and physical access, respectively). This form of privacy protects "unwelcome" access to an individual, that is likely to result in "distraction, inihibition, fear, and vulnerability."[149] The third, "expressive privacy," corresponds to the sort of privacy recognized in the *Griswold* line of cases. It protects a person "from the fears of pressure to conform, from being coerced to hold homogenized viewpoints, and from being harassed or damaged by the stigmatization of one's choices."[150]

Although DeCew notes that this sort of construal fails to provide a "unified and simple account of privacy," she nevertheless maintains that it, in its complexity, better manages to capture a general notion of privacy, as evidenced in both US case law and common judgments. In response, Parent argues that DeCew's position is, at least in part, based on a conflating of privacy and liberty.[151] DeCew is, however, adamant that

[146] Ibid., 64.
[147] Ibid., 73.
[148] Ibid., 75.
[149] Ibid., 77.
[150] Ibid., 78.
[151] Parent, "Review of Decew, Judith Wagner. *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology*," 438.

although the two concepts overlap, they are nevertheless separable, with privacy, as per her account, forming a unique subset of liberty:

> Loss of privacy can diminish freedom. Nevertheless, defending privacy cannot always protect liberty. It cannot guard against public assault, for example. But if privacy protects against certain intrusions by others, and if one has liberty when one is free of external restraints and interferences, then protection of privacy can preserve some liberty.[152]

The fundamental disagreement, between Parent and DeCew, as well as between narrow and wide accounts generally, pertains to the weight assigned to both legal interpretation of privacy and common judgments about its applicability in different cases. Parent, and other scholars leaning toward narrower accounts, are less likely to countenance such considerations than are those preferring wider accounts. The issue turns on a fundamental question of philosophical method, regarding the extent to which reliance on common use of a concept under consideration ought to figure in one's philosophical account of the concept. It is to these difficulties, and their applicability to the philosophical debate on privacy generally, that I now turn.

[152]DeCew, *In Pursuit of Privacy*, 58.

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A Contextual Account of Privacy

Privacy is a difficult phenomenon to conceptualize, as evidenced by the disagreement, between privacy scholars, about its proper form and content. These disagreements stem, in many cases, from the various weights different philosophers ascribe to different methodological positions and devices—a state of affairs not easily evaluated without closer evaluation of a vast amount of methodological concerns. But there is an alternative to moving to such increasingly abstracted domains. In the whereabouts context, the need for an account of privacy amenable to pragmatic policy application suggests that it is preferable to view privacy as an open-ended list of particular sorts of harms to the person, where the harms may or may not be acceptable in any given instance, in light of their underlying justifying values, and depending on the further contextual particulars.

5.1 Difficulties for Traditional Accounts of Privacy

There are many different ways in which one might go about carving up the conceptual landscape, in relation to some phenomenon or other. Analytic philosophers have tended to approach the issue through what has typically been termed "conceptual analysis," a method which, roughly speaking, emphasizes the establishing of a concept's sufficient and necessary conditions, in order to thereby fix and demarcate an extension. Even within the boundaries of such an approach, however, there are still numerous ways in which the analysis might be performed, and where these differ, it is not always obvious which one is to be preferred over another.

To take a simple medical example, *measles* is a respiratory infection caused by a specific virus, the so-called *measles virus* (a paramyxovirus of the genus *Morbillivirus*). If a patient presents with measles-like symptoms, but the measles virus is not present in the patient, then they do not have measles. Patient have measles if and only if they have the measles virus.

The situation is quite different in the case of the *common cold.* Although it is also, like measles, a viral respiratory infection, it can be caused by any of a vast amount of different viruses, including, among others, various rhinoviruses and coronaviruses. There is no specific underlying virus responsible for the disease in all cases, and it is instead recognized in virtue of typical symptoms—at least so long as these symptoms are not caused by a virus used to classify some other disease, such as the measles virus. Conceptually, *common cold* is unified by little more than a willingness to group certain macro-level features—i.e. certain salient viral disease symptoms, along with certain options for treating those symptoms—together under one heading, despite their disparate and non-unified underlying causes.

In other words, the medical concept of *measles* is defined primarily in terms of its viral (micro-level) cause, while the medical concept of *common cold* is defined primarily in terms of its salient (macro-level) symptoms. Each of these definitions provides a reasonably straightforward means of fixing the extension for each respective concept. In the case of measles, the measles virus constitutes the primary necessary and sufficient condition for the obtaining of the disease. In the case of common cold, a disjunctive list of independently sufficient possible symptoms (none of which are independently necessary) constitutes the primary means of establishing the obtaining of the disease.

It might be thought that either of these approaches is preferable to the other. Perhaps it would, for instance, be preferable, for some reason, to define *common cold* by reference to an exhaustive and disjunctive list of every virus that can cause the disease, similarly to the case of measles, only with reference to several viruses, instead of just one. Or perhaps, *common cold* is an altogether redundant concept, in a situation that could be better served by explicitly recognizing the differences between the underlying viral causes, by stipulating correspondingly different diseases, such as *rhino cold, corona cold*, and so on.

The medical case, of course, provides a perfectly sound defense for its current conceptual practices; where the diagnosis, treatment options, and prognosis for a disease

are all sufficiently similar, nothing is gained, medically speaking, by further differentiation, regardless of any possible theoretical benefits or drawbacks. Medicine here benefits from a reasonably clear and well-established normative framework: everything else being equal, the less disease, injury, and pain, the better. Generally speaking, medicine aims to decrease the incidence and severity of these. Whatever furthers this goal to a sufficient degree will, in all but very exceptional cases, be worth pursuing. Whatever does not further the goal to a sufficient degree is better ignored or altogether avoided. Where the choice to account for a concept one way or another has no noticeable impact on the incidence or severity of disease, injury, or pain, the question is, medically speaking, uninteresting.[1] Better, in such a case, to opt for the most pragmatic solution, even if it differs between one case and another, as with measles and common cold.

Things are far less straightforward where there is no such pre-conceived normative framework through which one might evaluate proposed accounts of some phenomenon. If one is not, for instance, bound by the normative framework of medicine, but only concerned with, say, the elegance and simplicity of a given account, then the medical concept of common cold is, in its conceptual messiness, arguably less appealing. If one, on the other hand, wishes to see accounts that are closer in line with common use of and judgments about the concepts they concern, then the medical concept of common cold is arguably more attractive. But there is no compelling reason to think that we ought to prefer elegance and simplicity over alignment with common use, or vice versa, with regard to any given phenomenon. Choosing between such alternative constellations of methodological commitments is no simple task.

These considerations apply in particular to cases like that of privacy, for a number of reasons. First, it is not at all clear what level of definiens, if any in particular, to rely upon in seeking to provide the definiendum; one might define privacy by reference to specific brain states, emotions, adaptive behaviors, social practices, existing law, or all of the above, or one might alternatively argue that such a choice is more or less arbitrary (e.g. in the sense that all those definitional candidates nevertheless demarcate the same extension). Second, even if this were determined, it is not clearly established how broad a definition of privacy ought to be, as evidenced by the disagreement between narrow

[1]There are complications here, such as those arising from conflicting interests and limited resources, as per Beauchamp, *The Principle of Beneficence in Applied Ethics*, § 6, but I take it as given that medicine has a clearer normative framework than ethics generally.

and wide accounts of the term. Third, even if both these concerns were allayed, it is still not clear what sort of normative considerations would follow; even if there were a general consensus that privacy comprises, say, a narrow class of specific emotions, it does not follow, without additional argument, that this warrants some sort of normative status for the concept so defined. It is not at all certain that more or better-protected privacy is, everything else being equal, preferable.

This state of affairs reveals a serious methodological uncertainty in conceptual work generally: given the lack of any specific framework for the evaluation of different accounts of some phenomenon, it is not clear how to establish the superiority of one of these over its competitors. This uncertainty is enhanced in those further cases where there is no clearly defined *normative* framework to benefit from in choosing between competing accounts of some phenomenon. In the case of privacy, there are reasons to presume that additional protection is normally a good thing, such as the significant embarrassment and discomfort that may result when aspects of a person's life are shared with others. But there are also compelling reasons to seek to limit such protections, including the risk that privacy is used as an excuse to cloak dangerous or otherwise ethically problematic behaviors, like spouse beating.[2] Unlike the medical case, privacy provides no clear-cut and straightforward normative framework.

5.1.1 Methodological Uncertainty

There are various ways in which this lack of consensus on a proper evaluatory framework makes for methodological difficulties in conceptual work. This can be so even where there is a broad consensus on the proper methodological starting point. There are, for instance, numerous widely accepted logical requirements that any robust account of some phenomenon must fulfill. First, an account must be *internally consistent.* That is, it must not contain any inconsistent propositions; it can not be that both *p* and *not-p* as part of the account, or as a direct consequence of its claims. If the account does give rise to any such inconsistency, this in itself provides a prima facie reason to reject it, or at least, where it is sufficiently complex, to require amendment or revision of some

[2]Cf. MacKinnon, *Toward a Feminist Theory of the State*, 191.

of its parts in order to remove the inconsistency.[3] The burden of ensuring this sort of internal consistency falls on the proponent of the account in question.

Second, there must be coherence between one's account on the one hand, and one's further theoretical commitments on the other. Much like in the case of internal consistency, it can not be that, say, one's novel account of privacy claims that *p*, while one's epistemological commitments state or imply that *not-p*. But while the case of internal inconsistency requires a rejection or revision of the account itself, the *external inconsistency* involved in such cases does not provide any obvious guidance on which of the inconsistent elements to reject or revise and which to retain: does the novel account of privacy trump the epistemological commitments, or vice versa?[4]

It is, in any given case of inconsistency, not obvious how one ought to go about establishing the relative value of the inconsistent elements, in order to determine a suitable trumping order between them. There are any of a number of candidate strategies for such a valuation—various rules and systems of logic, relevant empirical results, esthetic theoretical values like brevity or simplicity, etc.—but no obvious or prima facie reason to prefer some of the strategies at the expense of others. There is a risk of infinite regress here, since any valuation of trumping order presumably depends on one's preferences among available strategies, which in turn depend on a valuation of those strategies according to some other prior preference, itself subject to valuation, and so on. This general state of affairs is reflected in the diversity of existing philosophical approaches, as noted by Timothy Williamson:

> When philosophy is not disciplined by semantics, it must be disciplined by something else: syntax, logic, common sense, imaginary examples, the findings of other disciplines (mathematics, physics, biology, psychology, history, ...) or the aesthetic evaluation of theories (elegance, simplicity, ...). Indeed, philosophy subject to only one of those disciplines is liable to become severely distorted: several are needed simultaneously. ... Of course, each form of philosophical discipline is itself contested by some philosophers. But that is no reason to produce work that is

[3] On the problem of the underdetermination inherent to situations such as these, cf. Quine, "Two Dogmas of Empiricism," esp. 41; and Quine, "Ontological Relativity."

[4] By distinguishing, in this manner, between what I am calling *internal* and *external* inconsistencies, I do not mean to suggest that the two are logically distinct, as opposed to, say, opposite end points on a spectrum. Regardless of how one chooses to account for the issue, however, inconsistencies between two different elements of one's various theoretical commitments will nevertheless normally involve an underdetermination of which of the inconsistent elements one ought to reject or revise. Cf. Williams, "Inconsistency and Contradiction."

> not properly disciplined by anything. It may be a reason to welcome methodological diversity in philosophy: if different groups in philosophy give different relative weights to various sources of discipline, we can compare the long-run results of the rival ways of working.[5]

More specifically, the sort of methodological diversity Williamson describes is evident in the various weights different philosophers assign to different methodological commitments. Within the privacy discussion, some of the contrasting aspects of Parent's and DeCew's respective accounts illustrate this particularly well. Both philosophers agree that a robust account of privacy requires a clarification of precisely what sets privacy apart from other phenomena; i.e. on what basis it is possible to distinguish the concept of privacy from other closely related concepts. They differ, however, in their applications of this general rule.

Parent relies on a relatively stark notion of conceptual mutual exclusiveness, according to which the extension of the concept of privacy is best interpreted as strictly distinct from the extensions of other closely related concepts. He does acknowledge that it is possible to construe privacy as, for instance, "a part of liberty," but argues that doing so is only the result of "conceptual confusion."[6] Liberty, in Parent's view, is "the absence of external restraints or coercion," with a loss of liberty taking the form of "a deprivation of autonomy"; this is, in Parent's view, "clearly distinguishable" from privacy, insofar as a loss of the latter instead concerns the "acquisition of undocumented personal knowledge."[7] He is adamant that the two concepts do not apply to the same sorts of cases, for instance maintaining that "the [post-*Griswold*] *Eisenstadt* definition confuses the values of privacy and liberty."[8]

DeCew, on the other hand, and as noted in the previous chapter, constructs an account of privacy that allows significant overlap in conceptual extensions, while nevertheless requiring a proper separation of conceptual intensions.[9] In her view, "it is more intuitive to agree that liberty, privacy, and autonomy are distinct concepts that overlap

[5]Williamson, *The Philosophy of Philosophy*, 285.
[6]Parent, "Privacy, Morality, and the Law," 273.
[7]Ibid., 273–74.
[8]Parent, "A New Definition of Privacy for the Law," 316.
[9]The general point here is just Frege's well-rehearsed distinction between sense (intension) and reference (extension), where, for instance, the two different senses "evening star" and "morning star" nevertheless share the same referent; i.e. the planet Venus, as per Frege, "Sense and Reference," 210.

in their extensions," to the extent that "a subset of autonomy cases ... can plausibly be said to involve privacy interests as well."[10]

Is it perhaps so that DeCew is correct in her reflection on the situation, and Parent is incorrect, insofar as he fails to acknowledge the possibility of overlap in conceptual extensions between privacy and other closely related concepts? Such a question has no straightforward answer. There is nothing in Parent's argument that commits him to the (obviously false) view that a distinction of conceptual intensions always requires or implies a corresponding distinction of conceptual extensions. On the contrary, his position, in this respect, only concerns the claim that the extension of the concept of privacy does not overlap to the extent that others, such as DeCew, maintain that it does, or can. In Parent's view, a legal case such as *Eisenstadt* only concerns liberty, while in DeCew's view it concerns both privacy and autonomy, the former as a subset of the latter. The differences in their respective accounts are not due to any simple conceptual misunderstanding, on either's behalf. They are instead due to fundamentally differing views on the nature of the relation between the concept of privacy and its near conceptual neighbors. On Parent's view, the concept of privacy must be set apart from related concepts, while on DeCew's view it can figure in a less strictly segmented conceptual landscape.

Neither Parent nor DeCew offer any argument in favor of their own methodological commitments in this respect. And perhaps for good reason. For although it is possible to seek to determine the strength of these particular commitments, the situation is complicated by the vast amount of further methodological commitments on which they rely, and their various possible relative weightings and justifications. Prudence suggests that where one seeks to defend some particular methodological commitment in relation to some question, one ought to defend all methodological commitments relevant to that question, at least in those instances where they depart from widely shared assumptions. But each of these two issues—i.e. the question of relevance and the question of whether or not a methodological commitment is sufficiently widely shared—themselves fall squarely within the realm of methodological, or meta-philosophical, concerns, rather than that of specific concepts and their connection to the world.

Whether or not such a move to the realm of methodological concerns is considered problematic or impractical, any attempt to catalog and account for all relevant com-

[10]DeCew, *In Pursuit of Privacy*, 44.

mitments of this sort, in order to determine which of the many differing accounts of privacy that utilizes a methodologically stronger approach, is a near impossible task, for two reasons. First, the amount of methodological commitments requiring investigation in such a case is not only enormous, but also not exhaustively determined. It would be, like an attempt to exhaustively catalog all cognitive biases, a near hopeless undertaking, without any clearly defined end point. Second, and as noted in the quote from Williamson above, even if these initial practical problems could be overcome, or at least bracketed, it is nevertheless difficult to determine, with any certainty, the sorts of methodological commitments that may come to bear the most fruit in the long term.

Therefore, rather than attempt to sketch any such more or less exhaustive analysis of methodological commitments among the privacy philosophers discussed in the previous chapter, I will instead briefly note just two particular methodological concerns, and their respective complicating impacts on the philosophical discussion of privacy. The first concerns the differing extents to which individual philosophers rely on common judgments (often referred to as *intuitions*) about phenomena in constructing conceptual accounts of them. The second concerns the extent to which the constantly evolving nature of the common concept of privacy undermines attempts at exhaustive analysis.

5.1.2 The Status of Common Use

There is general agreement among philosophers on what the structure of a satisfactory account of privacy ought to look like: a logically consistent definition that is sufficiently consistent with one's other theoretical commitments, and that manages to strike a reasonable balance between respect for common use of the term and well-developed reasons for departing from such use where sufficient further benefits are derived from so doing. Parent summarizes this sentiment nicely:

> Defining privacy requires a familiarity with its ordinary use, of course, but this is not enough since our common ways of talking and using language are riddled with inconsistencies, ambiguities, and paradoxes. What we need is a definition which is by and large consistent with ordinary language, so that capable speakers of English will not be genuinely surprised that the term "privacy" should be defined in this way, but which also enables us to talk consistently, clearly, and precisely about the family of concepts to which privacy belongs.[11]

[11] Parent, "Privacy, Morality, and the Law," 269.

As noted in the previous chapter, various privacy scholars criticize Parent's account precisely for its perceived failure to accord with common use of and judgments about privacy. Davis, DeCew, and Nissenbaum all take issue with Parent's insistence on undocumented information as necessary for privacy. They provide a range of counterexamples and cases that suggest that privacy may properly pertain to situations involving documented information (in Parent's sense, i.e. belonging to the public record), or—in DeCew's case—even situations that need not concern personal information at all. They all take issue with what they see as Parent's overly counterintuitive account of privacy:

> I suggest, contrary to approaches like ... Parent's, that although an important purpose of philosophical theory is to introduce greater conceptual rigor, a normative theory that strays too far from ordinary usage and popular sentiment is thereby rendered unhelpful, or worse, irrelevant.[12]

The philosophical debate on privacy, in this respect, serves as a specific instance of a more general philosophical issue regarding the extent to which reliance on common judgments is methodologically appropriate.[13] Philosophers differ in the weight they are willing to accord to common judgments in their arguments. Their strategies can, roughly and approximately, be plotted along a spectrum relating what I will here refer to as *conceptual restrictiveness*—i.e. a measure of the extent to which one is willing to forgo adherence to common use and judgments in order to thereby secure some specific theoretical gain or gains.

At one end of this spectrum are exceedingly conceptually restrictive theories, according to which common judgments serve little or no purpose in the construction of a novel account, beyond setting the initial context. On such a view, once a sufficiently robust account (however defined) is in place, it can be utilized as a measure by which to gauge all purported instances of the phenomenon. Where common judgments and the novel account depart from one another, the common judgments are normally considered at fault, typically, according to this view, because they have mislabelled some phenomenon as the concept in question, when it is actually something else altogether. In the philosophical privacy discussion, Parent's view is more conceptually restrictive than most others, given his repeated insistence that purported compelling counterex-

[12]Nissenbaum, "Protecting Privacy in an Information Age," 580.
[13]E.g. Williamson, *The Philosophy of Philosophy*; Alexander, *Experimental Philosophy*.

amples to his account are not proper counterexamples, insofar as they mislabel some other phenomenon under the rubric of privacy.

At the other end of the spectrum are exceedingly conceptually permissive theories, according to which common judgments are essential and central to the construction of a novel account. On such a view, a novel account must adhere to certain minimum levels of theoretical acceptability, but beyond that, the more successfully it accords with common judgments, the more compelling the account. Where common judgments and the novel account depart from one another, the account is normally considered at fault, at least in all cases surpassing the minimum levels of theoretical acceptability (however defined). In the philosophical privacy discussion, DeCew's view is more conceptually permissive than most others, insofar as she demonstrates a greater concern than several other scholars for subsuming common judgments about what is commonly referred to as "privacy" within her account of the concept.

The permissive end of the spectrum results in accounts that might be considered conceptually messier than those arising from the restrictive end. But, as Nissenbaum argues, such definitions arguably have greater real-world potential, in terms of being put to use outside strictly conceptual and philosophical discussions. Closer proximity between a novel concept and its common counterpart will, I presume, make adoption of the novel concept more likely to spread (regardless of whether or not one considers this to be a preferable state of affairs).

If viewed in terms of John Rawls's theory of *reflective equilibrium*—understood as the end state of a series of iterative deliberations between one's "considered judgments" and one's general theoretical principles—the point is simply that different individuals according different weights to considered judgments will lead to divergent "equilibria."[14] The final position of one's view will depend on the initial weights one chooses to ascribe to one's judgments and principles, respectively, where a difference in the relative weightings results in correspondingly differing accounts.

This sort of construal is applicable to numerous philosophical debates. To mention one example, there is an ongoing discussion about the role proximity ought to play in determining our ethical obligations to needy others. To some, most notably Peter Singer, proximity is irrelevant to ethical obligation. This means that, on his view, we all have just as strong an ethical obligation to aid a sub-Saharan African child dying

[14]For Rawls's own exposition of reflective equilibrium, see Rawls, *A Theory of Justice*, esp. 20–21.

of malnutrition as we have to aid a child drowning in a shallow pond just outside our office.[15] Singer acknowledges the extreme counterintuitiveness of his view, but maintains that it is the common judgments that are at fault, rather than his theory.[16] Others, notably Frances Kamm, seek to construct a theory of ethical obligation to needy others that takes account of a purported ethical relevance of proximity, as based on common judgments about it. She explicitly criticizes theorists like Singer for failing to properly acknowledge those judgments.[17] Relative to one another, and in relation to ethical obligations to needy others, Singer's view tends toward the conceptually restrictive end of the spectrum, while Kamm's tends toward the conceptually permissive.

Somewhat relatedly, but within metaphysics, David Lewis has argued for what he terms *modal realism*, according to which possible worlds are real, as opposed to mere theoretical constructs or convenient fictions, and the term "actual" is taken to function indexically in relation to the world of the speaker.[18] Although Lewis acknowledges the highly counterintuitive nature of this assertion, noting that it is typically met with an "incredulous stare," he nevertheless insists that modal realism has sufficient advantages over the alternatives to justify discounting such judgments, inclining his view, on this matter, toward the conceptually restrictive end.[19]

Much as in the above case of the underdetermination involved in determining which inconsistent element to remove in the face of inconsistency, however, there is no compelling argument that common judgments—whether considered universally or relative to a given context of discussion—ought to be valued to a certain degree or other in philosophical argumentation. Philosophers instead differ in their emphasis on such judgments, and usually only implicitly so. This makes it difficult to establish the relative strength of different accounts of privacy when compared one to another, particularly insofar as ascribing a certain weight to common judgments might easily be interpreted as begging the question against alternate accounts with different ascribed weights. There is, as in the foregoing case regarding the appropriate way to account for privacy in relation to closely related concepts such as liberty and autonomy, no immediately obvious means of resolving this methodological impasse.

[15] Singer, "Famine, Affluence, and Morality."
[16] Singer, "Ethics and Intuitions."
[17] Kamm, "Faminine Ethics"; Kamm, "Does Distance Matter Morally to the Duty to Rescue?"; Kamm, "The New Problem of Distance in Morality."
[18] Lewis, *On the Plurality of Worlds*.
[19] Ibid., esp. 133–35.

5.1.3 The Shifting Grounds of Privacy

Technological advances, and the corresponding evolution of social mores, also have a significant impact on privacy. There is both a general and a specific concern in this. The general concern is a largely skeptical one, similar to those noted above: to whatever extent philosopher choose to rely on common judgments in analyzing some concept or other, they will have to work from common judgments occupying a particular place in time. But these judgments are constantly evolving, as we acquire or stipulate concepts that reference new phenomena, or that reference old phenomena in new ways. General common judgments about a simple and widespread concept, such as *family*, presumably differ in many respects between, say, the nineteenth and the twenty-first centuries.[20] Unless one is willing to posit a highly implausible view of something like eternal conceptual essences, this evolution necessarily renders all conceptual analyses relative to some given time period, as tied to the common use and judgments one chooses as the basis for one's investigations.

This consideration applies particularly forcefully to normatively loaded concepts like privacy, given fluctuations over time in the precise nature of its normative content. At a time t_1, for instance, it may be considered ethically problematic to have general knowledge about another person's consecutive intimate relationships with others, while at a time t_2 (some years or generations later), such features of social life may be considered sufficiently mundane to be legally and ethically uninteresting.

But there are also more specific concerns that affect privacy uniquely. For one, there are significant variations between common interpretations of privacy in different domains of discussion. Privacy, with regard to US law, differs in many, if not all, respects from privacy with regard to family members in a shared abode. This is merely an instance of the fact that any concept will, in any given situation, have a unique history of use relative to that situation, which informs and determines current and future use of the term relative to the situation. American lawyers who today speak of privacy as a legal concept will, for instance, do so in relation to either Prosser's four torts or the Supreme Court *Griswold* line of cases. They may speak of privacy as drawn directly from these sources, or as being contrary to them, but the concept they discuss will, nevertheless, be determined by its relation to these fundamental sources of its legal meaning in the US.

[20] Cf. Solove, "Conceptualizing Privacy," 1132–35.

This sort of talk about a US legal concept of privacy is potentially misleading, insofar as it might suggest a single, unitary interpretation of privacy within that domain. But as the previous chapter illustrated, there is significant disagreement among US jurisprudential scholars on the appropriate interpretation of the term. The various suggestions that exist for how it ought to be interpreted are, like their philosophical counterparts, widely incommensurable, and no fully consistent and unitary concept can be reconciled from the past and current application of privacy in US law, or the discussion of the latter among scholars.[21]

The interaction between the US legal concept of privacy and the subsequent philosophical discussion of the term is all the more complex when considering privacy in an altogether different jurisdiction, like that of the UK. One might, for instance, be inclined to suspect that if philosophical reflection on the term grew directly out of uniquely American legal circumstances and concerns, then it might also be the case that the philosophical discussion of the phenomenon is more or less restricted to US society, rather than universally applicable. There are, of course, many social and cultural similarities between the US and the UK—not least due to the common language—but it is difficult to ascertain, with any confidence, the extent to which the differences between the two might yield different local stipulative interpretations of privacy. This is particularly so given the divergence of the legal treatment of privacy in the two jurisdictions, and its almost entirely independent development in each country over the past century. The issue, in this manner, ties back in to some of the previously noted methodological difficulties; if one, for instance, acknowledges a larger role for common judgments about privacy in one's account, are there sufficiently large differences in common judgments between the two jurisdictions to bring about correspondingly differing philosophical accounts of privacy?

5.2 A New Framework for Privacy

The sort of methodological concerns I have considered here are not meant to indicate the impossibility of conceptual work generally, even if their skeptical form might at first

[21] Cf. Schneider, "Privacy Rights, Gene Doping, and Ethics," 114–16, where privacy is categorized as an "essentially contested concept."

suggest such a conclusion. On the contrary, they are only meant to flag important limitations to such work. More crucially, they flag specific limitations to the argument I am developing, in the following manner. The interest herein is to determine the strength of the claim that WADA's whereabouts requirements unacceptably invade the privacy of elite athletes in the UK. Doing so requires some sort of account of privacy, in order to make sense of what is at stake in that context. Choosing any one of the existing competing philosophical accounts over others demands some form of justification. The above methodological concerns indicate that such justification is not available without a significant detour into more abstracted methodological issues (if even then). But the interest here is not in resolving any methodological disputes—in fact, these arise only insofar as they affect the main focus, i.e. the question of the normative status of the whereabouts requirements. And this is a practical issue of real-world policy.

As a result, instead of expanding on the methodological issues, with the hope of establishing which of the many competing philosophical accounts of privacy are stronger, I propose to side-step the question altogether. The focus of this thesis is on the privacy concerns arising from elite athlete whereabouts requirements. The impetus for this focus is the discomfort that many individuals—both athletes and observers—have expressed about the requirements; the sense that they go too far, regardless of the overall validity of their aims in so doing. The majority of the concerned parties, however, are not philosophers, and arguably not interested in such philosophical concerns as the various aforementioned methodological difficulties. This is, again, not to suggest that such concerns are unimportant or irresolvable; they remain central to a comprehensive philosophical account of privacy, and some have contributed to the various insights into the nature of privacy wrought by the philosophical discussion on the topic so far. But such concerns are probably not likely to sway most of those with personal stakes in the whereabouts issue. To such individuals, there is presumably little satisfaction in responses such as the following:

> You may have some valid legal or ethical concerns in the whereabouts case, but all/most/some of them have nothing to do with privacy proper; they are perhaps about autonomy or some similarly related notion, but not privacy proper.

To which a reasonable response, at least within the whereabouts context, would be something like "I do not care precisely how the discomfort I feel is labelled, so long as it is taken seriously." This sort of statement illustrates a particularly important point

when discussing privacy in relation to such a contextualized issue as the whereabouts requirements: a philosophically refined account of privacy that fails to encapsulate the general thrust of people's self-identified privacy concerns in relation to some context or other fails to grapple sufficiently with the central and underlying normative issue, regardless of its possible further conceptual successes. The importance, in relation to elite athlete whereabouts requirements, lies not in technically precise declarations of sufficient and necessary conditions for the obtaining or not of privacy in a given case; it lies in evaluating the normative value of specific complaints typically worded in terms of privacy. The former is a purely conceptual concern, while the latter is to take seriously people's qualms about a given social practice, regardless of the label they may or may not have erroneously applied to those qualms.

These considerations can also be stated somewhat more formally. If *privacy* refers to a concept that is subject to the standard considerations of conceptual analysis (stipulation of necessary and sufficient conditions according to certain philosophical practices), let $privacy_c$ instead refer to the concept formed, in a given context, by the set of those concerns generally labelled as "privacy concerns" by participants within that context. An account of privacy will reflect (various possible) philosophical considerations, while an account of $privacy_c$ will instead reflect certain common concerns in the context. Thus formulated, the ethically interesting question, at least in the whereabouts context, is primarily about $privacy_c$, rather than about privacy; it reflects what participants in the discussion are interested in discussing. And where methodological difficulties, such as those discussed above, conspire to make any meaningful consensus on the nature of privacy implausible, $privacy_c$ provides a clear focus, relative to the context.

In this sense, then, it is perhaps more appropriate to state that this thesis deals with $privacy_c$, than with privacy. More specifically, it concerns the legal and ethical acceptability of the whereabouts requirements on elite athletes, with the topic circumscribed not by some particular philosophical definition of privacy, but simply by those normative concerns identified by the discussion participants as pertaining to "privacy," whether conceived of in a philosophically satisfactory manner or not.

In discussing contexts in this manner, it is worth noting that I am not proposing that they be individuated in some particular fine- or coarse-grained manner. Rather, a context can be as broad or as narrow as one chooses to conceive of it. Elite athlete

whereabouts requirements generally constitute a broader context, of which the same, but restricted to the UK, or to athletics in the UK, or to athletics in the UK around the time of a specific competition, all constitute increasingly narrow contexts. More specifically, I use context here simply to refer to the projected scope of use of one's account of privacy. One might, for instance, expect one's account to be utilized by practicing lawyers within some jurisdiction or other, in arguing their cases. Or one might expect it to be utilized only within philosophical and conceptual academic debates. Or one might, as I do here, expect it to be utilized by participants to the general discussion between WADA, ADOs, athletes and related parties, sport scholars, journalists, etc., in determining the legal and ethical acceptability of existing anti-doping regulations.

5.2.1 Conceptual Inflation

There is, of course, a risk of significant conceptual inflation where one allows a concept to run wild, without restrictions or limitations of any sort. This is perhaps particularly so in cases concerning concepts with strong emotive or normative components, such as privacy or liberty. The way such terms are normally invoked imbues them with a sense of importance and urgency that may lead those keen on promoting some view or other to label it under their heading, in order to thereby lend their view credibility, regardless of whether or not it is appropriate to do so. This is noticeable in, for instance, the large amount of claims purporting to constitute a human right of some sort. The label of "human right" is, with its various political and ethical connotations, attractive as a device to rhetorically strengthen a claim. At the same time, this sort of proliferation of human rights claims risks undermining the normative force of the concept, by watering it down, in making it applicable to an overly broad range of instances.[22]

To avoid such a scenario in the present case, it is therefore crucial to impose certain limitations on any appropriately contextualized account of a phenomenon like privacy. Allowing others to import whatever they choose into the contextually relativized concept, by making new and outlandish claims under its heading, can not be permitted. As noted in the quote from Williamson above, removing one source of philosophical discipline does not thereby remove the requirement for *some* form of discipline. But the forms of discipline to be relied on here still need clarification.

[22] Cf. Tasioulas, "The Moral Reality of Human Rights," 75; Raz, "Human Rights Without Foundations," 1–3.

At first glance, standard logical requirements still apply to a contextualized account of privacy: at least in the sense that there can be no instance of internal or external inconsistency, on pain of vacuity. There are, however, additional aspects to this when considering a contextualized account. First, where privacy is interpreted simply as a collection of context-relative concerns, inconsistency between the concerns need not lead to one of the inconsistent elements being rejected, as in most analogous instances of more traditional accounts. Instead, where the list of concerns is conceived of disjunctively, one need only add the corollary that the inconsistent elements not both be true.[23] The standards can afford to be looser than in more traditional accounts, since the contextual approach constitutes less a proper philosophical definition of privacy than a summary consideration of various disparate elements within a context, which, like common cold, may not be bound together by much more than common linguistic practices. In fact, the requirements can be loosened yet further where one chooses to deal with the various concerns in isolation from one another, rather than as constitutive of a broad, disjunctive notion of privacy. On such an approach, the concerns are evaluated one after another. To be worth consideration, they must be internally consistent, but there is no further requirement that they be consistent with each other, so long as they are assessed independently.

Beyond this, there are certain minimal conceptual requirements on what can reasonably be considered as at all pertaining to a contextualized account of privacy. These do not, however, constitute necessary and sufficient conditions for the obtaining of privacy in a context, but instead a form of framework or outer boundary for the discussion. This is necessary to limit the scope of the discussion, but it is not sufficient to define privacy, since the same or similar considerations also apply to a number of related concepts, such as *autonomy* and *liberty*. The two primary limitations that I will impose on the discussion herein are, first, a recognition of privacy as a negative concept—i.e. privacy as the absence of certain harms to the person, rather than as the presence of some positively defined state of affairs—and second, a recognition of privacy as a state of affairs that may or may not be worth protecting, depending on the most apposite balance of various further contextually relevant normative values. I discuss each of these in turn below.

[23] Formally: $((p \vee q \vee r \vee \neg p) \wedge \neg(p \wedge \neg p))$.

5.2.2 Privacy As a Negative Concept

Talk about privacy tends to consist primarily of objections to practices or technologies that are experienced as threatening to one's sense of privacy. There are numerous examples of this. A UK government watchdog opposes widespread reliance on high-definition CCTV cameras, on the basis that they may be used for potentially repressive surveillance of individuals.[24] European data protection authorities stipulate that websites in Europe are required to gather the "informed consent" of visitors to their site prior to tracking their online behavior through so-called *cookies* (small pieces of data that contain information about visitors), on the basis that covert tracking of such personal information is harmful to the tracked individual.[25] And teachers are reminded to mind the public availibility of their Facebook profile pages and to not "friend" their pupils, lest doing so blurs the line between their personal and professional roles and responsibilities.[26] In each case, the risk of some specific harm constitutes the basis for the resulting hesitation about a particular practice—a hesitation described, in all these instances, in terms of privacy.

In situations such as these, there is not normally any emphasis on establishing what privacy is supposed to be, so much as establishing that some state of affairs constitutes a threat to one's privacy. Similar examples occur in conceptual work, where "privacy" is sometimes glossed as the absence of some specific list of harms.[27] And although most explicit philosophical definitions of privacy do seek to establish the conceptual contours of the phenomenon, they nevertheless tend to do so through negative definitions; privacy as the absence of certain sorts of harms to the person. Some legal commentators after Warren and Brandeis define privacy as being let alone. Parent and Davis define privacy as others not possessing certain sorts of information about an individual. Gavison defines privacy as a state in which nobody has any information about a person, pays any attention to them, or has any physical access to them. And DeCew defines privacy as a state in which others do not have certain sorts of information about a person (like Parent and Davis), do not have access to them (like Gavison), and where they are free from certain pressures of conformity and coercion. Privacy, in each case, consists of the absence of certain states of affairs identified by the respective theorist.

[24] BBC, *High-Def CCTV Cameras Risk Backlash, Warns UK Watchdog.*
[25] Article 29 Working Party, *Opinion 2/2010.*
[26] Vasagar, *Pupils Are Not Your Facebook Friends, Net Privacy Expert Warns Teachers.*
[27] Cf. Allen, *Privacy and Medicine.*

This feature of the discussion on privacy—its tendency toward negative definitions—is shared with various other discussions regarding similarly broad concepts. It seems generally easier, for instance, to define the absence of health, than to define its presence, except of course in those simple reverse instances where its presence is defined negatively as the absence of some specific harmful states of affairs. Health as the absence of disease, injury, and pain.[28] Liberty as the absence of external coercion.[29] Privacy as the absence of harms arising from that which is, loosely speaking, "nobody else's business."

There are plausible explanations for this sort of general tendency toward negative definitions. It seems, for instance, that people have an easy time recognizing when they disapprove of a real or hypothetical situation, even in those cases where they experience significant difficulty specifying or justifying the reasons underlying their disapproval.[30] Such difficulties can arise regardless of whether the disapproval is widespread or varies significantly between individuals. In many cases, it seems that people often judge situations as ethically problematic due to subtle physiological cues or "gut feelings" that form the basis of their subsequent opinions on the matter, regardless of their ability to defend those opinions in argument. If this is so, it may help account for the widespread tendency to worry about purported privacy harms prior to any specification of how privacy ought to be interpreted. A feeling that something is wrong with some scenario under consideration entails ethical disapproval that, depending on environmental factors, may then be identified as a privacy issue. As a corollary to the discussion so far it can be claimed that, generally speaking, the experience of the threat of a privacy harm precedes reflection on the proper interpretation of privacy itself.

This, I contend, is also illustrative of the nature of the philosophical discussion on privacy. A number of harms, experienced to a varying degree by different individuals as privacy harms, inform the bulk of common interpretations of privacy. Philosophers attempting to make sense of the conceptual terrain then seek to distill certain core characteristics uniting or underlying these specific harms. But in their varying choices of which harms to investigate—as well as how, methodologically, to go about their investigations—they are led to different philosophical accounts of privacy. The wide and disparate natures of the resulting accounts arise, primarily, from the wide and

[28] Cf. Murphy, *Concepts of Disease and Health*.
[29] Cf. Carter, *Positive and Negative Liberty*.
[30] Haidt, Koller, and Dias, "Affect, Culture, and Morality, or Is It Wrong to Eat Your Dog?"; Haidt and Hersh, "Sexual Morality"; Haidt, "The Emotional Dog and Its Rational Tail."

disparate natures of the underlying harms. There are good reasons to suspect that it is so difficult to provide a philosophically satisfactory account of privacy because, as some of the skeptics maintain, the common notion itself is inherently confused; there is little or no solid conceptual ground on which to build.

This is, however, only an immediate problem for an account of privacy purporting to tell the entire story about the concept; claiming to reveal its "essence." Adopting the sort of contextual approach I propose—whereby the term "privacy" is intended merely as shorthand for the absence of a number of (possibly conceptually unrelated) contextually relevant normative concerns—no such certainty is needed in order to evaluate the normative strength of those concerns.

Such a view will, of course, result in accounts of privacy that differ from one context to the next. Privacy in the context of US jurisprudence will presumably differ from privacy in the context of UK jurisprudence, and each will presumably differ from privacy in the context of, say, family relations. There may be overlap, even significant overlap, between the different contexts, as concerns about certain harms may easily arise across separate contexts. But there can still be important differences. Abortion is, for instance, identified as a central privacy concern in US law—as a deeply private choice about the sort of life one desires to lead—but not generally in UK law (apart from through related data confidentiality law and similarly tangential issues). The focus, in a contextual account of privacy, will not be on establishing whether or not such identification is conceptually appropriate, but on establishing the means by which the normative concerns in question can be evaluated, in order to ascertain their normative value.

I will, therefore, proceed by taking privacy in the whereabouts context as pertaining to those so-identified harms (to be specified in the following chapter) that athletes and other participants to that general discussion worry about in relation to it. Privacy is, within this context, simply the absence of these harms. The more likely the harms are, the greater the threat to privacy. But there is no invasion of privacy unless one or more of the harms are realized. And, perhaps more importantly, there is no *unacceptable* invasion of privacy unless the realized harms lack sufficient independent legal and/or ethical justification.

5.2.3 Privacy As a Balancing of Conflicting Values

Privacy is an inherently social phenomenon; there is little sense talking about privacy in relation to a possible world that contains only one person. Apart from possible further stipulations, such as those involving past or future others, such a person can not really be said to lose or gain privacy, to keep some things rather than others private, or, perhaps most importantly, to suffer an invasion of their privacy. The interest in privacy, as well as the possibility of suffering from any of a variety of different purported privacy harms, only truly arise in relation to situations involving two or more individuals. Social interaction, of some sort, is a prerequisite to privacy.[31]

There are various social practices that aim to regulate social interaction in one manner or another. The law of a country seeks to codify those practices that are considered sufficiently important to warrant explicit regulation. But even legally unregulated social practices are shaped and controlled, to a large extent, by such phenomena as social conformity, expectations, taboos, and general cultural mores. Within this legal and ethical network of regulatory mechanisms, inter-regulatory conflicts inevitably arise. A particular criminal's right to a fair trial may be at odds with a general desire for vigilante-style violent justice for a particularly hateful crime. A promise to a relative may clash with a requirement to speak the truth in a court of law. Or a feeling that one is entitled to a certain degree of privacy, despite choosing to be in the public eye, may conflict with a widespread feeling that the public is entitled to a certain degree of insight into one's personal dealings, possibly as a direct result of one's choosing to be in the public eye.

Some of these regulatory mechanisms might be considered stronger than others. There are claims that some rights, such as the human right not to be tortured, are absolute, not permitting of any exception, and automatically overriding other rights.[32] Whether absolute rights can be properly said to exist or not, most of the regulatory mechanisms will be defeasible, in the sense that they may or may not be enforced, legally or ethically, in a given instance, depending on further contextual particulars. The claim that privacy is unacceptably invaded in a certain instance involving others wanting to know about a public person may be normatively stronger than the others' desire to know, while simultaneously being weaker in other comparable instances. Neither of

[31] Cf. Fried, "Privacy," 482; Solove, "A Taxonomy of Privacy," 483–84.
[32] Brecher, *Torture and the Ticking Bomb*; Matthews, *The Absolute Violation*.

the claims have, as such, a specific context-less value; they are each pro tanto defeasible claims given specific values in light of the particulars of each instance.

Indeed, in any given context, those harms identified as privacy harms need to be assessed in order to ascertain to what extent they might be acceptable. Such an assessment takes the form of a categorization of those values that impact on the harms in the context. These values arise from two sources. First, there are the values that form the rationale for being concerned about privacy in the first place, i.e. the specific reasons individuals give for being opposed to the harms. This may be due to non-specific concerns, such as general discomfort or a vague feeling that something is "nobody else's business." Or it may, for instance, be due to one's view on more abstracted ideals, such as justice or fairness. Second, there are the values that form the basis for the privacy harms themselves, i.e. the justifying reasons for the acceptability of the harms. These may also be more or less specific, and can arise from any of a variety of sources, whether legal, ethical, financial, or political.

As an example, consider again the case of a public person claiming an unacceptable invasion of privacy, where that person has nevertheless chosen to be in the public eye, say by running for public office. There are many potential sources of value underlying such a claim. These may include feelings of ethical propriety, such as the feeling that there are already reasonable boundaries between private and public in place, and they need respecting. Or they may include reference to a legal right, such as the sense that one is entitled to a certain domain of private life as set out in the law.[33] Or perhaps they include sentiments relating to fairness, such as the view that although choosing to run for public office will presumably decrease privacy to some extent, this decrease ought not to be out of proportion with what arguably similarly public persons, such as teachers or company executives, are subject to.

Likewise, the claim that there is an entitlement to a certain degree of public insight into the personal dealings of an individual running for public office has various potential sources of value. These might include, for instance, the perceived need to hold elected representatives to a certain ethical standard, or at least to ensure that they are

[33]Strictly speaking, a legal right is not a value in itself, although it *protects* a value. Likewise, a violation of a legal right is not a harm in itself, it is only a harm insofar as the value that the right protects is harmed. This distinction, however, has no practical impact on the issues considered here; the existence of a legal right protecting some value or other is a powerful, if indirect, indicator of the importance of the value, and can therefore figure as part of a justification for the unacceptability of permitting its harm.

the sorts of people that they seek to present themselves as to the electorate, i.e. that they are truthfully representing their political claims and expressed ideals.

Identifying the specific values at play in a given context will, however, not provide any particular assessment on whether one set of values trumps the other or not. Rather, the aim is at first just to recognize which values are being weighed against each other, in order to thereby derive a functional account that can, in turn, be applied to individual instances in order to render a final judgment on which of the values is stronger, in relation to that particular instance. So, we might assume, say, that some particular politician's interest in privacy trumps a public interest in their sexual relations with their spouse. But if they were to campaign on a platform of, say, anti-homosexuality, we might nevertheless also assume that the public interest in their sexual relations with a person of the same gender would trump their interest in privacy. Even if we assume that the underlying conflicting values remain the same between the two instances, it is still reasonable to presume that differences, like these, in the contextual particulars can lead to correspondingly differing final judgments.

I have argued above that a contextualized account of privacy is limited in two respects. First, it is circumscribed to those harms that are identified, within the context, as privacy harms. Second, establishing the normative strength of privacy, so identified, is restricted to a balancing of the values underlying each of the support for and the opposition to those harms. Such an identification of values will not, in itself, yield a normatively definitive answer to the acceptability of the privacy harms in the context, but it will yield a functional account that can then be applied to individual instances, in order to ascertain whether or not privacy is unacceptably invaded with regard to that particular instance. I still need to say something, however, about the practical implementation of these two steps; precisely how are contextual privacy harms, and their supporting and opposing underlying values, to be identified?

5.2.4 Determining Privacy Harms

Within a contextualized account of privacy, of the sort proposed here, how ought one to go about identifying those contextual harms that fall under the heading of (a contextualized notion of) privacy? Is the identification process limited to explicit claims of harms from discussion participants, or can the scope be expanded to include what one

takes to be implicit claims, or related claims in other discussions? Or ought one perhaps instead to apply some list of different categories of typical privacy harms, in order to thereby ascertain which ones are relevant in the context in question and which ones are not? And if so, how amenable is such a list to interpretation and change—is it best viewed as being fixed and closed, or flexible and open-ended?

The answer to these sorts of questions will, in all likelihood, vary with the specific requirements of the context under investigation. As a general rule, however, a charitable assessment of reasonableness will arguably suffice in most situations. If certain contextual privacy harms seem to be reasonable, within the context, even where they are not explicitly mentioned in the discussion, then there is no prima facie basis on which to oppose their inclusion in the discussion. Equally, as a methodological tool, there is no reason to either object to relying on a reasonable pre-conceived list of certain categories of privacy harms, nor to the notion that such a list might undergo important changes across time and cultures.

One might object that the standard of reasonableness I am considering here smuggles serious methodological difficulties, of the sort noted previously, into the discussion. If the measure of contextualized conceptual inclusion is based on a specific interpretation of *reasonableness*, then, one might insist, that interpretation itself stands in need of independent justification, to demonstrate that it is stronger than alternative interpretations of *reasonableness*. There are two general fears here: that one's contextual account of privacy may be over-inclusive of harms, or that it may be under-inclusive (or, perhaps, both, in relation to specific harms both included and not included in the account).

Such an objection, however, only applies to a strict interpretation of reasonableness, i.e. something like necessary and sufficient conditions for the obtaining of reasonableness. But the notion can instead be interpreted as merely a rough heuristic tool to enable further discussion, rather than a strict measure of some theoretical criteria. The boundaries of the discussion—as set by limiting one's contextual account of privacy to certain harms, and its normative appraisal to a balancing of the underlying conflicting values, together with the requirement that the harms themselves be at least internally logically consistent—is arguably sufficient for such purposes. The further appeal to reasonableness in identifying the harms in a given context, is then simply an appeal to a non-specific standard of inter-personal plausibility. If some harm seems, to some amount of individuals, to constitute a privacy harm in some context, then better to allow its claim

to that label and seek to establish its normative weight, than to argue that it ought not to be considered at all. Similarly, although it may be difficult to ensure that one has considered all reasonable claims of privacy harms within a given context, there is no compelling need to prove that one has cataloged all such harms exhaustively. Where others find such claims missing, their raising of the issue suffices for it to be taken into consideration in further discussion. But prior to such a response, there is no particular reason to presume any requirement that one seeks to pre-empt every possible expansion of the discussion.

Beyond these general considerations, I claim methodological agnosticism toward methods of identifying the relevant contextual harms. Although preferring a certain method myself, I make no claim as to its purported superiority over alternative means of effecting similar analyses. More specifically, I will opt for the following approach. In considering a given context, such as that of elite athlete whereabouts requirements, I find it pedagogically illuminating to approach it through a pre-conceived list of different categories of privacy harms, in order to determine which ones can be made to apply, in some form or other, to the context. I conceive of this list as open-ended, amenable to various sorts of cultural and temporal variations, but useful as a rough starting point for further reflection. If additional concerns are raised in the discussion itself, but not mentioned in this list, then they may be included for consideration as well.

There are many ways in which this sort of list of categories of privacy harms might be populated. The general considerations of privacy so far illustrate a broad array of candidate harms, ranging through publication of personal details, insecure databases containing personal information, and personal data being put to uses not explicitly acknowledged by the person to whom the data pertain, to instances involving blackmail, the unintended or undesired exposure of one's nudity to others, or even interference by one's government in those decisions—such as procreation and child-bearing—that are seen as particularly personal.

There are various ways of organizing these sorts of harms.[34] I follow Daniel Solove, in his distinctions of category, as I find them reasonably exhaustive in their general treatment of privacy issues. Briefly, Solove divides various privacy harms into four overarching categories, the majority of which pertain to personal information. More specifically, his major categories consist of the harms that may arise as part of (*a*) the collection

[34]Cf. Allen, *Privacy and Medicine.*

of personal information, (*b*) the processing of personal information, (*c*) the dissemination of personal information, and (*d*) certain forms of personal invasion.[35] Each of these requires a few words of further explanation.

As regards the collection of personal information, Solove notes potential privacy harms arising from two sources: *surveillance* and *interrogation*. The former concerns harms that arise when individuals are subject to observation by others in a non-reciprocative manner, while the latter concerns harms that arise when individuals have questioned pressed against them in a manner that disregards their level of comfort with the questioning. In relation to the processing of personal information, Solove identifies numerous potential privacy harms. *Data aggregation* can, as Nissenbaum argues, give rise to information that is more personally intrusive and harmful than the discrete bits of data on their own. *Linking specific data profiles to real individuals* has a similar impact. *Insecure data storage or processing* yields an inherent risk of one's data being discovered by parties who ought not to be privy to it. One's personal information may be utilized for vastly different, and potentially embarrassing or debilitating, purposes *other than those one initially agreed the data could be used for.* And, finally, harms may arise from *denying individuals access to information held about them*, including but not limited to their inability to thereby correct mistakes in the information.[36]

The dissemination of personal information, in Solove's view, also involves a number of potential privacy harms. *Confidence may be breached* (the harm arising from the betrayal of trust inherent in the relationship of confidence), or *information may be publicly disclosed* against one's desires (the harm arising from one's lack of control over the decision to disclose). People typically feel deeply humiliated by incidences of *exposure* of, for instance, their nakedness, their toilet behaviors, or their sexual behaviors. Where there is *increased accessibility to information about individuals*—such as if the information is made retrievable by anybody with an internet connection—worries about the aims to which the information may be put increase. *Blackmail* constitutes a legally well-recognized harm to an individual's privacy, as does *appropriation of a person's name or likeness.* There is a similar harm in *distortion*, whereby an individual is presented to the public in a false light.[37]

[35]Solove, "A Taxonomy of Privacy."
[36]Ibid., 491–523.
[37]Ibid., 523–48.

Finally, Solove notes two potentially harmful forms of personal invasion, which, like DeCew's third privacy "cluster," need not pertain to information at all. The first concerns the widespread feeling that each individual is entitled to a *personal zone* within their own home or some similar (physical or metaphorical) realm. This realm might be breached by various forms of nuisance and harassment, including loud noises, noxious odors, undesired telemarketing calls, or e-mail "spam." The second concerns *each individual's ability to make certain crucial decisions about their own life*, without undue interference by government or other similar institutions. This reflects the privacy concerns central to the *Griswold* line of cases.[38]

All of these various potential privacy harms are recognizable in different aspects of the legal and philosophical discussion of privacy. Although they are not all accepted by all the participants in those discussions, they do appear sufficiently frequently to warrant their inclusion in a list, such as this, of potential privacy harms for contextual application. Although this overview is necessarily brief, I will develop those harms that are relevant to the whereabouts context in more detail in the following chapter.

5.2.5 Determining the Underlying Values

As noted above, there are many potential sources for those values underlying either support for or opposition to privacy harms in relation to any given context. One common source of privacy complaints arises from contrasts between more or less analogous contexts that, despite being analogous, nevertheless differ in the extent of the privacy harms involved. They may concern, for instance, the potential exposures and invasions suffered by celebrities who are followed by tabloid press, as opposed to those of teachers or scholars. Or they may concern the extent of surveillance by CCTV security cameras in the UK, compared to the extent of similar measures in France. Or they may concern the tracking of the whereabouts of elite athletes, compared to similar forms of tracking of criminals. Contrasts such as these can help draw out normative intuitions about the contexts in question, in requiring either supporting argumentation for the acceptability of the differences in the privacy harms between them, or supporting argumentation for the view that the contexts are not sufficiently analogous, in the necessary way (however defined). If, for instance, elite athletes are found to be subject to more invasive tracking

[38] Ibid., 548–58.

than are some convicted criminals, then either the difference in the level of invasiveness needs some sort of normative justification, or there is a need to demonstrate that the two contexts are not sufficiently analogous to draw any normative conclusions from such a comparison.

Contrasting privacy harms in a given context with sufficiently comparable contexts in this manner has two important benefits. First, it can lead to insights into the sorts of underlying values at stake in the context of interest, both in support of and in opposition to the harms. Second, in those cases where privacy complaints arise specifically from comparisons of contexts—e.g. from claims that it is unfair to impose certain privacy harms on a subset of a population group when those harms are not also imposed on the population group as a whole—performing such comparisons allows an initial rough appraisal of those privacy harms that are worth investigating in closer detail, and those that do not differ to a sufficient extent between the contexts to warrant further examination. This is a general issue of normative coherence; if, say, society in general is unconcerned by some privacy harm, it will, everything else being equal, be more difficult to establish the normative unacceptability of that harm within some subcontext.

To take a more concrete example, if the general British public is not overly concerned with the way in which their government collects and processes their sensitive personal data, then everything else being equal, it will be more difficult to argue for the claim that the way in which the government collects and processes the sensitive personal data of a subset of that population, such as pregnant women, is unacceptable. Unless it can be shown, through further argumentation, that the set of pregnant women in the UK constitues some sort of ethically relevant exception to the general rule, the lack of concern in the broader context tells against concern in the narrower context. Normatively speaking, the greater the difference of privacy harms between the contexts, and the more similar they are in all other respects, the greater the normative impact. If it is, for instance, considered acceptable to demand whereabouts information from elite athletes, but not from academics or professional musicians or individuals competing for an attractive job position, then these differences arguably require either a thorough justification of their ethical underpinnings, or revision.[39]

In addition to this sort of comparison of contexts with each other, however, a given context will often also have a certain amount of inherent value conflicts, which may

[39] Cf. MacGregor and McNamee, "Philosophy on Steroids," 406–8.

be explicitly or implicitly obvious in the discussion otherwise. The context may, for instance, at its base pit questions of personal dignity against free speech, or freedom from social control against a need to implement effective anti-terrorist capabilities, or something similar, without requiring any recourse to comparison contexts.

Some of the sorts of values of interest here—particularly those supporting protections of privacy—have already been discussed in the foregoing chapter. They range from Fried's account of privacy as necessary to such values as friendship, trust, and love, through to Gavison's pre-empirical account of privacy as inherently linked to a wide array of further values, including democracy, individual autonomy, creativity, mental health, and the ability to have meaningful relationships.

Values opposing protections of privacy have also been noted. Warren and Brandeis, for instance, recognized that the right to free speech restricted the scope of their proposed right to privacy, insofar as there exist private issues that rightly concern the general public (such as those involving elected public officials acting in a manner inconsistent with their public claims). A similar balancing between public disclosure of personal information and free speech is often undertaken in both US and UK courts. But it is also possible to oppose protections of privacy regardless of the existence of any particular conflict of legal entitlements as such. So, for instance, some forms of protection of privacy might be resisted on account of the fact that privacy can be used to conceal bad things, such as the committing of crimes, or one's engaging in ethically reprehensible (although not illegal) behavior, or, for that matter, doping out of competition in order to gain a competitive advantage.

As already noted above, determining the values at play in a given context does not, in itself, yield any specific judgment on which values win out over the others. It will, however, provide a clearer account of the central normative contention(s), which can then be applied, as a functional account, to any given instance of the context in question, where the particular features of that instance will determine the relative weights of those values. In this manner, one can provide a final normative judgment on any individual instance within the context. The following chapter aims to provide an overview, in the above manner, of the privacy harms, and their corresponding underlying values, that pertain specifically to the whereabouts context.

— 6 —

Privacy in the Whereabouts Context

Establishing an account of privacy in the whereabouts context requires two things. First, it is necessary to identify those privacy harms that pertain to the context. Second, it is necessary to identify those values within the context that might be used to generate support for or opposition to any such harms. Doing so will provide a sufficiently comprehensive contextual account of privacy to allow for a subsequent appraisal, in the following chapter, of the claim that WADA's whereabouts requirements unacceptably invade the privacy of elite athletes.

6.1 Harms

As noted in chapter 1, there are various potential privacy harms for elite athletes that do not pertain to WADA's whereabouts requirements. WADA stipulates, for instance, that urine samples must be provided in "full view" of a doping control officer, in order to ensure that the athletes do not tamper with the sample through catheterization or similar.[1] Although this constitutes a harm of exposure, it is shared by all out-of-competition and in-competition doping tests involving urine samples, and does not arise from the issue of whereabouts requirements as such.

[1] WADA, *IST3*, § D.4.9.

Equally, there are various harms arising from the whereabouts requirements that do not pertain to privacy. The requirements are, for instance, by WADA's own admission burdensome on athletes, in the sense that they can take some time to complete.[2] This is an unfortunate feature of the system, but not one that activates a direct concern for privacy; that whereabouts submissions take time does not constitute a measure of the seriousness of any normally recognized privacy harm, nor have athletes or other parties to the discussion couched it in such terms. As a result, I will not treat it further.

The focus here lies instead on the domain formed by the conjunction of these two areas, i.e. elite athlete privacy concerns on the one hand and WADA's whereabouts requirements on the other. Within this suitably delimited domain there are a number of privacy harms, which arise as a direct or potential result of the whereabouts system:

1. Elite athletes are subject to extensive and ongoing whereabouts *surveillance* by ADOs.

2. Elite athletes are subject to regular *interrogation* by ADOs as to their whereabouts, in the form of their quarterly whereabouts report.

3. The whereabouts information of elite athletes is *aggregated* with other sources of information to provide a more complete athlete doping risk profile.

4. The whereabouts information of elite athletes may be subject to *data insecurity* risks.

5. The whereabouts information of elite athletes may be utilized for *unrelated purposes*, such as the tracking of political dissidents within a country.

6. Three whereabouts failures within an eighteen-month period constitute an anti-doping rule violation that is subject to *public disclosure*, as acknowledged by elite athletes in their consent to WADA's regulations.

7. Elite athletes are subject to a further risk of *breach of confidence*, if their whereabouts information is publicly disclosed in situations other than those acknowledged in WADA's regulations.

[2]WADA, *Whereabouts Requirements*, 1.

8. Elite athletes are subject to the risk of *blackmail* in relation to their whereabouts information.

9. In determining their daily sixty-minute time slot, elite athletes may be subject to unwanted *intrusion* into their homes by doping control officers.

Of these various privacy harms, 1 and 2 constitute integral features of the whereabouts system; 3, 6, and 9 are common features of the system, but ones that only arise in certain situations; and the remaining items 4, 5, 7, and 8 are possible but unlikely features of the system. I consider each of these points in detail below.

6.1.1 Surveillance

Surveillance concerns being the subject of undesired prolonged observation by others. Such observation is particularly emotive in non-public situations; people tend to experience significant discomfort or anxiety if they believe that they are being watched or bugged in their homes or workplaces, that their phones are being tapped, or that their general telephone or internet use is being actively monitored by others. But analogous concerns can also arise in more public situations, where people expect to be seen and heard by others. Individuals in public tend to experience significant discomfort if observation of them is out of proportion with general social customs, such as if strangers stare at them, eavesdrop on their conversations, or follow them from a distance.

The potential harm of surveillance takes different forms, depending on if the surveillance is obvious to or hidden from the person or persons who are subject to it. Instances of obvious surveillance have a well-established impact on social behavior, restricting it within, or at least aligning it more closely with, widespread norms and attitudes. Conformity is a powerful social pressure that can prohibit individuals from experimenting with their looks and views, freely expressing their opinion, or even asking others for help.[3] As Julie Cohen puts it, "Pervasive monitoring of every first move or false start will, at the margin, incline choices toward the bland and the mainstream."[4]

[3] For the classic psychology experiments on group conformity, see Asch, "Effects of Group Pressure upon the Modification and Distortion of Judgments"; for an empirical appraisal of the last point, see Karabenick and Knapp, "Effects of Computer Privacy on Help-Seeking."
[4] Cohen, "Examined Lives," 1426.

Surveillance that is hidden from the person or persons subjected to it functions in a slightly different manner. Situations in which people know that surveillance of them is possible, but are uncertain whether or not they are being observed at any given moment, are akin to Jeremy Bentham's Panopticon prison model.[5] Bentham suggested that one might increase the control of prisoners through a prison design that would allow guards to observe the former from a central "inspection lodge," without the prisoners knowing whether or not they were being observed at any particular moment.[6]

The form of social control that arises from such observation is today well-recognized, and at times strongly supported. It serves, for instance, as an important motivating factor behind the widespread use of CCTV security cameras throughout the UK. The argument, which is endorsed by a significant portion of the British public, maintains that CCTV cameras increase public safety by deterring crime and delinquency in public places.[7] There are, however, important drawbacks with the system (although Bentham himself rejected liberal critique of his ideas).[8] Perhaps most salient among these is the potential for abuse by totalitarian-style governments or organizations, which might use surveillance to impose a highly restrictive view of acceptable behaviors on a large group or population, and effectively identify and punish detractors from that imposed norm.[9]

These forms of social control would presumably not arise in a scenario concerning hidden surveillance, where there was no knowledge of even the possibility of being subject to that surveillance. Such a practice would be questionable on the basis of various other privacy harms, such as utilizing the personal information thus collected for various other purposes. But even barring such complications, it is reasonable to maintain that the power asymmetry that would arise betwen the observers and the observed in such an instance, in virtue of the latter having access to potentially vast stores of information about the former, is in and of itself problematic.[10]

Of these three surveillance scenarios—constant overt surveillance, Panopticon-style survillance, and entirely covert surveillance—the whereabouts context corresponds to

[5]Bentham, *Panopticon, or the Inspection House.*
[6]Ibid., 5.
[7]Morrison and Svennevig, *The Public Interest, the Media and Privacy*, 41–42, 90.
[8]Bentham, *Panopticon, or the Inspection House*, 127–28.
[9]The potentially devastating repercussions of a Panopticon-style surveillance society is given its perhaps most dramatic and well-known characterization in Orwell, *Nineteen Eighty-Four*; cf. Møller, "One Step Too Far."
[10]Cf. Solove, "A Taxonomy of Privacy," 495.

the second, Panopticon-style form that, although hidden from those subject to it, is nevertheless known by them to exist. Elite athletes know that they are subject to the requirements, but have no knowledge about when the requirements will be utilized by their relevant ADO in order to (*a*) ascertain whether or not the information they have provided them with is correct, and (*b*) test them to determine whether or not they are doping.

As previously noted, WADA particularly emphasises the importance of no advance notice out-of-competition doping testing. This is done in order to tackle the sort of doping practices that can be used during training periods, but that retain their performance-enhancing effects on the athlete at later stages, such as during competitions, despite no longer leaving any detectable traces. This emphasis of WADA's is only made practically feasible by the collection of reliable elite athlete whereabouts information. Without the requirements, WADA argues, there is no effective means of maximizing compliance with anti-doping regulations.

This situation is similar in many respects to that of CCTV camera use in public places. Both contexts rely on surveillance as a primary means of deterring undesirable behaviors; crime and delinquency in one case, doping in the other. In the context of CCTV, people who commit a crime in a public place can not be certain that anybody will see them doing so—it may be that nobody is watching the camera footage, that they are not recording and storing the images for subsequent retrieval, that they are turned off or faulty, or that they are pointed in such a manner that the crime can not be observed or inferred from the images. In the whereabouts context, athletes who dope can not be certain that anybody will discover the illicit behavior—it may be that there is no plan to perform any no advance notice out-of-competition doping test on them anytime soon, or that such plans are disrupted by, say, revisions of testing strategies in light of the suspicious behavior of other athletes in the same RTP and a resulting reallocation of testing resources. The criminal who would have been caught on CCTV need not be so, much like the doping athlete who would have tested positive need not be subject to any out-of-competition doping tests during the relevant time periods.[11]

For most individuals, however, the existence of CCTV security cameras arguably imposes a worry about ensuring that they not behave in an unacceptable manner while

[11] For the argument that general CCTV camera deployment is more ethically problematic than elite athlete whereabouts requirements, see Hanstad and Loland, "Elite Athletes' Duty to Provide Information On Their Whereabouts."

under the gaze of the cameras. Similarly, for most athletes, the collection and active monitoring and utilization of their whereabouts information by their relevant ADO arguably impose a worry about ensuring that they do not fall foul of WADA's anti-doping rules by breaking them and risking getting caught.

This, however, constitutes a point at which the analogy breaks down. CCTV is meant to monitor behavior in public places, but not to ensure compliance with prior promises submitted to, say, one's place of work or significant other. WADA's whereabouts requirements, on the other hand, bind athletes to behave according to specific rules, in addition to ensuring that they either remember to keep to their itinerary as per their prior whereabouts submissions, or remember to update their itinerary wherever they depart from those submissions. Non-athletes are subject to the monitoring of (certain aspects of) their behavior through CCTV, while athletes are subject to the monitoring of (certain aspects of) their previously expressed intentions *as well as* to (certain aspects of) their behavior. As a result, athletes are arguably under a significantly more taxing form of surveillance—they are not only required to behave according to a set of expectations, they are also required to keep in mind precisely what they have expressed at an earlier stage—up to three months in the past—regarding their projected whereabouts, in order to either adhere to those plans, or revise them accordingly.

This state of affairs constitutes an unprecedented level of surveillance, compared to other social groups and practices in British society. Individuals who, like athletes, compete for analogous social goods—such as students applying for prestigious university positions, academics applying for scarce funding resources, or professionals applying for desirable and relevant employment—are not subject to any remotely similar regulations. The same applies to individuals who, again like athletes, arguably serve as important role models to young people—such as teachers, artists, or public officials. Even those individuals who have a direct responsibility for the health and/or safety of large parts of the general public—individuals like doctors and other healthcare professionals; commercial airline pilots; or members of the police force, fire brigade, or military—do not have any similarly taxing levels of surveillance imposed upon them.

There are individual exceptions within these groups. In the case of *Whitefield v. General Medical Council*,[12] for instance, the Privy Council found that the claimant—a doctor suffering from serious depression and alcohol consumption—constituted a suffi-

[12][2002] UKPC 62, [2003] IRLR 39.

cient risk to his patients to justify a requirement of absolute abstinence. The doctor's compliance with the requirement was to be determined by random breath, blood, or urine tests, with the doctor risking a loss of his medical license if he at any point failed to comply, or to pass such a test. The judgment in the case did not specify precisely how he was to be made subject to the random tests, but it is plausible to assume that it was not through a system resembling WADA's whereabouts system. And even if it were so, there remains a fundamental difference: the doctor in *Whitefield* had certain requirements imposed on him as the result of serious problems that existed prior to the imposition, while athletes have analogous (if not more taxing) requirements imposed on them simply in virtue of being elite athletes, regardless of whether or not there is any indication that they have had prior problems with doping.

The only group in British society that is subject to a level of surveillance plausibly comparable to that imposed on elite athletes is criminals who are placed under curfew according to the Criminal Justice Act 2003. The act stipulates that the whereabouts of such individuals are to be tracked, where necessary, through the use of electronic monitoring.[13] In practice, this typically means ensuring they are within specified premises at specified time intervals, by fitting them with an ankle monitor that detects if they either tamper with the monitor or leave the premises during the specified times.[14]

Where individuals under curfew may fail to follow the imposed regulations, they risk significantly harsher sanctions than do athletes who fail to adhere to the information they provide as part of their whereabouts reports. Again, however, athletes arguably have a more taxing requirement to keep in mind the specifics of their reported whereabouts information. This will obviously differ from one individual athlete to the next—a highly repetitive schedule for an athlete arguably removes the cognitive burden of needing to either remember or constantly remind oneself what whereabouts information one has registered. But the imposition of, for instance, ever changing competition schedules—due to, among other things, the actual placement of athletes in the competitions, determining whether they go on to compete at a higher level or not—is arguably more cognitively taxing to keep track of than is the comparatively simple requirement that one must always be at the same specific place within the same specific time frame.

[13]Criminal Justice Act 2003, §§ 215, 253.
[14]Waddington, "'A Prison of Measured Time'?" esp. 185–86.

As a result, elite athletes are, compared to most other people in British society, subject to an unprecedented level of surveillance. Apart from a subset of UK criminals, elite athletes form a unique set, regarding the extent to which their movements and actions are monitored by others. While there are concerns about the widespread reliance on CCTV security cameras generally, especially as regards their potentially chilling effect on the general public, the form of surveillance to which athletes are subject forms an additional and unique burden on them.

6.1.2 Interrogation

Interrogation concerns being actively pressed by others to divulge information. It is similar to surveillance in that it constitutes a form of gathering of personal information—as opposed to the processing or dissemination of such information—but it differs insofar as it only pertains to direct communication between two parties, the interrogator and the interrogated. Surveillance, on the other hand, does not require any similar form of communication between observer and observed. It can, therefore, be conducted without the knowledge of the individual subject to the surveillance, while interrogation can not be conducted without the knowledge of the individual being interrogated.

Like surveillance, interrogation can range from the relatively benign to the highly opprobrious. This seems to be determined, in large part, by social norms concerning the limits of acceptability regarding the questioning of others. It is, for instance, common to ask people various types of questions when getting to know them personally, when interviewing them for a potential position of employment, or when seeking to compile statistical information about a group of people. But the range of acceptable questions is circumscribed by social mores, such that it is not normally considered acceptable to, for instance, ask casual acquaintances about their sexual preferences, or job interviewees about their political or religious beliefs.

What is the specific harm involved in having socially awkward questions pressed against oneself? It is, after all, possible to refuse to answer, particularly where one is well aware that the questions are outside the range of general acceptability. Yet many nevertheless feel that there is a privacy harm involved regardless of whether the questions are answered truthfully, evasively, or even not at all, as noted in the aforementioned quote from Scanlon:

> If you press personal questions on me in a situation in which this is conventionally forbidden, I can always refuse to answer. But the fact that no information is revealed does not remove the violation, which remains just as does the analogous violation when you peek through my bathroom window but fail to see me because I have taken some mildly inconvenient evasive action.[15]

There are various means by which such a harm might be instantiated. First, the very act of asking certain types of questions itself influences the tone and possible interpretation of a conversation. Refusing to answer a probing question does not constitute a simple declining to open a new avenue of discussion; it carries with it various potentially unintentional connotations. Depending on the way the refusal is phrased, it may be interpreted as if the person expressing the refusal is trying to hide something in doing so. Once this sort of question has been asked, any type of response is pregnant with interpretative possibilities. Solove plausibly suggests that this is an important motivating factor underlying the social opprobrium against asking such questions.[16]

Second, and somewhat relatedly, it is common to assume that skilled interrogators will be able to convey a certain image of an interrogated individual through the types of questions they ask, and the manner and order in which they ask them. This need not be as simple as asking obviously leading or insinuating questions of the sort "Do you still beat your wife?" It can also be accomplished through complex strategies intended to draw out anything from a complete confession of some act to mere inference or innuendo that the person being questioned is not reliable in certain crucial respects.[17]

The whereabouts context is, however, not as problematic as scenarios such as these. It is more akin to filling out a form requesting sensitive personal information, on the assumption that the information will be responsibly dealt with by those to whom it is submitted. Where it is not responsibly dealt with, in either situation, various other privacy harms such as data insecurity or blackmail may arise. But these harms do not arise from the initial interrogative information request as such.

There are, however, some important differences between the whereabouts requirements and filling out a form requesting personal information. These pertain primarily to the nature of the whereabouts requirements qua requirements. Elite athletes must submit their planned whereabouts for the upcoming annual quarter in advance every

[15]Scanlon, "Thomson on Privacy," 317.
[16]Solove, "A Taxonomy of Privacy," 500.
[17]Cf. ibid., 501.

three months to their relevant ADO. They are required to ensure that the information is complete, correct, and up-to-date at all times. Failure to submit the information, or submitting incomplete whereabouts information (such that it is not obvious from the information how a doping control officer would be able to locate the athlete at any given time) count as a filing failure or, in particularly egregious instances, an anti-doping rule violation such as sample evasion. The former constitutes a whereabouts failure—of which an athlete may have up to three in any eighteen-month period before facing sanctions—whereas the latter results in immediate sanctions. Failure to keep submitted and complete whereabouts information up-to-date is subject to similar considerations, the ultimate severity of any imposed sanctions depending on the athlete's "degree of fault."[18]

In either instance, the strict liability nature of WADA's whereabouts rules means that failure to comply with the rules will eventually result in a ban for the affected athletes. They will, in other words, be actively prohibited from participating in their sport for the length of the ban, whether the nature of their engagement in that sport was more akin to full-time employment or part-time interest. Refusing to answer WADA's questions regarding whereabouts are, therefore, tantamount to excluding oneself from continued participation in one's sport.

There is no other form of employment or hobby in British society that is subject to similar requirements to submit personal information to one's employer or organization, on a regular basis, and subject to harsh sanctions where it is not accurate, complete, and up-to-date. There is a strong similarity, however, between the interrogative nature of WADA's whereabouts requirements and that of the UK system of state benefits. A benefit like, say, Child Tax Credit is paid out to those families with children in the UK who earn less than a certain amount of annual taxed income.[19] To apply for Child Tax Credit, it is necessary to submit relevant personal information to Her Majesty's Revenue and Customs (HMRC), such as one's address, the amount and age of children in one's household, and one's projected annual earnings. These sorts of factors determine the final amount of the tax credit paid.

To ensure that a household qualifies to receive a Child Tax Credit, the HMRC undertakes regular checking of the information provided to them, to establish that it is com-

[18]WADA, *WADC2*, §§ 10.3.3.
[19]HMRC, *What Are Tax Credits?*

plete, accurate, and up-to-date. Where this is not the case, they may charge a penalty fee from the tax credit recipient. This can occur in instances where people intentionally or "negligently" give them incorrect information, where they fail to inform them of relevant changes in their circumstances within a month of the changes occurring, or where they fail to provide any supporting documentation requested by the HMRC.[20] Particularly egregious cases, such as those involving outright tax credit fraud, are subject to civil or criminal investigations, depending on the severity of the fraud.[21]

This is strikingly similar to the case of WADA's whereabouts requirements in several respects, although there are some differences between the two. The first concerns the historical nature of the social good provided in each instance, and the potential sociological ramifications of this. Wherever state benefits have existed, they have taken the form of aid to qualifying individuals. In many countries, such as the UK, qualification is not determined automatically, but only upon receipt of a formal application from those individuals seeking access to the benefit. In such cases, the provision of personal information is inherent to the nature of the social good, and therefore expected by all. WADA's whereabouts requirements differ insofar as they are a much more recent imposition on athletes; the world of elite sport is significantly older than the existence of the whereabouts requirements. Athletes seeking access to the social good provided by participation in elite sport are subject to requirements that would not have been levied against elite athletes of their parents' or grandparents' generation. This constitutes a significant shift of expectations on affected indiviuals, and may be a primary reason underlying the strong initial protests against the system. WADA itself seems to suggest as much in claiming that athletes will be more accepting of the new whereabouts requirements "once things settle down."[22]

It is not entirely clear whether this sort of distinction between a longstanding system and a more recently implemented one has, or ought to have, any normative force in considering the potential interrogative harms of WADA's whereabouts requirements. But even if this is deemed not to be the case—even if WADA is correct in assuming that the issue has more to do with resistance to change than with any ethical flaws in the system itself—there are nevertheless some further concerns with the whereabouts requirements.

[20]HMRC, *Tax Credit Penalties.*
[21]HMRC, *Tax Credit Fraud.*
[22]As quoted in BBC, *Athletes Air Issues Over Testing.*

These arise, in particular, because of the highly resource-intensive nature of out-of-competition doping testing. At competitions, ADOs can test a multitude of athletes at one location in a short time span. Outside those competitions, however, they need to actively locate the various individual athletes for testing. This sort of activity requires a strategic allocation of the available resources, primarily by planning, in advance, whom to test at what times. As a result, unreported changes to an athlete's whereabouts would constitute a potentially significant waste of resources, in sending a doping control officer to perform a doping test on an athlete when they are not at the location specified in their whereabouts submission.

This state of affairs indicates why it is not possible for ADOs to—like the HMRC in the case of Child Tax Credits—accept changes to one's registered information only after the fact. It also explains why it is not practically feasible for WADA to rely on a GPS-based tracking system as a means of monitoring athlete whereabouts (as was suggested by Klüft). Since this would only provide real-time information, and no indication of how it might come to change in the future, it would be difficult for doping control officers to effectively plan their out-of-competition tests in advance and according to a reasonable distribution of test resources[23]

It is important, however, to distinguish between the interrogative demands on elite athletes, and the burdens entailed by the extent of the whereabouts surveillance on them. The latter require keeping in mind prior whereabouts information, the former only requires keeping in mind a particular deadline by which one must resubmit upcoming whereabouts information. Strictly speaking, therefore, there remain compelling similarities between interrogation in the whereabouts context and interrogation in the context of state benefits. Both require a good deal of personal information, within specified and rigidly monitored time frames (whereabouts in advance, state benefits in retrospect). Failure to adhere to the requirements, in either case, risk leading to discontinued access to the social good provided by each, respectively. Some elite athletes may depend, for their livelihood, on continued access to the world of elite sport, but so some people receiving state benefits may depend, for their livelihood, on continued access to the benefits.

[23] Cf. Halt, "Where Is the Privacy in WADA's 'Whereabouts' Rule?" 287–88.

6.1.3 Aggregation

Aggregation is a type of information-processing; it differs from surveillance and interrogation in only applying to information that has already been collected in one manner or another. It concerns the bringing together of various discrete bits of information, in order to thereby create a more complete data profile. This occurs in various contexts, such as when a company relies on its own customer database in conjunction with credit reports to determine those customers who they deem most suitable to market their latest product to, or when the National Health Service combines medical reports about an individual from various surgeries and hospitals to construct a fuller medical profile.

Like surveillance, the incidence of aggregation has increased drastically with certain developments in technology. Digitized databases and widespread internet communications allow for the potential concatenation of all manner of different forms of information about a person at near-instant speeds, where it might have taken weeks or even months to accomplish a similar gathering of physical records in the past. The same holds true of people's internet behavior, which has the potential to be monitored in various ways by the owners of any website a person visits, through the deployment of website cookies that can track different aspects of a person's internet use.[24]

Aggregation serves various purposes, including the possibility of utilizing the aggregated information about people to provide them with a more tailor-made experience, be it in relation to medical services, education and employment opportunities, or choosing to display to them those ads that they are most likely to find interesting. The potential harm of aggregation arises from the fact that discrete piece of personal information may tell very little about a person while kept discrete, but may yield a much more revealing picture of them than they prefer upon combination into a central data profile. This is the problem Nissenbaum noted, in discussing her concept of "privacy in public":

> The value of aggregates is that they are multidimensional and as such provide more information than pictures that are less filled out. Beyond this, however, an aggregate can incorporate a richer portrait of the individual than even the bits taken together ... as it may include not only information explicitly given but information inferred from that which has been given. ... Demographic profiles, financial profiles, and consumer profiles identify people as suitable targets for proposed

[24] Cf. Kosinski, Stillwell, and Graepel, "Private Traits and Attributes Are Predictable from Digital Records of Human Behavior."

> "treatments." Used in this way, a profile may be seen as a device that offers a way of targeting people as the likely means to fulfilling someone else's end.[25]

In the whereabouts context, aggregation arises in the form of the stipulation that ADOs undertake a doping risk profile for each athlete in an RTP, in order to perform "target testing" of those athletes deemed to be at higher risk of doping. WADA suggests various criteria by which this might be determined. Some of these pertain to whereabouts information, such as prior whereabouts failures or whereabouts information indicating that the athlete moves to a "remote location."[26] But many pertain to other sources of information, such as abnormal biological parameters, sudden performance improvements, financial incentives, or even "reliable information from a third party."[27] In submitting their whereabouts information to WADA, elite athletes are thus aware of the fact that the information they provide will be aggregated with various other sources of information about them, in order to enable a more intelligence-led allocation of testing resources.

This state of affairs is reminiscent of the manner in which a police force might rely on various sources of information to compile a more complete picture of criminal conduct. This is particularly so in regard to the intelligence-led nature of both scenarios. They differ, however, in that suspected criminals under investigation need not be at all aware that information about them is being aggregated, whereas athletes are made fully aware of this being the case, in regard to the anti-doping work undertaken by the various ADOs. In this manner, the whereabouts context is again more analogous to that of state benefits, where various government institutions and organizations may share and aggregate data in order to ensure that the same individuals are not, for instance, receiving a high income at the same time as they are claiming benefits intended for those with a lower income. Both this and the whereabouts context suffer from serious potential privacy harms where such aggregated data profiles are used for other purposes than those indicated. But where the aggregation functions as a tool to accomplish objectives known to and, for the most part, accepted by those whose data is being aggregated, it is difficult to see how or why either case would constitute a greater privacy problem, in this respect, than the other. On the assumption that this form of aggregation is not

[25]Nissenbaum, "Protecting Privacy in an Information Age," 589–90.
[26]WADA, *IST3*, § 4.4.2.
[27]Ibid., § 4.4.2.

particularly problematic in the context of state benefits, it therefore follows that it is also not particularly problematic in the whereabouts context.

6.1.4 Public Disclosure

Public disclosure is a means of disseminating information, rather than a means of collecting or processing it. It concerns those situations where a true piece of information about a person is made available to the public at large. Taken as a privacy harm, it concerns those instances of dissemination to the general public that are damaging to the reputation of the person to whom the information in question pertains. In this respect, it is one of the privacy harms that is in most direct competition with freedom of speech or press; the former puts certain limits on what can be truly said about others, while the latter pushes against those limits in the interest of public elucidation. Legally speaking, the primary test to determine, in any given case, which of the two is to take precedence, is the newsworthiness test; where something is deemed sufficiently newsworthy, for whatever reasons, the harms of public disclosure are considered overridden.

Public disclosure differs from libel, in the sense that it only concerns true information about a person, whereas libel pertains to the dissemination of false information. It differs from blackmail in that there is no initial threat of disseminating the information, in return for some desired reward, in the case of public disclosure.

As already noted, the primary harm involved in public disclosure is the damage it does to a person's reputation. This can arise in a variety of situations, and lead to a number of indirect or secondary harms. It may, for instance, be the case that convicted criminals, who have completed their sentence and subsequently move to a new town in order to "start over," are recognized as former criminals by some of their new neighbors. Where those neighbors proceed to inform the rest of the community, the person's reputation risks serious damage, to the point that it may not only be impossible for them to succeed in their plans to start over, they may also be at risk of social repercussions or even vigilanteism, depending on perceptions of their former crimes.

The same sorts of considerations apply to criminal suspects. The British press routinely publishes the names, addresses, personal histories, and photographs of criminal suspects. A recent well-known examples of this concerns the murder of Joanna Yates.

The initial suspect, Yates's landlord Chris Jefferies, was discussed avidly in the media.[28] He was later released from police custody, and Yates's neighbor Vincent Tabak was eventually convicted of the murder instead.[29] Despite having no criminal charges against him, the discussion of Jefferies as a murder suspect in the media was sufficient to not only create long-lasting damage to his reputation, but to constitute a significant security risk to him in his subsequent dealings in public.[30]

WADA takes a slightly more careful approach than that of the British press, in this respect. According to their regulations (and as noted above), ADOs are required to publish information about those anti-doping rule violations over which they have jurisdiction, only once they have been determined:

> No later than twenty (20) days after ... an anti-doping rule violation has [been determined], ... the Anti-Doping Organization responsible for results management must publicly report the disposition of the anti-doping matter including the sport, the anti-doping rule violated, the name of the Athlete or other Person committing the violation, the Prohibited Substance or Prohibited Method involved and the Consequences imposed. ... Publication shall be accomplished at a minimum by placing the required information on the Anti-Doping Organization's Web site and leaving the information up for at least one (1) year.[31]

This procedure only applies to full anti-doping rule violations, however, and not to individual whereabouts failures. According to WADA, information pertaining to the latter is not to be disclosed "beyond those persons with a need to know unless and until that Athlete is found to have committed an anti-doping rule violation."[32] The potential harm here, of public disclosure, is therefore not unique to the whereabouts system, but shared by all anti-doping regulation. And even if it were unique to the whereabouts requirements, it would still be difficult to recognize any specific privacy harm beyond that suffered by, for instance, many criminal suspects whose identities are routinely reported in the press. Elite athletes found guilty of an anti-doping rule violation have their information made public, but those suspected of an anti-doping rule violation suffer no similar fate. There are two potential complications here. The first occurs when an athlete is found guilty of an anti-doping rule violation, despite being innocent. The reputation

[28]See e.g. BBC, *Landlord Arrested in Jo Yeates Murder Inquiry*.
[29]BBC, *Vincent Tabak Found Guilty of Jo Yeates Murder*.
[30]BBC, *Jo Yeates's Landlord Christopher Jefferies "Getting on with Life"*.
[31]WADA, *WADC2*, §§ 14.2.2, 14.2.4.
[32]WADA, *IST3*, § 11.6.4.

damage that can occur from this is important and problematic, but again no more so than that suffered by criminal suspects who later turn out to be innocent bystanders. Second, there are significant potential problems where information about whereabouts failures are, for instance, leaked to the press, in order to discredit an individual athlete, prior to them being found guilty of any anti-doping rule violation. Insofar as this, however, is expressly against WADA's rules for the conduct of an ADO, it instead comes under the heading of breach of confidence, considered below.

6.1.5 Intrusion

Intrusion is different from the other privacy harms currently under consideration, insofar as it need not pertain to information at all. Some scholars, such as Parent, would in fact deny its claim to the label of a privacy harm altogether, instead restricting their accounts of privacy to specific aspects of personal information. In constructing an account of privacy relative to the whereabouts context, however, it is important to consider every instance of what might be considered a privacy harm by parties to the discussion within the context.

Intrusion concerns the perceived sanctity of zones of personal space, both physical and metaphorical. Most typically applied to the home, it can also apply to one's belongings or person, and the physical space around these, or even to non-physical zones such as one's email account or telephone number. The exact nature of these zones—the extent to which they are protected—depends on various environmental factors. There are, for instance, lower expectations of physical personal space in crowded areas like elevators and public transport than there are in less dense areas like parks or nature reserves. Relative to these environments, however, there are various social norms—norms that, to some extent, differ from one culture to another—that dictate the acceptability of getting within a specific physical range of another person.

The harms arising from intrusion primarily concern the fact that it is perceived as disruptive to one's normal or intended behavior or activities, or as interrupting one's solitude. Telemarketing calls, spam email, or unsolicited interaction from other people in public can all be considered instances of intrusion. The same might be said of an overly enthusiastically sociable neighbor or acquaintance, who takes any opportunity to make a social call, whether invited or not. It also applies to more legally serious instances, such as nuisance, or even trespass.

There is arguably a harm of intrusion in doping tests, where an elite athlete is required to provide a urine or blood sample (in addition, the former also contains the harm of exposure, as noted earlier). This applies to anti-doping work generally, however, and is not specific to the whereabouts system. Relative to the former, the primary harm of intrusion is, in most instances, a practically unavoidable one.

Elite athletes are, however, required to provide their ADO with a sixty-minute time slot for every day, between the hours of six in the morning and eleven at night. In order to ensure that the risk of missing a no advance notice test during this time slot is minimized, many athletes in fact choose to set it to between six and seven in the morning, at their own home. Since most athletes sleep at home every night, doing so removes the potential burden of needing to remember different locations for different days or periods. It may also, however, increase feelings of intrusion whenever doping control officers arrive for no advance notice out-of-competition doping tests.[33] Some athletes, particularly if they happen to feel strongly about such visits to their own home, may make alternative arrangements, setting their sixty-minute time slot to their school, workplace, or training facility. This may help avoid some of the harm of intrusion, but does not mitigate it entirely, insofar as doping control officers can and also do test athletes outside their specified sixty-minute time slot (they can not register a missed test at such times, but failure by an athlete to be at a specified location might still count as a filing failure). Furthermore, it is important to consider the additional cognitive burden of having a more varied, as opposed to a more fixed, whereabouts schedule, as per the discussion on surveillance above.

Finally, to the extent that the harm of intrusion might occur in relation to a desire or need for solitude, regardless of extraneous physical considerations, it is important to recognize that it can still be significant. One unfortunate example of this consideration is the case of Belgian cyclist Kevin van Impe, who was visited by a doping control officer for the purpose of performing a no advance notice out-of-competition doping test while he was in the process of making arrangements for the funeral of his recently deceased prematurely born infant son.[34] There are no stipulations in WADA's anti-doping regulations about any mitigating circumstances, and the officer in the case was adamant: a brief postponement of the test would count against the rider as a refusal to provide a

[33] Fordyce, *Inside the Anti-Doping System.*
[34] Quénet, *Drug Testers Impose on Funeral Arrangements.*

sample; an anti-doping rule violation, rather than just a whereabouts failure. This level of severity is not only unprecedented when compared to other social practices (with the possible exception of criminal arrests and other police work, such as testing suspected drunk drivers), it is also highly ethically problematic. If it is at all indicative of something like a standard approach to anti-doping work within ADOs, it would seem to imply that there are few things in the life of an elite athlete that could be considered secondary to the need to be available for out-of-competition doping tests. The severity of the requirements, thus interpreted, is highly questionable.

6.1.6 Other Privacy Harms

In addition to the above potential privacy harms, there are a number of lesser harms worth noting. These harms are lesser not in the sense of their potential for damage—which can be significant—but in the sense that they are not particularly likely to occur in the whereabouts context.

The privacy harm of data insecurity arises wherever there are insufficient protections in place for sensitive personal information. The concerns here range over a variety of potential instances and consequences, including risks of identity theft, disclosures, blackmail, etc. Even where there are no other qualms about providing personal information to some organization, there may nevertheless be significant hesitation to doing so where the information is seen as being at risk of falling into unauthorized hands. The DPA 1998 requires a certain level of security measures to be in effect wherever sensitive personal information is collected, stored, or processed, for precisely these sorts of reasons.

In the whereabouts context, WADA stipulates a number of rules and regulations regarding the handling of the athlete data that the various ADOs collect. In particular, their *ISPPPI* sets out their approach to these issues. Among other things, the *ISPPPI* requires ADOs to designate one person to be accountable for both compliance with the *Standard*, as well as with "all locally applicable privacy and data protection laws."[35] In addition, the same person must ensure such "security safeguards" as are necessary to protect against "the loss, theft, or unauthorized access, destruction, use, modification

[35]WADA, *ISPPPI*, § 9.1.

or disclosure" of personal information, with the further stipulation that the extent of the security correspond to the sensitivity of the personal information in question.[36]

Without direct access to the particular software implementation of WADA's and the ADOs' relevant databases, and a thorough understanding of computer security, it is impossible to estimate the potential risk of data insecurity in relation to the whereabouts context. While athletes have complained about flaws in the technical implementation of the whereabouts-logging software (as noted in chapter 2), bugs are a relatively common feature of software in ongoing development, and not necessarily an indicator of any lack of data security.

The concern about data insecurity is, however, made more pressing by a recent white paper from computer security company McAfee, detailing extensive computer hacking, consisting of "targeted intrusions into more than seventy global companies, governments, and non-profit organizations during the last five years."[37] Specifically, McAfee notes WADA as being compromised in August 2009 and suffering repeated intrusions over the subsequent fourteen months.[38] WADA has responded to the statements, acknowledging a security breach to its email system in February 2008, but maintaining that the ADAMS database has never been compromised, and that it has "no evidence from its security experts of the intrusions as listed by McAfee and the Agency has yet to be convinced that they took place."[39]

Although this sort of publicity is unlikely to increase elite athlete confidence in the management of their whereabouts information, the risks are arguably not greater than those to other organizations, particularly those organizations that transfer personal data abroad (as is the case for e.g. many internet businesses with customers in the UK and with their primary bases in other countries). As a potential target for hacking attempts, there is no indication that WADA is either more likely to be chosen as a target, or that it has any less robust protection measures in place than do comparably situated organizations. Unless it could be shown that WADA has been negligent in its protection of athlete information, the concerns about data insecurity do not differ to any particularly large extent between elite athletes and the general public.

[36]WADA, *ISPPPI*, § 9.2–9.3.
[37]Alperovitch, *Revealed: Operation Shady RAT*, 1.
[38]Ibid., 8.
[39]WADA, *WADA statement regarding McAfee report*.

One of the potential downstream risks of data insecurity is that the information obtained by an unauthorized party might be put to use for some unrelated purpose. But the same sort of concerns might also apply where, for instance, the government of a country pressures the country's NADO to divulge its athlete whereabouts information, in order to more efficiently monitor political dissidents. Such a scenario constitutes an instance of the privacy harm of secondary use, in which possibly legitimately collected personal information is utilized for some illegitimate purpose, in the sense that the individual to whom the personal information pertains has not approved of or authorized such use.

The DPA 1998 explicitly protects an individual's data from being processed for any purposes "likely to cause substantial damage or substantial distress to him or to another," where that damage or distress is considered unwarranted.[40] Although this will not protect against all instances of secondary use—particularly insofar as the extent of "substantial" and "unwarranted" damage or distress is left unspecified—it does protect against the most problematic instances, such as, arguably, the tracking of political dissidents. Then again, there are no clear indications that such concerns apply to British society in the first place.

In the whereabouts context, particularly where restricted to the UK, it is unlikely that serious problems of secondary use of athlete information will normally arise. Much like in the case of data insecurity, WADA has clear guidelines on how to minimize the risk of such problems, stating, among other things, that ADOs must only use whereabouts information for "purposes of planning, coordinating or conducting Testing," as well as that they must inform all affected athletes about the "purposes for which [their] Personal Information may be used and how long it may be retained."[41] Where these stipulations are followed, athletes are arguably not subject to any greater particular risk of secondary use than are non-athletes, with regard to their collected personal information.

As noted above, an athlete guilty of an anti-doping rule violation, including three whereabouts failures within a time period of eighteen months, will be subject to a public disclosure, by their relevant ADO, regarding the nature of the violation. Such disclosure does not, however, apply to the individual whereabouts failures themselves, at least not

[40]DPA 1998, § 11.
[41]WADA, *WADC2*, § 14.3; WADA, *ISPPPI*, § 7.1.

where they do not amount to a fully-fledged anti-doping rule violation. WADA requires such whereabouts failures to remain restricted to those parties "with a need to know."[42]

Where there is a failure to abide by these rules, there may be an attendant privacy harm of breach of confidence. This sort of harm arises where there is a prior relationship between two parties that is based on trust (usually of a contractual nature), and where one party breaks the trust by publicly disclosing information inherent to the relationship, despite a prior explicit or implicit promise not to do so. It is similar to public disclosure, in the sense that true information about an individual is made publicly available, but it differs insofar as the harm in a public disclosure merely consists of the damage to the affected individual's reputation, while the harm in a breach of confidence primarily concerns the breaking of trust (although there may also be additional reputation damage involved).

The nature of the agreement between WADA and elite athletes, in relation to anti-doping work, is contractual. In order to be allowed to participate in their relevant sports, elite athletes are required to recognize and adhere to WADA's rules and regulations. As part of their whereabouts submissions, they are required to include explicit consent to the sharing of their whereabouts information between different ADOs, as per WADA's stipulations.[43] But the ADOs themselves are also contractually bound to WADA's regulations, in a similar manner, including the stipulation that individual whereabouts failures not be publicly disclosed.

There are instances where these rules have been flouted by ADOs, in a manner that highlights the harm of breach of confidence as potentially problematic in the general whereabouts context. Møller has, for instance, described in great detail the situation surrounding the unprecedented expulsion of Danish cyclist Michael Rasmussen, while in the yellow jersey, from the 2007 Tour de France.[44] Despite at the time not being subject to any anti-doping rule violation, Rasmussen was discredited by severe media pressure after it came to light that he had certain whereabouts warnings that could have been taken to indicate cheating. As a result, the Tour de France race director, Christian Prudhomme, pressured Rasmussen's cycling team, Rabobank, into pulling him from

[42]WADA, *IST3*, § 11.6.4.
[43]Ibid., § 11.3.1.
[44]Møller, *The Scapegoat*.

the race, claiming that "we cannot say that Rasmussen cheated but his negligence and lies had become unbearable."[45]

The ethically interesting question in the Rasmussen case concerns how the media received information about his whereabouts warnings in the first place, given that such information was considered to be confidential at the time (and still is, as per the *ISPPPI*).[46] When Møller interviewed the Danish journalist who had first broken the news about the warnings, his answer indicated that he was being fed privileged information by officials within the International Cycling Union and WADA, leading Møller to conclude that the sports organizations "that promote themselves as fighting for fair sport do this by unfair means and are apparently ready to betray athletes whose interests they were originally formed to protect."[47]

Møller presents a compelling outlook on the case, but regardless of whether his characterization of it is entirely correct or not, the fact that personal athlete information—recognized by WADA and ADOs as confidential—was leaked to the press in some form or other, means that there was a breach of confidence in the Rasmussen case. The further indication that the leak may have come from higher up in the ADO echelons increases the ethical seriousness of the case, insofar as it suggests a potentially precedential willingness to flout the established and contractually enforced rules. This is all the more notable insofar as WADA and ADOs have, in general, given no indication that they would tolerate any similar form of flouting of the rules from athletes.

It is difficult to say with any certainty how prevalent this sort of problem is. But it remains problematic not least in the picture it reinforces in other athletes; namely that ADOs may well hold themselves as beyond ethical scrutiny, in at least certain respects, and entirely in contradiction with the rules and regulations that they themselves espouse. The Rasmussen case constituted, in the breach of confidence that it involved, a serious privacy harm. But the precedent it sets for athletes generally also constitutes a privacy threat, in the risk that other athletes be subjected to similar practices.

Finally, as with any store of sensitive personal information, there is a (small) risk of blackmail of elite athletes in relation to their submitted whereabouts information. Whether initiated by an ADO or a third party who is given, or who illegitimately accesses, the information in question, the harm of blackmail to an affected athlete is, like

[45]As quoted in ibid., 25.
[46]Møller, *The Scapegoat*, 65–72; WADA, *ISPPPI*, § 8.3.
[47]Møller, *The Scapegoat*, 136.

the harm of blackmail generally, significant. Unlike many of the other potential privacy harms under consideration, blackmail constitutes a criminal offence in the UK, and is, therefore, legally punishable by significantly harsher sanctions than those others. At the same time, however, it is not normally the case that an athlete who is subject to WADA's whereabouts requirements is at greater risk of blackmail than any other individual who provides similarly sensitive information to some other organization.

There are, however, important exceptions to this generalization. Where an ADO is willing to share confidential information with third parties, as in the Rasmussen case, it is possible that instances of blackmail might arise. It could, for instance, be the case that an investigative journalist privy to the information sees it as an opportunity to pressure an individual athlete into, say, financial compensation in order to keep the information out of media circulation. There is no publicly recorded instance of this sort of scenario with relation to whereabouts failures, but the possibility exists, as a downstream risk of a breach of confidence. Given the lengths to which many professional athletes seem willing to go to excel within their sport, it can not be concluded that an athlete, in such a scenario, would not choose to provide the financial compensation rather than tarnish their sporting career by bringing criminal charges, with the corresponding publicity such an action would inevitably involve. Nevertheless, such a case is still not unique to the whereabouts context, given that similar considerations apply to many instances of blackmail arising in entirely non-sports-related contexts.

Of all these lesser potential privacy harms in the whereabouts context, none are commonplace. Most of them can also be equated with equal or analogous risks for non-athletes. The circumstances surrounding the breach of confidence involved in the Rasmussen case, however, indicate the possibility of certain systemic failures regarding the lengths to which WADA and ADOs might be willing to go in pursuit of their goal of doping-free sport. Little can be said with certainty, however, in regard to any potential universal conclusions drawn from such a particular instance.

6.2 Underlying Values

Having performed an initial evaluation of the potential privacy harms arising from WADA's whereabouts requirements, it is time to turn to the values underlying the vari-

ous positions in the debate on whereabouts, not least in order to determine those harms with sufficient relevance to warrant further discussion.

Some people oppose the imposition of the whereabouts requirements on the basis that they invade athlete privacy, while others support the same imposition regardless of any potential effects on that privacy. Identifying the underlying values that form the basis of and inform these various positions will, in so doing, allow for the construction of a suitably contextual functional account of the privacy issues at stake in the whereabouts context. In the following chapter, this functional account will then be used as the basis for a final evaluation of the legal and ethical acceptability of WADA's whereabouts requirements.

6.2.1 Values Supporting Privacy Protection

As noted in chapter 2, a number of athletes and other interested parties have complained about WADA's whereabouts requirements, couching the complaints in the language of privacy. Murray has characterized the requirements as "draconian," Nadal has referred to the system as an "intolerable hunt," FIFA, UEFA and the BCCI have all officially criticized the "invasion of privacy" that they consider the rules to involve, and Møller has rejected the "rigorous surveillance regime" that the system imposes.[48]

All these complaints share a strong disapproval of WADA's whereabouts requirements, in the sentiment that they are not only out of proportion with the practical needs of anti-doping work, but that they constitute an unacceptable departure from what I will call *common standards* of privacy. A common standard refers here to the culturally and temporally contingent and variable attitudes, among the general public, about the acceptability of some form of privacy harms. So, for instance, a common standard in the UK states that it is an unacceptable privacy harm for strangers to search through one's luggage (an instance of intrusion, in the terminology used to characterize privacy harms above). This standard, however, also admits of important exceptions; police who, say, suspect some form of crime, or airport security staff taxed with ensuring the reasonable safety of all airline passengers.

[48]Eason, *Andy Murray Criticises New Anti-Doping Rules*; FIFA, *FIFA and UEFA Reject WADA "Whereabouts" Rule*; Indian Express, *BCCI Rejects Anti-Doping Clause, Stands By Its Players*; Møller, "One Step Too Far."

This notion of a common standard is, as any concept based on the widespread views or practices of a population, vague and open to interpretation. But the point of the concept is not to yield an exact extension, and it therefore requires no precise conceptual boundaries. On the contrary, the point of the concept is just to illustrate the extent to which a given instance is removed from general practices; the standard functions as a sort of comparator, rather than as an arbiter, of any given instance. Thus, it is, for instance, plain that the surveillance involved in WADA's whereabouts requirements is, on average, further removed from the common standard than is the surveillance of, say, civil servants, on average.

As noted above, common standards do permit of exceptions. The question can then be reformulated as follows: do the privacy harms arising from the whereabouts requirements constitute acceptable exceptions to the departures from the relevant common standards that the requirements involve? That is, like in the case of airport security staff searching personal luggage, might WADA's whereabouts requirements be acceptable, in light of their overall aims?

Although WADA answers this question affirmatively, the consensus of the aforementioned critics is the opposite. On their collective view, whatever the acceptability of the aims that WADA has in implementing their rules and regulations, they consider the implementation of the requirements themselves to be unacceptable as exceptions to the relevant common standards. This sort of concern is, by and large, a concern regarding fairness. Where a particular subset of some population is held to more stringent demands than the population generally, considerations of fairness impose a need to provide justification for the demands. Such justifications can vary widely in nature; they might, for instance, be financial, legal, ethical, political, or sociological. But where there are significant differences in the treatment of different groups, some form of justification is nevertheless necessary in order for the differences in treatment to be considered generally acceptable.

In the whereabouts context, the primary thrust of the opposition to WADA's requirements is precisely that they are perceived as incompletely justified, on an underlying and (generally) implicit basis of fairness. Fairness dictates that where the general population enjoys certain protections from privacy harms, elite athletes ought to enjoy them as well, or, at least, enjoy them to a larger extent than the imposition of the whereabouts requirements makes possible. If, for instance, only criminals are subject

to a similar extent of surveillance, considerations of fairness recommend a rejection or, at least, a relaxation of the athlete surveillance.

This sort of concern with fairness engages different aspects of the various potential privacy harms noted above, but focuses primarily on those harms that are significantly stronger in the whereabouts context; surveillance and intrusion. In addition to such concerns about fairness between population groups, the Rasmussen case highlights a further source of value underlying arguments for protections against privacy harms in the whereabouts context. The value of trust, in various sorts of personal, commercial, and official relationships, forms the basis for the English common law doctrine of breach of confidence. English common law, in other words, provides potential remedy in court for any instances with details analogous to those of the Rasmussen case. This illustrates the perceived value of trust, with regard to the aforementioned sorts of relationships, generally. It also indicates the perceived importance of ensuring that sufficient regulation is in place to safeguard this trust, in order to maintain a viable relationship between elite athletes and their various ADOs.

Given the specific privacy harms relevant to the whereabouts context, as listed above, the primary values underlying arguments for protection against those harms are then, in the case of surveillance and intrusion, fairness between social groups, and, in the case of breach of confidence, trust in contractual relationships.

6.2.2 Values Opposing Privacy Protection

There are a variety of factors supporting the imposition of whereabouts requirements in their current form, i.e. opposing extended protections against the privacy harms to which they give rise. One important vindication of WADA's work is the widespread policy support it receives through the ratification, by various countries, of the 2003 Copenhagen Declaration on Anti-Doping in Sport and the 2005 UNESCO International Convention against Doping in Sport, as discussed in chapter 2. To reiterate, the Convention stipulates that signatories are required to "commit themselves to the principles of [WADA's *WADC*]," through such mechanisms as legislation, regulation, policies, and administrative practices.[49] Similarly, WADA's *WADC* requires all governments to "take all actions and measures necessary to comply with" the Convention.[50]

[49] International Convention against Doping in Sport, art. 4.
[50] WADA, *WADC2*, § 22.1.

It is important to recognize that, as a result of this state of affairs, all discussion regarding the values supporting WADA's whereabouts requirements take place against a backdrop assuming something like their general validity by fiat. Government signatories are asked to adhere to the principles of WADA's *WADC*, by various means, thereby presumably providing a climate of increased tolerance toward the various existing and possible future rules and regulations of WADA. It is, for instance, difficult to conceive of a successful implementation of something equivalent to WADA's whereabouts requirements on, say, academic university staff.[51] Whatever the underlying cause of any difference in attitudes between the two cases, the UNESCO Convention is nevertheless likely to increase support for WADA's stipulations, at the cost of certain privacy harms that might, under less politically charged circumstances, have been more strongly objected to.

In any event, it is also important to recognize that even where the critics here considered attack what they see as the injustice and disproportionality inherent to an imposition of WADA's whereabouts requirements, they nevertheless claim to support anti-doping work generally. That is, there is no dispute, in this case, regarding the validity of WADA's goals of doping-free sport, only a dispute regarding the acceptability of their means of seeking to achieve those goals. Regardless, insofar as the latter are a means of achieving the former, the underlying values will be the same for both. These values are shared by both proponents and critics of the requirements, but the two camps differ in the former taking the values to be sufficiently powerful to override, to at least some extent, the values noted above in favor of increased privacy protections for elite athletes. While the values themselves are not generally in dispute, their relative weighting against countervailing values is.

The *WADC2* refers to the value underlying anti-doping work as the "spirit of sport," a phenomenon it considers collectively constituted by a number of specific individual values:

- Ethics, fair play and honesty
- Health
- Excellence in performance

[51] Although such a scenarios is (humorously) considered in Holm, "The 36th Meeting of the Pay and Conditions Committee of the Union of Philosophers, Sages and Other Luminaries (UK University Branch), or Doping and Proportionality."

- Character and education
- Fun and joy
- Teamwork
- Dedication and commitment
- Respect for rules and laws
- Respect for self and other Participants
- Courage
- Community and solidarity[52]

According to WADA, its anti-doping program seeks to preserve these "intrinsic values." Many of the values are relatively vague, but they can be plausibly viewed as derived from, or at least centered around, the first two values in the list. There is a fundamental concern that, on the one hand, doping upsets the balance of fairness otherwise presumed to exist between competitors, and, on the other hand, that doping is harmful to the health of athletes.

The former concern, about fairness between competitors, is interesting insofar as it is, in the whereabouts context, weighed against fairness between social groups. The two forms focus on different aspects of fairness, comparing and contrasting different phenomena; regulatory demands on different subsets of people in a society versus the extent to which an athlete is able to achieve certain sporting results without recourse to something like "artificial stimulation." In fact, fairness can function as a comparator of any of a number of phenomena, such that it might, for instance, be claimed that natural differences in biological abilities between competing athletes are unfair, or that disparities in the financial investment in their respective training regimens are unfair.[53] These sorts of notions of fairness can be pushed further, to the point that performance enhancement, at least given certain restrictions, is sometimes espoused as a means of "levelling the playing field" between vastly differing natural endowments, i.e. in favor of, rather than opposed to, fairness between athlete competitors.[54]

[52]WADA, *WADC2*, 14.

[53]For the former, see e.g. Tännsjö, "Genetic Engineering and Elitism in Sport"; Foddy and Savulescu, "Ethics of Performance Enhancement in Sport," 515; for the latter, see e.g. Savulescu, Foddy, and Clayton, "Why We Should Allow Performance Enhancing Drugs in Sport," 667; Foddy and Savulescu, "Ethics of Performance Enhancement in Sport," 515.

[54]Savulescu, Foddy, and Clayton, "Why We Should Allow Performance Enhancing Drugs in Sport," esp. 667–68.

Nevertheless, it remains plausible to presume that doping between otherwise more or less equally matched competitors can, everything else being equal, upset many people's strongly held notions of fairness in competitions. I will leave the requisite strength of the everything-else-equal-clause unspecified, and only mention it to highlight the further difficulties such a position must deal with. For current purposes, I am satisfied to take the claim of doping as upsetting fairness between competitors at face value, and use it, in the following chapter, as a contrast to the claims of whereabouts requirements as upsetting fairness between social groups. These are the two primary values of contrast in the whereabouts context.

In addition, however, there are also the secondary values of trust in contractual relationships and athlete health. The latter is, like the issue of fairness between competitors, a difficult issue to properly ascertain. Elite athletes generally compete at a level that requires extraordinary physical feats, which are exerting to the point that participation in elite-level sports can seriously increase the risk of various illnesses and injuries.[55] Additionally, it is not entirely clear that forms of doping that enable athletes to recover from exertion or injury quicker than would otherwise be possible are detrimental, rather than beneficial, to their health. Again, however, I am satisfied, for the sake of argument, to take the claims of the negative impact of doping on athlete health at face value, and assume their validity as a value to be contrasted, in the whereabouts context, with those values underlying the opposition of the whereabouts requirements.

[55]See e.g. Gleeson, "The Scientific Basis of Practical Strategies to Maintain Immunocompetence in Elite Athletes"; Nieman, "Exercise Effects on Systemic Immunity"; Freeman et al., "Sports Injuries"; Harp and Hecht, "Obesity in the National Football League."

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Whereabouts Reconsidered

Having established an account of privacy for the context of elite athlete whereabouts requirements, the question of the requirements' legal and ethical acceptability remains to be determined. By looking at the contextually relevant harms and values, I conclude (*a*) that WADA's whereabouts requirements face specific legal difficulties, in the UK, with respect to the contextually relevant forms of surveillance and intrusion; and (*b*) that the requirements are only ethically acceptable in relation to sports with a sufficiently high risk of doping. As a result, the imposition of the whereabouts requirements on elite athletes is, at least in certain specific respects, both legally and ethically unacceptable.

7.1 A Brief Recapitulation

The implementation of WADA's revised whereabouts requirements has given rise to the claim that the requirements invade the privacy of elite athletes in an unacceptable manner.[1] I will refer to this as the *privacy-invasion claim*. The claim, as it stands, is far from certain, for various reasons. First and foremost, it is, in many instances, unclear whether the claim is intended to be understood in legal or ethical terms, or perhaps both.

[1]The claim, in other words, consists of the negative answer to the original research question: *In relation to elite athlete privacy, are WADA's current whereabouts requirements acceptable?*

Where the emphasis is on legal considerations, the strength of the privacy-invasion claim will depend on the geopolitical jurisdiction in which it is invoked. Legally established protections of privacy differ from one country or region to another. The appraisal of the claim will therefore differ in accordance with the relevant or chosen legal context. It may, for instance, turn out that the whereabouts requirements in fact violate a legally protected notion of the privacy of elite athletes in country *A*, but not in country *B*, due to differences in their respective law. And even where the legal context is restricted sufficiently to obviate any need for such comparisons—as here, given the focus on UK law—it is nevertheless uncertain what scope to give this sort of general talk about privacy. Various UK laws, for instance, rely on something like the protection of privacy as an underlying value. Sometimes this is evident in the wording of the law, while at other times it only becomes evident in the courts' application of the law to individual cases. Are such instances nevertheless to be considered in determining the success of the privacy-invasion claim? Or, to rephrase, at what point does a legal instance have such a tenuous connection to privacy that it can be ignored in assessing the legal strength of the claim?

The context of legal practice provides a relatively straightforward answer: it is less about the concepts one chooses to invoke, and more a matter of determining which forms of legal redress have a chance at successful outcome in court, however the latter is defined; i.e. what sorts of claims can be made to stick in relation to the whereabouts requirements? But this is unsatisfactory, from a jurisprudential and conceptual standpoint, where the interest lies in determining the legal strength of the privacy-invasion claim itself. The fact that there are conceivably various legal problems with the whereabouts requirements does not thereby imply that all such problems necessarily concern the privacy of elite athletes.

Similar considerations apply where the emphasis in the privacy-invasion claim is instead on ethical issues. In such cases, the strength of the claim will depend on the particular sort of account of privacy upon which one chooses to rely, which will, in turn, demarcate the relevant areas of ethical investigation. But differing accounts of privacy might result in differing assessments of the privacy-invasion claim, making it difficult to determine the ethical strength of the claim. And regardless of the sort of account of privacy relied on, it is still conceivable that there are ethical problems with the whereabouts requirements that have nothing to do with privacy, however one has

chosen to define it; it would be incorrect to assume that all ethical problems pertaining to the whereabouts issue necessarily concern privacy as such.

Either way, in relation to both the legal and the ethical interpretations of the privacy-invasion claim, a definitive assessment of strength can not be provided without a clearer account of what exactly privacy consists in; i.e. a specification of those issues that belong under the rubric of privacy, and those that do not.

In the previous chapter I defined privacy, in relation to the whereabouts context, as the non-realization of any of a specified list of contextually relevant privacy harms. On this account, an invasion of (as opposed to a mere threat against) privacy occurs only once at least one of the contextually relevant privacy harms is realized. But even where such an invasion of privacy can be identified, it is a separate question to what extent the invasion might nevertheless be considered legally or ethically acceptable, in light of further justificatory considerations. For the privacy-invasion claim to hold, it is sufficient to determine just one instance of legally or ethically unacceptable privacy invasions in the whereabouts context.[2]

I argued, also in the previous chapter, that insofar as one of the underlying values opposing the privacy harms in the whereabouts context was that of fairness between social groups, the question of acceptability does not arise for those contextually relevant privacy harms that do not differ in any meaningful sense between the (British) whereabouts context and the context of British society generally. If the realization of some contextually relevant privacy harm is considered sufficiently acceptable in the latter case, and is taken to apply with equal force and specificity in both contexts, then there is no compelling reason to maintain that it is not equally acceptable in the former. This is the case for the contextually relevant privacy harms of interrogation, aggregation, data insecurity, secondary use, public disclosure, and blackmail.

The interest here lies instead with those contextually relevant privacy harms whose acceptability is less analogous and certain. These are the harms that are unique, in some way, to the whereabouts context, whether due to their strength or breadth in that context. This also corresponds to the underlying concerns arising from the whereabouts context; when people complain about WADA's whereabouts requirements invading the

[2]Semi-formally, the claim that WADA's whereabouts requirements are legally and ethically acceptable in relation to privacy takes the form of a universal generalization. Showing this to be false requires just a single instance of existential instantiation demonstrating that the requirements are, in fact, legally or ethically unacceptable in relation to privacy in some particular instance.

privacy of elite athletes, they mean to indicate that there is something extraordinary about the requirements, and their concomitant harms, that suffices to justify resisting their imposition. They are, in this sense, disanalogous to similar privacy harms for the general public, to the extent that they warrant further investigation. This is the case, I argued, for the possible harms of surveillance, intrusion, and, possibly, breach of confidence. It is to these possible harms, and their legal and ethical acceptability, that I now turn.

7.2 Legal Acceptability

Establishing the legal acceptability of WADA's whereabouts requirements in the UK requires two things. First, it is necessary to identify those contextually relevant privacy harms that merit legal attention. These will consist of the harms that either (*a*) violate specific instances of law in a well-established manner; or (*b*) differ sufficiently from prior cases to necessitate original jurisprudential analysis. Having established the harms to be further investigated, it remains to assess their legal standing. This is to be done, in what follows, by (*a*) identifying those instances of law that pertain to the harms in question; and then (*b*) establishing the extent to which those instances of law can be made to support or oppose the imposition of the harms. Where pertinent legal principles come into conflict, there may be no simple answer to this question. Legal analysis ought, however, at the very least to establish the relevant principles in any such instance, in order to thereby facilitate legal evaluation of specific future instances.

7.2.1 Surveillance

The harm of surveillance in the whereabouts context arises from the extensive cognitive burdens placed on the athletes. First, they are pressured to adhere to specified norms of behavior, namely those forbidding practices involving some form of doping. This is, in itself, unsurprising; most surveillance scenarios display an alignment of behavior toward the generally acceptable, or at least away from the explicitly forbidden, and this is often cited as justification for the general acceptability of surveillance practices. Second, however, the athletes are also required to adhere to their own prior specifications regarding their whereabouts information. That is, athletes must abide by, or revise in

advance, the whereabouts information they have submitted to their relevant ADOs. In order for either of these two options to be practically feasible, athletes must actively keep in mind or regularly remind themselves of the specific information they have submitted, to thereby ensure that they do not miss any potential no advance notice out-of-competition doping tests. Given the strict liability presumed in WADA's *WADC2*, this entails that elite athletes are, to a greater degree than in any analogous surveillance scenarios, under severe pressure to ensure that they conform not only with the specified norms of behavior, but also with their own prior commitments.

There are various areas of law that might be taken to apply to such issues of surveillance. Perhaps most prima facie applicable, RIPA 2000 sets out legal limitations to covert surveillance of individuals by public bodies in the UK, primarily as a means of enabling law enforcement agencies to investigate suspected criminal activity. Although the UK NADO, UK Anti-Doping (UKAD), is a UK public body, it is not known to have utilized any of the powers of RIPA 2000 in order to perform any covert surveillances. This is not surprising, given that the work of ADOs is not tied, by the *WADC* and the *IST*, to covert surveillance of the sort regulated by RIPA 2000. There are arguably significant problems with an ADO implementing such unknown covert surveillance techniques as are normally utilized in criminal investigations, not least insofar as there are no such provisions in the official anti-doping regulations. But, as stated, there is no indication that this is currently the case.

A more promising legal approach would be to bring an action against the whereabouts requirements on the basis of CE human rights law, specifically the ECHR article 8 right to private and family life. The ultimate merit of any such approach will, however, depend on a number of successive factors.[3] First, given that the HRA 1998 limits action based on ECHR human rights complaints to public authorities—which the act declares have a positive obligation to maintain the rights—the applicability of the law will be determined by the status of the relevant ADO; that is, whether or not it constitutes a public authority, in the sense of the HRA 1998. Even if this is not found to be the case—i.e. that the ADO is not found to have any positive obligation under the HRA 1998—it may still be possible to utilize the moderate horizontal effect of the law to claim one's ECHR rights in court. This will, however, only be possible where one has succeeded in bringing an action based on something other than those rights.

[3]Cf. Pendlebury and McGarry, "Location, Location, Location."

By whatever means, once such an ECHR case is in court, there are two steps to evaluate in relation to the article 8 right to private and family life, as concerns the whereabouts requirements. The first step consists of establishing whether or not the requirements engage the right, that is, if they fall within the scope of the right declared in article 8.1 of the ECHR (as interpreted through, among other things, Strasbourg jurisprudence). The second step, which only becomes relevant if this is found to be the case, consists of establishing whether the violation of article 8.1 might nevertheless be justified in terms of the qualifications noted in article 8.2. Doing so consists of 3 substeps: (*a*) determining whether or not the violation serves a legitimate objective; (*b*) determining whether or not the violation is a sufficiently effective means of enabling that objective; and (*c*) determining whether or not there are any viable (and less harmful) alternatives.[4] Only once all these elements have been determined will it follow whether or not WADA's whereabouts requirements are legally compatible with article 8 of the ECHR. It is to these factors I now turn.

Whether or not one's ADO counts as a public authority in the UK, for the sake of the HRA 1998, depends on the nature of the ADO in question. According to the legislation, a *public authority* is defined as including "(*a*) a court or tribunal, and (*b*) any person certain of whose functions are functions of a public nature."[5] These admittedly vague specifications are qualified in various different ways, but for present purposes it is sufficient to note the following: most IFs, insofar as they are not based in the UK, will not count as public authorities within the scope of the HRA 1998. UKAD, demonstrably does; the UK government counts UKAD as an executive non-departmental public body (NDPB), which it defines as a body "typically established in statute and carrying out executive, administrative, regulatory and/or commercial functions."[6] For this reason, it is possible for athletes to claim their ECHR rights directly against UKAD, although they are unable to do the same against most IFs. In the latter case, the ECHR rights are only possible to claim horizontally, i.e. in relation to some other non-ECHR-related cause of legal action. It is uncertain to what extent doing so is a viable means of claiming one's ECHR rights against the whereabouts requirements; at the very least, it would be significantly more difficult to convince the courts of the merit of such a

[4] I borrow this division of justificatory factors from Pendlebury and McGarry, "Location, Location, Location," 71–74.
[5] HRA 1998, § 6.3.
[6] Cabinet Office, *Public Bodies 2012*, 1, 60.

case, compared to the positive ECHR obligations UKAD has in virtue of its status as an NDPB.[7]

On the assumption, then, that the most plausible basis for a successful action against the whereabouts requirements—in relation to article 8 of the ECHR—would be aimed against UKAD, the subsequent question concerns the extent to which the whereabouts requirements engage the article 8 right. Determining this issue will, of course, depend on the account of privacy on which one relies. For present purposes, the focus therein lies on the surveillance of individuals by an organization. The ECtHR has declared that surveillance constitutes an "interference" with article 8 of the ECHR.[8] This is also in line with common judgments about the whereabouts requirements generally; namely, that the surveillance they entail is disproportionate to the goals of WADA.

The crucial question, however, concerns the extent to which such an interference might nevertheless be justified, in terms of at least one of the qualifying clauses of article 8.2 of the ECHR, particularly that concerning the "protection of health or morals." The three issues identified above as pertaining to the question of justification are the extent to which it serves a legitimate objective, the extent of its effectiveness, and whether or not there are any viable (less harmful) alternative possibilities. As regards the first of these, I have already noted, in the foregoing chapter, that I take the legitimacy of WADA's underlying whereabouts-related values—particularly those concerning fairness between competitors and athlete health—at face value, assuming their validity for the sake of argument. This is also entailed by the initial declaration of the thesis, in chapter 1, that I am assuming the general validity of the goal of doping-free sport. These assumptions, however, are not spurious; the content and scope of adherence to the goal of doping-free sport—in relation to both political and legal positions in the UK—is substantial. Government support of UKAD, UK ratification of the UNESCO International Convention against Doping in Sport, the anti-doping work undertaken by the political establishment in the run-up to and for the course of the 2012 London Olympic Games, all signify that there exists significant and widespread political support of WADA's anti-doping stance.

In the UK context, then, there exists a broad consensus on the legitimate objectives of anti-doping work generally. Insofar as the whereabouts requirements contribute to

[7]Cf. Pendlebury and McGarry, "Location, Location, Location," 65–70.
[8]See e.g. *Copland v. UK* [2007] ECHR 62617/00, ¶ 41–44.

this end, they derive their legitimacy from it. This issue, concerning the contribution of the whereabouts requirements to the goal of doping-free sport, constitutes the second factor in evaluating the justification of the requirements within the scope of article 8.2 of the ECHR. As noted in previous chapters, WADA maintains that no advance notice out-of-competition testing is crucial to the elimination of out-of-competition doping practices. This is arguably correct, insofar as surveillance provably entails a chilling effect on whatever is considered delinquent behavior within a given cultural context. Much like CCTV seems correlated with a decrease in antisocial behavior, so out-of-competition doping testing—as made possible by the whereabouts requirements—is arguably correlated with a decrease in doping practices. Some have, however, challenged this claim. EU Athletes (EEAA)—a federation of European players' associations and athlete unions—have maintained that unless and until WADA can provide statistics supporting the claim of an effective chilling effect on such doping practices, their claim remains at best unproven.[9] This is, however, a highly difficult claim to determine, insofar as there are no reliable statistics to compare the situations before and after the imposition of the whereabouts requirements. Regardless of the effectiveness of current out-of-competition doping testing (EEAA indicates that it seems to be ten times less effective than in-competition testing in catching dopers),[10] it may nevertheless be that the existence of the testing acts as a powerful form of deterrence, such that out-of-competition doping practices might substantially spread were it removed. In the face of such speculative considerations, however, it is perhaps preferable to instead assess whether out-of-competition doping testing might reasonably be *more* effective at eliminating such practices than alternative policies.

This question constitutes the third factor to be determined in assessing the justification of the whereabouts requirements in terms of ECHR article 8.2. If there are no sufficiently viable alternatives to out-of-competition doping testing, then the practice will be as effective as can be under the circumstances, regardless of how effective that may be in terms of real numbers. There are some potential alternative future developments within this domain, but as of yet they remain uncertain or limited in important respects. So, for instance, Trimega Laboratories—a private UK company—claim to have developed a method to test for a variety of banned substances through chemical analysis

[9]EEAA, *WADA Code Review*, 62–63.
[10]Ibid., 62.

of individuals' hairs.[11] This is purported to entail not only a significantly less invasive method of testing (the removal of a single hair), but to also have the benefit of allowing individual historical analysis (given that the effects of the substances tested for remain in the hair for a matter of months). It remains to be seen to what extent such a method might prove sufficiently reliable to utilize in anti-doping work, but if so, it might arguably obviate the need for whereabouts requirements altogether. There are, of course, remaining questions about the method; can one test hairs from anywhere on the body, or must they be from, say, the head? And if so, is it impossible to test those individuals who shave their heads? Until these sorts of issues can be satisfactorily determined—and until there are well-established tests for a majority of drugs, including in smaller above-trace amounts—it is uncertain whether or not these sorts of developments constitute viable alternatives to the present system of out-of-competition doping testing.

In the absence of any such currently well-established alternatives, the political pressure in favor of strict anti-doping measures—from both outside and within the UK—make it difficult to ascertain the extent to which the whereabouts requirements might be justified in a court case testing them against article 8 of the ECHR. As a result, the legal acceptability of the requirements in relation to these issues remains indeterminate.

7.2.2 Intrusion

The EU enforces the stipulation of legal limits, within its member states, on the maximum amount of time that any employed individual can spend working.[12] As noted in chapter 3, these limits include the stipulation that individuals are due a certain amount of time—on a daily, weekly, and annual basis—when they are free from the obligations of their work. On the other hand, WADA's whereabouts requirements specify that all elite athletes who belong to the RTP of their IF or NADO are required to submit, as part of their whereabouts information, a daily sixty-minute time slot during which they will be available, at a specific location, for no advance notice out-of-competition doping testing.[13] Some claim that the two conflict, such that the whereabouts requirements can not be considered legal in the UK or EU.[14]

[11]Trimega Laboratories, *Hair Drug Testing*.
[12]EWTD 2003; WTR 1998.
[13]WADA, *IST3*, § 11.3.
[14]See e.g. Halt, "Where Is the Privacy in WADA's 'Whereabouts' Rule?"

To see whether or not such a claim has any legal merit, it is first necessary to establish whether the working time limitations are at all applicable to professional athletes. The ECJ case of *UEFA v. Bosman*[15] tested the extent to which regulations of sport could be considered subject to EU law. More specifically, the case concerned a professional Belgian footballer's desire to transfer to a new French football club at the end of his contract with a Belgian club. As the French club refused to pay the "transfer fee" (a means of generating profit in the trade of players) levied by the Belgian club, the latter refused to let Bosman go. As a result of the situation, he suffered reduced wages, and proceeded to file a suit against the Belgian club at the ECJ for restraint of trade. The court found in his favor, arguing that sport was regulated by EU trade law, at least insofar as "it constitutes an economic activity within the meaning of Article 2 of the Treaty [on the Functioning of the European Union]."[16] This, the court maintained, applied to the "activities of professional or semi-professional footballers, where they are in gainful employment or provide a remunerated service," that is, where they are in a paid employment relationship with their club.[17]

As a result of the ruling in *Bosman*, highly-ranked football players in the EU now have significantly more freedom to choose between clubs once their contract periods end. And, more pertinent to the issues herein, the ruling also demonstrates that at least some sporting regulations—such as those concerning employment and gainful trade—can be made subject to EU law. A separate issue, however, concerns the extent to which anti-doping regulations, specifically, might fall within the same category.[18]

This question was treated in another ECJ case, *Meca-Medina v. Commission of the European Communities*,[19] which concerned two swimmers who had tested positive for nandrolone and subsequently been suspended from competition for four years by FINA. Following a failed appeal to CAS, the swimmers filed a suit against FINA and the IOC at the ECJ, claiming that the suspension constituted a violation of their freedom to provide remunerated services.[20] Although the case was initially rejected—among other things on the the basis that anti-doping rules were "sporting aspects of a sport," as opposed

[15][1995] ECR I-04921.
[16]Ibid., § 73.
[17]Ibid., § 74.
[18]Cf. Halt, "Where Is the Privacy in WADA's 'Whereabouts' Rule?" 280–81.
[19][2006] ECR I-06991.
[20]Ibid., §§ 10–16.

to "economic aspects of a sport"—the claimants nevertheless succeeded in being heard on appeal. Although ultimately finding in favor of the defendants, the ECJ nevertheless clarified its stance on anti-doping regulations, maintaining that,

> the penal nature of the anti-doping rules at issue and the magnitude of the penalties applicable if they are breached are capable of producing adverse effects on competition because they could, if penalties were ultimately to prove unjustified, result in an athlete's unwarranted exclusion from sporting events, and thus in impairment of the conditions under which the activity at issue is engaged in. It follows that, in order not to be covered by [specific prohibitions] laid down in [the Treaty on the Functioning of the European Union], the restrictions thus imposed by those rules must be limited to what is necessary to ensure the proper conduct of competitive sport.[21]

Anti-doping rules can, in other words, be the subject of legal action at the European level, at least where they violate specific EU trade rights. Included in this are such directives as the EWTD 2003.[22] To briefly reiterate the details from chapter 3, the EWTD 2003 stipulates that workers are entitled to a rest period of at least eleven consecutive hours during every twenty-four-hour period, an additional rest period of at least twenty-four consecutive hours during every seven-day period, and at least four weeks of paid annual leave.[23] The daily sixty-minute time slot of the whereabouts requirements will overlap some of these rest periods. Specifically, it will necessarily occur during the twenty-four hours of consecutive rest every week, as well as during the minimum four weeks of paid annual leave.

The "rest period" in the directive is interpreted as any period that is not working time.[24] Therefore, the question of the legal acceptability of WADA's whereabouts requirements relative to working time limitations—at least for those athletes who qualify as "workers" for the purposes of the law, that is, who are employed—turns on the question of whether or not the daily sixty-minute time slot qualifies as work or as rest.

The most relevant analog to the daily sixty-minute time slot is doctors who are "on call," such that they may be required to work (and therefore need to take certain precautions, such as maintaining the ability to work), but need not be. The question whether

[21] Ibid., § 47.
[22] Treaty on the Functioning of the European Union 2007, art. 153.
[23] EWTD 2003, arts. 3, 5, 7.
[24] Ibid., art. 2.2.

being on call, in this manner, is considered to be working time or not has been addressed in ECJ case law. The case of *Simap v. Conselleria*,[25] which considered whether or not Spanish doctors on call were working or not, concluded the following:

> Time spent on call by doctors in primary health care teams must be regarded in its entirety as working time, and where appropriate as overtime, ... if they are required to be present at the health centre. If they must merely be contactable at all times when on call, only time linked to the actual provision of primary care services must be regarded as working time.[26]

A similar form of reasoning can be applied to the whereabouts context. WADA stipulates that affected athletes must be (physically) contactable during their daily sixty-minute time slots, in order to be available for no advance notice out-of-competition doping testing. This is analogous to the manner in which doctors must remain contactable and able to work while on call. In both situations, individuals are subject to certain limitations in regard to what might be termed their "suitability for work"; doctors on call are expected to remain in the vicinity, and to maintain their professional judgment unimpeded by alcohol or drugs, while athletes on call during their sixty-minute slot are expected to maintain their professional status by not doping.

However, if employed athletes are not actually tested during their daily sixty-minute time slot, then much like the doctors who are on call without actually being called in to their place of work, it is unlikely that the ECJ would consider them to be working. Hence, in order to abide by the EWTD 2003, WADA and the various concerned ADOs need only ensure that such elite athletes are not tested too frequently, even if they maintain the requirement for the provision of a daily sixty-minute time slot. WADA (or an ADO) could hypothetically fall foul of the directive, by for instance testing an employed athlete during the daily time slot seven days in a row. Given the concerns over optimal resource allocation for anti-doping testing, as well as restrictions on how soon an athlete can be tested again following a missed test, however, it is not currently plausible that any athletes would be subject to such treatment.

Nevertheless, there are potential problems with the whereabouts requirements when considering the granting of a minimum of four weeks' annual leave. In order to comply, WADA, or the relevant ADO, would need to ensure not only that there was a minimum

[25][2000] ECR I-07963.
[26]Ibid., ¶ 52.

period of four weeks during which any given athlete was not tested, but this would also need to coincide with a time period during which the same athlete was not, ostensibly, training or competing; i.e. not working. As a result, the time period in question would presumably be known to athletes in advance, thereby providing them with upwards of four weeks of potential doping opportunities, were they so inclined. In addition, insofar as annual leave is taken to apply to situations where an individual worker is neither working nor on call, the four weeks of annual leave, if granted, would obviate the need to submit whereabouts requirements during that time period.

Unlike article 8 of the ECHR, EU working time limitations are not formulated in a qualified manner. The EWTD 2003 stipulates certain "minimum safety and health requirements for the organisation of working time," while article 7 of the directive, on annual leave, declares that all member states,

> shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.[27]

It is therefore unlikely that the ECJ, if faced with a legal challenge to WADA's whereabouts requirements on the basis of the working time restrictions, would perform a balancing of arguments in favor of the requirements. Unless and until elite athletes are legally disincluded from the "conditions for entitlement to" the annual leave—and *Bosman* entails that it would not be an easy task to convince the ECJ of any merit to doing so—the provision of four weeks' annual leave remains a "minimum requirement" for employed athletes in the EU.

For these reasons, at least for those athletes who can legally be considered employees, WADA's whereabouts requirements, as they currently stand, violate their legal right to a specific amount of resting time, during which they are free from the obligations of their work. Recognizing this, and adjusting the regulations thereafter, need not affect WADA's and the various ADOs' anti-doping work to a great extent on a practical level; a similar strategy for testing out of competition as is currently in place could still occur, while nevertheless ensuring that it would adapt to existing legislation in practice. The primary exception to this is the stipulation for a minimum of four weeks' annual leave. It is understandable if WADA is hesitant to introduce rules that might be seen as giving

[27] EWTD 2003, art. 7.

a free pass to doping, if only for a limited time period during the year. But not doing so is to ignore the existing legislation. In terms of employed athletes in the UK and their right to maximum working time limitations, at least, WADA's whereabouts requirements are not legally acceptable.

7.2.3 Breach of Confidence

As noted in chapter 3, English common law has a well-developed legal tradition regarding breach of confidence. As a result, it is difficult to conceive of a case like that of Michael Rasmussen in Denmark not being legally reprimanded in the UK, at least where brought before a court. WADA's regulations at the time stipulated that the whereabouts information Rasmussen had provided was to be kept confidential. The fact that the information was nevertheless released to a journalist entails that there was a breach of confidence.

It is worth rehearsing the nature of the common law on breach of confidence, notably that it allows, from *Prince Albert* onward, a claim to be brought against an individual or organization responsible for a public disclosure, even if they have no direct connection to the original breach of confidence itself. For instance, in *Barrymore v. News Group Newspapers Ltd.*,[28] the plaintiff had been engaged in an extra-marital homosexual affair with another man, who had subsequently provided details of the affair to *The Sun* newspaper. Barrymore sued the paper for breach of confidence, and the court concurred, maintaining:

> When people enter into a personal relationship of this nature, they do not do so for the purpose of it subsequently being published in *The Sun*, or any other newspaper. The information about the relationship is for the relationship and not for a wider purpose.[29]

The purported breach of confidence in this case applied to the third party newspaper. Although the information had already been divulged by the former lover to journalists (the original breach of confidence), and was therefore, to all intents and purposes, already known to individuals outside Barrymore's closest circle of family and friends, the

[28] [1997] FSR 600 (Ch.)
[29] Ibid., 602.

defendant in the case was not the former lover, but *The Sun*, where the details of the affair had been published.

This is representative of the English common law on confidence, where the provision of personal information in confidence to another, although it may decrease one's privacy with respect to that information and recipient, will not suffice for a claim that the privacy of the information is thereby lost, having been made public.[30]

There is, however, no specific consideration of legal accceptability in relation to breach of confidence as regards WADA's rules and regulations themselves. Insofar as they expressly forbid such breaches of confidence of the personal information of athlete whereabouts information, they comply with the law. Were an instance such as that which befell Rasmussen to arise in England, however, it would almost certainly entail legal action, with a great chance of success.

7.3 Ethical Acceptability

Unlike in the legal situation, there is no recourse to consensually established ethical precepts from whence one might undertake an assessment of the ethical acceptability of the whereabouts requirements in general. Given the general disagreement on ethical values, their relative weights, and their applicability to different sorts of situations, establishing any such ethical acceptability instead requires a determination of how to best balance the contextually relevant underlying values against each other. This is analogous to the manner in which the UK courts approach certain well-established value conflicts involving privacy harms.

As already noted, it is generally recognized that a right to free speech conflicts with a right to keep personal information from being published in the media. But there is no prima facie preference, in legal practice, for one of these rights over the other. Instead, the result of a particular case will depend on the specifics of that case. So, for instance, where celebrity x has been the subject of an unwanted investigative tabloid exposure in newspaper A, the courts might find in favor of the celebrity, while where celebrity y has been the subject of an unwanted investigative tabloid exposure in newspaper B, the

[30]See e.g. *Franchi v. Franchi* [1967] RPC 149 (Ch.) 152.

courts might instead find in favor of the newspaper, due to differences in the salient and relevant details.[31]

As noted in the previous chapter, the specific values underlying support for the privacy harms arising from the whereabouts context are, primarily, fairness between competitors and athlete health. The specific values underlying opposition to the same privacy harms are, primarily, fairness between social groups and, at least in the case of breach of confidence, trust between elite athletes and their ADOs. For the sake of argument, I grant all these values as valid. Rather than the validity of the values themselves, then, the central question here concerns the extent to which different specific features of different instances affect the relative weighting of the values, and how the different possible constellations of weightings impact considerations about the ethical acceptability of WADA's whereabouts requirements.

7.3.1 Fairness Between Competitors

The central ethical value conflict in the whereabouts context is between two different forms of fairness. The first contends that fairness between competing athletes—i.e. ensuring that the playing-field is as "level" as possible—suffices to justify the imposition of the requirements on the athletes. The second contends that fairness between social groups—i.e. ensuring that no particular social group is subject to regulations that are out of proportion with those that apply generally to a broader context—suffices to justify a rejection of the same requirements. By focusing on different aspects of fairness, the two values yield diametrically opposed conclusions about the whereabouts requirements.

The first value, fairness between competing athletes, is used to justify the whereabouts requirements in something like the following manner. Where athletes choose to dope out of competition, they will, everything else being equal, have an unfair advantage over those competitors who have not similarly doped out of competition, in the sense that they will be in a better position to win the competition with a lesser overall level of exertion than their competitors (or, alternatively, win with a greater margin with the same overall level of exertion as their competitors). These competitors might be undoped because they do not have access to the same doping technologies, or they

[31] Cf. *A v. B*; *Campbell*; *Von Hannover*; *Mosley* [2008].

might be undoped because they prefer not to dope, for whatever reason (such as personal moral beliefs, health concerns, etc.).

There might be instances of in-competition doping. Strictly speaking, these are not allowed by the everything-else-equal-clause of the scenario, but they are worth consideration nevertheless. There are already mechanisms in place to make in-competition doping more difficult to successfully get away with, such as automatic testing of all medalists at the most recent Olympic Games in London.[32] While presumably not perfect in implementation, this testing nevertheless minimizes the risk that an athlete is competing against others who are benefitting from very recent use of some illicit performance-enhancing technology.

The whereabouts requirements are presented as an analogous means to this of ensuring the same sort of risk-minimization for the phenomenon of doping out of competition. By one's ADO keeping a close eye on the behaviors and habits of one's competitors, the imposition of the requirements functions as a form of insurance against the risk of an athlete needing to compete against others who are benefitting from non-recent use of some illicit performance-enhancing technology.

The central ethical variable, in the relative weighting of the value of fairness between competitors in the whereabouts context, concerns the relative prevalence of doping out of competition between different sporting contexts. Where the relative prevalence of such doping is high, the relative weight of the value as a justification for the imposition of the whereabouts requirements is correspondingly high. Where the relative prevalence of doping out of competition is instead sufficiently low, this justification evaporates. In a hypothetical instance in which no doping out of competition occurs, the value of fairness between competitors as a justification for the imposition of the whereabouts requirements has no force. On the contrary, in such a hypothetical instance, the whereabouts requirements are altogether redundant; they do not protect either fairness between competitors or athlete health, since there is no doping to threaten them in the first place.

In practical terms it is, of course, near impossible to satisfactorily assess the prevalence of doping in any given instance. Since it is ostensibly against the rules, then wherever it occurs, it occurs to some degree of secrecy and seclusion. There are no official numbers on the extent of doping among elite athletes, only rough estimates based on

[32]IOC, *1,000-Strong Anti-Doping Unit Fighting to Keep the Games Clean.*

what certain subsets of those athletes voluntarily divulge, or what WADA and the various ADOs are able to establish through their various testing procedures.[33]

As a result, it is necessary to look for other measures of the prevalence of doping. The most promising approach, in this respect, is presumably to investigate the risk of doping, relative to a given sporting context. This is promising for a number of reasons. First, it is plausible to assume that the risk of doping in a given sporting context is likely to at least roughly correspond to the actual prevalence (or, perhaps, prevalence if there were no rules against it) of doping within that context. If there is more to be gained in competition by doping out of competition, then there is, in all likelihood, a greater chance that competitors will seek to take advantage of this by doping out of competition wherever they consider themselves likely to get away with it.

Second, WADA already stipulates that IFs and NADOs undertake this sort of assessment of doping risks in the various sports, disciplines, and nations over which they have jurisdiction, in order to thereby better allocate scarce anti-doping resources where they are seen to have the most significant impact. It is, in other words, already part of anti-doping work to evaluate precisely what these sorts of relative risks between sporting contexts are. This is, for instance, the basis for WADA's stipulation that a NADO focus its out-of-competition doping testing resources on those sports where the risk of doping is considered sufficiently high.[34] It is also evident in WADA's stipulation that IFs determine their own criteria for athlete inclusion in their respective RTPs, so as to ensure that they subject a sufficient amount of the elite athlete population to unannouced out-of-competition doping tests:

> Each IF shall define the criteria for Athletes to be included in the international Registered Testing Pool for its sport, and shall publish those criteria as well as a list of the Athletes meeting those criteria. ... The criteria used should reflect the IF's evaluation of the risks of Out-of-Competition doping in that sport. ... While such criteria (and therefore the number of Athletes in the Registered Testing Pool) may vary from sport to sport, an IF must be able to demonstrate it has made a proper assessment of the relevant risks and has adopted appropriate criteria based on the results of that assessment.[35]

As an example, the IAAF includes 538 individual elite athletes in its most recent RTP, while the World Curling Federation (WCF) includes only thirty-five in its respec-

[33]See e.g. Lentillon-Kaestner and Ohl, "Can We Measure Accurately the Prevalence of Doping?"
[34]WADA, *IST3*, §§ 4.3.1, 11.2.2.
[35]Ibid., § 11.2.1.

tive RTP.[36] These numbers correspond roughly to the relative risk of out-of-competition doping in each sport (offset against their respective popularities), as do the respective criteria for inclusion. Athletes competing in athletics stand to gain a significant competitive edge through the illicit out-of-competition use of, say, steroids or, in at least some instances, EPO. As a result, the IAAF includes not only its "top-performing athletes" in its RTP, but also athletes who are, for instance, serving periods of ineligibility, or whom the IAAF "wishes to target for Testing."[37] Athletes competing in curling, however—as with most other precision sports, such as archery and shooting—stand to gain very little from doping out-of-competition (although they may still stand to benefit from certain forms of in-competition doping). As a result, the WCF limits its RTP to those athletes who "won Gold, Silver and Bronze medals at the World Curling Championships 2012 (Men & Women) and are still competing," in addition to those who "won Gold or Silver medals at the World Wheelchair Championships 2012 and are still competing."[38]

This disparity in the risk of doping out of competition is also visible in the focus on different sports in the NADOs. So, for instance, although Canada has nine individual athletes listed among the thirty-five who are part of the WCF's RTP, none of these athletes are included in the RTP of the Canadian NADO, the Canadian Centre for Ethics in Sport (CCES).[39] Of the only three individual Canadian athletes listed among the 538 who are part of the IAAF's RTP, all three are included in CCES's RTP, in addition to another eighty-nine athletics athletes who are not part of the IAAF's RTP.[40] The risk of doping out of competition in athletics, by these measures at least, is very much higher than the risk of this form of doping in curling.

These considerations demonstrate that the value of fairness between competitors will have significantly less ethically justificatory force, for the purpose of WADA's whereabouts requirements, in those sporting contexts where the risk of doping out of competition is sufficiently low. In fact, WADA, IFs, and NADOs already recognize this general state of affairs, in, for instance, focusing more of their efforts on out-of-competition doping testing in the case of athletics over that of curling. As this state of affairs reflects, the differing natures of the two different sports result in very different anti-doping

[36]IAAF, *IAAF Registered Testing Pool*; WCF, *Registered Testing Pool 2012–2013.*
[37]IAAF, *IAAF Anti-Doping Regulations*, § 2.11.
[38]WCF, *Registered Testing Pool 2012–2013.*
[39]CCES, *CCES Registered Testing Pool.*
[40]Ibid.

requirements. Everything else being equal, there are significantly stronger reasons to believe that the whereabouts requirements are acceptable, on the basis of the value of fairness between competitors, in relation to athletics than there are in relation to curling. By way of generalization, there are significantly stronger reasons to believe that the whereabouts requirements are acceptable, on the basis of the value of fairness between competitors, in relation to some sports (such as those requiring explosive strength or extended stamina—the sort of physical demands that can be greatly improved by doping) than there are in relation to others (such as those requiring careful and measured precision).

7.3.2 Fairness Between Social Groups

The second form of fairness relevant to the whereabouts context—namely that between social groups—is used to justify opposition to those privacy harms that are unique to the context. Fairness between social groups will not, of course, recommend protection against privacy harms in only one context of two, if the harms are shared in both. In such a case, considerations of fairness can just as easily result in either of two conclusions: either the harms ought to be protected against to an equal extent in both contexts, or they ought to be implemented to an equal extent in both contexts. This highlights a relatively simple point of coherence; where the privacy harms in two different contexts differ, in some ethically irrelevant way, the inconsistency can be overcome either by removing the harms in both contexts, or by imposing them in both contexts. Either way, the result will be fairness between the contexts, in relation to the privacy harms in question.

It is, however, not sufficient to only compare contexts, given that an individual context can be construed in a theoretically fanciful or perverse manner. To consider fairness between the whereabouts context and such a fanciful theoretical construct is not as illustrative of general ethical acceptability as it will be to consider, again, fairness between the whereabouts context and the context of society generally. Only the latter contrast permits strong ethical justification for protection against some privacy harm or other; if the harm is allowed in the whereabouts context, but not in society generally, then unless there are sufficiently ethically relevant differences to account for the differences in treatment, there is a strong prima facie reason to reject the harm.

As a result, the weight of the value of fairness between social groups, in the whereabouts context, will correlate with the extent to which different instances of the whereabouts context, and the context of society generally, differ in their imposition of the privacy harms. The harms may still be acceptable, of course, where the values supporting them are sufficiently strong in comparison, but where this is not the case, the harms will be unacceptable.

As noted in the previous chapter, it is difficult to find any analog—in terms of scope and severity—to the whereabouts-relative harms of surveillance and intrusion in the more general context. The harms are, simply, out of proportion with those comparable harms that apply to the general public.

This is, furthermore, also the case across the various instances of the whereabouts context; i.e. across different sporting contexts. The whereabouts requirements apply, as per WADA's stipulations, to all elite athletes competing at the top of their respective fields. Although there will be a difference, as discussed in the previous section, in the amount of individual athletes subject to the requirements relative to any individual sport, wherever the athletes are subject to them, the requirements apply in full. So for those 538 athletes who form IAAF's RTP, as well as for those thirty-five athletes who form WCF's RTP, the same requirements are imposed: quarterly whereabouts submissions, including all manner of location information, in addition to a daily sixty-minute time slot when the athlete must be available for no-advance-notice out-of-competition doping testing.[41]

It is arguably the case that the IAAF spends a larger portion of its financial resources on out-of-competition anti-doping work than the WCF, insofar as the former has a significantly larger pool of individual athletes to monitor and test than does the latter. This will, of course, depend on the percentage, rather than the absolute number, of IF members who make up the RTP (assuming that this is a reasonably reliable indicator of cost of out-of-competition anti-doping work versus IF financial resources generally). But even if it is assumed that the requirements on IAAF are greater than those on WCF, there is no difference to those individual athletes who happen to be included in either of their respective RTPs; they will be required to adhere to precisely the same set of rules, regardless of their particular sporting background. The weight of the value of fairness between groups therefore applies to precisely the same degree to the individuals who

[41] WADA, *IST3*, § 11.3.

form part of any official ADO RTP, regardless of the specific sporting context to which they belong.

This raises an interesting point. When balancing the values of fairness between competitors and fairness between social groups, in the whereabouts context, the weight of the former varies across sporting contexts, while the weight of the latter stays fixed. This means that fairness between competitors might outweigh fairness between social groups in one sporting context, such as athletics, but not in another, such as curling. In fact, if one assumes the risk of out-of-competition doping to be close to nil in the latter, then it follows that there is a corresponding near-nil weight to the value of fairness between competitors as a justification for the imposition of the whereabouts requirements in any such case.

7.3.3 Health and Trust

There are, however, further considerations of value, prior to drawing any final conclusions about the ethical acceptability of the whereabouts requirements. The first of these concerns athlete health. Assuming, as per the previous chapter, that doping out of competition is in conflict with athlete health, it then follows that higher rates of out-of-competition doping will correlate with an increasing weight for the value of athlete health as a source of justification for the imposition of the whereabouts requirements, and the resulting privacy harms.

The value of athlete health, in the whereabouts context, is therefore tied to the prevalence of doping out of competition in a given sporting context, in the same manner as the value of fairness between competitors. Where there is little or no doping out of competition, there are correspondingly few or low out-of-competition doping-related risks to athlete health, relative to the context. As already noted, since prevalence of doping is difficult, if not impossible, to determine with any degree of certainty, risk of doping may take its place in a value-estimation of the sort being undertaken here. And, again as for the value of fairness between competitors, the weight of the value of athlete health will, in relation to whereabouts, vary with the risk of doping between different sporting contexts.

For this reason, although fairness between competitors and athlete health both work in tandem to provide ethical justification for the imposition of the whereabouts requirements, wherever the risk of doping out-of-competition is sufficiently low, there will be

a correspondingly low weight to the justification so provided. In a case like that of precision sports (with their presumed near-nil risk of out-of-competition doping), then, neither fairness between competitors, nor athlete health, nor the two in combination, presumably suffice to counterbalance the concerns emanating from the value of fairness between social groups.

As a result, after a careful balancing of the values at stake, it can be concluded that where the risk of doping out of competition is sufficiently low—such as, presumably, in most precision sports—there is sufficient ethical justification for protection against the privacy harms resulting from the imposition of the whereabouts requirements to reject the latter. That is, in cases like these, where the risk of doping falls below some reasonable threshold, the requirements are not ethically acceptable, and, as such, where the particular sporting context permits, the privacy-invasion claim succeeds. This is a serious problem for the perceived mandate of WADA; to maintain its ethical status, the organization needs to reconsider the specifics of its policy, in order to allow for whereabouts requirements that are more sensitive to the various different sporting contexts.

This conclusion is strengthened further in any instance where WADA, or one of the many ADOs, is seen to be failing by its own regulations, for instance by engaging in the sort of breach of confidence evident in the Rasmussen Tour de France case. Although that case arguably constitutes an isolated incident, it is nevertheless important in the sense that it contributes to expectations, at least among affected athletes, about the possible behavior of their ADOs. If athletes perceive such behavior as tolerated by the very same organizations that impose a set of ethical standards upon them, they will, over time, lose their faith in the overall ethical credibility of the system. That is to say, imposing certain ethical standards on athletes, while nevertheless failing to adhere to the same set of ethical standards oneself, is likely to undermine the mandate required by WADA to achieve its overall goal of fighting doping in elite sport by undertaking efficient anti-doping work. Objections to its system are likely to increase proportionately to the incidence of such cases.

This is important merely in the following sense. As of yet, the Rasmussen case seems to exhibit relatively unprecedented behavior in relation to the work of ADOs. But it has not led to sanctions within any of the ADOs that could conceivably have been responsible for the original breach of confidence. As a result, the Rasmussen case itself does not noticeably affect considerations regarding the ethical acceptability of the whereabouts

requirements. But where the incidence of analogous cases increases, it will become all the more difficult for WADA to provide ethical justification for its work, insofar as the incidences will negatively affect the ability to claim such ethical justification in the first place.

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Conclusion

In the foregoing account, I have concluded that WADA's whereabouts requirements are probably not legally acceptable, in relation to (certain aspects of) the extent of the surveillance and intrusion that they entail. Nor are they ethically acceptable, in those sports with a sufficiently low risk of doping. This final chapter provides a retrospective summary account of the argument relied on to reach these conclusions, as well as a brief overview of the specific policy recommendations that follow from them. In addition, I consider the recent changes to the whereabouts requirements suggested in WADA's latest draft *IST* (a part of their second and still ongoing review of the *WADC* and *International Standards*). Although the changes are positive, their ultimate implementation remains, for the time, undetermined.

8.1 Summary

WADA's whereabouts requirements have given rise, through the demands that they place on elite athletes, to various complaints. Thse include the complaint that they invade the privacy of the affected athletes in an unacceptable manner. The claim can be interpreted as a legal or an ethical claim. Where understood as the former, the strength of the claim will depend, in particular, on the legal jurisdiction in which it is invoked; differing laws between jurisdictions entail that the whereabouts requirements might be legally acceptable in one but legally unacceptable in another. Where understood as the latter, the strength of the claim will depend, in particular, on the concept of privacy

in mind; certain interpretations of the concept may entail ethical acceptability, while others may entail the opposite.

Since my interest has been in the specific privacy-related elements of the complaints against the whereabouts requirements, both the legal and the ethical issues require a closer specification of the nature of the concept of *privacy*. There are various legal and ethical issues with the whereabouts requirements that have little or nothing to do with privacy, much as there are various legal and ethical privacy issues for elite athletes that have little or nothing to do with the whereabouts requirements. This thesis has focused exclusively on the intersection of these two domains, namely those issues arising in relation to the combination of WADA's whereabouts requirements *and* the privacy of elite athletes. But drawing any conclusions about this particular domain necessitates a prior specification of the relevant scope of privacy.

To keep the legal question within a tolerable scope, I have further restricted my legal investigations to the jurisdiction of the UK (and, wherever common law traditions are concerned, England). The resulting research questions have then been formulated as follows: *(a) Do WADA's current whereabouts requirements constitute a legally acceptable invasion of the privacy of elite athletes in the UK? (b) Do WADA's current whereabouts requirements constitute an ethically acceptable invasion of the privacy of elite athletes generally?*

As already noted, in order to answer these questions, it is crucial to first determine the appropriate content and scope of privacy. The philosophical discussion of these matters stems, to a large extent, from concerns about the expanding scope of the US legal concept of privacy, as witnessed in the *Griswold* line of Supreme Court cases. Fundamentally, scholars disagree about whether privacy is restricted to matters of personal information (thereby rejecting the privacy rationale in *Griswold*), or if it might be able to accommodate more (thereby allowing the privacy rationale in *Griswold*). In investigating the nature of the dispute between such narrow and broad accounts of privacy, I have maintained that they stem from separate and incompatible views on such methodological questions as the proper weight to accord the common use of a term. These problems are important, and significant, in the sense that they entail serious obstacles for any person attempting to make a rational and justified choice between competing accounts without simlutaneously necessitating an investigation of the myriad methodological issues impinging on that choice.

Given the nature of the thesis topic—i.e. concerns about global sport policy—I have maintained that it is unpreferable to require such extensive methodological considerations in order to attend to the concerns in question. Equally, however, it is philosophically unacceptable to simply presume the superiority of some account of privacy over others. Instead, I have suggested side-stepping these difficulties altogether, by opting for a contextual account of privacy that includes in the concept that which individuals in any given context denote by the term, in order to thereby seek to establish the underlying normative concerns to assess them on their own terms, regardless of the extent to which they fit into traditional accounts of privacy. Doing this sort of thing is, of course, a conceptually risky endeavor; the emotive appeal of privacy entails that many individuals may be content to use the term to denote all manner of things. Such conceptual inflation risks undermining that very same emotive appeal, by watering the concept down in letting it refer to an overly broad range of phenomena.

As a result, I have suggested certain limitations on any contextual account of privacy. First, I have argued for a view of privacy as the absence of certain harms to the person, where the harms in question are determined by the context in question. If the harms are likely in the context, I have said that privacy is threatened. If the harms are realized, I have said that privacy is invaded. If the harms are absent altogether, privacy, at least in relation to those specific contextual harms, is fully intact. Second, I have argued for a view of privacy as directly concerning conflicting values between people in society. More specifically, in any case where privacy is raised as a concern of some sort, I have argued that there will be different underlying (contextual) values that both support and oppose protection against the harm concerned. So, for instance, while certain values concerning autonomy might be used to oppose unknown covert surveillance of individuals in a society, other values concerning keeping the country safe from terrorism might be used to support the same form of surveillance. Once these values are properly identified, and the contextual variables affecting their potential weights in specific instances have been determined, it is possible to establish their respective strengths against each other in any given instance of the context in question, thereby determining whether the contextual privacy harms are acceptable or not in relation to that particular instance.

Given this schema, I have argued that there are a number of privacy harms and underlying values that pertain to the whereabouts context. Of these, however, only two

harms—concerning surveillance and intrusion—were found to be significantly disproportionate to similar harms not normally entailing particular concern in the broader context of British society generally. Given that the central and foremost underlying value supporting the whereabouts privacy invasion claim is a specific concern that the whereabouts requirements are disproportionate to the broader context of society generally, it was deemed necessary to investigate only these harms and their attendant values, in order to establish the extent of, respectively, their legal and ethical acceptability. Due to the specifics of the Michael Rasmussen Tour de France case, I also investigated the impact of breach of confidence concerns on the whereabouts requirements.

The law on privacy in the UK is a diffuse, patchwork affair, dictated to alternating extents by common law traditions and principles, parliamentary legislation, and various international legal treaties to which the UK is subject, particularly in its standing as a member of the CE and the EU. In relation to surveillance, intrusion, and breach of confidence, the most relevant areas of law were identified as those concerning the ECHR human right to private and family life, EU law on maximum working time, and the English equitable doctrine of breach of confidence, respectively (although the last was shown not to arise in any problematic form for the requirements themselves, only for breaches of confidence explicitly against WADA's own regulations). In relation to the ECHR right, it was found that insofar as UKAD constitutes an NDPB, it is directly affected by the right through the HRA 1998, and, as such, could have a lawsuit brought against it by individuals in the UK for a breach of that right. Given that the right is qualified, however, and particularly in light of the UK's obligations as a signatory to UNESCO's International Convention against Doping in Sport, it is uncertain what the precise outcome of any such suit would ultimately be. The UK is, as many other countries, deeply invested in the fight against doping in sport, and it is therefore uncertain to what extent such considerations might impact on the qualification of the ECHR right to private and family life in relation to elite athlete doping issues.

EU law on maximum working time, however, constitutes an important, if somewhat limited, legal restriction to WADA's whereabouts requirements. Specifically, the law stipulates, among other things, at least four weeks of paid annual leave for all workers in the EU. For those athletes who qualify as workers (e.g. those employed as part of a professional sports team), the requirement that they must provide their whereabouts for every day of the year without exception contradicts EU and UK law, and is therefore

legally unacceptable. This constitutes an important problem for WADA, insofar as four weeks is a substantial period of time during which individual athletes could potentially benefit greatly from out-of-competition doping; it is understandable that the organization is unwilling to be seen to issue any such free pass. Nevertheless, as things currently stand, it is difficult to establish how WADA might avoid such concerns without simultaneously contravening the EU law on maximum working time.

In addition, as regards the ethical dimension of the topic, I derived a functional account of the values to be balanced against each other in any given sporting instance. First, the values of fairness between competitors and athlete health, which each support the imposition of the whereabouts requirements (despite its attendant harms), were established to fluctuate across sporting contexts, depending on the risk of doping within the sport in question. Where the risk is high, the values provide greater justificatory strength for the imposition of the requirements. But where the risk is low or non-existent, the values provide little or no such justification; if there is no risk of doping in a sport, fairness between competitors and doping-related concerns about athlete health as reasons for the imposition of harsh whereabouts requirements have no normative force. Second, however, the value of fairness between social groups, which opposes the imposition of the whereabouts requirements (because of its attendant harms), was instead seen to be fixed across sporting contexts. Insofar as the requirements have the same content and scope in all relevant cases, and apply to the same extent to all elite athletes regardless of sport, there is no variation in its justificatory strength for the view that the whereabouts requirements are unacceptable.

Ultimately, then, regardless of the particular merit ascribed to the underlying values in question, it can be established that there are probably sporting contexts involving a high risk of doping in which the (constant) value of fairness between social groups has *less* justificatory force than the contrasting (fluctuating) values of fairness between competitors and athlete health, thereby rendering the whereabouts requirements ethically acceptable. But there are also sporting contexts involving such a low risk of doping that the (constant) value of fairness between social groups is almost guaranteed to have *more* justificatory force than the contrasting (fluctuating) values. Wherever one finds it reasonable to set the threshold, the whereabouts requirements are, in their current form, ethically unacceptable in any sporting context that falls below that threshold.

The final answer to each of the research questions is therefore a qualified "no". In

the legal case, there may (but need not necessarily) be human rights concerns, but at least for those athletes who qualify as workers the requirements are unacceptable. In the ethical case, the requirements are also unacceptable, in relation to all sporting contexts in which the risk of doping is sufficiently low.

8.2 Policy Recommendations

There are many potential ways in which WADA's whereabouts requirements could be reformulated in order to accommodate these concerns. The human rights concerns could arguably be mitigated, to at least some extent, by slightly milder requirements, without thereby foregoing the perceived necessity of extensive no advance notice out-of-competition testing. This could be achieved in a variety of ways, but a plausible candidate for such a resolution would be some manner of distinguishing between elite athletes within the RTP, in something like the manner currently implemented by the ICC in relation to professional cricketers. So, for instance, WADA might stipulate a division of all athletes currently in the RTP into two separate player pools, where the higher pool consists of (something like) all athletes ranking above some reasonably high cut-off point (significantly higher than most criteria for inclusion in current RTPs) relative to the sport in question, together with those athletes who have committed some form of major or minor doping offense within a certain past time range, and the lower pool consists of all other athletes in the current RTP. If, then, the full whereabouts requirements were taken to apply to the higher pool, the lower pool might be required to provide something like, say, their whereabouts information five days a week, from Monday to Friday, instead of every day of the week. Such a division between player pools is strongly in line with WADA's current emphasis on ensuring that no advance notice out-of-competition doping test resources are allocated where they are seen to be most likely to have an impact.

From a purely pragmatic standpoint, although WADA's goal of doping-free sport may be laudable in itself, limited resources entail a need to effectivize wherever WADA seeks to have any significant impact. It is not clear that reasonable distinctions, stipulated by WADA, between different player pools, would not be able to provide at least some such effectivization. In practice, this is already the case in every ADOs' criteria for inclusion in their RTP, together with the further possibility of alternate lower-level

player pools subject to milder requirements. These are, however, rarely utilized in practice. As a result, a central stipulation from WADA itself, establishing a certain amount of player pools, as well as their concomitant rules for inclusion, would arguably provide the incentive necessary for such implementation. Although this would not remove the whereabouts burdens from all elite athletes, the full requirements would only apply to a small subset of those currently affected; a state of affairs that is arguably much easier to defend in relation to human rights concerns. Given the qualified nature of the ECHR right to private and family life, a requirement for full whereabouts information—applied only to the absolutely highest echelons of a sport together with previously established dopers—would be significantly easier to defend in terms of the article's "protection of health or morals"-clause than is the current practice of applying the requirements to a large number of athletes regardless of actual intentions to submit them to any no advance notice out-of-competition doping tests.

As regards maximum working time, WADA has no immediately available options if it seeks to abide by the relevant laws in the EU. The extent to which a global organization need or ought to directly concern itself with local laws and regulations is of course an open question, but the fact remains: if an employed athlete were to file a lawsuit against, say, UKAD, on the basis of the EWTD 2003, then given the lack of any provisions excepting athletes from standard EU trade rights such as the EWTD 2003 (and particularly in light of the ruling in *Bosman*, that sporting organizations are subject to largely the same sort of economic and trade considerations as non-sporting organizations), it is highly likely that the courts would rule in favor of the athlete. In order to be considered legally acceptable, at least in the UK, WADA's whereabouts requirements must include provisions for four weeks' annual leave for all employed athletes.

Finally, the ethical concern could be mitigated by an official recognition of the varying vulnerabilities to doping between different sports. In fact, the preconditions for this already exist as part of the *IST3*. As noted in chapter 2, each ADO with testing jurisdiction is responsible for the development of a "Test Distribution Plan," which includes, among other things, an evaluation—for each sport, discipline, or country—of the potential risk of doping. That is to say, WADA recognizes the inherent differences between different types of sports, and further recognizes that this warrants treating them, in at least certain respects, in a different manner. Where the risk of doping out of competition is high, WADA stipulates that an ADO ought to invest correspondingly more resources

in no advance notice out-of-competition doping testing, and ought to include a larger number of athletes in its RTP. Where the risk of doping out of competition is low, the opposite considerations apply.[1]

At the same time, however, the same whereabouts requirements apply to all athletes who are part of an ADO's RTP. Regardless of the risk profile for out-of-competition doping in their particular sport or discipline, those athletes will nevertheless be subject to the same exact requirements.[2] In its original *IST1*, WADA allowed ADOs to stipulate different whereabouts requirements, different definitions of whereabouts failures, and different sanctions for such failures.[3] The system resulted, among other things, in disagreements on these matters between ADOs sharing testing jurisdiction of athletes. As a result, the 2009 *WADC2*, and its concomitant *International Standards*, sought to "harmonize" the whereabouts rules, by making them uniform across all sporting contexts.

It would, however, be a relatively straightforward issue to create, for instance, a tiered approach, according to which different sports are classified into different categories depending on their specific risk profile. The categories—whether three or eight or any other reasonable number in amount—could then be provided with a specific set of harmonized whereabouts requirements relevant to particular contexts, both as regards the content of the requirements and the scope and severity of any subsequent punishments. This would permit the flexibility that is lacking from the current requirements, without giving rise to the inconsistencies arising from the *IST1*'s stipulation that ADOs determine such issues largely on their own.

8.3 Upcoming Revisions

WADA's *WADC* and *International Standards* are currently undergoing the final phase of their second major review, with the aim of finalizing a third, revised version of the *WADC* (fourth, in the case of the *IST*), *WADC3*, by November 2013, to be formally implemented from January 2015 onward. The code review process has invited submissions for review considerations, from any interested parties, in several phases, the first

[1]WADA, *IST3*, §§ 4.2–4.3, 11.2.
[2]Ibid., § 11.3.
[3]WADA, *WADC1*, §§ 2.4, 10.4.3; WADA, *IST1*, §§ 4.4, 14.3.

of which began in January 2012.[4] After each submission phase, WADA has produced a draft document proposing certain revisions to their regulations. Although all the submission phases have now passed, it is nevertheless illuminating to investigate the latest draft version of the *IST*, the upcoming *IST4*.

Specifically, the *IST4* falls in line with several of the suggestions considered above. It (helpfully) treats the issue of whereabouts in an altogether separate annex, and although many of the elements remain the same as in the *IST3* (such as the general requirements for all athletes in an ADO's RTP to provide whereabouts information), others have been significantly revised.

First, although the regulations still stipulate an anti-doping rule violation arising from any combination of three missed tests or filing failures, it has reduced the relevant time period from eighteen to twelve months, meaning that any such whereabouts failures will "expire" six months earlier than they do under the current system.[5] Second, the requirements for whereabouts information can be waived during competition periods by those ADOs who are "satisfied that [they have] enough information from other sources to find the Athlete for Testing on In-Competition dates."[6] This releases those athletes who compete in tournaments where their successes from one day to the next influence their subsequent whereabouts from the need to constantly update their whereabouts information. Each of these two stipulations aims to reduce the current burdens on athletes, and is therefore, in relation to the foregoing discussion, a welcome development.

There are also more significant revisions. For one, the draft *IST4* allows a different distribution of testing between those sports with high versus low risks of doping. Under the current regulations, ADOs are required to utilize both in-competition and out-of-competition doping testing, with the ratio of each dictated by the specific relevant doping risk profile. Under the draft regulations, however, an allowance can "very exceptionally" be made, to remove the requirement for out-of-competition doping testing altogether in the "small number of sports and/or disciplines where it is determined in good faith there is no material risk of doping during Out-of-Competition periods."[7]

[4]WADA, *Code Review Plan*.
[5]WADA, *IST4*, § I.1.5.
[6]Ibid., § I.3.2.
[7]Ibid., § 4.4.1.e.ii.

Furthermore, and in addition to the above, the draft regulations specify that whereabouts information ought only to be collected to the extent that it facilitates no advance notice out-of-competition doping testing; where this is not the case, the requested whereabouts information is deemed superfluous, and therefore unnecessary, at least in part. More specifically, WADA recommends a tiered approach, where an ADO includes in its RTP *only* those athletes from whom it "plans to collect three or more Samples per year," and where the ADO deems that requesting their full whereabouts information is the "only way to conduct such Testing effectively and efficiently and with No Advance Notice."[8] For all those athletes who do not match these criteria, WADA recommends lower-level player pools consisting of lesser whereabouts requirements, as determined by the relevant ADO.

Although these changes are highly commendable, particularly insofar as they mitigate many of the legal and ethical concerns noted above, there are nevertheless still other concerns with them. For one, the provision that ADOs themselves determine how to categorize their athletes, along with the sort of whereabouts information to request from all the non-RTP player pools, risks generating similar problems of incommensurable whereabouts practices between different ADOs as did the *IST1*. Although WADA has attempted to mitigate the likelihood of this by now specifying that ADOs who share testing jurisdiction over an athlete must recognize each other's findings in relation to that athlete, there is nevertheless an inherent risk that vastly differing categorization schemes between different ADOs will lead to claims of unfair treatment between athletes belonging to different IFs or NADOs. It would arguably have been preferable to see WADA develop clear stipulations in regard to a certain number of tiers or categories for sports, divided by their doping risk profiles, as opposed to just specifying the regulations applicable to the very highest level of athletes, and leaving the remaining decisions to each individual ADO.

It is commendable to see a specification of the exact threshold value for inclusion of an athlete in an ADO's RTP (namely, that the ADO intends to test that athlete at least three times within any twelve months). It would have been more commendable to see at least some amount of proposed threshold values for lower tiers of athletes, with related respective (increasingly lesser) whereabouts requirement stipulations. As noted, the draft regulations, if implemented, risk the incommensurability and perceived

[8]WADA, *IST4*, § 4.6.3.

unfairness resulting from the *IST1*, with a further downstream risk of a strong counter-reaction, in the form of a return to the severity of the *IST2* and *IST3*. Within global anti-doping regulation, it would be preferable to aim for a degree of stability in this respect, rather than risk setting the pendulum of general athlete opinion swinging back and forth with each new iteration of the regulations.

That being said, it is not certain whether or not or to what extent the current draft regulations correspond to the final *IST4*. Although WADA is transparent in the code review submissions it receives (storing everything in publicly available archives on its website), it is far from transparent in relation to the actual process of determining which of the submissions it ultimately places particular emphasis on. The precise decision-making procedures are not accessible or described in any detail, and, as a result, it is impossible to predict to what extent the current draft changes will remain in the final document, until it is published later this year. And even so, the next iteration of WADA's regulations will only come into effect at the beginning of 2015. Until then, the current regulations, with their inherent legal and ethical privacy problems, remain.

Academic References

Adams, Elbridge L. "The Right of Privacy, and Its Relation to the Law of Libel." *American Law Review* 39 (1905): 37–58.

Alexander, Joshua. *Experimental Philosophy: An Introduction*. Cambridge: Polity Press, 2012.

Alldridge, Peter. "'Attempted Murder of the Soul': Blackmail, Privacy and Secrets." *Oxford Journal of Legal Studies* 13 (1993): 368–87.

Allen, Anita. "Privacy and Medicine". Stanford Encyclopedia of Philosophy. 2011. http://plato.stanford.edu/entries/privacy-medicine/, accessed January 5, 2013.

Alperovitch, Dmitri. *Revealed: Operation Shady RAT*. August 2, 2011. http://www.mcafee.com/us/resources/white-papers/wp-operation-shady-rat.pdf, accessed September 2, 2011.

Altman, Irwin. *The Environment and Social Behavior: Privacy, Personal Space, Territory, Crowding*. Monterey, CA: Brooks/Cole Publishing Company, 1975.

American Law Institute. *Restatement (Second) of Torts*. 1976.

Archard, David. "The Value of Privacy." In *Privacy and the Criminal Law*, edited by Erik Claes, Antony Duff, and Serge Gutwirth, 13–31. Oxford: Hart Publishing, 2006.

Aristotle. *Politics*. Edited by Carnes Lord. Chicago, IL: University of Chicago Press, 1985.

Article 29 Working Party. *Opinion 2/2010: On Online Behavioural Advertising*. June 22, 2010. http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp171_en.pdf, accessed August 16, 2012.

— *Opinion 3/2008: On the World Anti-Doping Code Draft International Standard for the Protection of Privacy*. March 2008. http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2008/wp156_en.pdf, accessed July 25, 2011.

Article 29 Working Party. *Second Opinion 4/2009: On the World Anti-Doping Agency (WADA) International Standard for the Protection of Privacy and Personal Information, on Related Provisions of the WADA Code and on Other Privacy Issues in the Context of the Fight Against Doping in Sport by WADA and (National) Anti-Doping Organizations.* April 2009. http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2009/wp162_en.pdf, accessed July 25, 2011.

Asch, Solomon E. "Effects of Group Pressure upon the Modification and Distortion of Judgments." In *Groups, Leadership and Men*, edited by Harold Guetzkow, 177–90. Pittsburgh, PA: Carnegie Press, 1951.

Austin, Lisa. "Privacy and the Question of Technology." *Law and Philosophy* 22 (2003): 119–66.

Bartels, Else M., Judith Swaddling, and Adrian P. Harrison. "An Ancient Greek Pain Remedy for Athletes." *Pain Practice* 6 (2006): 212–18.

BBC. "Athletes Air Issues Over Testing". BBC Sport. February 16, 2009. http://news.bbc.co.uk/sport1/hi/front_page/7892590.stm, accessed April 26, 2010.

— "Greek Duo Out of Olympics". BBC Sport. August 18, 2004. http://news.bbc.co.uk/sport1/hi/olympics_2004/athletics/3571944.stm, accessed June 22, 2010.

— "High-Def CCTV Cameras Risk Backlash, Warns UK Watchdog". BBC News. October 3, 2012. http://www.bbc.co.uk/news/technology-19812385, accessed December 2, 2012.

— "Jo Yeates's Landlord Christopher Jefferies 'Getting on with Life'". BBC News. November 2, 2011. http://www.bbc.co.uk/news/uk-england-bristol-15551619, accessed November 5, 2012.

— "Lance Armstrong Admits Doping to Win Cycling Titles". BBC News. January 18, 2013. http://www.bbc.co.uk/news/world-us-canada-21070952, accessed March 22, 2013.

— "Landlord Arrested in Jo Yeates Murder Inquiry". BBC News. December 30, 2010. http://www.bbc.co.uk/news/uk-england-12092600, accessed November 5, 2012.

— "Leader Rasmussen Pulled from Tour". BBC Sport. July 25, 2007. http://news.bbc.co.uk/sport1/hi/other_sports/cycling/6916698.stm, accessed June 22, 2010.

— "Phone hacking: Cameron and Miliband demand new watchdog". BBC News. July 8, 2011. http://www.bbc.co.uk/news/uk-politics-14073718, accessed July 17, 2012.

— "Press 'Need to Act' after Leveson: Media Reaction". BBC News. November 30, 2012. http://www.bbc.co.uk/news/uk-20546397, accessed November 30, 2012.

— "Vincent Tabak Found Guilty of Jo Yeates Murder". BBC News. October 28, 2011. http://www.bbc.co.uk/news/uk-england-bristol-15448121, accessed November 5, 2012.

Beauchamp, Tom. "The Principle of Beneficence in Applied Ethics". Stanford Encyclopedia of Philosophy. 2008. http://plato.stanford.edu/entries/principle-beneficence/, accessed January 10, 2013.

Bentham, Jeremy. *Panopticon, or the Inspection House.* London, 1791.

Best, Samuel J., Brian S. Krueger, and Jeffrey Ladewig. "Privacy in the Information Age." *Public Opinion Quarterly* 70 (2006): 375–401.

BeVier, Lillan R. "Information about Individuals in the Hands of Government: Some Reflections on Mechanisms for Privacy Protection." *William and Mary Bill of Rights Journal* 4 (1995): 455–506.

Bloustein, Edward J. "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser." *New York University Law Review* 39 (1964): 962–1007.

Brecher, Bob. *Torture and the Ticking Bomb.* Oxford: Blackwell, 2008.

Brown, C. Harmon, ed. "IAAF Medical Manual". IAAF. 2009. http://www.iaaf.org/medical/manual/index.html, accessed July 22, 2011.

Cabinet Office. *Public Bodies 2012.* 2012. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79258/public-bodies-2012_1.pdf, accessed April 25, 2013.

Calcutt, David. *Report of the Committee on Privacy and Related Matters.* Cm 1102. 1990.

— *Review of Press Self-Regulation.* Cm 2135. 1993.

Carter, Ian. "Positive and Negative Liberty". Stanford Encyclopedia of Philosophy. 2012. http://plato.stanford.edu/entries/health-disease/, accessed January 8, 2013.

Cartmell, Larry W. et al. "The Frequency and Antiquity of Prehistoric Coca-Leaf-Chewing Practices in Northern Chile: Radioimmunoassay of a Cocaine Metabolite in Human-Mummy Hair." *Latin American Antiquity* 2 (1991): 260–68.

CAS. "History: Origins". http://www.tas-cas.org/history, accessed November 13, 2012.

CCES. "CCES Registered Testing Pool". December 10, 2012. http://www.cces.ca/en/files-53-cces-registered-testing-pool, accessed January 19, 2013.

CE. "EU accession to the European Convention on Human Rights". 2011. http://hub.coe.int/web/coe-portal/what-we-do/human-rights/eu-accession-to-the-convention, accessed September 23, 2012.

— "Reform of the European Court of Human Rights". 2012. http://hub.coe.int/web/coe-portal/what-we-do/human-rights/reform-of-the-european-court, accessed July 8, 2012.

CE. "The Convention in 1950". 2010. http://human-rights-convention.org/the-texts/the-convention-in-1950/, accessed March 18, 2012.

CJEU. "General Presentation". Curia. 2012. http://curia.europa.eu/jcms/jcms/Jo2_6999/, accessed November 11, 2012.

Cohen, Julie E. "Examined Lives: Informational Privacy and the Subject as Object." *Stanford Law Review* 52 (2000): 1373–438.

Davis, Frederick. "What Do We Mean by 'Right to Privacy'?" *South Dakota Law Review* 4 (1959): 1–24.

Davis, Steven. "Is There a Right to Privacy?" *Pacific Philosophical Quarterly* 90 (2009): 450–75.

DeCew, Judith Wagner. *In Pursuit of Privacy: Law, Ethics and the Rise of Technology*. Ithaca, NY: Cornell University Press, 1997.

Dimeo, Paul. "The Origins of Anti-Doping Policy in Sports: From Public Health to Fair Play." In *Elite Sport, Doping and Public Health*, edited by Verner Møller, Mike McNamee, and Paul Dimeo, 29–40. Odense: University Press of Southern Denmark, 2009.

Dworkin, Gerald. "Privacy and the Press." *Modern Law Review* 24 (1961): 185–89.

— "The Younger Committee Report on Privacy." *Modern Law Review* 36 (1973): 399–406.

Eason, Kevin. "Andy Murray Criticises New Anti-Doping Rules". Times. October 8, 2010. http://www.timesonline.co.uk/tol/sport/tennis/article5671975.ece, accessed February 6, 2009.

ECtHR. *50 Years of Activity: The European Court of Human Rights; Some Facts and Figures*. April 2010. http://www.echr.coe.int/NR/rdonlyres/ACD46A0F-615A-48B9-89D6-8480AFCC29FD/0/FactsAndFiguresENAvril2010.pdf, accessed September 25, 2011.

Edelstein, Ludwig. *The Hippocratic Oath: Text, Translation, and Interpretation*. Baltimore, MD: Johns Hopkins University Press, 1943.

EEAA. *WADA Code Review: First Submission*. 2012. http://antidopingreform.files.wordpress.com/2012/03/finaldraftwadarevision-5.pdf, accessed November 17, 2012.

Ely, John Hart. "The Wages of Crying Wolf: A Comment on *Roe v. Wade*." *Yale Law Journal* 82 (1973): 920–49.

Ennis, Darren. "Doping-EU Regulator Wants 'Whereabouts' Rule On Hold". Reuters. February 21, 2009. http://www.reuters.com/article/idUSLL63504720090221, accessed April 25, 2010.

FIFA. "FIFA and UEFA Reject WADA 'Whereabouts' Rule". March 24, 2009. http://www.fifa.com/aboutfifa/footballdevelopment/medical/media/news/newsid=1040455/index.html, accessed August 5, 2011.

FIFPro. "Legal Threat to Anti-Doping Code". January 27, 2009. http://www.fifpro.org/news/news_details/1144, accessed August 13, 2012.

FINA. "By Laws 2009–2013". September 2009. http://www.fina.org/project/index.php?option=com_content&task=view&id=2609&Itemid=119, accessed November 3, 2009.

Foddy, Bennett and Julian Savulescu. "Ethics of Performance Enhancement in Sport: Drugs and Gene Doping." In *Principles of Health Care Ethics*, edited by Richard E. Ashcroft et al., 511–19. 2nd ed. West Sussex: John Wiley and Sons, 2007.

Ford, Bonnie D. "Landis Admits Doping, Accuses Lance". ESPN: Olympic Sports. May 21, 2010. http://sports.espn.go.com/oly/cycling/news/story?id=5203604, accessed November 25, 2012.

Fordyce, Tom. "Inside the Anti-Doping System". BBC Sport. June 9, 2011. http://www.bbc.co.uk/blogs/tomfordyce/2011/06/inside_the_anti-doping_system.html, accessed August 24, 2011.

Freeman, J. R. et al. "Sports Injuries." In *Textbook of Traumatic Brain Injury*, edited by J. M. Silver, T. W. McAllister, and S. C. Yudofsky, 453–76. Washington DC: American Psychiatrics Publishing, Inc., 2005.

Frege, Gottlob. "Sense and Reference." *Philosophical Review* 57 (1948): 209–30.

Fried, Charles. *An Anatomy of Values*. Cambridge, MA: Harvard University Press, 1970.

— "Privacy." *Yale Law Journal* 77 (1968): 475–93.

— "Privacy: Economics and Ethics." *Georgia Law Review* 12 (1978): 423–28.

Gavison, Ruth. "Feminism and the Public/Private Distinction." *Stanford Law Review* 45 (1992): 1–45.

— "Privacy and the Limits of Law." *Yale Law Journal* 89 (1980): 421–71.

Gildenberg, Philip L. "History of Pain Management." In *A History of Neurosurgery: In Its Scientific and Professional Contexts*, edited by Samuel H. Greenblatt, T. Forcht Dagi, and Mel H. Epstein, 439–64. Park Ridge, IL: American Association of Neurological Surgeons, 1997.

Gleeson, M. "The Scientific Basis of Practical Strategies to Maintain Immunocompetence in Elite Athletes." *Exercise Immunological Review* 6 (2000): 75–101.

Greer, Steven. *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights.* 2000. http://www.echr.coe.int/library/DIGDOC/DG2/HRFILES/DG2-EN-HRFILES-17(2000).pdf, accessed October 10, 2012.

Gross, Hyman. "The Concept of Privacy." *New York University Law Review* 42 (1967): 34–54.

Gurry, Francis. *Breach of Confidence.* Oxford: Clarendon, 1984.

Haidt, Jonathan. "The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment." *Psychological Review* 108 (2001): 814–34.

Haidt, Jonathan and Matthew A. Hersh. "Sexual Morality: The Cultures and Emotions of Conservatives and Liberals." *Journal of Applied Social Psychology* 31 (2001): 191–221.

Haidt, Jonathan, Silvia Helena Koller, and Maria G. Dias. "Affect, Culture, and Morality, or Is It Wrong to Eat Your Dog?" *Journal of Personality and Social Psychology* 65 (1993): 613–28.

Halt, James. "Where Is the Privacy in WADA's 'Whereabouts' Rule?" *Marquette Sports Law Review* 20 (2009): 267–89.

Hanstad, Dag Vidar. "Governance and the Whereabouts System: A Norwegian Case Study." In *Doping and Anti-Doping Policy in Sport: Ethical, Legal and Social Perspectives,* edited by Mike McNamee and Verner Møller, 217–32. London: Routledge, 2011.

Hanstad, Dag Vidar and Sigmund Loland. "Elite Athletes' Duty to Provide Information On Their Whereabouts: Justifiable Anti-Doping Work or an Indefensible Surveillance Regime?" *European Journal of Sport Science* 9 (2009): 3–10.

Hanstad, Dag Vidar, Eivind Å. Skille, and Miranda Thurston. "Elite Athletes' Perspectives on Providing Whereabouts Information: A Survey of Athletes in the Norwegian Registered Testing Pool." *Sport und Gesellschaft* 6 (2009): 30–46.

Harp, J. B. and L. Hecht. "Obesity in the National Football League." *Journal of American Medical Association* 293 (2005): 1061–62.

Harrison, Adrian P., Steen H. Hansen, and Else M. Bartels. "Transdermal Opioid Patches for Pain Treatment in Ancient Greece." *Pain Practice* 12 (2012): 620–25.

Henkin, Louis. "Privacy and Autonomy." *Columbia Law Review* 74 (1974): 1410–33.

Herbert, Guy. "Zero Privacy". Guardian. August 13, 2008. http://www.guardian.co.uk/commentisfree/2008/aug/13/privacy.privacy, accessed April 24, 2013.

HMRC. "Tax Credit Fraud". 2012. http://www.hmrc.gov.uk/taxcredits/things-go-wrong/complaints-appeals/fraud.htm, accessed October 28, 2012.

— "Tax Credit Penalties". 2012. http://www.hmrc.gov.uk/taxcredits/things-go-wrong/complaints-appeals/penalties.htm, accessed October 28, 2012.

— "What Are Tax Credits?" 2012. http://www.hmrc.gov.uk/taxcredits/start/who-qualifies/what-are-taxcredits.htm, accessed October 28, 2012.

Hoberman, John. "How Drug Testing Fails: The Politics of Doping Control." In *Doping in Elite Sport: The Politics of Drugs in the Olympic Movement*, edited by Wayne Wilson and Edward Derse, 241–74. Champaign, IL: Human Kinetics, 2001.

— "Putting Doping Into Context: Historical and Cultural Perspectives." In *Performance-Enhancing Technologies in Sports: Ethical, Conceptual, and Scientific Issues*, edited by Thomas H. Murray, Karen J. Maschke, and Angela A. Wasunna, 3–27. Baltimore, MD: Johns Hopkins University Press, 2009.

Holm, Søren. "The 36th Meeting of the Pay and Conditions Committee of the Union of Philosophers, Sages and Other Luminaries (UK University Branch), or Doping and Proportionality." *International Journal of Sport Policy and Politics* 3 (2011): 225–33.

Home Office. *Rights Brought Home: The Human Rights Bill.* Cm 3782. 1997.

Houlihan, Barrie. *Dying to Win: Doping in Sport and the Development of Anti-doping Policy.* 2nd ed. Strasbourg: Council of Europe, 2002.

HSE. "The Working Time Regulations". 2012. http://www.hse.gov.uk/contact/faqs/workingtimedirective.htm, accessed May 28, 2012.

IAAF. *IAAF Anti-Doping Regulations.* October 24, 2012. http://www.iaaf.org/download/download?filename=5848a102-ca09-40a1-b75d-edc04b9f6384.pdf, accessed January 19, 2013.

— "IAAF Opinion On 'New' Whereabouts Requirements". March 5, 2009. http://www.iaaf.org/antidoping/news/newsid=49573.html, accessed July 30, 2011.

— *IAAF Registered Testing Pool.* January 17, 2013. http://www.iaaf.org/download/download?filename=5c26f535-4de5-404f-9119-101f9147f859.pdf, accessed January 19, 2013.

ICC. *About the ICC Whereabouts Programme.* August 18, 2010. http://static.icc-cricket.com/ugc/documents/DOC_E5EDA0714F8E74450D35EC374E88D3F6_1282140925964_895.pdf, accessed September 1, 2011.

— *The International Cricket Council Anti-Doping Code: Whereabouts Requirements for Out-of-Competition Testing.* August 18, 2010. http://static.icc-cricket.com/ugc/documents/DOC_E5EDA0714F8E74450D35EC374E88D3F6_1282140856940_134.pdf, accessed September 1, 2011.

ICO. "Introduction to the ICO". 2012. http://www.ico.gov.uk/about_us/our_organisation/introduction.aspx, accessed June 22, 2011.

Indian Express. "BCCI Rejects Anti-Doping Clause, Stands By Its Players". August 2, 2009. http://www.indianexpress.com/news/bcci-rejects-antidoping-clause-stands-by-its-players/497078, accessed April 24, 2011.

IOC. "1,000-Strong Anti-Doping Unit Fighting to Keep the Games Clean". July 30, 2012. http://www.olympic.org/news/1-000-strong-anti-doping-unit-fighting-to-keep-the-games-clean/170049, accessed November 25, 2012.

— *Factsheet: The Fight Against Doping and Promotion of Athletes' Health.* July 2012. http://www.olympic.org/Documents/Reference_documents_Factsheets/Fight_against_doping.pdf, accessed October 15, 2012.

— "Lausanne Declaration on Doping in Sport". 1999. http://www.sportunterricht.de/lksport/Declaration_e.html, accessed July 28, 2011.

Jenkins, Reese V. "Technology and the Market: George Eastman and the Origins of Mass Amateur Photography." *Technology and Culture* 16 (1975): 1–19.

Joint Committee on Human Rights. *Seventh Report.* 2004. http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/39/3907.htm, accessed July 15, 2012.

Kalven, Harry, Jr. "Privacy in Tort Law: Were Warren and Brandeis Wrong?" *Law and Contemporary Problems* 31 (1966): 326–41.

Kamm, Frances. "Does Distance Matter Morally to the Duty to Rescue?" *Law and Philosophy* 19 (2000): 655–81.

— "Faminine Ethics: The Problem of Distance in Morality and Singer's Ethical Theory." In *Singer and His Critics*, edited by Dale Jamieson, 162–208. Oxford: Blackwell, 1999.

— "The New Problem of Distance in Morality." In *The Ethics of Assistance: Morality and the Distant Needy*, edited by Deen K. Chatterjee, 59–74. CUP: Cambridge, 2004.

Karabenick, Stuart A. and John R. Knapp. "Effects of Computer Privacy on Help-Seeking." *Journal of Applied Social Psychology* 6 (1988): 461–72.

Katz, James E. and Annette R. Tassone. "Public Opinion Trends: Privacy and Information Technology." *Public Opinion Quarterly* 54 (1990): 125–43.

Kilkelly, Ursula. *The Right to Respect for Private and Family Life: A Guide to the Implementation of Article 8 of the European Convention on Human Rights.* 2001. http://echr.coe.int/NR/rdonlyres/77A6BD48-CD95-4CFF-BAB4-ECB974C5BD15/0/DG2ENHRHAND012003.pdf, accessed October 11, 2012.

Kimball, Bob and Beau Dure. "BALCO Investigation Timeline". USA Today. November 27, 2007. http://usatoday30.usatoday.com/sports/balco-timeline.htm, accessed November 18, 2012.

Kosinski, Michal, David Stillwell, and Thore Graepel. "Private Traits and Attributes Are Predictable from Digital Records of Human Behavior." *Proceedings of the National Academy of Sciences of the United States of America* 110 (2013): 5802–5.

Krotoszynski, Ronald J. "Autonomy, Community, and Traditions of Liberty: The Contrast of British and American Privacy Law." *Duke Law Journal* 1990 (1990): 1398–454.

Lehmann, Arthur C. and Luois J. Mihalyi. "Aggression, Bravery, Endurance, and Drugs: A Radical Re-evaluation and Analysis of the Masai Warrior Complex." *Ethnology* 21 (1982): 335–47.

Lentillon-Kaestner, Vanessa and Fabien Ohl. "Can We Measure Accurately the Prevalence of Doping?" *Scandinavian Journal of Medicine and Science in Sports* 21 (2011): e132–e142.

Leveson, Brian. *An Inquiry into the Culture, Ethics and Practices of the Press: Executive Summary and Recommendations.* November 2012. http://www.official-documents.gov.uk/document/hc1213/hc07/0779/0779.pdf, accessed November 30, 2012.

Lewis, David. *On the Plurality of Worlds.* Oxford: Blackwell, 1986.

Locke, John. *Of Civil Government: The Second Treatise.* Rockville, MD: Wildside Press LLC, 2008.

MacGregor, Oskar and Mike McNamee. "Philosophy on Steroids: A Reply." *Theoretical Medicine and Bioethics* 31 (2010): 401–10.

MacKinnon, Catharine. *Toward a Feminist Theory of the State.* Cambridge, MA: HUP, 1989.

Macur, Juliet. "Armstrong Drops Fight against Doping Charges". New York Times. August 24, 2012. http://www.nytimes.com/2012/08/24/sports/cycling/lance-armstrong-ends-fight-against-doping-charges-losing-his-7-tour-de-france-titles.html, accessed November 25, 2012.

Markesinis, Basil. "Our Patchy Law of Privacy: Time to Do Something about It." *Modern Law Review* 53 (1990): 802–9.

Marston, Geoffrey. "The United Kingdom's Part in the Preparation of the European Convention on Human Rights, 1950." *International and Comparative Law Quarterly* 42 (1993): 796–826.

Matthews, Richard. *The Absolute Violation: Why Torture Must Be Prohibited.* Montreal: McGill-Queen's University Press, 2008.

Mazanov, Jason and Vanessa McDermott. "The Case for a Social Science of Drugs in Sport." *Sport in Society* 12 (2009): 276–95.

McCamus, John D. "Celebrity Newsgathering and Privacy: The Transformation of Breach of Confidence in English Law." *Akron Law Review* 39 (2006): 1191–215.

McFee, Graham. *Ethics, Knowledge and Truth in Sports Research: An Epistemology of Sport.* London: Routledge, 2010.

McNamee, Mike, ed. *The Ethics of Sports: A Reader.* London: Routledge, 2010.

McNamee, Mike and Verner Møller, eds. *Doping and Anti-Doping Policy in Sport: Ethical, Legal and Social Perspectives.* London: Routledge, 2011.

McNamee, Mike and Lauri Tarasti. "Ethico-Legal Aspects of Anti-Doping Policy." In *Doping and Anti-Doping Policy in Sport: Ethical, Legal and Social Perspectives*, edited by Mike McNamee and Verner Møller, 9–26. London: Routledge, 2011.

Mead, Margaret. *Coming of Age in Samoa.* New York, NY: New American Library, 1949.

Mill, John Stuart. *On Liberty.* 2nd ed. London: John W. Parker and Son, 1859.

Møller, Verner. "One Step Too Far: About WADA's Whereabouts Rule." *International Journal of Sport Policy and Politics* 3 (2011): 177–90.

— *The Doping Devil.* Copenhagen: Books on Demand, 2008.

— *The Ethics of Doping and Anti-Doping: Redeeming the Soul of Sport?* London: Routledge, 2010.

— *The Scapegoat: About the Expulsion of Michael Rasmussen from the Tour de France 2007 and Beyond.* Aarhus: AKAPRINT, 2011.

Morgan, William J. "Athletic Perfection, Performance-Enhancing Drugs, and the Treatment-Enhancement Distinction." *Journal of the Philosophy of Sport* 36 (2009): 162–81.

Morgan, William J. and Klaus V. Meier, eds. *Philosophic Inquiry in Sport.* Champaign, IL: Human Kinetics Publishers, 1988.

Morrison, David E. and Michael Svennevig. *The Public Interest, the Media and Privacy.* March 2002. www.ofcom.org.uk/static/archive/bsc/pdfs/research/pidoc.pdf, accessed June 29, 2011.

Murphy, Dominic. "Concepts of Disease and Health". Stanford Encyclopedia of Philosophy. 2008. http://plato.stanford.edu/entries/health-disease/, accessed January 8, 2013.

Nagel, Thomas. "Concealment and Exposure." *Philosophy and Public Affairs* 27 (1998): 3–30.

Neuberger, David. *Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice.* May 20, 2011. http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/super-injunction-report-20052011.pdf, accessed December 5, 2012.

Nieman, D. C. "Exercise Effects on Systemic Immunity." *Immunological Cell Biology* 78 (2000): 496–501.

Nissenbaum, Helen. "Protecting Privacy in an Information Age: The Problem of Privacy in Public." *Law and Philosophy* 17 (1998): 559–96.

Ödman, Samuel. "Försök, att utur naturens historia förklara de nordiska gamla kämpars berserka-gång." *Kungliga Vetenskaps Academiens Handlingar* 5 (1784): 240–47.

OECD. "OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data". 1980. http://www.oecd.org/document/18/0,3746,en_2649_34255_1815186_1_1_1_1,00&&en-USS_01DBC.html, accessed April 15, 2011.

Orwell, George. *Nineteen Eighty-Four.* London: Secker and Warburg, 1949.

Parent, W. A. "A New Definition of Privacy for the Law." *Law and Philosophy* 2 (1983): 305–38.

— "Privacy, Morality, and the Law." *Philosophy and Public Affairs* 12 (1983): 269–88.

— "Recent Work on the Concept of Privacy." *American Philosophical Quarterly* 20 (1983): 341–55.

— "Review of Decew, Judith Wagner. *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology.*" *Ethics* 109 (1999): 437–39.

Parrott, Andrew et al. *Understanding Drugs and Behaviour.* West Sussex: John Wiley and Sons, 2004.

PCC. *Towards a New System of Self-Regulation.* March 9, 2012. http://www.pcc.org.uk/assets/0/Draft_proposal.pdf, accessed July 23, 2012.

Pendlebury, Adam and John McGarry. "Location, Location, Location: The Whereabouts Rule and the Right to Privacy." *Cambrian Law Review* 40 (2009): 63–75.

Posner, Richard A. "The Right of Privacy." *Georgia Law Review* 12 (1978): 393–422.

— "Uncertain Protection of Privacy by the Supreme Court." *Supreme Court Review* 1979 (1979): 173–216.

Pratt, Walter F. *Privacy in Britain.* London: Associated University Press, 1979.

Prosser, William L. "Privacy." *Californica Law Review* 48 (1960): 383–423.

Quénet, Jean-François. "Drug Testers Impose on Funeral Arrangements". Cycling News. March 16, 2008. http://www.cyclingnews.com/news/drug-testers-impose-on-funeral-arrangements# null, accessed November 15, 2012.

Quine, W. V. O. "Ontological Relativity." *Journal of Philosophy* 65 (1968): 185–212.

— "Two Dogmas of Empiricism." *Philosophical Review* 60 (1951): 20–43.

Rachels, James. "Why Privacy Is Important." *Philosophy and Public Affairs* 4 (1975): 323–33.

Rawls, John. *A Theory of Justice.* Cambridge, MA: HUP, 1971.

Raz, Joseph. "Human Rights Without Foundations." *Oxford Legal Studies Research Paper Series* (2007): Working Paper No. 14.

Reid, Karen. *A Practitioner's Guide to the European Convention on Human Rights.* London: Sweet and Maxwell, 1998.

Reiman, Jeffrey H. "Privacy, Intimacy, and Personhood." *Philosophy and Public Affairs* 6 (1976): 26–44.

Richards, Neil M. and Daniel J. Solove. "Privacy's Other Path: Recovering the Law of Confidentiality." *Georgetown Law Journal* 96 (2007): 123–82.

— "Prosser's Privacy Law: A Mixed Legacy." *California Law Review* 98 (2010): 1887–924.

Roos, Malin. "Operera in ett chip i mig". Expressen. December 3, 2006. http://www.expressen.se/1.479628, accessed September 2, 2011.

Roy, J. "*Polis* and *Oikos* in Classical Athens." *Greece and Rome* 46 (1999): 1–18.

Samuels, Alec. "Privacy: Statutorily Definable?" *Statute Law Review* 17 (1996): 115–27.

Savulescu, Julian, Bennett Foddy, and M. Clayton. "Why We Should Allow Performance Enhancing Drugs in Sport." *British Journal of Sports Medicine* 38 (2004): 666–70.

Scanlon, Thomas. "Thomson on Privacy." *Philosophy and Public Affairs* 4 (1975): 315–322.

Schneider, Angela J. "Privacy Rights, Gene Doping, and Ethics." In *Doping and Anti-Doping Policy in Sport: Ethical, Legal and Social Perspectives*, edited by Mike McNamee and Verner Møller, 111–25. London: Routledge, 2011.

Schoeman, Ferdinand. "Privacy and Intimate Information." In *Philosophical Dimensions of Privacy: An Anthology*, edited by Ferdinand Schoeman, 403–18. Cambridge: CUP, 1984.

Seipp, David J. "English Judicial Recognition of a Right To Privacy." *Oxford Journal of Legal Studies* 3 (1983): 325–70.

Shortt, S. E. D. "Physicians, Science, and Status: Issues in the Professionalization of Anglo-American Medicine in the Nineteenth Century." *Medical History* 27 (1983): 51–68.

Singer, Peter. "Ethics and Intuitions." *Journal of Ethics* 9 (2005): 331–52.

— "Famine, Affluence, and Morality." *Philosophy and Public Affairs* 1 (1972): 229–43.

Solove, Daniel J. "A Taxonomy of Privacy." *University of Pennsylvania Law Review* 154 (2006): 477–560.

— "Conceptualizing Privacy." *California Law Review* 90 (2002): 1087–155.

— *The Digital Person: Technology and Privacy in the Information Age.* New York, NY: NYU Press, 2004.

Solove, Daniel J., Marc Rotenberg, and Paul M. Schwartz. *Privacy, Information, and Technology.* New York, NY: Aspen Publishers, 2006.

Spitzer, Giselher. "A Leninist Monster: Compulsory Doping and Public Policy in the GDR and the Lessons for Today." In *Doping and Public Policy*, edited by John Hoberman and Verner Møller, 133–44. Odense: University Press of Southern Denmark, 2004.

— "Sport and the Systematic Infliction of Pain: A Case Study of State-Sponsored Mandatory Doping in East Germany." In *Doping and Anti-Doping Policy in Sport: Ethical, Legal and Social Perspectives*, edited by Mike McNamee and Verner Møller, 413–25. London: Routledge, 2011.

Suits, Bernard. *The Grasshopper: Games, Life and Utopia.* Toronto: University of Toronto Press, 1978.

Tamburrini, Claudio. "Are Doping Sanctions Justified?: A Moral Relativistic View." *Sport in Society: Cultures, Commerce, Media, Politics* 9 (2006): 199–211.

Tännsjö, Torbjörn. "Genetic Engineering and Elitism in Sport." In *Genetic Technology and Sport: Ethical Questions*, edited by Claudio Tamburrini and Torbjörn Tännsjö, 57–69. London: Routledge, 2005.

Tasioulas, John. "The Moral Reality of Human Rights." In *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* Edited by Thomas Pogge, 75–101. Oxford: OUP, 2007.

Teetzel, Sarah. "Respecting Privacy in Detecting Illegitimate Enhancements in Athletes." *Sport, Ethics and Philosophy* 1 (2007): 159–70.

Thompson, Paul B. "Privacy and the Urinalysis Testing of Athletes." In *Philosophic Inquiry in Sport*, edited by William J. Morgan and Klaus V. Meier, 313–18. Champaign, IL: Human Kinetics Publishers, 1988.

Thomson, Judith Jarvis. "The Right to Privacy." *Philosophy and Public Affairs* 4 (1975): 295–314.

Todd, Terry. "Anabolic Steroids: The Gremlins of Sport." *Journal of Sport History* 14 (1987): 87–107.

Trimega Laboratories. "Hair Drug Testing". 2013. http://www.trimegalabs.co.uk/tests/hair-drug-testing.php, accessed May 4, 2013.

Vasagar, Jeevan. "Pupils Are Not Your Facebook Friends, Net Privacy Expert Warns Teachers". Guardian. April 24, 2011. http://www.guardian.co.uk/education/2011/apr/24/pupils-facebook-friends-net-privacy-teachers, accessed July 9, 2012.

Verroken, Michele. "Drug Use and Abuse in Sport." *Bailliere's Best Practice and Research: Clinical Endocrinology and Metabolism* 14 (2000): 1–23.

WADA. "About WADA". November 2009. http://www.wada-ama.org/en/About-WADA/, accessed May 25, 2010.

— *Athlete Testimonies on Whereabouts System.* 2009. http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-IS-Testing/WADA_Athlete_Testimonies_Whereabouts_EN.pdf, accessed April 27, 2010.

— "Code Review - Archives". March 2010. http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/The-Code/Code-Review/Code-Review-Archives/, accessed June 25, 2011.

— "Code Review Plan". 2011. http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/Code_Review/Code%20Review%202011-2013/WADA-Code-Review-Plan-Nov2011-EN.pdf, accessed January 5, 2013.

— *International Standard for Testing (IST1).* 2003. http://www.wada-ama.org/Documents/Other_Languages/Spanish/Testing_Standard_2003_FINAL_EN_Jun03.pdf, accessed June 24, 2011.

— *International Standard for Testing (IST2).* 2009. http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-IS-Testing/WADA_Int.Standard_Testing_2009_EN.pdf, accessed January 4, 2010.

— *International Standard for Testing (IST3).* 2012. http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-IS-Testing/2012/WADA_IST_2012_EN.pdf, accessed February 4, 2013.

— *International Standard for Testing (IST4).* forthcoming. http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/Code_Review/Code%20Review%202015/International-Standards/IST-2015-Draft-version-1.0.pdf, accessed April 25, 2013.

— *International Standard for the Protection of Privacy and Personal Information (ISPPPI).* 2009. http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-IS-PPPI/WADA_IS_PPPI_2009_EN.pdf, accessed January 4, 2010.

— "Questions and Answers on 2012 Prohibited List". September 2011. http://www.wada-ama.org/en/Resources/Q-and-A/2012-Prohibited-List/, accessed January 13, 2013.

— "Questions and Answers on Whereabouts". October 2009. http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/International-Standards/Testing/QA-on-Whereabouts/, accessed May 25, 2010.

— *The 2013 Prohibited List: International Standard.* 2013. http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-Prohibited-list/2013/WADA-Prohibited-List-2013-EN.pdf, accessed January 25, 2013.

— "WADA statement regarding McAfee report". August 3, 2011. http://www.wada-ama.org/en/News-Center/Articles/WADA-statement-regarding-McAfee-report/, accessed September 2, 2011.

— *Whereabouts Requirements: Introductory Note.* 2009. http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-IS-Testing/WADA_Whereabouts_IntroductoryNote_EN.pdf, accessed July 26, 2011.

— *World Anti-Doping Code (WADC1).* 2003. http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/Code_Review/1st_Consultation/WADA_Code_2003_EN.pdf, accessed June 24, 2011.

— *World Anti-Doping Code (WADC2).* 2009. http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/WADA_Anti-Doping_CODE_2009_EN.pdf, accessed January 4, 2010.

— *World Anti-Doping Code (WADC3).* forthcoming. http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/Code_Review/Code%20Review%202015/WADC-2015-draft-version-3.0.pdf, accessed June 4, 2013.

Waddington, Ivan. "'A Prison of Measured Time'?: A Sociologist Looks at the WADA Whereabouts System." In *Doping and Anti-Doping Policy in Sport: Ethical, Legal and Social Perspectives*, edited by Mike McNamee and Verner Møller, 183–99. London: Routledge, 2011.

— "Surveillance and Control in Sport: A Sociologist Looks at the WADA Whereabouts System." *International Journal of Sport Policy and Politics* 2 (2010): 255–74.

Waddington, Ivan and Andy Smith. *An Introduction to Drugs in Sport: Addicted to Winning?* London: Routledge, 2009.

Warren, Samuel D. and Louis D. Brandeis. "The Right to Privacy." *Harvard Law Review* IV (1890): 193–220.

WCF. "Registered Testing Pool 2012–2013". November 21, 2012. http://www.worldcurling.org/download/?dl==AFVxIkVWZ1RhxmRWR1aatWVFlVeWxGc3NlRapVUtVTV, accessed January 19, 2013.

Webb, Sarah. "Curbs On a Modern Miller's Tale". Guardian. December 11, 2006. http://www.guardian.co.uk/media/2006/dec/11/mondaymediasection9, accessed June 25, 2011.

Westin, Alan. *Privacy and Freedom.* New York, NY: Atheneum, 1967.

Williams, John N. "Inconsistency and Contradiction." *Mind* 90 (1981): 600–602.

Williamson, Timothy. *The Philosophy of Philosophy.* Oxford: Blackwell, 2007.

Winfield, Percy H. "Privacy." *Law Quarterly Review* 47 (1931): 23–42.

Younger, Kenneth G. *Report of the Committee on Privacy.* Cmnd 5012. 1972.

Legal Citations

English Case Law

Abernethy v. Hutchinson (1825) 1 H. and Tw. 28, 47 ER 1313

A-G v. Observer Ltd. [1990] 1 AC 109 (HL)

A v. B plc. [2002] EWCA Civ. 337, [2003] QB 195

Barrymore v. News Group Newspapers Ltd. [1997] FSR 600 (Ch.)

Bent v. Allot [1579] Cary 94, 21 ER 50

Berd v. Lovelace [1576] Cary 62, 21 ER 33

Bernstein v. Skyviews and General Ltd. [1978] QB 479 (QB)

Boardman v. Phipps [1967] 2 AC 46 (HL)

Campbell v. Mirror Group Newspapers Ltd. [2004] UKHL 22, [2004] 2 AC 22

Coco v. AN Clark Ltd. [1968] FSR 415 (Ch.)

CTB v. News Group Newspapers Ltd. [2011] EWHC 1232 (QB), [2011] All ER 142

Douglas v. Hello! Ltd. [2001] QB 967 (CA)

Faccenda Chicken Ltd. v. Fowler [1987] Ch. 117 (CA)

Franchi v. Franchi [1967] RPC 149 (Ch.)

Gee v. Pritchard (1818) 2 Swans. 402, 36 ER 670

Giggs (previously known as "CTB") v. News Group Newspapers Ltd. [2012] EWHC 431 (QB), [2012] All ER 93

Hellewell v. Chief Constable of Derbyshire [1995] All ER 473 (QB)

Hunter v. Canary Wharf Ltd. [1997] AC 655 (HL)

Hutcheson (formerly known as "KGM") v. News Group Newspapers Ltd. [2011] EWCA Civ. 808

Kaye v. Robertson [1991] FSR 62 (CA)

R v. Khan (Sultan) [1997] AC 558 (HL)

Khorasandjian v. Bush [1993] QB 727 (CA)

Malone v. Metropolitan Police Comr. [1979] Ch. 344 (Ch.)

McKennitt v. Ash [2006] EWCA Civ. 1714, [2008] QB 73

Millar v. Taylor (1769) 4 Burr. 2303, 98 ER 201

Morison v. Moat (1851) 9 Hare 241, 68 ER 492

Mosley v. News Group Newspapers Ltd. [2008] EWHC 1777 (QB), [2008] All ER 322

Pollard v. Photographic Co. [1888] Ch. D. 345 (Ch.)

Pope v. Curl (1741) 2 Atk. 342, 26 ER 608

Prince Albert v. Strange (1849) 1 Mac. and G. 25, 41 ER 1171

Queensberry v. Shebbeare (1758) 2 Eden 62, 21 ER 33

Saltman Engineering Co. v. Campbell Engineering Co. [1963] 3 All ER 413 (CA)

Stephens v. Avery [1988] Ch. 449 (Ch.)

Tolley v. JS Fry and Sons Ltd. [1930] 1 KB 467 (CA)

Tolley v. JS Fry and Sons Ltd. [1931] AC 333 (HL)

Venables v. News Group Newspapers Ltd. [2001] Fam. 430 (F)

Wainwright v. Home Office [2003] UKHL 53, [2004] 2 AC 406

Whitefield v. General Medical Council [2002] UKPC 62, [2003] IRLR 39

X (formerly known as Mary Bell) v. O'Brien [2003] EWHC 1101 (QB), [2003] All ER 282

Yovatt v. Winyard (1820) 1 Jac. and W. 394, 37 ER 425

European Case Law

UEFA v. Bosman [1995] ECR I-04921

Copland v. UK [2007] ECHR 62617/00

Dudgeon v. UK [1981] ECHR 7525/76

Von Hannover v. Germany [2004] ECHR 59320/00

Malone v. UK [1984] ECHR 8691/79

Meca-Medina v. Commission of the European Communities [2006] ECR I-06991

Moreno Gomez v. Spain [2004] ECHR 4143/02

Mosley v. UK [2011] ECHR 48009/08

Peck v. UK [2003] ECHR 44647/98

Pretty v. UK [2002] ECHR 2346/02

Simap v. Conselleria [2000] ECR I-07963

S v. UK [2008] ECHR 30562/04

UK v. CEU [1996] ECR I-05755

US Case Law

Berger v. New York 388 US 41 (1967)

Duran v. Detroit News Inc. 504 NW 2d 715 (Mich. Ct. App. 1993)

Eisenstadt v. Baird 405 US 438 (1972)

Florida Star v. BJF 491 US 524 (1989)

Griswold v. Connecticut 381 US 479 (1965)

Katz v. US 389 US 347 (1967)

Kyllo v. US 533 US 27 (2001)

Loving v. Virginia 388 US 1 (1967)

Nader v. General Motors Corp. 255 NE 2d 765 (NY Ct. App. 1970)

Olmstead v. US 277 US 438 (1928)

Pavesich v. New England Life Insurance Co. 50 SE 68 (GA 1905)

Roe v. Wade 410 US 113 (1973)

Stanley v. Georgia 394 US 557 (1969)

Times Mirror Co. v. Superior Court 53 Cal. 3rd 1325 (CA 1991)

US Dept. of Justice v. Reporters Comm. for Freedom of the Press 489 US 749 (1989)

Whalen v. Roe 429 US 589 (1977)

Other Case Law

WADA v. FILA 2008/A/1470 (CAS)

WADA v. Pakistan Cricket Board 2006/A/1190 (CAS)

UK Legislation

Access to Personal Files Act 1987

Criminal Justice Act 2003

Data Protection Act 1984

Data Protection Act 1998 (DPA 1998)

HC Debate, May 23, 2011, vol. 528, col. 638

Health and Safety at Work etc. Act 1974

Human Rights Act 1998 (HRA 1998)

Interception of Communications Act 1985 (IOCA 1985)

Police Act 1997

Police and Criminal Evidence Act 1984

Protection from Harassment Act 1997

Regulation of Investigatory Powers Act 2000 (RIPA 2000)

Working Time Regulations SI 1998/1833 (WTR 1998)

European Legislation

CE Resolution on the Doping of Athletes (67/12)

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

Council Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31 (European Data Protection Directive 1995) (EDPD 1995)

Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time [1993] OJ L307/18 (European Working Time Directive 1993)

Directive 2000/34/EC of 22 June 2000 amending Council Directive 93/104/EC concerning certain aspects of the organisation of working time to cover sectors and activities excluded from that Directive [2000] OJ L195/41 (European Working Time Directive 2000)

Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L299/9 (European Working Time Directive 2003) (EWTD 2003)

Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby

Statute of the Council of Europe

Treaty on the Functioning of the European Union 2007

International Treaties

International Convention against Doping in Sport (2005) 2419 UNTS 201

International Covenant on Civil and Political Rights 999 UNTS 171

Universal Declaration of Human Rights UNGA Res 217 A(III) (UDHR)

Colophon

This thesis was created with LaTeX 2_ε, BibLaTeX, and the Memoir package. It was typeset using XeLaTeX and *fontspec*. The text is set in 12 pt. Minion Pro.

As it treats both legal and philosophical issues, the thesis adopts the arguably most widespread referencing system for work falling into that category: the standard (footnote) Chicago style, albeit with one important caveat. The Chicago style primarily advocates use of the US-focused Bluebook system for legal references. Given the primary restriction here to UK and European law, I have instead chosen to rely on the UK-focused Oxford University Standard for Citation of Legal Authorities (OSCOLA)—both for the composition of legal references and for the appropriate titles for UK justices—within the more general formatting framework of the Chicago style.