the constitutional mission of legitimating the law's claim of sovereignty over the lives of individuals, and in performance of this task, the proper place of academic lawyers is the legal community.[9] In America, Paul Carrington has sketched a similar articulation.[10]

What is required, however, is not outline, but a full accounting of the philosophy and practice of the legal academy. Hart Publishing is to be lauded for having in the past year published two books on the legal academy, Professor's Cownie's and Anthony Bradney's *Conversations, Choices and Chances: The Liberal Law School in the Twenty-First Century*.[11] And Professors Cownie and Bradney are to be praised for expending the effort, and for having the courage, to contribute at book length to this important debate. Unhappily, neither of their books is the book we academic lawyers so desperately need.

F.C. DECOSTE*

Privacy and the Press by Joshua Rozenberg. Oxford, Oxford University Press, 2003, pp. 288, hbk £18.99.

It should come as no surprise that a book written by a well-known journalist and commentator should lay out the law relating to privacy and freedom of expression in an extremely engaging and readable manner. Nor that the main argument is that a privacy tort should not be introduced into UK law, either by Parliament or the judiciary. The author states early on that his aim is to "set out the law as objectively as I can", but that if "asked to choose between freedom of expression and personal privacy, however defined, my instinct is to come down on the side of free speech." (p 8) The law concerning privacy is currently of intense interest, not least because it is in a state of flux. Rozenberg's book provides a solid foundation for understanding the relevant legal issues and presents the law in a manner sophisticated enough for lawyers, yet accessible enough for a wider audience.

Rozenberg divides his discussion into eight chapters. Chapter 1 is an introductory chapter, which begins by describing the history and development of the action for breach of confidence (starting with *Prince Albert* v *Strange*[1]) and its role in protecting privacy. In its modern form, and under the influence of the Human Rights Act 1998 (HRA), the requirement for a confidential relationship in cases of private information appears to have fallen away. Even so, Rozenberg notes that breach of confidence may be an imperfect tool for protecting privacy. Chapter 1 also discusses actions in

9. "Editor's Preface" in P. B. H. Birks (ed.), *Pressing Problems in Law, Volume 2: What Are Law Schools For?* (Oxford University Press, 1996).
10. See Paul Carrington, "Of Law and the River" (1984) 34 *Journal of Legal Education* 222 and *Stewards of Democracy: Law as Public Purpose* (Boulder: Westview Press, 1999).
11. Oxford: Hart Publishing, 2003. I discovered from Cownie (p 22) that Bradney is her husband and erstwhile colleague. For my review of Bradney, see (2004) 38(1) *The Law Teacher* 133.

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1. (1849) 1 Mac & G 25, 41 ER 1171.

defamation (*Tolley* v *Fry* [2] and *Charleston* v *News Group Newspapers Ltd* [3]) and passing off (*Irvine* v *Talksport Ltd* [4]). These legal actions may be used by a claimant to control what is published about them or, to put it conversely, to restrict freedom of expression in some manner. However, as Rozenberg recognises, they are poor substitutes for a privacy right. The author also briefly explores the US publicity right and the tension between privacy and publicity. This brings to mind the remark of Cornish and Llewelyn[5] that "the underbelly of privacy is publicity," and should alert the reader to the risk of inadvertently—or perhaps covertly—introducing a publicity right via a privacy right. Whether or not the UK should recognise a right of publicity is a separate issue worthy of extensive debate, which is, as one might expect, beyond the ambit of Rozenberg's book.

The thin line between privacy and publicity is highlighted by the decisions of Lindsay J and the Court of Appeal in *Douglas* v *Hello!*,[6] which are discussed in chapter 2, together with the privacy and breach of confidence cases that have been decided since the HRA came into force. In Rozenberg's view, *Douglas* v *Hello!* "was more about control than privacy" (p 69) and the claimants "appeared to be claiming a right of publicity" (p 70). If the Douglases had wanted a truly private wedding, then they could have achieved this without selling the exclusive rights of coverage to OK! Magazine. Yet Rozenberg underplays the significance of the Douglases successfully establishing a breach of confidence. While Hello! had to pay significant damages to OK!, the damages awarded to the Douglases amounted to only £14,600 in total—much less than the £600,000 they had sought. Thus, the case, "will not act as much of a disincentive to newspapers that may be tempted to invade people's privacy in the future. Unless they are causing commercial damage by spoiling a rival's exclusive, it seems they will not have much to lose." (p 83) Seen in this light, the developing law of confidence, shaped to protect privacy, begins to look somewhat toothless.

The Court of Appeal decision in *A* v *B plc*[7] is also analysed in chapter 2. In discussing the guidelines set out by Lord Woolf in *A* v *B plc* Rozenberg comments that guideline 12 concerning the defence of public interest "has been heavily and rightly criticized" (p 56). This is because it confuses that which is merely of interest to the public with that which is in the public interest. Even so, he believes there is sense in the view that fewer privacy rights should be accorded to public figures than everyone else.

The House of Lords decision in *Campbell* v *MGN*[8] had not been delivered at the time of the book's publication. Rozenberg's discussion of *Campbell* is therefore limited to the decisions of Morland J and the Court of Appeal. But it seems likely that he would be disappointed by the majority's decision to find in favour of Naomi Campbell (although, we might note the trivial sum awarded in compensation—£3,500—and thus doubt the cautionary impact of this decision on newspapers). The majority of

2. [1931] AC 333.
3. [1995] 2 AC 65.
4. [2003] FSR 35.
5. W. Cornish and D. Llewelyn, *Intellectual Property* (5th ed., London: Sweet & Maxwell: 2003), para 8-60.
6. *Douglas* v *Hello! Ltd* (No 1) (CA) [2001] QB 967; (No 6) (HC) [2003] EMLR 31.
7. [2003] QB 195.
8. [2004] EMLR 15.

the House of Lords (represented by Lord Hope, Baronness Hale and Lord Carswell) held that details of Campbell's attendance at Narcotics Anonymous meetings and the visual portrayal of her leaving such a meeting was private information that imported a duty of confidence. In balancing Articles 8 and 10 of the ECHR, Article 8 considerations prevailed. This was largely because the public's right to know the details of her treatment was of a lower order than knowing she was a drug addict (a fact which she had previously denied) and disclosure of such details had the potential to harm her recovery. Rozenberg is critical of Morland J's decision, favouring that of the Court of Appeal. Thus, it seems likely that he would side with the minority views of Lord Nicholls and Lord Hoffmann, who each preferred to give a degree of latitude to the press in the way in which they legitimately reported the fact that Miss Campbell had a drug problem. Lord Nicholls' view was that

> publication of this information in the unusual circumstances of this case represents, at most, an intrusion into Miss Campbell's private life to a comparatively minor degree. On the other hand, non-publication of this information would have robbed a legitimate and sympathetic newspaper story of attendant detail which added colour and conviction . . . The balance ought not to be held at a point which would preclude, in this case, a degree of journalistic latitude in respect of information published for this purpose.[9]

In a similar vein Lord Hoffmann observes that "[t]he practical exigencies of journalism demand that some latitude must be given"[10] and that Campbell's relationship with the media is such that "when a newspaper publishes what is in substance a legitimate story, she cannot insist upon too great a nicety of judgment in the circumstantial detail with which the story is presented."[11]

In chapter 3, Rozenberg lucidly sets out the jurisprudence relevant to Article 10 ECHR. In this chapter, he also considers the extent to which freedom of expression demands that public inquiries, such as the Shipman and Hutton inquiries, be televised. He argues that televising proceedings would adversely affect witnesses and thus the decisions not to do so accord "with authority and common sense" (p 111). Instead of televising the proceedings of public inquiries, Rozenberg favours that it should become standard practice to make available on-line transcripts of these proceedings (as was done in the Hutton inquiry).

Chapter 4 concentrates on Article 8 jurisprudence, such as *Peck* v *UK*,[12] along with the UK decisions in *Venables* v *News Group Newspapers Ltd*[13] and *X (formerly Mary Bell)* v *SO*.[14] Rozenberg agrees with the decision in *Venables* that if identification of the defendants poses a real threat to their lives, privacy must be respected however much freedom of expression is valued. However, he doubts whether the lives of Thompson and Venables are still at risk from vigilantes. Rozenberg is more critical of

9. *Campbell* (HL), 257.
10. *Campbell* (HL), 264.
11. *Campbell* (HL), 265.
12. [2003] EMLR 15.
13. [2001] Fam 430.
14. [2003] EMLR 37.

anonymity for defendants such as Mary Bell, mainly because he sees any intrusion into her privacy as self-induced (through having sold her story to a newspaper and thus reviving interest in her life). Moreover, he believes that anonymity for defendants is a "seductive slippery slope" that could lead to "granting widespread anonymity to all who have been convicted of serious crimes, child and adult alike". (p 137)

In chapter 5 Rozenberg examines the law relating to protection of journalists' sources. In reflecting on the House of Lords decision in *Ashworth Hospital Authority* v *MGN Ltd,*[15] he comments that it demonstrates "an alarming tendency for the courts to order disclosure where there is no real need for it." (p 150). In other words, although Article 10 ECHR should prevail, it should be applied cautiously in demanding that sources are revealed since "*any* disclosure of a journalist's sources has a chilling effect on the freedom of the press." (p 150). Rozenberg also discusses the background and reforms of the PCC. While critical of individual decisions of the PCC, such as its finding in favour of the *Daily Mirror* in the Tony Martin case (where Martin, upon release from prison, sold his story to the *Daily Mirror* for a reputed £125,000), he firmly favours self-regulation as an option. Put simply, it "is better than any of the alternatives on offer." (p 164) Moreover, its decisions remain subject to judicial review.

Defamation is the subject of chapters 6 and 7; the former discusses at length qualified privilege and *Reynolds* v *Times Newspapers Ltd,*[16] the latter mainly examines the litigation in *Loutchansky* v *The Times.*[17] As Rozenberg points out, the ability of defamation to protect a person's privacy is undermined by the fact that truth is a complete defence in defamation actions. As such, from the point of view of discussing privacy, two chapters on defamation could be considered overkill. However, defamation raises important issues concerning freedom of expression of the media and the chapters add balance to the book as a whole.

Chapter 8, entitled *Looking to the Future,* sets out Rozenberg's view of where UK law should go. After briefly reviewing the privacy law in France, Germany, and California, along with the draft EU Constitution and Charter, the author concludes that "a Privacy Act would be both dangerous and wrong" and that he has "misgivings about a significant extension to the common law of privacy". (p 227)

What are Rozenberg's reasons for this conservative view? Proponents of privacy legislation argue that it would put the existing common law into a statutory form and bring certainty and legitimacy to a privacy right. Rozenberg objects to legislation because he believes it would not enhance certainty and would inevitably lead to greater restrictions on the media. Since any legislation would have to be interpreted compatibly with the HRA, Rozenberg argues this would generate uncertainty, at least until a substantial number of decisions from appellate courts had been delivered. But this argument could be made in relation to any new piece of legislation and thus is a weak reason for rejecting a statutory approach. As for the degree to which the freedom of the press would be fettered, this is impossible to assess in the absence of draft legislation. Presently, there is little likelihood that the Government will attempt to legislate in the area of privacy.

15. [2002] EMLR 36.
16. [2001] 2 AC 127.
17. [2002] QB 321; [2002] QB 783.

Rozenberg also objects to the courts developing a tort of privacy, arguing that the law is restrictive enough already and a new tort would create as many problems as it attempted to solve. The restrictiveness of the existing law may be doubted, in the light of his observation (in chapter 2) that damages payable to individuals in a breach of confidence action are too minor to dissuade newspapers from invading privacy. If the existing law is as ineffectual at curbing media intrusion as Rozenberg suggests, this surely enhances the argument for a new tort of privacy. Recognising a new tort would also go a long way to clarifying the law of confidence and represent a more honest articulation of what the judges are presently doing. Under the influence of the HRA, the action for breach of confidence has changed dramatically to accommodate privacy interests. This is amply highlighted by dicta in *Campbell*. For example, Lord Hoffmann comments that as a result of the HRA there

> has been a shift in the centre of gravity of the action for breach of confidence when it is used as a remedy for the unjustified publication of personal information . . . Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity—the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people.[18]

Lord Hoffmann believes that, "[t]hese changes have implications for the future development of the law."[19] In a similar vein, Lord Nicholls observes that breach of confidence "has now firmly shaken off the limiting constraint of the need for an initial confidential relationship" and "[i]n doing so it has changed its nature".[20] Lord Nicholls suggests that "[t]he essence of the tort is better encapsulated now as *misuse of private information*."[21] Comments such as these indicate that breach of confidence, at least in the realm of personal information, is being altered radically to resemble a right of privacy. Such artificiality should be dispensed with and it seems preferable for an appellate court to recognise, at the very least, a restricted tort of privacy—one arising out of breach of confidence jurisprudence.

Rozenberg is to be commended for tackling an uncertain area of the law and making it intelligible to lawyers and non-lawyers alike. As a result, his book constitutes a useful addition to the debate about whether or not to introduce a tort of privacy into UK law.

TANYA APLIN*

18. *Campbell* (HL), 263. But compare Lord Hope (in the majority) at 270 who doubts whether the centre of gravity has shifted and comments that the balancing exercise is the same, "although it is plainly now more carefully focussed and more penetrating."
19. *Campbell* (HL), 263.
20. *Campbell* (HL), 253.
21. *Campbell* (HL), 253. Emphasis supplied.

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